

Document:-
A/CN.4/SR.2752

Summary record of the 2752nd meeting

Topic:
Responsibility of international organizations

Extract from the Yearbook of the International Law Commission:-
2003 vol. I

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

25. He had proceeded on the premise that the present work was a sequel to the draft articles on State responsibility. The Commission should try to define the category of organizations that exercised functions similar to those of States. In English, such functions might be referred to as governmental. He was aware that the use of that term might raise drafting problems in other languages. If the definition referred to governmental functions, then non-governmental organizations, which usually did not exercise those functions, were left out, apart from a few exceptions, such as ICRC, which exercised some governmental functions in the broad sense. The Commission might discuss what to do about those exceptions. His decision to rule out non-governmental organizations was in keeping with the views expressed by many delegations in the Sixth Committee in response to the Commission's request for comments. The proposed definition would also leave out governmental organizations whose conduct was less likely to give rise to questions of responsibility under international law. International human rights rules were of relevance to all organizations, whether governmental or non-governmental, but there were many rules of international law which concerned entities only insofar as they exercised governmental functions. For an organization to be covered by the draft articles, the definition might specify that some of its members must be States, but the presence of other subjects—other international organizations, territories or individuals—was not a reason for excluding it.

26. The definition in draft article 2 proposed by the Special Rapporteur in his report contained three elements: (a) the organization included States among its members; (b) it exercised functions in its own capacity and not as an instrument of other subjects; and (c) those functions might be regarded as governmental. The definition of "organization" related to the scope of the draft articles, but it might be preferable to follow the precedents referred to in paragraph 28 of the report and place the definition in draft article 2, while draft article 1 specified the general scope. It seemed appropriate to make it clear from the outset what the draft articles were about, namely issues relating to the responsibility of international organizations under international law. That would exclude the sometimes interrelated questions of the civil liability of international organizations. One reason was that at the present time there were very few rules of general international law on the civil liability of international organizations. Thus dealing with civil liability would constitute solely an exercise in progressive development of the law, which would be difficult to carry out on a general scale. The other reason for omitting civil liability was that the questions were heterogeneous. Rules of international law existed on the civil liability of States which operated a nuclear plant, but that did not mean the resulting civil liability was analogous to responsibility under international law. Referring to responsibility under international law would make it clear that the draft articles did not cover international liability for injurious consequences arising out of acts not prohibited by international law, the topic assigned to Mr. Sreenivasa Rao as Special Rapporteur. In suggesting that such liability should not be included in the present draft articles, he had again followed the view expressed by a large number of representatives in the Sixth Committee in response to the Commission's request for comments.

He did not wish to query the usefulness of a study on international liability for injurious consequences also in the case of international organizations, nor did he wish to increase the burden on Mr. Sreenivasa Rao. The Commission should perhaps decide that the questions which might arise in the case of international organizations were really more analogous to questions concerning States, and that it should deal with them as a sequel to the present study, or possibly within the scope of the work on liability.

27. Another point needed to be considered in an introductory provision. Article 57 of the draft articles on State responsibility for internationally wrongful acts expressly left aside not only "any question of the responsibility under international law of an international organization" but also any question of the responsibility of "any State for the conduct of an international organization". The study in hand would be inadequate if it did not attempt to fill that gap and cover responsibility for the conduct of an organization incurred by States as members or otherwise. The scope of the draft articles should include an express reference to that issue in draft article 1.

28. He would like to defer his presentation of draft article 3, on general principles, as it sought to encompass the substance of articles 1 to 3 of the draft articles on State responsibility for internationally wrongful acts.

Organization of work of the session (*continued*)

[Agenda item 2]

29. Further to consultations, the CHAIR announced the composition of the Drafting Committee for the topic of reservations to treaties: Mr. Kateka (Chair), Mr. Pellet (Special Rapporteur), Mr. Comissário Afonso, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Kamto, Mr. Rodríguez Cedeño, Mr. Rosenstock and Mr. Yamada (members), and *ex officio* Mr. Mansfield (Rapporteur). Membership was still open to other members of the Commission.

The meeting rose at 5.50 p.m.

2752nd MEETING

Tuesday, 6 May 2003, at 10.05 a.m.

Chair: Mr. Enrique CANDIOTI

Present: Mr. Addo, Mr. Al-Marri, Mr. Baena Soares, Mr. Brownlie, Mr. Chee, Mr. Comissário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kemicha, Mr. Koskenniemi, Mr. Mansfield, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao,

Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Yamada.

The responsibility of international organizations
(*continued*) (A/CN.4/529, sect. E, A/CN.4/532,¹
A/CN.4/L.632)

[Agenda item 7]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIR invited the Commission to continue its consideration of draft articles 1 and 2 contained in the first report on the responsibility of international organizations (A/CN.4/532) introduced by the Special Rapporteur.

2. Ms. ESCARAMEIA commended the Special Rapporteur for his history of the topic. Like him, she believed that the Commission should try to model the draft articles on the responsibility of international organizations on the draft articles on State responsibility for internationally wrongful acts² whenever there was no specific reason to do otherwise. As for the scope of the study and with regard to the definition of the term “international organization”, it was good to use the references to international organizations contained in previous conventions. Since international organizations were not composed exclusively of States and their constituent instruments were not always international treaties, the Special Rapporteur was proposing a functional approach to the definition of an international organization, starting from the premise that, in order for such organizations to have responsibility, they must have international personality. While she realized that the organization itself was different from the sum of its members, she had problems with the Special Rapporteur’s proposal to use the governmental functions exercised by such organizations as a defining criterion. Governmental functions were in fact very difficult to establish. International organizations could exercise functions that were associated more with the State, for instance, judicial or legislative functions, but they could also be lobbies for human rights or environmental protection. Would an international organization then be responsible only for acts arising from its judicial or legislative functions and not from its other functions?

3. She agreed fully with the scope of the draft articles as defined in article 1, namely, responsibility under international law, but not civil liability. She also agreed that the Commission should limit itself for the time being to acts that were wrongful under international law and should tackle the difficult question of the responsibility of States which somehow contributed to the wrongful act of an organization or which were members of an organization that committed a wrongful act, the responsibility of the organization itself being a different issue. On the other hand, she had problems with the wording of article 2, particularly the phrase “insofar [as] it exercises in its own

capacity certain governmental functions”. That seemed to exclude any organization which did not exercise governmental functions, probably because it would involve issues of civil liability, but that could raise the question of international responsibility for acts that were not easily connected with governmental functions. That led to the core question of what governmental functions were. It might be safer to go back to the traditional criteria of the organization’s membership and constituent instrument and to say that the latter did not necessarily have to be an international treaty and that the organization’s members could be any kind of territorial-based entity, in other words, territories as well as States. She assumed that the present study did not apply to organizations whose member were non-territorial entities, such as individuals or non-governmental organizations.

4. Mr. PAMBOU-TCHIVOUNDA said that the use in English of the words “governmental functions” might mislead the reader. It went without saying that the concept of government related to States, but the topic under consideration concerned not States but international organizations. There could therefore be no doubt about what was meant by “governmental functions”, and the Special Rapporteur appeared to have succumbed to this confusion.

5. Mr. PELLET recalled that, during the consideration of the draft articles on State responsibility for internationally wrongful acts, the Commission had had lengthy discussions on how the idea of *prérogatives de puissance publique*, which was familiar to French jurists and had ultimately been used, should be translated into English. What applied in the context of State responsibility was less appropriate in the context of the responsibility of international organizations, however. The English term posed a real problem, whereas the French was perfectly acceptable, and a very complicated translation problem was thus involved. He nevertheless reserved his position, as he was not sure whether the definition of an international organization should be based on governmental functions. Many international organizations had no such functions; what they provided was much more of an international public service.

6. Mr. DUGARD said that the Special Rapporteur had been wise in stressing the elements of an international organization’s membership and its function in article 2. It would be extremely difficult to emphasize only governmental functions because some organizations seemed to exercise them while others did not. Many people considered, for example, that national liberation movements had international legal personality and could exercise governmental functions. The same might be said of many non-governmental organizations, which increasingly carried out functions normally reserved for States. It was even fair to say that today they played an important role in the development of international law, perhaps even in the creation of customary law, which might be described as a governmental function. But that simply showed that governmental functions could not be used as the sole criterion. There must be an additional criterion, and the Special Rapporteur had wisely chosen to emphasize both the function of the organization and the fact that States must be members. There must be some States involved in the organization in order to give it an intergovernmental char-

¹ Reproduced in *Yearbook ... 2003*, vol. II (Part One).

² See 2751st meeting, footnote 3.

acter. There were always going to be difficult cases, and that was why it was important to emphasize both criteria.

7. Mr. BROWNLIE said that it was not a good idea to try to define what governmental functions were. Governments did all sorts of things. They could create railways and even private enterprises. From a purely pragmatic viewpoint, he wondered why the criterion was useful as a factor of differentiation.

8. Mr. GAJA (Special Rapporteur) said he agreed that there was indeed a translation problem, the reverse of the one that had come up during the drafting of the draft articles on State responsibility for internationally wrongful acts. The term “governmental functions” could be understood in many ways. The concept could be widened to comprise that of *service public*, as mentioned by Mr. Pellet. The basic reason for having a criterion of that sort was that the Commission should be developing rules which followed the framework of the ones on State responsibility. It was reasonable to take into consideration those entities that, even if it was only a small part of their activity, could be assimilated to the activity of States, because some of the functions of the international organization were of the kind that a State would normally be expected to undertake. That did not mean that there might not be obligations under international law that were incumbent on other types of organizations. Similarly, individuals had not only rights under international law, but also obligations. The fact that one did not deal with the responsibility of individuals, or of non-governmental organizations composed of individuals, did not mean one denied that problems involving the responsibility of such entities existed.

9. Mr. ROSENSTOCK pointed out that a significant element of article 2 that facilitated the kind of language and approach used by the Commission was that it spoke of exercising certain functions, meaning that the institutions functioned, at some point, in some way, at a governmental level or like a government. That did not mean that they were governments, but rather that they did some things that governments did. The fact that it was not necessary for their activities to be specifically those of governments in order for the particular actions under consideration to give rise to responsibility seemed to support the general approach in article 2. It might be argued that the wording was not ideal, but, until something better was found, it could be seen as a reasonably sensible definition of what ought to be involved if the laws of State responsibility were to be applied.

10. Mr. BROWNLIE said that, in fact, the concept that worked best was that of “activity analogous to that of Governments”—a beautiful phrase that was completely useless, but was exactly what was needed. The article referred not to governmental functions but to the functions of international organizations, which were analogous to governmental activity.

The meeting rose at 10.30 a.m.

2753rd MEETING

Wednesday, 7 May 2003, at 10.05 a.m.

Chair: Mr. Enrique CANDIOTI

Present: Mr. Addo, Mr. Al-Marri, Mr. Baena Soares, Mr. Brownlie, Mr. Chee, Mr. Comissário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kemicha, Mr. Koskenniemi, Mr. Mansfield, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Yamada.

Statement by the Director-General of the United Nations Office at Geneva

1. Mr. ORDZHONIKIDZE (Director-General, United Nations Office at Geneva), welcoming the members of the Commission to Geneva, said that since its inception the Commission had held almost all its sessions in that city. Tasked with the progressive development and codification of international law, it had made impressive achievements over the 55 years of its existence: the law of treaties, the law of the sea, State responsibility, diplomatic relations, humanitarian law and an international criminal court were just a few of the areas that owed their codification to the Commission. Never before had so many different fields of international law been clarified and regulated. The fact that the last half-century had seen the universal codification of international law at an unprecedented pace was attributable in no small measure to the work of the Commission.

2. International law laid the foundations for just, humane and rational conduct among States. It set the basic rules on which any civilized society must rely. At the dawn of the twenty-first century, which was witnessing the emergence of a global community confronted with unprecedented challenges and risks, well-ordered State behaviour had become more crucial than ever before.

3. It was sometimes averred that the rule of law was too often ignored or flouted. He profoundly disagreed with that assertion: those whose short-sighted motives drove them to show contempt for international law usually found themselves obliged to circumvent it.

4. The scope of the Commission’s agenda for its fifty-fifth session testified to the extensive areas of law that still required international regulation. The fact that the Commission studied topics such as diplomatic protection, reservations to treaties, unilateral acts of States and the responsibility of international organizations was proof that many fundamental elements remained to be defined before universally accepted norms were established. He was confident that the Commission would continue to fulfil