

Document:-
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Summary record of the 2800th meeting

Topic:
Responsibility of international organizations

Extract from the Yearbook of the International Law Commission:-
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temporal potential for future exploitation; rather, the implication was that if an underground source of water did not yield exploitable quantities of water, then it was not an aquifer.

69. Mr. Mansfield had suggested that a separate definition of “aquifer system waters” might be necessary. While he was not certain that that was the case, he wondered whether use of the rock formation, as well as use of the aquifer waters, should be covered. He would give more thought to the question, raised by Mr. Mansfield, as to why the obligation not to cause harm had been limited in article 4, paragraph 2, to harm to other aquifer system States, rather than to harm to the aquifer system itself.

70. Some members had questioned the relationship between the impairment of the functioning of an aquifer, mentioned in article 4, paragraph 3, and the permanent destruction of an aquifer, referred to in paragraph 27 of his second report. His understanding was that an aquifer could be exploited to an extent that made it impossible to extract further water from the rock formation. However, as he had already said, he might decide to relocate paragraph 3 elsewhere in the draft articles.

71. Several members had addressed the concept of “significant harm” from different perspectives. There was a long history of debate on that topic in the Commission, on which he intended to draft an informal information note for members. At present he wished briefly to recall that the text of the Convention on the Law of the Non-navigational Uses of International Watercourses considered by the Commission on first reading had used the term “appreciable harm”.⁸ Much thought had gone into considering possible alternatives to the word “appreciable”, such as “significant”, “substantial” or “serious”. The Commission had sought to find a term to indicate a threshold that was low enough to trigger discussions before serious damage occurred yet high enough to ensure that consultations were not required to deal with trivial matters. The word “appreciable” had been considered to mean both “capable of being measured” and “significant”. Even on first reading of those draft articles, the concern had been the degree of harm. The Commission had considered that harm was “significant” if it was not minor or trivial, but was less than “substantial” or “serious”. The degree of harm constituted by the term “significant” in a particular case would depend on the circumstances. Ultimately, the Commission had settled for the word “significant” on second reading.⁹ That precedent had been followed when the Commission had adopted article 3 of the draft articles on prevention of transboundary harm from hazardous activities, in 2001.¹⁰ Thus, the Commission had recommended the threshold of significant harm to the General Assembly twice in similar drafts, and it would need to have a

⁸ At its thirty-second session, in 1980, the Commission had begun the first reading of the draft articles on the law of the non-navigational uses of international watercourses [see *Yearbook ... 1980*, vol. II (Part Two), chap. V, pp. 110–136]; at its forty-third session, in 1991, the Commission had provisionally adopted all the draft articles on first reading [see *Yearbook ... 1991*, vol. II (Part Two), chap. III, pp. 66–78].

⁹ At its forty-sixth session, in 1994, the Commission had adopted the final text of the draft articles on the law of the non-navigational uses of international watercourses [see *Yearbook ... 1994*, vol. II (Part Two), chap. III, pp. 89–135].

¹⁰ See 2797th meeting, footnote 3.

compelling reason if it were to modify that threshold in the current text. He would, however, give careful consideration to any suggestions for an alternative formulation.

72. Ms. Escarameia had asked why it was necessary to include the phrase “each associated with specific rock formations” in the definition contained in paragraph (b) of article 2. While the phrase in question was a precise scientific description of an aquifer system, he conceded that it had no legal significance and could be deleted.

73. Mr. Gaja had raised the issue of the scope of the Convention on the Law of the Non-navigational Uses of International Watercourses. It was for members of the Commission, as the drafters of the Convention, to answer that question. He himself would prepare a paper on the question of what aquifers, if any, were covered by that Convention. It was nevertheless his intention that the current draft should cover all aquifers, even if that entailed some overlap with the Convention.

74. Several members had touched on the relationship between the different types of use referred to in article 7. In his view, the article depended on the Commission’s ultimate formulation of the principles governing the various uses of aquifer systems. In his view, paragraph 2 of that article as currently drafted did not constitute an exception to paragraph 1. Paragraph 2 simply said that in the event of a conflict between, for instance, extraction of drinking water for the local population and extraction for the purpose of filling a swimming pool for foreign tourists, priority should be given to the former.

75. Mr. Chee had reminded him of the ILA Rules on International Groundwaters, which would be finalized when the Association met in Berlin later in 2004.¹¹ He fully intended to take the outcome of that meeting into consideration.

The meeting rose at 1 p.m.

2800th MEETING

Tuesday, 18 May 2004 at 10 a.m.

Chairperson: Mr. Teodor Viorel MELESCANU

Present: Mr. Addo, Mr. Baena Soares, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Momtaz, Mr. Opertti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodriguez Cedeño, Mr. Yamada.

¹¹ See 2798th meeting, footnote 10.

Responsibility of international organizations¹
(A/CN.4/537, sect. A, A/CN.4/541,² A/CN.4/545,³
A/CN.4/547,⁴ A/CN.4/L.648 and Corr.1)

[Agenda item 2]

SECOND REPORT OF THE SPECIAL RAPPORTEUR

1. Mr. GAJA (Special Rapporteur) said that, in his second report on the responsibility of international organizations (A/CN.4/541), he considered questions of attribution of conduct to international organizations. While there were some published materials relating to the practice of international organizations, a large amount of documentation could be consulted only if international organizations made it available. The requests for information sent out by the secretariat in September 2002 had produced some replies, listed in an informal document dated 7 May 2004 and entitled "Comments and observations received from international organizations". He had been able to take all of them into account, with the exception of the second reply by IAEA, dated 29 March 2004. Some replies had been accompanied by a number of documents that had not been reproduced in an informal document, but most had already been published elsewhere. Two international organizations had preferred to engage in theoretical discussion and had made only limited reference to their own practice. While the replies of the organizations were of great interest to the Commission, cooperation on their part had generally, and regrettably, been disappointing. There were a number of reasons for that, one being that the archives of international organizations relating to their practice were not organized according to the Commission's needs, meaning that some research had to be done. Another was that an organization might prefer not to make its practice known, an attitude that was also typical of States. Still another was that some organizations were concerned about the type of principles and rules that the Commission might formulate. At the present stage of its work, the Commission seemed to have little choice but to pursue its study on the basis of the available materials and hope that cooperation would be more readily provided by international organizations as its work proceeded and the purpose was better understood. Mistrust and lack of comprehension of the Commission's intentions were two obstacles that should give way with time.

2. In its 2003 report to the General Assembly on the work of its fifty-fifth session, the Commission had invited Member States to comment on certain issues relating to the attribution of conduct to an international organization or to a State.⁵ Several States had expressed their views in the Sixth Committee and he had taken those views into account in his report. Moreover, in its resolution 58/77 of 9 December 2003, the General Assembly had requested the Secretary-General to invite States and international organizations to submit information con-

cerning their practice relevant to the topic "Responsibility of international organizations", including cases in which States members of an international organization could be regarded as responsible for acts of the organization. The request had not referred specifically to questions of attribution, but they were certainly not excluded. For the time being, four replies from States had been received and were reproduced in an informal document before the Commission entitled "Comments and observations received from international organizations". Three of the replies had been received late in the month of April and he had not been able to take them into account in his report. States and international organizations had also made several comments on the draft articles adopted by the Commission at its previous session. Those comments were reproduced in the two informal documents prepared by the secretariat that he had already mentioned. The Commission would no doubt wish to examine them in due course, together with the comments made in the Sixth Committee.

3. Turning to the content of his report, he said that he had tried to clarify the distinction, sometimes blurred in practice, between attribution of conduct and attribution of responsibility. In some cases, an international organization could be held responsible for conduct that could not necessarily be attributed to it. Responsibility could rest jointly with an international organization and one or more of its member States, but the conduct in question might have been undertaken either by the international organization or by one or more of the member States. There might also be cases parallel to those envisaged in Part One, chapter IV, of the draft articles on the responsibility of States for internationally wrongful acts adopted by the Commission at its fifty-third session⁶; for instance, when an international organization assisted a State in committing an internationally wrongful act. While the State alone would have committed the act, the international organization would have to be regarded as being responsible as well.

4. In paragraphs 10 to 13 of his report, he considered further cases in which an international organization could be held responsible for conduct engaged in by a member State, in the context of annex IX to the United Nations Convention on the Law of the Sea, the European Convention on Human Rights and the implementation of measures adopted by the Security Council under Article 41 of the Charter of the United Nations. The conduct engaged in by a State organ should be attributed to that State, according to the draft articles on State responsibility, which made no exception for a case in which a State organ, in engaging in certain conduct, was complying with an obligation that the State may have acquired as a result of its membership of an international organization. However, the attribution of conduct to the State did not necessarily imply that the State was responsible or that it was the only responsible entity. For example, according to annex IX to the United Nations Convention on the Law of the Sea, responsibility was expressly related to competence. The decisive element was the area of competence and, if the State conduct occurred in the area of competence of an international organization, then the international organization would be responsible and the reverse

¹ For the text of articles 1 to 3 of the draft articles and commentaries thereto adopted by the Commission at its fifty-fifth session, see *Yearbook ... 2003*, vol. II (Part Two), chap. IV, sect. C, pp. 18–23.

² Reproduced in *Yearbook ... 2004*, vol. II (Part One).

³ *Ibid.*

⁴ *Ibid.*

⁵ *Yearbook ... 2003*, vol. II (Part Two), chap. III, sect. A, p. 14.

⁶ See 2792nd meeting, footnote 5.

would be true as well. In such cases, he considered that the rules of attribution were not affected. The question concerning the responsibility of international organizations when attribution was not involved should be left for a further report. When an international organization was held responsible for conduct that was not its own, the general principle stated in article 3, paragraph 2 (a), adopted at the preceding session, would not apply, because that paragraph posed as a condition for the existence of an internationally wrongful act that the conduct should be attributable to the international organization under international law.⁷ It did not say, however, that the responsibility of the international organization always depended on the existence of an internationally wrongful act of that organization. In any event, general principles were liable to exceptions. That did not detract from the correctness of the principle as a general principle. It should also be noted that article 2 of the draft articles on State responsibility, which stated a similar general principle, made no express exceptions for the cases covered in Part One, chapter IV, of that draft. Consequently, even there, a general principle could be found that was derogated from in another part of the draft articles.

5. Paragraphs 14 to 28 of the report dealt with the central issue of the report: the general rule of the attribution of conduct to an international organization. Persons or entities were not usually defined as “organs” of an international organization for the purposes of the attribution of conduct. Even when, as in the case of the United Nations, the constituent instrument used the word “organs”, the attribution of conduct to the organization was also made with regard to officials or other agents who had some connection with organs, but were not themselves defined as organs. In its advisory opinion on the *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, of which a passage was cited in paragraph 16 of the report, ICJ pointed out that the United Nations might be required to bear responsibility for acts performed by the United Nations or by its agents acting in their official capacity. When a person was entrusted by an organization in his or her official capacity with a mission, that person acted for the organization. The person’s conduct thus became part of the organization’s conduct. For the purposes of attribution, there would be little reason for distinguishing between entities or persons who had the formal status of “organ” or official, on the one hand, and agents who did not have the status of official, on the other hand. Agents who did not have the status of official were increasingly being entrusted with the functions of organizations. He had certainly considered the possibility of drawing such a distinction, but had realized that, in practice, there were no elements that appeared to justify establishing different rules for agents who were not defined as officials. Moreover, whereas in the case of States, in conformity with article 4 of the draft articles on State responsibility, the internal law of the State was the principal criterion for identifying who was an organ of the State, the term generally used for international organizations was the “rules of the organization” (art. 2). That was the term used in the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (hereinafter “the

1986 Vienna Convention”), where it was defined to mean, in particular, “the constituent instruments, decisions and resolutions adopted in accordance with them, and established practice of the organization”. The majority of representatives of States in the Sixth Committee as well as certain international organizations had found that definition adequate. Other States had encouraged the Commission to develop the definition. What seemed important in the view of those who were in favour of the definition in the 1986 Vienna Convention was that it established a balance between what was stated in the constituent instruments and what resulted from practice. Once practice was regarded as established, it supplemented what derived, directly or indirectly, from the organization’s constituent instrument.

6. His article 4, paragraph 3, reproduced that definition, with two minor alternatives placed in brackets. As to the first, since the term “decisions and resolutions” did not apply to all international organizations and, moreover, decisions could be regarded as a subcategory of resolutions, it would probably be better to use a more general and abstract term such as “acts of the organization”. Another solution would be to use the phrase “resolutions of the organization”, but not all organizations formally adopted resolutions. The second minor change proposed involved the replacement of the words “established practice” by the words “generally accepted practice”, which was the expression used by ICJ in its *Namibia* opinion in its interpretation of Article 27, paragraph 3, of the Charter of the United Nations. If those minor changes, which had not yet been put to member States and international organizations for comment, were adopted, the text would be more accurate without altering the substance of the definition. Although a majority of States and international organizations had been in favour of reproducing the definition in the 1986 Vienna Convention, he did not think that it would provoke criticism on their part. However, if the Commission preferred to retain the 1986 definition, he had no objection.

7. International organizations could often function only if one or more member States placed one of its organs at the organization’s disposal. The opposite case of international organizations seconding officials to States was rare. Most practice concerning the attribution of conduct related to military operations authorized or recommended by the Security Council and it clearly showed that the forces involved could not be regarded as having been placed at the disposal of the Organization, the basic reason being that when they operated outside the United Nations chain of command, their conduct was attributable only to the relevant Member States. With regard to forces that had been seconded to the Organization, the United Nations had “assumed its liability for damage caused by members of its forces in the performance of their duties”. That assertion, which was taken from the report of the Secretary-General on financing of United Nations peacekeeping operations,⁸ had not given rise to any critical comments in the General Assembly and could be regarded as the Organization’s current position. As peacekeeping forces were considered in the report to be United Nations forces, it could be assumed that their

⁷ See footnote 1 above.

⁸ A/51/389, para. 8.

conduct was attributable to it. That view had been reiterated by the United Nations Legal Counsel in a reply to the questionnaire of the Commission's secretariat, a passage of which was contained in paragraph 36 of the report.

8. At times, there had been a discussion on the different functions of peacekeeping forces. However, the effective function of peacekeeping forces was not material to the attribution of conduct. The decisive element was whether such forces were placed in the United Nations chain of command. The problem, however, was that the national State of the contingent placed at the disposal of the United Nations retained control for disciplinary matters and had exclusive jurisdiction for criminal matters. There was thus a kind of dual control. Depending on the circumstances, either the United Nations or the national State exercised control or there might also be joint control. There was a series of bilateral agreements between the United Nations and contributing States established on the same model, but they did not have any effect with regard to third parties and were thus not decisive in settling the question of attribution. In particular, the fact that the United Nations might have a right of recovery in certain circumstances, as in cases of gross negligence, did not affect the attribution of conduct *vis-à-vis* third parties. That was an internal matter and there was nothing in those arrangements which could be regarded as a solution to the problem under general international law. The prevailing doctrinal view referred to the criterion of "effective control" in order to apportion the attribution of conduct between the United Nations and the contributing State. That criterion had also been adopted by the Secretary-General in connection with joint operations, as illustrated in the paragraphs of the report of the Secretary-General on financing of United Nations peacekeeping operations referred to in paragraph 41 of the Special Rapporteur's report. It should also apply to peacekeeping operations and more generally in the case of dual jurisdiction or control. The Commission had used it in the context of diplomatic protection: the criterion of effective control there allowed priorities to be established both between claimant States and between respondent States or organizations. There was no reason why the same criterion should not also apply to other State organs placed at the disposal of international organizations, as well as to the case in which an international organization placed one of its organs at the disposal of another organization, a less common occurrence referred to in paragraph 46 of the Special Rapporteur's report.

9. The proposed article 5 differed from article 6 on the responsibility of States in that it was explicit about a subject on which article 6 was merely implicit: that for the purposes of attribution, there should be an element of control on the part of the entity—in that case, the international organization—at whose disposal the organ was placed. That element of control appeared in the commentary to article 6 on State responsibility, but the Commission seemed to go a little too far because it spoke of exclusive control on the part of the receiving State. If that criterion was applied in article 5 and it was decided that conduct would be attributed to the organization only in cases of exclusive control, it would lead to a situation in which the organization would not be regarded as responsible even when it had effective control of the organ.

10. The question of the *ultra vires* conduct of an international organization or one of its organs, officials or agents was considered not from the point of view of the lawfulness of the act in question, but from that of the responsibility of the organization for such conduct. In the *Certain Expenses of the United Nations* advisory opinion, ICJ had found that the *ultra vires* character of an act would not relieve the Organization of related expenses. The same could be said for the responsibility of an international organization for the *ultra vires* conduct of one of its agents or organs. However, if an international organization were to incur responsibility for *ultra vires* conduct, there must be a close connection between the functions of the agent and the *ultra vires* conduct. In order to make that point clear, article 7 of the draft articles on State responsibility premised attribution on the fact that the organ, person or entity empowered to exercise elements of governmental authority had acted "in that capacity", a wording which was not very satisfactory, but which he nevertheless proposed using in article 6 because it would be difficult to explain why the criterion applicable in the case of international organizations should be different from the one applicable in the case of States. If the Commission wished, however, it could be specified that a close connection must exist between the *ultra vires* conduct of the agent and the conduct entrusted to the agent. Other minor changes had been made to the wording of article 7 of the draft articles on State responsibility, as explained in paragraph 58 of the Special Rapporteur's report.

11. With regard to article 7, he had also used the corresponding wording from the draft articles on State responsibility, namely that of article 11. An international organization might acknowledge or adopt as its own a conduct which would not be attributed to it under the preceding articles. There again, it would be difficult to find reasons for adopting wording that departed from that used in the draft articles on State responsibility. Moreover, article 11 had already been applied in practice and he cited as an example the decision of Trial Chamber II of the International Tribunal for the Former Yugoslavia in the *Nikolic* case.

12. With regard to the other cases of attribution of conduct to an international organization dealt with in paragraphs 64 to 67 of his report, he said that if article 4 was adopted as proposed or with a similar wording, it would be unnecessary to include draft articles modelled on articles 5 and 8 of the draft articles on State responsibility. Article 4 would cover most cases in which a person was entrusted with part of an international organization's functions or whose conduct was directed or controlled by an international organization, especially since the definition of the rules of the international organization included a reference to established or generally accepted practice. Cases not taken into account in the provision would be rare. By analogy, other provisions of the draft articles on State responsibility might also be said to apply to the responsibility of international organizations, but only in exceptional cases. For example, the question of the responsibility of an international organization administering a territory might arise in the case of an insurrection, but it would not be useful to adopt a provision on the subject in the draft articles on responsibility of international organizations. However, if the Commission deemed it

necessary, it would be easy to transpose the relevant provisions of the draft articles on State responsibility to the case of international organizations.

13. Mr. MONTAZ praised the quality of the Special Rapporteur's report, which covered the doctrine on the topic in a very comprehensive manner. The general approach to the question of "relations between attribution of conduct to an international organization and attribution of conduct to a State", the subject of chapter I, seemed wise. Although articles 4 to 11 of the draft articles on State responsibility adopted in 2001 did not relate directly to international organizations, it was a good idea to take them fully into account for consistency's sake. The examples cited by the Special Rapporteur in paragraph 13 *in fine* and paragraph 32 of his report should be considered at the same time because both cases related to an internationally wrongful act arising from action by Member States of the United Nations based on an authorization or recommendation by the Security Council to make use of force and, in both cases, the act had been attributed to the State. The Security Council had authorized the Member States of the Organization to use force on a number of occasions since the end of the cold war. That was a possibility and not an obligation and it was thus quite normal for acts carried out in that context to be attributed to the State and not to the United Nations. The same reasoning should be followed in the case of acts giving effect to a recommendation by the Security Council or the General Assembly. He asked the Special Rapporteur whether he thought that it might be possible to include a clear rule along those lines in the draft articles.

14. Turning to the proposed draft articles themselves, he gathered that the provisions of article 4 were also applicable to the case of an omission. In paragraph 3 of that article, he preferred the words "acts of the organization" to the phrase used in the 1986 Vienna Convention—"decisions and resolutions"—which lent itself to confusion because the resolutions of an international organization did not necessarily contain decisions. He was, however, in favour of retaining the expression "established practice", which had been used in the 1986 Vienna Convention. He also thought that paragraph 3 should be moved to article 2 of the draft, especially if the terms defined there were used in other articles.

15. Article 5 did not give rise to any major difficulties, provided that the commentary eventually made it clear what was meant by "effective control". For consistency's sake, the corresponding wording of the draft articles on State responsibility should perhaps be followed more closely.

16. With regard to article 6, he asked whether it might not be necessary to refer not only to the conduct of an organ or an official of an organization, but also to that of a member State to which part of the organization's functions had been entrusted. Lastly, he did not really see the need for or purpose of article 7 and particularly questioned the meaning of the words "principle ... of agency or ratification" in paragraph 60 of the report. Article 9 of the draft articles on State responsibility could be transposed *mutatis mutandis* to the current draft because it was possible to imagine peacekeeping forces acting spontaneously

and outside their mandate to replace the official authorities of the territory in which they operated on account of the absence or inadequacy of those authorities. There had already been such a case with the United Nations peacekeeping forces in Cyprus and that could easily happen again. In closing, he asked how the drafting of a specific rule on the attribution of conduct of peacekeeping forces would be "at odds with the pattern of the articles on State responsibility", as the Special Rapporteur asserted in paragraph 34 of his report, and why, in that case, States had been asked to communicate their views on whom the conduct of those forces should be attributed to.

17. Mr. MATHESON pointed out that the Commission should avoid the temptation of following the draft articles on State responsibility too closely or automatically. Careful thought had to be given in each instance to whether it was sensible to transpose a particular provision and, if so, in what manner it should be modified to meet the different circumstances and responsibilities of international organizations. That was not an easy task because international organizations differed in basic ways both from States and from one another. There was also a natural tendency to rely heavily on United Nations practice, but it was important not to lose sight of the fact that the draft also covered regional organizations and specialized organizations, some with many members and some with only a few.

18. With regard to the specific question of the attribution of conduct, he asked whether it was fair to assume, in article 4, paragraph 1, that the conduct of an official of an organization or another person entrusted with part of the organization's functions was to be regarded as an act of the organization only to the extent that the person in question was acting in that official capacity rather than in a personal capacity. That limitation was referred to in article 6 in the context of acts in excess of authority; did it also need to be mentioned explicitly in article 4?

19. As to article 5, it was not entirely clear how the criterion of "effective control" would be applied in practice. For example, in the context of United Nations peacekeeping operations, it appeared that the Organization accepted responsibility for acts of all national military personnel under United Nations command, subject to any separate arrangements which might exist between the United Nations and the State in question in respect of reimbursement to the United Nations. To apply that criterion, would it depend on whether the United Nations or the State had actually given the order to commit the act in question, or on the degree to which the United Nations or the State had influenced the conduct of the forces concerned? Was there a presumption that the United Nations had effective control over forces under its command, unless demonstrated otherwise? Before producing specific wording, the Commission would do well to have a more complete compilation of the practice of the United Nations and regional organizations in the area of peacekeeping operations, drawing in particular on such organizations as the NATO, OAS and ECOWAS. In any event, irrespective of how the question of "effective control" was resolved, it was important to make it clear, perhaps in the commentary, that military commanders were responsible under the law of armed conflict for the conduct of their subordinates, that they must ensure that the persons under their control

complied with the rules of international humanitarian law and that they could not evade such responsibility by pleading a lack of effective control.

20. Mr. FOMBA said that he shared the view expressed in paragraph 1 of the report that the comments made in the Sixth Committee on the draft articles adopted in 2003 “should be considered by the Commission before the end of the first reading”, so that the Commission could “decide whether to revise the draft articles ... or to postpone their revision to the second reading”. He also supported the suggestion that international organizations should be encouraged to submit new information concerning their practice. As for the relationship between the attribution of conduct to an international organization and the attribution of conduct to a State, he endorsed the course of action adopted by the Special Rapporteur to ensure the consistency of the Commission’s work by justifying any changes in approach or wording in identifying differences in practice or objective distinctions in nature. The two key words were “nature” and “practice”. That, in turn, related back to the question of the perception and critical assessment, from both the theoretical and the practical points of view, of the political and legal nature of States and international organizations and of their actual functioning. The answers would be found through an examination of such crucial questions as whether international organizations were subjects of international law, either in full or in part, as well as the nature of their legal personality, the principle of speciality, the theory of implied powers, the relevance of their constituent elements from the socio-political point of view, their scope and means of activity and their characteristics.

21. In paragraphs 6 *et seq.* of the report, the Special Rapporteur gave a more than adequate account of the various possibilities or combinations and considered their validity or invalidity in the light of existing practice and theory.

22. With regard to the general rule concerning the attribution of conduct to an international organization, the Special Rapporteur’s approach, with its conclusion, in paragraph 14 of the report, that the reasoning behind article 4 of the draft articles on State responsibility was analogous to that underlying the corresponding aspect of international organizations, was, in his view, logical and appropriate. He noted that, in paragraphs 15 to 27 of the report, the Special Rapporteur attempted to outline a possible definition of a general rule on the attribution of conduct to an international organization, with particular emphasis on the importance of practice as a constituent element of such a definition. Paragraph 24 also raised the question as to whether, “for the purpose of attribution of conduct in view of international responsibility, practice should not be given a wider significance than when the organization’s capacity or competence is discussed”, adding that “when practice develops in a way that is not consistent with the constituent instrument, the organization should not necessarily be exempt from responsibility”. Although he shared the Special Rapporteur’s view, all the relevant assessment elements and criteria should surely also be taken into account.

23. The Special Rapporteur’s move to improve the definition of the term “rules of the organization”, on the basis

of a critical analysis of the terms “decisions and resolutions” and “established practice”, also made considerable sense. With regard to the question as to whether the definition of “rules of the organization” should appear in article 4 or article 2, he shared the Special Rapporteur’s view that a decision could wait until the Commission had a better idea of whether the term would appear only in the context of a general rule on the attribution of conduct or whether it would be used in other provisions, in which case the existing text of article 4, paragraph 3, ought to be transferred to article 2. As for the applicability of the criteria defined in article 4, paragraph 1, of the draft articles on State responsibility, which set out the State’s functions and the position and nature of organs of the State, he endorsed the Special Rapporteur’s approach. Although it would be possible to outline the functions of an international organization, there seemed to be no need to do so.

24. The actual text of article 4 did not appear to give rise to any particular difficulties. He found the phrase “entrusted with part of the organization’s functions” somewhat unsatisfactory; a better form of words might be found, such as “acting on behalf of the organization” or “who carries out a mission on behalf of the organization” or even “who exercises a function assigned by the organization”. In paragraph 2, it might be preferable to amend the final phrase to read “under the *relevant* rules of the organization”. Such wording would make it possible to avoid having to provide a definition in paragraph 3 of the rules in question. If paragraph 3 was retained, the words “decisions and resolutions” could, if necessary, be replaced by the words “acts of the organization”, a more generic and neutral term. The words “established practice” might well be adequate, given that they could be understood in the classic sense of a custom and not only in a temporal sense.

25. Turning to the chapter of the report on the conduct of organs placed at the disposal of an international organization by a State or another international organization, he said that, with regard to the use that might be made of the replies by Governments concerning the question of the attribution of conduct of peacekeeping forces (para. 34), he shared the Special Rapporteur’s view that to draft a specific rule on attribution of conduct would not be appropriate, for at least three reasons: firstly, such an endeavour would be at odds with the pattern of the articles on State responsibility; secondly, it would be difficult in view of the problems posed by the definition of the term “peacekeeping forces”; and, lastly, the question of attribution of conduct of such forces had not been clearly defined. In paragraph 46 of the report, the Special Rapporteur reached a similar conclusion in relation to the rarer case in which an international organization placed one of its organs at the disposal of another international organization. He wondered whether the Special Rapporteur’s view was provisional or definitive in that regard.

26. As to the phrase “governmental authority”, he endorsed the view expressed in paragraph 47 of the report, which stated that few international organizations exercised that kind of authority and that that reference should therefore be made more generally to the exercise of an organization’s functions. In relation to the definition of the basis on which national contingents were placed at

an organization's disposal (paragraph 48 of the report), he agreed with the Special Rapporteur that the text should explicitly indicate the basis for the control exercised by the beneficiary State over the organ—the only reference to which in the draft articles on State responsibility appeared in the commentary to article 6—and emphasize not exclusiveness of control, but the extent of effective control. He concurred with the Special Rapporteur's proposal that the text of article 5 should not repeat the specifications of the authors of the wrongful conduct given in article 4, paragraph 1, so long as it was understood that what applied to organs of an international organization also applied to officials and the other persons referred to; however, the distinction must be made clear in the commentary. As drafted, article 5 did not give rise to any particular problems. The words "for the exercise of one of that organization's functions" could be retained, unless a better alternative could be found.

27. With regard to the chapter of the report on the question of the attribution of *ultra vires* conduct, he said that he had no objection to retaining the words "in that capacity", as used in article 7 of the draft articles on State responsibility. Overall, he endorsed the minor changes proposed by the Special Rapporteur to the text of that article, although he had his doubts about the use, in the final phrase of the French text, of the words "*sa*" and "*ses*", which had the effect of personalizing the authority and instructions referred to. A more general and impersonal formulation should suffice, however, or else the phrase should be replaced by wording along the following lines: "... *outrepasse la compétence dévolue ou contrevient aux instructions reçues ou données*" ("exceeds the authority devolved upon it or contravenes instructions that have been given or received"). With that proviso, the text of article 6 seemed acceptable.

28. Referring to the chapter of the report on conduct acknowledged and adopted by an international organization as its own, he said he agreed with the Special Rapporteur's view that the Commission should not take a different approach from the one that had led it to adopt article 11 of the draft articles on State responsibility. The illustrations of recent practice, given in paragraphs 61 and 62 of the report, were also extremely useful. Article 7, which was, after all, modelled on article 11 of the draft articles on State responsibility, was entirely acceptable.

29. Lastly, with regard to the chapter of the report on other cases of attribution of conduct to an international organization, and especially with regard to the question of transposing articles 5, 8, 9 and 10 on State responsibility, he took the view that, although the Special Rapporteur seemed, on the face of it, to be adopting a sensible approach in suggesting that the Commission should refrain from "writing parallel texts and [should] leave open the possibility of an application by analogy of the rules established for States in the rare cases in which a problem of attribution that is covered by one of these articles may arise" (paragraph 64 of the report), care should be taken to avoid drawing hasty conclusions; the Commission should be cautious and give further thought to the implications of certain recent developments, to which the Special Rapporteur referred in paragraph 67 of the report.

30. Mr. Sreenivasa RAO commended the Special Rapporteur on the excellent quality of his report, in which he had referred to and rigorously analysed a number of interesting concepts that, in his own view, were interrelated. Others had pointed out the relationship between articles 4 and 6, for example. There was also a clear link between the concept of "effective control", which was the subject of article 5, and that of "conduct [that] exceeds authority or contravenes instructions", which was covered by article 6. As the Special Rapporteur had indicated, some essential aspects of the topic should be carefully considered. For example, he wondered whether the established or generally accepted practice of an international organization could be considered a criterion for the rules of the organization, by virtue of which a given decision or resolution could serve for the attribution of conduct to that organization. All those concepts would require more thought and the Drafting Committee would need to look at them more closely when it considered the proposed draft articles. In the case of established practice, however, and generally accepted practice, which was even more important, such concepts invariably contained a time element and always showed the need for widespread acceptance. Ultimately, they were not as different from each other as they appeared. Similarly, when it came to decisions and resolutions, it was noteworthy that a resolution frequently involved a decision, whereas a decision could exist without a resolution, to the extent provided for by the constituent instrument of the organization. That applied, for example, to decisions taken by the United Nations Secretary-General. Fine tuning was therefore called for.

31. Thanks to his careful approach, the Special Rapporteur had successfully adapted the draft articles on State responsibility to those on the responsibility of international organizations. In dealing with the topic, however, the Commission faced some basic dilemmas, as it had in considering State responsibility. The question might well be asked as to whether it was truly possible to formulate articles on the responsibility of international organizations without understanding the basic differences between them or the methods by which they adopted their decisions or made recommendations to States. In other words, he wondered whether it was possible to separate primary rules from secondary rules in dealing with such matters. The problem had arisen in relation to the draft articles on State responsibility and would arise with even greater force in the case of international organizations. Mr. Matheson and Mr. Momtaz had rightly raised the question of what kind of relationship existed between peacekeeping forces and the international organization under whose auspices they acted. The same applied to the relationship between State actions based on the Organization's recommendations under Chapter VI of the Charter of the United Nations and those taken on the basis of Chapter VII. In both those situations, the question that arose was how far the responsibility of the Organization extended, if it was unknown whether a primary or a secondary rule was involved. Another question to be considered related to joint and several responsibility, which was fairly clear-cut in the European Union, but much less so in the United Nations. For example, if the Organization were to play a more active role in Iraq, and the United States did not disengage, who would have responsibility on the ground?

The question had been asked, but the answer was not simple.

32. He did not know how much more work needed to be done on such issues for the draft articles under consideration to become really valuable. If the Commission restricted itself to transposing the concept of State responsibility to the situation of international organizations without sufficient analysis, however, the question would remain unanswered. In any case, the Commission should not return to the question of primary rules or the functions of international organizations or rewrite the law relating to international organizations in order to identify the rules on their responsibility. It should, however, give more thought to some particularly complex questions, such as the problems raised by Mr. Matheson with regard to command and control in cases where they were exercised by States and not by the international organization concerned. Thus, in the case of the Korean hostilities, although they had been waged under the United Nations flag, General MacArthur had not taken instructions from anyone. It would need to be established whether the responsibility of the United Nations ceased upon the adoption of a decision whose execution was left entirely to States, which were subsequently responsible for their actions or their failure to act, or whether the United Nations retained some responsibility. He hoped that the Special Rapporteur would give the Commission further guidance on all those points.

33. The CHAIRPERSON, speaking as a member of the Commission, said that he joined other speakers in thanking the Special Rapporteur for the submission of his second report. The way in which it was structured, the arguments it brought to bear, on the basis of both theory and practice, and the fact that it relied on replies given by Governments and international organizations gave it considerable authority. It would, however, be most useful if the Special Rapporteur could reply to two questions: firstly, since an international organization was a special subject, composed of a number of States which delegated some authority to it, but retained their decision-making power in many areas, he wondered whether consideration might not be given to such a concept as "joint and several" responsibility of the organization and the States comprising it (or, at any rate, those which had voted in favour of a given action). Secondly, he asked whether an international organization could have responsibility for an omission.

34. Mr. GAJA (Special Rapporteur), replying to Mr. Momtaz, said that the rule that he had suggested should be characterized as negative, since it would mean that where a State was given an authorization by an international organization, on the understanding that the attribution of the conduct in question would be made to the State, there would be no attribution to the organization, except with regard to responsibility that it might have in another respect. He had drawn on the approach adopted by the Commission when it had decided to delete all negative rules during its consideration on second reading of the draft articles on responsibility of States for internationally wrongful acts.

35. With regard to Mr. Momtaz's other suggestion that a rule should be drafted to correspond with article 9 of the

draft articles on State responsibility, the example given—the United Nations intervention in Cyprus—was not relevant, since it actually related to State responsibility and therefore to article 9.

36. The first of the Chairperson's two questions, which related to the joint and several responsibility of States and a given organization, should not be considered in the context of attribution; it would be dealt with later in a report on the relationship between the various responsibilities. The second question, concerning omissions, was of great relevance to, for example, the United Nations and the situation in Rwanda, but even in that case the problem was not so much one of attribution as one of primary rules.

37. Mr. ECONOMIDES said that any action undertaken in accordance with Chapter VII of the Charter of the United Nations should entail the responsibility of the United Nations, regardless of how far a given State was equally responsible. He found unacceptable Mr. Momtaz's view that responsibility belonged solely to States.

38. Mr. MOMTAZ said that practice was quite the opposite of what Mr. Economides had said. As the Special Rapporteur recalled in the report, when the United States had intervened in Korea, on the recommendation of the Security Council, and United States forces had mistakenly bombed targets in Chinese territory and in the Soviet Union, the United States had accepted responsibility for the damage caused. Similar conduct had been observed in the context of embargoes agreed by the Security Council, when States had assumed responsibility for wrongful acts committed by their nationals during ship inspections.

39. Mr. ECONOMIDES said that he did not dispute existing practice and that he fully agreed with Mr. Momtaz's comments. In cases in which the State concerned accepted responsibility and compensated victims, the problem was solved, but in cases in which a State refused to assume such responsibility or to bear all compensation costs, the international organization—as "moral author", in the context of joint and several responsibility—was still entirely responsible.

40. Mr. PELLET said that a distinction must be drawn between an organization's responsibility for recommending or authorizing the use of force contrary to international law—which could, in his view, only be deemed a violation of the Charter of the United Nations (in the case of the United Nations) or of a rule of *jus cogens*—and the responsibility of States that had committed an internationally wrongful act by implementing such an authorization. The former case could occur, although it remained rather unlikely, but, where the second was concerned, he had difficulty in understanding the concept of "moral author": as far as he was concerned, there was no doubt about the responsibility of the State. Thus, in the *Matthews* case, which related to elections to the European Parliament in the British territory of Gibraltar, the European Court of Human Rights had ruled that only the United Kingdom was responsible because it had put its own interpretation—an unlawful one—on the decision of the Court of Justice of the European Communities. He was therefore very sceptical about the extremely general concept that Mr. Economides seemed to want to promote.

41. Mr. ECONOMIDES said that where an individual acting on behalf of a State committed a wrongful act, the State was responsible. He therefore saw no reason why an international organization would not be held responsible for a wrongful act committed by a State acting on its behalf. That position seemed perfectly tenable to him.

The meeting rose at 12.55 p.m.

2801st MEETING

Wednesday, 19 May 2004 at 10 a.m.

Chairperson: Mr. Teodor Viorel MELESCANU

Present: Mr. Addo, Mr. Baena Soares, Mr. Candiotti, Mr. Chee, Mr. Comissário Afonso, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Momtaz, Mr. Niehaus, Mr. Operti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Yamada.

Responsibility of international organizations¹ *(continued)* (A/CN.4/537, sect. A, A/CN.4/541,² A/CN.4/545,³ A/CN.4/547,⁴ A/CN.4/L.648 and Corr.1)

[Agenda item 2]

SECOND REPORT OF THE SPECIAL RAPPORTEUR *(continued)*

1. Mr. PELLET said that while he disagreed with the general thrust of chapter I of the Special Rapporteur's report (A/CN.4/541), he could agree to the three draft articles proposed by the Special Rapporteur with only a few reservations, which he would clarify.

2. With regard to draft article 4, he had been among those members of the Commission who had expressed some hesitancy in connection with article 4 of the draft articles on responsibility of States for internationally wrongful acts at the time of their adoption in 2001⁵. At the time, he had held that in defining the term "organs of State", the Commission must restrict itself to reference to internal law. With hindsight, however, he now believed that he had been wrong and that the Special Rapporteur on that topic, Mr. Crawford, who had advocated a broader formulation that had resulted in the ambiguous wording of paragraph 2 of that article, had probably been right in thinking that international law had a contribution to make to such a definition.

¹ For the text of articles 1 to 3 of the draft articles and commentaries thereto adopted by the Commission at its fifty-fifth session, see *Yearbook ... 2003*, vol. II (Part Two), chap. IV, sect. C, pp. 18–23.

² Reproduced in *Yearbook ... 2004*, vol. II (Part One).

³ *Ibid.*

⁴ *Ibid.*

⁵ See 2792nd meeting, footnote 5.

3. However, that was certainly not the case with the draft articles on the responsibility of international organizations, and the Special Rapporteur had been right to state that only the "internal law" of an international organization could determine who might engage its responsibility. In his view, international organizations, unlike States, were too diverse to permit the formulation of a general rule. He had no objection to defining the "law" of an international organization as "the rules of the organization", since that term could be justified by the 1986 Vienna Convention. It was for that very reason, however, that paragraph 3 of article 4 should not depart from the definition of "rules of the organization" contained in article 2, paragraph 1 (j), of the 1986 Vienna Convention. To do so would require more convincing reasons than those cited by the Special Rapporteur in paragraph 25 of his report. It was unfortunate that the standard term "constituent acts" had been replaced with the much less common term "constituent instruments". He shared the Special Rapporteur's dissatisfaction with the term "decisions and resolutions", even though that term appeared in the Charter of the United Nations; but he was not much happier with the proposed alternative "acts of the organization", if only because it was not at all certain that a resolution was always a legal act, particularly if it took the form of a recommendation. He found both "established" and "generally accepted", which the Special Rapporteur had proposed as terms qualifying the practice of an organization, to be generally consistent with the terminology of the 1986 Vienna Convention.

4. Two additional interrelated problems with the drafting of article 4 were slightly more serious. Article 4, paragraph 1, of the draft articles on State responsibility confined itself to indicating that the responsibility of a State was linked to the conduct of its organs. The term "organs" included the officials who were covered by the definition contained in paragraph 2 of that article and in paragraph (12) of the commentary, which left no doubt that the word "person" could mean a natural or legal person, including an individual office holder. Thus the Commission might do better to reflect that language in the present draft articles and agree that the word "organ" included the officials of an organization, who triggered the responsibility of the organization only when they acted as organs or as representatives thereof.

5. He found it harder to comprehend what the Special Rapporteur meant by the references in paragraph 1 of article 4, to "another person entrusted with part of the organization's functions". In its advisory opinion in the *Reparation for Injuries* case (p. 177), ICJ had defined an "agent" as meaning any person through whom an organization acted. Given that that was an entirely satisfactory definition, he wondered why that definition had not been used in paragraph 1 of article 4 of the present draft, which could then simply read "The conduct of an organ or agent of an international organization shall be considered ...". Likewise, paragraph 2 would then read: "Organs and agents referred to ...". Indeed, the Special Rapporteur had himself taken precisely that approach in paragraph 19 of his report.

6. His final problem with article 4 had to do with the word "structure", at the end of paragraph 1. One characteristic