

Document:-
A/CN.4/SR.2803

Summary record of the 2803rd meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
2004, vol. I

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responsibility of the United Nations must not be excluded, since the Security Council was the sole body competent to authorize such operations, for which it established the mandate and the purpose. Such instances really involved joint operations undertaken nearly simultaneously by organizations and Member States or, conversely, by member States and international organizations, and it was only logical that responsibility should be shared and borne jointly or severally, depending on the case.

22. Turning to the four draft articles that the Special Rapporteur proposed in his report, he said that, in view of the comments made during the discussion by other members of the Commission, he suggested that article 4 should be amended to read:

“1. The conduct of any organ of an international organization, of its officials or of any other person acting for that organization shall, when related to an official act, be considered as an act of that organization in conformity with international law, whatever the position the organ, official or person holds within the organization.

2. The rules of the organization shall determine which are the organs, officials or persons that act for it.

3. For the purposes of this article, ‘rules of the organization’ means all the acts adopted by the organization, whether constituent or other, irrespective of their specific denomination, and the well-established practice of the organization.”

23. On article 5, he pointed out that, in the phrase “organ of ... an international organization that is placed at the disposal of another international organization”, the word “organ” was not defined, as it was in the draft articles on State responsibility, and he accordingly wished to know whether it also covered an official of the organization. The wording of article 6 should be reviewed because the phrase “entrusted with part of the organization’s functions” was inadequate. He also wondered why it was stipulated in article 6 that the official or person must act “in that capacity” when no such stipulation was made in article 4, although the formulation that he had proposed for article 4 solved that problem. As to article 7, he wondered whether, on the basis of the principle of speciality, an international organization could acknowledge and adopt as its own conduct that which did not come within its jurisdiction.

24. He agreed that all the draft articles should be referred to the Drafting Committee, but regretted that the Commission had examined only four at the current session, as that pace of work was too slow.

25. Mr. KABATSI said that he joined in the consensus which appeared to have emerged on the work done by the Special Rapporteur. He could accordingly at the outset declare his support for the referral of articles 4 to 7 to the Drafting Committee.

26. While the elaboration of the study on the topic of responsibility of international organizations should follow a path very close to that of the draft articles on State responsibility, care must be taken not to assume that the same solutions would apply in the same way in the two drafts. Otherwise, there would have been no reason to

undertake the study. The Special Rapporteur was clearly aware of that and, where circumstances so indicated, he departed from the provisions in the draft articles on State responsibility, as in the case of article 4. In other cases—for example, articles 6 and 7—he kept the provisions that he was proposing close to those in the draft on State responsibility. In still other instances, he had found it useful to retain certain parts of the draft on State responsibility, to reject others and to supply new provisions to craft a new article. He himself found that approach to be both correct and useful.

27. There was no doubt that the Drafting Committee would proceed as usual to refine and correct the draft articles proposed by the Special Rapporteur, but one could already say, as other members of the Commission had, that in article 4, paragraph 1, the word “part” should be replaced by the word “certain” and that the same suggestion applied to article 6. The proposed amendments to paragraph 3 should be left for the Drafting Committee to address. The Special Rapporteur was worried that the word “established” carried a connotation of time elapsed and would prefer the phrase “generally accepted”. In his own view, the element of time was present in the second expression as well as in the word “established”. There again, the Drafting Committee should be able to come up with the most appropriate formulation.

The meeting rose at 1 p.m.

2803rd MEETING

Tuesday, 25 May 2004, at 10 a.m.

Chairperson: Mr. Teodor Viorel MELESCANU

Present: Mr. Addo, Mr. Al-Baharna, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, 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. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Ms. Xue, Mr. Yamada.

Responsibility of international organizations⁷ **(continued) (A/CN.4/537, sect. A, A/CN.4/541,⁸ A/ CN.4/545,⁹ A/CN.4/547¹⁰, A/CN.4/L.648 and Corr.1)**

[Agenda item 2]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

⁷ 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.

⁸ Reproduced in *Yearbook ... 2004*, vol. II (Part One).

⁹ *Ibid.*

¹⁰ *Ibid.*

1. Mr. GALICKI said that the four draft articles contained in the second report (A/CN.4/541), together with draft articles 1 to 3 contained in the first report,¹ seemed justified, indeed necessary, for the codification of legal rules on the responsibility of international organizations. The excellence of the second report did not, however, mean that the Commission should necessarily endorse the draft texts in their present form. Indeed, his understanding was that the Special Rapporteur did not intend them as anything other than a basis for further developments and corrections.

2. It was clear from the titles of the four draft articles proposed in the second report that they drew on the draft articles on responsibility of States for internationally wrongful acts adopted by the Commission in 2001;² thus the problems of attribution of conduct, of the conduct of organs placed at the disposal of the responsible entity, of excess of authority or contravention of instructions, and of conduct acknowledged and adopted by the responsible entity as its own were dealt with respectively in articles 4, 6, 7 and 11 of the draft articles on State responsibility. Other cases of attribution of conduct were provided for in articles 5, 8, 9 and 10 of the draft articles on State responsibility, but the Special Rapporteur had rightly decided not to apply them to the attribution of conduct to international organizations: some had a clearly territorial element, while article 5 dealt with governmental authority. As for conduct directed or controlled by a responsible State, which was covered by article 8 of the draft articles on State responsibility, he was not fully convinced that, in the case of the responsibility of international organizations, the situation was fully covered by the wide definition in draft article 4, as claimed by the Special Rapporteur in paragraph 66 of his report.

3. With regard to draft article 4, he endorsed the idea of identifying a general rule on attribution of conduct to an international organization, even though such a rule had been identified in specific relation to State responsibility. Taking into account the particular characteristics of international organizations, the Special Rapporteur rightly extended the concept of an act by an organization under international law to include the conduct of one of its officials or another person entrusted with part of the organization's functions. Such a formula seemed to cover the concept of an "agent" of an international organization, as used by ICJ in some of its advisory opinions.

4. The draft article rightly used the term "rules of the organization" rather than the term "internal law" to establish the link between the organization and its organs, officials or other persons. The question remained, however, as to how the term "rules of the organization" should be understood for the purposes of the draft articles. The definition of the term as contained in article 2, paragraph 1 (j), of the 1986 Vienna Convention could not be considered exhaustive, since its use of the term "in particular" immediately suggested that there were other possibilities. On the other hand, neither the phrase "decisions and resolutions" nor the phrase "established practice" seemed satisfactory. Nor was the proposed formula "acts of the

organization" acceptable, since it could be understood as including substantial "external" acts of the organization. Moreover, the difference between the concepts of "established practice" and "generally accepted practice" was not so clear as to justify the replacement of the one by the other. The definition of the term "rules of the organization" should also be considered from the standpoint of how it applied to the draft articles as a whole, not just to article 4. It should therefore be located in article 2 rather than in article 4.

5. The draft articles also lacked a definition, or at least a description, of the term "organ of an international organization", by contrast with article 4, paragraph 2, of the draft articles on State responsibility, which stated that an organ "includes any person or entity which has that status in accordance with the internal law of the State". The question was whether, in the draft articles currently under consideration, an organ also included persons and entities having that status in accordance with the rules of the organization. The situation was complicated by the fact that article 4 of the present draft differentiated between "organs", "officials" and other "persons". That meant that "persons" and "entities" did not form part of the organ, which was not the case in article 4 of the draft articles on State responsibility.

6. Another question related to persons or entities which were not organs of the State under article 4 of the draft articles on State responsibility but which, in accordance with its article 5, could be considered as exercising elements of governmental authority. Their role should surely be reflected in the draft articles. The Special Rapporteur seemed not to attach due importance to the differing language of the two sets of draft articles. In that regard, definitions of other terms used in the current draft would be helpful.

7. With regard to draft article 5, one important consideration was the criteria for the effective control exercised by a given international organization over the conduct of an organ of a State or an international organization placed at its disposal. The draft article corresponded to draft article 6 on State responsibility, but the criterion of effective control seemed much harder to evaluate than the criterion of acting in the exercise of elements of the State's governmental authority. Indeed, the two criteria were not comparable, since article 5 of the current draft related to the external activity of effective control exercised by an organization, whereas article 6 of the draft articles on State responsibility related to internal characteristics of organs placed at the disposal of a State.

8. As for draft article 6, he concurred with the Special Rapporteur's view that the main reason justifying the inclusion of *ultra vires* provisions was the need to protect third parties. The text of the draft article was almost identical to that of article 7 of the draft articles on State responsibility and the reasons for its formulation were very similar. The common denominator of the two provisions was the requirement that organs, officials or persons acted "in that capacity". Although conceding that the term was "rather cryptic and vague", the Special Rapporteur had decided to retain it. In order to make it more understandable and more applicable to complex situations, the

¹ See 2802nd meeting, footnote 9.

² See 2792nd meeting, footnote 5.

term should be replaced by a phrase such as “within their apparent authority or general scope of authority”, a phrase used by Mr. Brownlie in the fifth edition of his *Principles of Public International Law*.³

9. Draft article 7, like article 11 of the draft articles on State responsibility, covered other situations in which organizations might acknowledge and adopt conduct as their own. It gave them the opportunity to fill certain lacunae that might appear within their sphere of activities. The provision should therefore be included in the draft articles.

10. Despite his strictures, the report and the proposed draft articles were extremely well elaborated, thoroughly analysed and based on solid theoretical and practical foundations. All four draft articles should therefore be referred to the Drafting Committee.

11. Ms. XUE said that, considering that there was limited practice among States and international organizations, the Special Rapporteur had gone into the topic carefully and provided the Commission with a solid basis for further study. However, not enough comments and materials had yet been submitted by international organizations for a consistent, generally accepted pattern of practice to emerge. The report focused excessively on the practice of the United Nations family and the European Union, which was understandable given their significance and influence in international life. Such practice was not, however, necessarily representative of the general pattern of behaviour of international organizations. Moreover, it was questionable to what extent their practice was based on a belief in the normative principle of attribution of conduct to the organization and to what extent it was simply dictated by expediency. In progressively developing international law in that field, the Commission faced the difficult task of distinguishing between what was the standard practice of international organizations and what constituted special cases.

12. In an integrated community such as the European Union, the line between national and Union competence was often blurred and kept shifting. Even in cases where national competence was transferred, there might still be some margin for discretion in the implementation of Union laws and regulations, which made it even harder to distinguish between the conduct of a member State and that of the European Union. Moreover, in a number of international organizations, consideration was being given to the membership of the European Union, as distinct from that of its members. Thus the report considered, in paragraphs 10 and 11, a clear-cut case in which the European Community undertook responsibility for all customs measures, whether taken at the Community or at national level. It was not clear, however, who would be responsible for compensation if one member State caused damage to a third party by specific national measures carried out in application of the relevant Community law. Theoretically, it seemed that the organization should take responsibility, but, in practice, matters were not that simple.

13. The issue of the attribution of conduct to an international organization was much more complicated than the attribution of conduct to a State. Thus, although the present draft articles were, as the Special Rapporteur freely admitted, largely based on draft articles 4 to 11 on State responsibility, the question of what constituted an “act of an international organization” was the key element, whereas, in the case of State responsibility, attribution of conduct depended on what constituted an “act of a State”. Article 4 of the current draft text dealt with a number of elements that were important for the consideration of the attribution of conduct, namely the institutional basis of responsibility, the rules of the organization—including its generally accepted practice—and the functional link between the actor and the organization. In that regard she had two suggestions to make. Firstly, the phrase “entrusted with part of the organization’s functions” was not precise enough to reflect the general practice of international organizations. The idea conveyed should be that the actor both possessed and *was performing in* an official capacity at the time of the wrongful conduct. A person entrusted with part of the organization’s functions might not always be acting in the performance of his or her official duty. As shown in paragraphs 15 and 16 of the report, organizations were held responsible only for damages incurred as a result of acts performed by them or by their agents acting in their official capacity. They were not accountable for private acts by their officials.

14. Secondly, the Special Rapporteur had not given sufficient attention to the term “organ”, apparently in an attempt to avoid dealing with the complexity of peacekeeping operations within the United Nations system. In paragraph 35 of the report and in the comments made by the United Nations Secretariat, peacekeeping forces were referred to as “subsidiary organs of the United Nations”. Some operations were under the direct command and control of the United Nations, while others remained under the command and control of the contributing State. In terms of attribution of conduct, however, the legal consequences of those acts might differ. In the former case, the acts would be imputed to the organization, while in the latter either the contributing State assumed responsibility for its troops or the organization and the State took joint and several responsibility. In other words, the term “organ”, as currently used in article 4, could give rise to problems of interpretation and application. Some of the material relating to article 5 should be more carefully studied in connection with article 4.

15. Article 5 contained an element that was critical for invoking the responsibility of international organizations, namely, “effective control” over the conduct in question. Cases in which international organizations had taken responsibility generally had three elements in common: they were undertaken with the authorization of the organization, they reflected the official capacity of the organization and the conduct was carried out under the effective control of the organization. The last of those elements was particularly important in the case of organizations, since the persons entrusted with the functions of the organization did not have the same legal ties to the organization that State officials had to their country of nationality. That situation should be reflected both in article 5 and in article 4.

³ I. Brownlie, *Principles of Public International Law*, 5th ed. (Oxford, Oxford University Press, 1998), p. 453.

16. The statement in paragraph 11 of the Special Rapporteur's report that "[r]esponsibility of an organization does not necessarily have to rest on attribution of conduct to that organization" was rather confusing. As in the case of State responsibility, the essential question was not who actually carried out the conduct, but what conduct could be attributed to the State. Just as wrongful acts were never perpetrated by a State but by its officials or agents, so the acts of an international organization were carried out by the organization's members, agents or persons entrusted with part of its functions. The only difference was that, as subjects of international law, States members of an organization might under certain circumstances assume joint and several responsibility.

17. In that connection, she disagreed with the Special Rapporteur's reading of Annex IX of the United Nations Convention on the Law of the Sea as constituting an example of attribution of responsibility. According to article 6 of that Annex, "Parties which have competence under article 5 of this Annex shall have responsibility for failure to comply with obligations or for any other violation of the Convention". The words "failure" and "violation" still meant that responsibility was based on conduct that could be attributed to the competent party. As with States, attribution of conduct was a secondary rule that was not necessarily stated in the primary rule.

18. In his first report, the Special Rapporteur had said that he did not intend to address liability issues relating to international organizations; as the second report showed, however, the attribution of conduct and the content of responsibility were related issues. In looking at the conduct of an organ or officials of an organization, determining what lay within the organization's mandate and what fell outside it depended much on the terms of the agreement between the organization and its member States. In practice, the dividing line was often the performance of official duty. Thus the wording of article 6 seemed too broad; as she had noted in connection with article 4, the person concerned acted not only in an official capacity but also during the performance of duty. That would limit the scope of the article to acts regarding which there was a reasonable expectation of potential responsibility on the part of an organization.

19. Article 7 had been closely modelled on the corresponding article on State responsibility. However, she was not convinced that the two examples provided in the report actually supported the inclusion of such an article in the present draft. In the first example, the European Community was required to assume its responsibility by law and not merely by virtue of its own acknowledgement of responsibility. The second example, involving the International Tribunal for the Former Yugoslavia, was even less helpful insofar as any normative claim was concerned. Without a greater number of relevant cases, the article was more likely to give rise to questions than to provide useful legal guidance.

20. In general, the Special Rapporteur had shed a great deal of light on a very complex issue. However, in view of the policy issues raised in the plenary debate, she thought that the draft articles needed further work, and she there-

fore concurred with the majority view that they should be referred to the drafting Committee.

21. Mr. BROWNLIE noted that Ms. Xue had sought to identify formal criteria for the authorization by States and organizations of particular acts and had thus been unhappy with the text of article 6, on excess of authority. Two extremely relevant problems had not been given sufficient prominence in the Special Rapporteur's report. Looking at the topic against the background of the Commission's work on State responsibility, it was clear that, while one must guard against the use of facile analogues, past work on other topics should not be ignored. One major area of similarity between State responsibility and the responsibility of international organizations, particularly *vis-à-vis* third parties, had to do with the nature of State responsibility as applied by tribunals, which was based not on fault but on objective responsibility. Thus, if an institution engaged in risk-creating activities, it was not necessary to demonstrate proof of intention or negligence; it was the creation of the risk that constituted the basis of the responsibility. Ms. Xue had rightly drawn attention to the fact that international organizations acted only through their agents. The Commission should therefore pay more attention to the basis of responsibility, and that was an area in which the work on State responsibility offered useful experience. It would be preposterous if a claimant State had always to demonstrate some form of express authorization on the part of the international organization committing a wrongful act. The question of the burden of proof must also be considered. Normally, it was the respondent State that had the responsibility of showing that there had been no authority. While his comments were drawn from examples relating to State responsibility, they were highly relevant to the current topic in a policy sense.

22. As a policy matter, he thought it unreasonable that States should be able to limit their liability by acting through an international organization or by forming such an organization. Some of those matters would doubtless be elucidated in the judgments issued by ICJ in the eight cases concerning Kosovo (*Legality of Use of Force* cases).

23. Mr. MOMTAZ asked Ms. Xue if she could elaborate on the criticisms that she had raised with regard to the arguments put forward by the Special Rapporteur regarding article 5 of Annex IX of the United Nations Convention on the Law of the Sea. She had said that the dividing line between the competence of an international organization and that of States was often not clear, yet he thought that the example cited by the Special Rapporteur in paragraph 12 of his report was a clear example of such a clear-cut division. In fact, the Convention attributed certain rights and obligations to States in the exclusive economic zone, and, to the best of his knowledge, the States of the European Union had renounced their right to exercise those rights in favour of the Union. Thus, any action taken in the exclusive economic zone would be attributable to the European Union and not to its member States.

24. Ms. XUE said that her comments had focused on the observation by the Special Rapporteur in paragraph 11 of his report, in which he had stated that "responsibility of an organization does not necessarily have to rest on

attribution of conduct to that organization”. The examples supporting that contention had focused on the European Union and Annex IX of the United Nations Convention on the Law of the Sea. Notwithstanding those two examples, she doubted that there were any bases for invoking the international responsibility of an international organization other than attribution of conduct. The basis for invoking State responsibility lay in two elements: the existence of an internationally wrongful act and attribution of conduct to the State. In the case of international organizations, that basis continued to be the conduct of the organization, even though the conduct was not necessarily carried out by the organization itself, but by its agents. Although Annex IX to the Convention said that responsibility was shared between the organization and its member States, the basis of responsibility continued to lie in the wrongful act, which could be imputed either to the organization or to the State. That basic principle was also applicable to international organizations, and in that respect the regime of State responsibility and the regime of the responsibility of international organizations were the same.

25. Mr. ADDO said that the constituent instrument of every international organization prescribed the powers and functions of the organization and identified the organs that were entitled to exercise those powers. As the *Reparation for Injuries* case had demonstrated, it was necessary to show that an organization had been given, either expressly or by necessary implication, the power to perform the acts in question. If those acts were not performed or authorized by the organ so empowered by the constituent instrument, the question was whether they had legal effect.

26. Those questions had been considered by ICJ in its advisory opinion on the *Certain Expenses of the United Nations* case. The expenses at issue related to United Nations peacekeeping forces and had been authorized for inclusion in the Organization’s regular budget by the General Assembly. Two Member States had maintained that the Assembly was not the authorized organ, and that under the Charter of the United Nations the appropriation could be legally authorized only by the Security Council. In its opinion, the Court had held that while the action might have been irregular in terms of the Organization’s internal structure, the expenses incurred were nevertheless expenses of the Organization.

27. Since international legal personality conferred on international organizations the right to conclude treaties, it also implied legal responsibility for acts of a tortious or contractual nature. If an international organization could be a “plaintiff” on the international plane, then it could also be a “defendant” when the circumstances warranted. In practice, international organizations had long acknowledged acts of officials or agents, such as troops acting under their control. Most international organizations also assumed financial responsibility for contractual obligations *vis-à-vis* States. As a rule, member States did not incur individual responsibility for the acts or engagements of the organization.

28. Questions relating to the responsibility of international organizations had arisen most conspicuously in

the context of United Nations peacekeeping activities. Responsibility for damage and personal injuries by military forces contributed by Member States but acting under the authority of the United Nations had been assumed by the Organization. However, legal personality implied not only the capacity to bring claims, as in the *Reparation for Injuries* case, but also responsibility on the part of the international organization itself for internationally wrongful acts.

29. Given the great diversity of international organizations, the existence of a single law applicable to all of them was open to question. Since the law governing each organization derived from its own constituent instruments and practices, each would be governed by different legal principles that could be applied to other organizations only by analogy. Yet it was true that customary international law and, to some extent, treaties had generated principles of general application, relating, *inter alia*, to the legal personality of international organizations, implied competencies, the interpretation of constituent instruments, privileges and immunities and the liability and responsibility of international organizations and their member States.

30. Turning to the draft articles proposed by the Special Rapporteur, he said that as article 4 was consistent with the law of international organizations, it was acceptable and should be referred to the Drafting Committee for further consideration. Articles 5 and 7 were likewise in accordance with the law and should also be referred to the Drafting Committee. He was somewhat hesitant, however, with regard to article 6. Under the doctrine of *ultra vires*, an organ or entity could act validly only within the powers granted to it, so that when an organ or organization exceeded its powers, the act was null and not an act of the organization. The Special Rapporteur had said that the key words in that regard were “acting in that capacity”. However, that seemed to imply that the *ultra vires* doctrine did not matter. Was an act that exceeded the powers of an organ or organization null and void, or was it voidable, in other words, effective until set aside by a competent body? If that was the case, he wondered how the Special Rapporteur interpreted the individual opinion issued by Judge Morelli in the advisory opinion on the *Certain Expenses of the United Nations* case, in which the latter had said: “In the case of acts of international organizations ... there is nothing comparable to the remedies existing in domestic law in connection with administrative acts. The consequence of this is that there is no possibility of applying the concept of voidability to the acts of the United Nations. If an act of an organ of the United Nations had to be considered as an invalid act, such invalidity could constitute only the *absolute nullity* of the act. In other words, there are only two alternatives for the acts of the Organization: either the act is fully valid, or it is an absolute nullity, because absolute nullity is the only form in which invalidity of an act of the Organizations can occur” (p. 222, para. 8). While he understood that it was the policy of the United Nations that, in order to protect third parties who had entered into a contract with the Organization, *ultra vires* acts could be ignored, he wondered what happened in international organizations that did not pursue such a policy.

31. The way to bypass that particular problem would seem to be to have the constituent act of the organization stipulate that wrongful acts became void only following a determination by a competent body, or else to raise a presumption that acts of international organizations directed at the fulfilment of the purposes of the organization were valid, which meant that the burden of proof lay on the State arguing the contrary.

32. Mr. COMISSÁRIO AFONSO said that he supported the general approach and methodology adopted by the Special Rapporteur in his analysis and in the conclusions reached in his report. The fundamental point of departure remained, as indicated in paragraph 32 of the first report, that responsibility of an international organization under international law would generally be caused by the wrongful conduct of that organization. Another point to be borne in mind was the premise stated in paragraph 5 of the second report that the provisions on attribution of responsibility in the draft on the responsibility of States for internationally wrongful acts had to be fully taken into account when discussing issues relating to attribution to international organizations that were parallel to those concerning States.

33. On article 4, in paragraph 25 of the report the Special Rapporteur discussed two possible amendments of the definition of the term “rules of the organization” contained in the 1986 Vienna Convention. He agreed that the expression “decisions and resolutions” needed to be given a firmer theoretical basis. As for the phrase “established practice”, while it was true that “generally accepted practice” would render the text clearer, the difference was not, in his view, all that great. The most important element was the idea of consent and continuity, rather than merely that of time and duration. A practice in an international organization became an integral part of its decision-making culture to the extent that it met with no opposition and thus became a *sui generis* rule with its own life and logic; both expressions retained that idea. The practice must be established by the force of consensus and be generally accepted by member States: the practice mentioned in paragraph 23 of the report was a clear example.

34. In support of article 5, the report discussed the question of United Nations peacekeeping operations. On the whole, he agreed with the test of effective control over the conduct of forces proposed by the Special Rapporteur. However, as paragraph 44 showed, it was not a simple issue and deserved more careful study. Peacekeeping operations generally raised a wide range of theoretical, legal and practical problems that went beyond the scope of the Commission’s work. In principle, it was the Security Council that established peacekeeping forces and that was supposed to be responsible for their command and control, even if it decided to entrust the conduct of such operations to Member States. It would be strange if the Security Council could confer a mandate to act, yet bear no responsibility for the actions that ensued. It should also be borne in mind that, in some cases, peacekeeping forces operated in a host country under an agreement signed with the United Nations, even if there was already a decision by the Security Council to send such forces. Such decisions, known as status of forces agreements, were not mentioned in the report, yet their legal consequences

could include internationally wrongful acts arising either from the conduct of a State or from that of the United Nations. The relationship was not limited solely to that between the lending State and the borrowing organization, but also involved the receiving State: it was thus trilateral. The criterion of effective control set out in article 5 was probably satisfactory, but it should be supplemented with a functional approach, and the legal nature of the status of forces agreements would need to be defined more clearly. Did they resemble a situation in which an international organization lent one of its organs to a State after borrowing forces from another State? Article 5 could perhaps be broadened to encompass such complexities, including questions of dual attribution. On the other hand, while article 1, adopted in 2003, stated that the draft articles applied to the question of the international responsibility of a State for the conduct of an international organization, it was not clear how that principle could be incorporated in draft article 5. Perhaps it would be appropriate to bring in the “without prejudice” clause in article 57 of the draft articles on State responsibility. Draft article 5 appeared to fully cover the attribution of conduct of an organ placed at the disposal of an international organization, but not the converse situation, and paragraph 31 of the report should accordingly be reflected in the article.

35. He supported draft articles 6 and 7, which, in their underlying logic and doctrine, fully met the requirements of the corresponding articles in the draft articles on State responsibility. Accordingly, he was in favour of referring all the draft articles to the Drafting Committee.

36. Mr. BROWNLIE said that both the Special Rapporteur and Mr. Comissário Afonso had been too ready to embrace the concept of effective control over the conduct of the organ as a criterion in article 5. In the policy sphere, an analogy with State responsibility was instructive. There, the broad test was authority, or apparent authority, not effective control. In many cases, it was precisely the failure of the State to exercise effective control that was the basis of responsibility. He saw no principle of logic or consideration of policy which would dictate that the situation should be any different in dealing with the activities of organizations. The effective control concept could not serve as a substitute for that of authority or apparent authority. The distinction between the two was all the more important now that peacekeeping operations were no longer confined to controlling picket lines, as in Cyprus, but involved the administration of territory from which, in some cases, the lawful Government had been excluded.

37. Mr. DUGARD said that the Commission had become accustomed to a high standard of reports from the Special Rapporteur and that it had not been disappointed. For article 4, paragraph 3, he preferred the language of article 2, paragraph 1 (*j*), of the 1986 Vienna Convention (“decisions and resolutions”) to the alternative suggested in paragraph 25 (“acts of the organization”), which did not convey the meaning as accurately.

38. His main comment related to the attribution of conduct to an international organization under article 4, paragraph 1, and article 6. Both provisions used the phrase “or another person entrusted with part of the organization’s

functions”, a concept with which he had difficulties. The Special Rapporteur, clearly aware of those difficulties, cited the advisory opinion of ICJ on the *Reparation for Injuries* case (paragraph 15 of the report). He himself believed that the whole question of who was a United Nations agent on whose behalf the United Nations could bring a claim or whose conduct could be attributed to the Organization had not been properly explored. It had, however, been raised in the *Reparation for Injuries* case by Judge Azevedo, in whose view the term “agent” included officials or experts appointed directly by the Organization, regardless of nationality, but not representatives of Member States or experts appointed having regard to their countries.

39. The Special Rapporteur had correctly examined the attribution of conduct of an agent to an international organization from the perspective of the responsibility of States for injuries to United Nations agents. If an international organization could claim for injury to an agent, then it could incur responsibility for the acts of the same agent. That was made clear in paragraph 16 of the report, in which the Special Rapporteur quoted the advisory opinion of ICJ on the *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* case. From it he concluded, that according to the Court, the term “agents” was intended to refer, not only to officials, but also to other persons acting for the United Nations on the basis of functions conferred by an organ of the Organization.

40. In another opinion quoted by the Special Rapporteur in paragraph 15 of his report, ICJ had noted that in practice, the United Nations had had occasion to entrust missions—increasingly varied in nature—to persons not having the status of United Nations officials. The United Nations had many Special Rapporteurs and experts who no longer received honoraria yet were nevertheless entrusted with important missions. He himself was a Special Rapporteur of the International Law Commission and was a member in his personal capacity, not in his capacity as a South African national, although he had been elected as belonging to the African Group. If he were to be injured in the meeting room by a terrorist group attached to State X, would the United Nations claim on his behalf? He did not think so, nor did he think that medical expenses would be paid. Conversely, if he incorrectly stated the law and the Commission acted on that incorrect statement and a State, having acted to its disadvantage, sued another State on the basis of that statement, would the United Nations be held responsible? Could his conduct or that of the Commission be attributed to the United Nations? He very much doubted that it could. That raised the whole question of whether the members of the Commission were agents of the United Nations, persons “entrusted with part of the organization’s functions”.

41. He was also Special Rapporteur on human rights violations in Palestine, a position to which he had been appointed in his individual capacity. If he was injured while on mission to Gaza, would the United Nations claim on his behalf? He was not quite sure, though he had had great difficulty in getting the United Nations to agree to pay medical fees in the event of his being injured in the occupied Palestinian territories. Conversely, if he made a

statement that defamed an individual, a State or an organization or if he assaulted a member of the Israeli Defence Forces, would the United Nations be held responsible? He did not think so, though he was not sure.

42. Those questions, while they illustrated the problem, did not affect the drafting. He thus supported the referral of the draft articles to the Drafting Committee. He did not see how the drafting could be improved, but wished to reiterate that the whole question of who was an agent of the United Nations remained an unexplored area. United Nations practice was not clear on the subject. The Commission should therefore not too readily assume that acts of United Nations agents such as members of the Commission should be attributed to the United Nations.

43. Mr. CHEE, referring to the attribution of acts of an agent to the principal organ, said that United Nations law itself stemmed from the private law governing agency–principal relations. The Commission was still in the exploratory stages of creating rules, and should proceed case by case and follow evolving practice to establish the rules of the Organization.

44. Mr. GAJA (Special Rapporteur) thanked the members of the Commission for their useful comments, which would be of help to the Drafting Committee and in the preparation of the commentary. He noted first that some of the comments related only to the French version of the report, one example being the changes proposed in article 4, paragraph 3, to the definition of “rules of the organization” as established in the 1986 Vienna Convention.

45. His report had not disregarded differences between States and international organizations. Those differences were reflected in the fact that there were only four articles on attribution of conduct in the present draft, whereas there were eight such articles in the draft on responsibility of States. Moreover, at least two of those four articles differed noticeably from the corresponding provisions in the 2001 draft. Nor had differences among international organizations been ignored, although he had indeed attempted to state general rules. In any case, no suggestion had been made in the discussions that special rules should be established for particular categories of organizations with regard to issues of attribution.

46. While it was true that the second report relied heavily on United Nations practice, the United Nations was the most important international organization and provided a model for other organizations; moreover, its practice was to a large extent known. On the other hand, he had not relied on European Union practice in formulating the articles because of certain special features which members had cited.

47. According to article 2 of the draft articles on responsibility of States, conduct included omissions, a notion that was also covered in article 3 of the draft articles on responsibility of international organizations adopted in 2003. Omissions could therefore be attributed to international organizations. A different question was whether an international organization was under an obligation to take a certain course of action, so that the corresponding omission would represent a breach. That question would

need to be addressed during the examination of the objective element, a subject he proposed to cover in 2005. In a subsequent report he would go on to consider questions relating to responsibility of international organizations for the conduct of their member States and the responsibility of States for the conduct of an international organization of which they were members. Thus, his silence on those issues must be seen in context: at present he was dealing only with attribution of conduct to an organization, not with possible consequences for States. He was certainly aware that problems existed and had to be addressed. He had touched on some of them in chapter I of the report, but had not yet developed them. They had been mentioned for two reasons. Firstly, attribution of certain conduct to a State did not automatically imply that the same conduct could not simultaneously be attributed to an international organization. Therefore, there was no need for a derogation from some of the draft articles on State responsibility. The second reason, which was not specific to organizations but also had to do with States, as could be seen in the examples given in Part One, chapter IV, of the articles on State responsibility, was that there were cases in which responsibility was not premised on the conduct of the responsible entity. Those two points were important. The tendency in practice, especially on the part of the European Union, had been to assume that, whenever the European Union was responsible, conduct by member States had to be attributed to the Union. He had argued against that assumption for years.

48. With regard to questions not yet discussed in his reports, no policy was suggested. The delay in dealing with policy issues relating to the responsibility of member States did not affect questions of attribution of conduct to international organizations. That was a preliminary matter which could be addressed irrespective of what the Commission eventually decided to do about additional responsibility for member States. In any case, he failed to see why policy relating to attribution of conduct to international organizations should differ from policy concerning attribution of conduct to States. That was also the case for Mr. Koskenniemi's hypothesis of an international organization which aspired to a greater presence in international relations than it actually had, because that organization could assert its own responsibility without having to deny attribution of conduct to a member State.

49. With regard to the general rule on attribution as contained in article 4, which had been the subject of various comments aimed mainly at improving the wording, the Drafting Committee should examine whether the word "agents" needed to be defined and whether the word "officials" should also be used. He had referred to "organs, agents and officials" without making any distinction. On a comment by Mr. Galicki, he said that there was no real need to give three separate definitions; there could be an overlap. What was important were the external boundaries for attribution rather than the internal boundaries between those categories.

50. As noted by Ms. Escameia, Mr. Fomba, Mr. Matheson, Mr. Kolodkin and Mr. Economides, conduct was attributed to the international organization only when the official or agent was exercising certain functions which pertained to the organization. That was implicit: firstly, in

the reference in article 4 to the rules of the organization, although it might be worded more clearly; and, secondly, in the fact that there was a specific provision on *ultra vires* conduct. He was reluctant to use the words "in that capacity" in article 4, because they were also employed in article 6, where they referred to a different situation.

51. Questions relating to the definition of "rules of the organization" could best be left to the Drafting Committee. He noted that in the majority view, the words "act of the organization" and "established practice" were to be preferred. The words "established practice" were not identical with "generally accepted practice", as was shown by the example of the military interventions by ECOWAS in Liberia and Sierra Leone, which, although hardly justified by "established practice", had been generally accepted by the organization's members.

52. Turning to the question of a State organ placed at the disposal of an international organization, he said that an agreement between the contributing State and the organization would usually attempt to define clear lines of accountability, but that that was not invariably the case; nor was the agreement always complied with. Thus, as pointed out by Mr. Mansfield, there was a need for a criterion, which should be either control or effective control. Practice appeared to confirm the use of one or the other, usually the latter. As it was uncertain whether there was a presumption that control corresponded to the agreement between the contributing State and the organization, such a presumption could be stated as an element of progressive development, but only on condition that the injured third party knew, or should have known, how responsibility was assigned under the agreement.

53. Contributing States retained some control over national contingents in peacekeeping forces. The contributing State was under an obligation to prevent and punish breaches of international humanitarian law, and the organization was required to take measures to prevent those breaches and to report individual cases to the contributing State.

54. With regard to Mr. Pellet's comments, he noted that a delegate to the General Assembly was not placed at the disposal of the United Nations. He agreed that a State official who was placed at an organization's disposal might well become the organization's official or agent. However, article 5 needed to cover only the case in which such a person also acted on behalf of the State of origin, because then it would not be clear under whose control he or she operated, whereas if the person no longer acted as a State organ, the problem of attribution of conduct to the State did not arise. A similar remark could be made in reply to a question by Mr. Economides on whether article 5 should also refer to the case of an official of an international organization who was placed at the disposal of another organization.

55. On a point by Mr. Brownlie, he said that draft article 5 had to be different from articles in the draft on responsibility of States; there, the question was whether an individual's conduct could be attributed to a State, and the word "control" was used, whereas in the current case, the question was whether conduct was to be attributed to a

State or to an international organization. In any case, conduct would be attributed to a subject of international law.

56. As he had noted in his report, *ultra vires* conduct could be considered from two different angles. One was the legality of *ultra vires* conduct, and then, as suggested by Mr. Pambou-Tchivounda, the Commission might have to look to the reasons for such conduct. However, considered from the perspective of responsibility of international organizations, the legality of *ultra vires* conduct was not decisive. An international organization should not be allowed to disclaim attribution because of the *ultra vires* nature of its conduct if the actions of the organ, official or agent related to the functions entrusted to them. Seen from that angle, the Commission did not have to take up the question of validity.

57. Acknowledgement of conduct by an international organization did not imply that the same conduct could no longer be attributed to a State. A reference in the commentary might be sufficient to allay Mr. Yamada's concern in that regard. Mr. Economides and Mr. Rodríguez Cedeño had rightly stressed the need for acknowledgement to be consistent with the existing rules of the organization. He was reluctant to endorse their suggestion that some wording should be added to article 7. To do so would depart from the parallel with article 11 of the draft on responsibility of States, while a similar concern could also be expressed with regard to States. Moreover, it would not be easy to identify which rules of the organization specifically related to the question.

58. Despite some criticism, the general sense of the discussion seemed to have been that all four draft articles should be referred to the Drafting Committee, and he therefore proposed that the Commission should decide accordingly. The remaining question was whether the Drafting Committee should also be instructed to draft a provision parallel to article 9 of the draft articles on State responsibility, as suggested by Mr. Momtaz, Mr. Pellet and Mr. Kolodkin, and possibly also provisions parallel to other articles. That was the matter with respect to which he had mentioned an analogy when introducing his second report. He had not couched his suggestion in general terms, as Mr. Pambou-Tchivounda had alleged, but had referred only to those organizations which exercised control over a territory in the way that States did, and to the extent that they actually exercised that control; only then could an analogy be drawn. Although there were a few organizations that exercised control over a territory, the cases were limited. Moreover, instances such as those cited in articles 9 and 10 on State responsibility were rare, and he personally would prefer to see some wording in the commentary explaining why the draft articles departed from those on State responsibility.

59. The CHAIRPERSON asked whether the Commission was ready to refer draft articles 4 to 7 to the Drafting Committee and to request the Drafting Committee to elaborate some paragraphs in the commentary, explaining why the approach taken differed from the one used in the articles on State responsibility.

60. Mr. PAMBOU-TCHIVOUNDA asked whether it was part of the Drafting Committee's work to help prepare the commentary.

61. The CHAIRPERSON said that, as a number of members of the Commission had proposed including in the draft articles other provisions modelled on those of the articles on State responsibility, he was suggesting that the Drafting Committee should be used as a forum in which to discuss ideas for possible inclusion in the commentary. The Special Rapporteur would doubtless appreciate such assistance. On that understanding, he took it that the Commission wished to refer draft articles 4 to 7 to the Drafting Committee.

It was so decided.

Organization of work of the session (*continued*)*

[Agenda item 1]

62. Mr. RODRÍGUEZ CEDEÑO (Chairperson of the Drafting Committee) announced that the Drafting Committee on the topic of responsibility of international organizations would be composed of Mr. Candioti, Mr. Chee, Mr. Economides, Ms. Escarameia, Mr. Kabatsi, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Momtaz, Mr. Niehaus, Mr. Yamada, and Mr. Comissário Afonso (*ex officio*).

The meeting rose at noon.

2804th MEETING

Wednesday, 26 May 2004, at 10 a.m.

Chairperson: Mr. Teodor Viorel MELESCANU

Present: Mr. Al-Baharna, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, 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. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Ms. Xue, Mr. Yamada.

International liability for injurious consequences arising out of acts not prohibited by international law (international liability in case of loss from transboundary harm arising out of hazardous activities) (A/CN.4/537, sect. C, A/CN.4/540,¹ A/CN.4/543,² A/CN.4/L.661 and Corr.1, A/CN.4/L.662)

[Agenda item 4]

SECOND REPORT OF THE SPECIAL RAPPORTEUR

1. Mr. Sreenivasa RAO (Special Rapporteur), introducing his second report on the legal regime for the

* Resumed from the 2797th meeting.

¹ Reproduced in *Yearbook ... 2004*, vol. II (Part One).

² *Ibid.*