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Summary record of the 2876th meeting

Topic:
Responsibility of international organizations

Extract from the Yearbook of the International Law Commission:-
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33. The conditions for an act to be regarded as lawful because it was performed in self-defence were to some extent controversial. The Commission had not conducted an examination of those conditions when drafting the articles on responsibility of States for internationally wrongful acts,⁹⁰ nor, in his view, should it do so in the context of international organizations. The first question that arose was whether self-defence was relevant to international organizations. The term had frequently been used in United Nations documents—probably not always appropriately—in order to specify the circumstances in which the use of force by United Nations peacekeeping forces was permissible. According to the position taken by the United Nations, they were entitled to react to attacks—including for the defence of the mission—and such a reaction was to be regarded as lawful. The same would apply to organizations other than the United Nations that lawfully employed armed forces. Self-defence could also be invoked by an international organization under other circumstances, such as an armed attack on a territory that it administered. Although the World Health Organization held that “a circumstance such as self-defence is by its very nature only applicable to the actions of a State”, that view appeared to ignore circumstances in which self-defence would be relevant. UNESCO, on the other hand, had favoured including self-defence as a circumstance precluding wrongfulness.

34. The second question was whether an international organization that was the target of an armed attack could invoke self-defence under the same conditions as a State. There again, he could see no reason why a different condition should apply to an international organization. As noted in paragraph 18 of the report, the ICJ had stated, in its judgment in *Oil Platforms*, that it did “not exclude the possibility that the mining of a single military vessel might be sufficient to bring into play the ‘inherent right of self-defence’” (para. 72 of the judgment). That was, admittedly, a broad conception of self-defence, but it stood to reason that the same solution should apply if an armed force deployed by an international organization or a territory that an organization administered was the object of a similar attack.

35. Countermeasures had been referred to in article 22 of the draft articles on responsibility of States for internationally wrongful acts,⁹¹ within the chapter on circumstances precluding wrongfulness, only because of the effect that they had on the wrongfulness of the act by the State resorting to such a measure. Detailed provisions on countermeasures had been included in Part Three of the draft articles. A similar approach should be taken with regard to international organizations. It could not be ruled out that such an organization might take countermeasures under certain circumstances. For example, should a State or another international organization breach an obligation under a bilateral agreement with an international organization, there was no reason why the latter should not be entitled to resort to countermeasures. The conditions under which it might do so would need to be discussed. UNESCO had noted that the issue should be “clearly distinguished from that of sanctions, which may be adopted by an organization against its own member

States”. The Commission would need to reflect on whether sanctions could be regarded as countermeasures. It should do so, however, only when it came to discuss the implementation of international responsibility. Meanwhile, the provision could either be left blank save for the title, or else a text modelled on article 22 of the draft articles on responsibility of States for internationally wrongful acts could be included, with an implied reference to the provisions—yet to be written—that would specify the conditions under which an international organization might resort to countermeasures.

36. There were a considerable number of references to necessity in the practice of international organizations. The main question was whether, as a circumstance precluding wrongfulness, the concept of necessity should be applied to international organizations as liberally as it was to States. According to article 25 of the draft articles on responsibility of States for internationally wrongful acts,⁹² States could invoke necessity when a grave peril threatened one of their essential interests or an essential interest of the international community as a whole. The essential interests that an international organization could invoke should not, however, be as wide-ranging as those of States. Paragraph 42 of the report referred to the way in which the term was understood by various international organizations, including the World Bank and the IMF. The European Commission referred to the need to protect an “essential interest enshrined in its Constitution as a core function and reason of its very existence”. The first part of this wording was explicitly endorsed by ILO, and UNESCO also referred to the “functions” of the organization. Indeed, the latter had—somewhat prematurely—approved the text of draft article 22 appearing in paragraph 46 of the report, which stated that the only essential interests for which an international organization might invoke necessity were those which the organization had the function to protect. That would exclude, on the one hand, other interests pertaining to the international community but not entrusted to that organization and, on the other hand, interests relating to the very existence of the organization, unless the grave peril would also affect the essential interests that the organization had the function to protect.

The meeting rose at 1 p.m.

2876th MEETING

Tuesday, 16 May 2006, at 10 a.m.

Chairperson: Mr. Guillaume PAMBOU-TCHIVOUNDA

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Momtaz, Mr. Operti Badan, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Valencia-Ospina, Ms. Xue, Mr. Yamada.

⁹⁰ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 26, para. 76.

⁹¹ *Ibid.*, p. 27 and pp. 75–76 for the commentary.

⁹² *Ibid.*, p. 28 and pp. 80–84 for the commentary.

Responsibility of international organizations (continued) (A/CN.4/560, sect. C, A/CN.4/564 and Add.1–2, A/CN.4/568 and Add.1, A/CN.4/L.687 and Add.1 and Corr.1)

[Agenda item 4]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. The CHAIRPERSON invited the members of the Commission to comment on the Special Rapporteur's fourth report on responsibility of international organizations.

2. Ms. ESCARAMEIA congratulated the Special Rapporteur on his excellent work on a highly technical subject, the study of which was made all the more difficult by the dearth of practice in the matter. The absence of practice might explain why the draft articles closely followed the pattern of the draft articles on responsibility of States for internationally wrongful acts. Nonetheless, she did not understand why some areas had been included and others excluded, especially situations of coercion, to which reference was made in paragraph 8 of the report. Such situations had likewise been excluded from the draft articles on responsibility of States for internationally wrongful acts,⁹³ but since she had not participated in the debate on that subject, she was unaware of the precise reasons for that decision, and the commentary threw no light on the matter. Very small organizations could easily be coerced by a strong State or another organization, as had been pointed out by Belarus (see paragraph 8 of the report). Coercion not only engaged the responsibility of the coercing State, it also precluded the wrongfulness of the act of the organization being coerced, yet even from reading of the commentary to article 18 of the draft articles on responsibility of States, it was unclear why coercion was not listed among the circumstances precluding wrongfulness since, according to paragraph (2) of the commentary, “[C]oercion ... has the same essential character as *force majeure*”,⁹⁴ inasmuch as the coerced State would have no effective choice but to comply with the wishes of the coercing State. Similarly, paragraph (4) of the commentary to the same draft article, indicated that “the wrongfulness of an act is precluded *vis-à-vis* the coerced State”,⁹⁵ while paragraph (3) of the commentary to draft article 23 stated that coercion might also amount to *force majeure* if it met the various requirements of that article.⁹⁶ It therefore seemed that the reason for excluding coercion from the circumstances precluding wrongfulness was essentially a question of degree and that it was necessary to ascertain whether the force was so irresistible as to prevent the organization from performing its obligations. Since *force majeure* covered several other situations, such as unforeseen events, coercion should be granted some autonomy in the draft articles, though possibly within strict limits. She did not see why it should be necessary to decide that coercion produced effects only on the entity exerting coercion and not on the coerced entity, although that choice was doubtless explained by

reasons given when the draft articles on responsibility of States for internationally wrongful acts had been debated. Those considerations might also apply to cases of fraud, in which an international organization was mistakenly induced by a State or another organization to commit an act.

3. As in the draft articles on responsibility of States, the Special Rapporteur had identified six circumstances precluding wrongfulness. The first was consent; there were several examples of practice, so that it was possible to have a very clear idea of the subject matter. Draft article 17 ought to indicate that other entities besides States and international organizations, for example territories or autonomous regions, which might be members of international organizations, could give their consent to the commission of a given act by an international organization. There was no reason to exclude such entities.

4. The question of self-defence was more controversial because it was normally associated with the defence of a population or territory and hence did not apply to international organizations except when they administered territories. In all other cases it was the defence of the forces in the service of the international organization that was at issue. Since States could obviously invoke the right of self-defence if their armed forces were attacked, a parallel could be established if, for example, United Nations armed forces were attacked. As the *Oil Platforms* case plainly demonstrated, territory was not the sole target. Practice provided several examples, including the rules of engagement of United Nations forces, to which the Special Rapporteur alluded. If force was used by an international organization one of whose members had been the object of an armed attack, especially if that organization was a collective defence organization such as NATO or certain other regional organizations, the right of self-defence could be invoked only if the response was from the international organization itself and not from its members, even if they were acting collectively. She suggested that in draft article 18, which dealt with that issue, the words “the Charter of the United Nations” should be replaced by “international law”, because the Charter contained no reference to self-defence on the part of international organizations.

5. As for draft article 19 (Countermeasures), international organizations could very well apply countermeasures; indeed, they were a fairly common device, especially where commercial interests were at stake, and organizations with a commercial purpose, such as the European Union, had already used them against other international organizations or non-member States. Countermeasures therefore had a place in the draft articles. She favoured alternative B of draft article 19, as proposed in paragraph 25 of the report, as a basis for the Commission's work.

6. In dealing with *force majeure*, the Special Rapporteur had raised the very interesting issue of the inability of an international organization to perform its obligations for financial reasons. The point certainly deserved closer examination, but if that circumstance were included, the requirement set out in draft article 20, paragraph 2 (b), was too stringent. It would be difficult for an international

⁹³ *Ibid.*, p. 26, para. 76.

⁹⁴ *Ibid.*, p. 69.

⁹⁵ *Ibid.*, p. 70.

⁹⁶ *Ibid.*, p. 76.

organization not to assume the risk of such a situation occurring, because that risk was always present, since an international organization did not have the same means as a State with which to secure its financial resources. Although it could expel members that did not pay their contributions, that step was more likely to exacerbate the problem than to solve it.

7. As for distress, it was difficult to envision examples in practice, at least as far as international organizations were concerned. Nevertheless, when they administered territories, possible instances were non-compliance with the obligation to save the lives of the people in those territories, or a situation in which the armed forces of an international organization needed to enter a territory without prior authorization in order to save the lives of members of those forces. Perhaps it might be advisable to broaden the scope of draft article 21 by replacing, in paragraph 1, the phrase “other persons entrusted to the author’s care” with a phrase such as “persons with whom it has a special relationship”, since paragraph (7) of the commentary to article 24 of the draft articles on responsibility of States used the wording “where there exists a special relationship between the State organ or agent and the persons in danger”⁹⁷—a formulation which seemed preferable, as the persons in question might not have been entrusted to the author’s care, but could be relatives, or any other persons whose fate was important to the author. In a different context, but for the same reason, the Rome Statute of the International Criminal Court excluded international criminal responsibility in situations where the life of the author or of other persons close to him was at stake.

8. She concurred with the view of most States and international organizations that necessity was a notion which ought to be included in the text. On the matter of the essentiality of the interests to be protected, she disagreed with the view expressed by the Special Rapporteur in paragraph 41 of the report: the interests defended by international organizations such as the United Nations, were much more important than those of certain small States, and the disappearance of the Organization would have far wider implications in terms of international affairs than would the disappearance of some small island States. Consequently the interests championed by an international organization were not necessarily less essential than those defended by a State. As UNESCO had pointed out, those interests should not be confined to those enshrined in its constituent instrument—the Special Rapporteur seemed to agree on that point—but should also include those mentioned in other documents, or even implied powers. In draft article 22, paragraph 1 (a), mention should therefore also be made of the very existence of the international organization as an essential interest, even if that appeared a risky course of action for reasons that the Special Rapporteur had probably borne in mind; for that existence could in itself have dramatic consequences for the international community as a whole. In subparagraph (b), it was likewise necessary to consider whether the obligation of not seriously impairing an essential interest should refer not only to the interest of States, but also to that of other international organizations

or other entities. Basically she approved of draft article 22, subject to the two points she had raised. She had no comments on draft article 23.

9. Lastly, she concurred with the Special Rapporteur’s comments on draft article 24 (Consequences of invoking a circumstance precluding wrongfulness), and especially with his remarks concerning the temporal limitation implied in subparagraph (a). She therefore proposed that the words “no longer exists” should be replaced by “does not exist”.

10. Mr. MANSFIELD said that the examination of the issue of circumstances precluding the wrongfulness of an act of an international organization confirmed the wisdom of the Special Rapporteur’s approach of following the general pattern of the draft articles on responsibility of States, while considering carefully in each situation whether there were grounds for departing from or modifying the relevant provisions in the case of international organizations. He supported the Special Rapporteur’s view that the Commission’s reason for not employing the distinction between “justification” and “excuse” in the draft articles on responsibility of States was equally valid in the case of responsibility of international organizations.

11. He agreed with the Special Rapporteur that the circumstances in which consent might preclude the wrongfulness of an act of an international organization did not give rise to any particular issues, and supported his proposal that the relevant draft article should follow the model of the corresponding provision on responsibility of States, with only the necessary textual modifications. The inclusion of an article establishing self-defence as a ground for precluding the wrongfulness of an act of an international organization seemed at first sight more problematic; one did not immediately think of an international organization needing to use force in self-defence. However, as the report rightly pointed out, the need for self-defence might well arise in the context of United Nations peacekeeping missions and also in respect of other organizations that had military forces or were administering territories. Thus, there was no reason why an international organization should not be able to respond lawfully to an armed attack. Draft article 18 seemed a satisfactory formulation which left it to the commentary to make the point that in some circumstances an international organization might be able to invoke self-defence in its response to an attack on a member State.

12. As pointed out by the Special Rapporteur, the issue of countermeasures could not be fully dealt with until the conditions under which an international organization might resort to countermeasures had been considered. However, there seemed to be no reason why an international organization should be precluded from resorting to countermeasures in appropriate circumstances, and it therefore seemed desirable at the current stage to include a provisional article along the lines of Alternative B suggested by the Special Rapporteur in paragraph 25.

13. While he saw no reason why an international organization should be unable to invoke *force majeure* as a circumstance precluding wrongfulness, in particular for

⁹⁷ *Ibid.*, p. 80.

natural events or “an irresistible happening of nature”, he was less happy with the idea, discussed in paragraph 31, that “financial distress”, might constitute an instance of *force majeure*. A failure by member States to pay their financial contributions might well place an international organization in a very difficult position, but a State could not invoke *force majeure* as a circumstance precluding wrongfulness merely because it had failed to receive payments or revenue that were critical to its solvency, and he did not see why an international organization should be any different. At the very least, it would seem unacceptable that an international organization should take on new contractual obligations, in the knowledge that it would be unable to fulfil them because its members were deliberately withholding the necessary contributions. That said, article 20 was satisfactory as drafted.

14. He still had concerns about the idea that States could invoke necessity as a circumstance precluding the wrongfulness of an act which would otherwise be contrary to international law, given the risk of abuse, and in the case of an international organization, the argument was significantly weaker. An international organization could not invoke the necessity of its own survival, but only the preservation or protection of an interest that it existed to protect, in other words an essential interest the protection of which was part of the functions that had been specifically entrusted to it. As draft article 22 reflected that restrictive view, set out in paragraphs 41 to 44 of the report, of the circumstances in which an international organization could invoke the state of necessity, he could go along with it, albeit with some continuing misgivings.

15. Mr. ADDO congratulated the Special Rapporteur on the quality of his fourth report, the content of which he endorsed almost in its entirety. He supported the Special Rapporteur’s approach of following the general pattern adopted in the draft articles on responsibility of States. Commenting on the various draft articles on circumstances precluding the wrongfulness of an act of an international organization, he supported draft article 17 (Consent) and draft article 18 (Self-defence), which were modelled on draft articles 20 and 21 respectively of the draft articles on responsibility of States for internationally wrongful acts.⁹⁸ With regard to countermeasures, he endorsed the idea of leaving the text blank, as envisaged in paragraph 25 of the report. As for *force majeure*, he noted that international law did not impose responsibility where the non-performance of an obligation was due to circumstances entirely beyond the control of the State, and was of the view that the same must apply in the case of international organizations. Draft article 20, which was in conformity with article 23 of the draft articles on responsibility of States,⁹⁹ was therefore acceptable.

16. On distress, he agreed with the Special Rapporteur that there was no reason why different rules should apply to States and to international organizations; draft article 21, which was based on article 24 of the draft articles on responsibility of States, was thus satisfactory. On necessity, he agreed with the Special Rapporteur that there was no reason to depart from the model provided by draft article 25 on responsibility of States, and he

supported the proposed wording for draft article 22. He also endorsed draft articles 23 (Compliance with peremptory norms) and 24 (Consequences of invoking a circumstance precluding wrongfulness), which were modelled on draft articles 26 and 27 of the draft articles on responsibility of States respectively.¹⁰⁰

The meeting rose at 10.45 a.m.

2877th MEETING

Wednesday, 17 May 2006, at 10 a.m.

Chairperson: Mr. Guillaume PAMBOU-TCHIVOUNDA

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Momtaz, Mr. Operti Badan, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Valencia-Ospina, Ms. Xue, Mr. Yamada.

Responsibility of international organizations (continued) (A/CN.4/560, Sect. C, A/CN.4/564 and Add.1–2, A/CN.4/568 and Add.1, A/CN.4/L.687 and Add.1 and Corr.1)

[Agenda item 4]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. Mr. MOMTAZ said that, in drafting his fourth report, the Special Rapporteur had—quite rightly, in his view—once again followed the general pattern adopted for the draft articles on the responsibility of States for internationally wrongful acts. That approach did not, however, make the Special Rapporteur’s task any easier; the general remarks prefacing the main body of the report clearly showed the pitfalls he had faced in drawing up draft articles on circumstances precluding wrongfulness. The Commission was particularly indebted to the Special Rapporteur for outlining specific scenarios and situations relating to international organizations in order to justify his retention of the circumstances precluding the wrongfulness of acts of States in the present set of draft articles.

2. Draft articles 17, 19, 20 and 21 did not pose any difficulties. His reading of draft article 18 on self-defence invited the conclusion that the use of force by an international organization in the exercise of its inherent right of self-defence under Article 51 of the Charter of the United Nations would not engage the organization’s responsibility, even if the armed attack was carried out by a non-State entity. In other words, it was not necessary for the attack to have been launched by, or to be imputable to, a State. States and non-State entities were therefore placed

⁹⁸ *Ibid.*, p. 27.

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*, p. 28.