

Document:-
A/CN.4/3083

Summary record of the 3083rd meeting

Topic:
Responsibility of international organizations

Extract from the Yearbook of the International Law Commission:-
2011, vol. I

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other than a State or an international organization, thereby raising a number of other problems. Since the draft articles on State responsibility did not touch on the issue either, one could even “kill two birds with one stone”. As for including the issue in the draft articles under review, his main objection was that this would require the amendment of 10 to 15 draft articles on State responsibility, for which the moment was not, in his view, opportune—even if clearly some provisions would have to be re-examined in the future, whether in the context of an international conference or of the Commission’s own work.

66. Sir Michael had made a proposal regarding the formulation of draft article 1, paragraph 2, which the Drafting Committee could take up in the light of article 57 of the draft articles on State responsibility. In the context of work on the draft articles on the responsibility of international organizations, he himself saw nothing wrong with discussing the responsibility of States members of such organizations. The responsibility of States for the acts of an organization of which they were members was generally considered a part, and sometimes the main part, of any text on the responsibility of international organizations. While the title of the draft articles was perhaps not very precise, the text was known to cover the responsibility of international organizations *and* the responsibility of States members of those organizations for internationally wrongful acts committed by the organizations. He had proposed adding a definition of the term “organ” to draft article 2, something which had elicited general agreement, though Mr. Nolte had thought that the suggested definition was circular and had proposed different wording. The definition was in fact based on the rules of the organization, which determined whether a person or entity constituted an organ; that notwithstanding, he was willing to consider a different approach. As for the term “agent”, which was always associated with the term “organ”, he saw no reason why his definition should not be made more precise if the Drafting Committee considered that useful. As Mr. Pellet had criticized draft article 7 and had not seemed satisfied with the changes he himself had suggested to the commentary, he invited him to propose wording that would take into account the concerns expressed by the international organizations, which had made no specific proposals. If all the draft articles were sent to the Drafting Committee, nothing would prevent it from amending draft article 7 and the commentary thereto.

67. Regarding draft article 13, on aid or assistance in the commission of an internationally wrongful act, Mr. Nolte and Sir Michael had urged the insertion in the commentary of a passage taken from the commentary to the corresponding text of the articles on State responsibility to the effect that in order for the international organization’s responsibility to arise, the aid or assistance needed to have been provided with the intention of facilitating the commission of the wrongful act. To return to Mr. Nolte’s example, if the World Bank had supervised the building of a dam which it itself had financed, and the dam had collapsed—as had, unfortunately, recently been the case—then, for the World Bank to incur responsibility, it had to have had the intention of facilitating the dam’s collapse. He found it troubling that the wording proposed did not seem to be solidly based on the text of the draft article, to put it mildly. Introducing the criterion of intent would, on

the other hand, be in conformity with the policy of making the commentaries consistent with those on the articles on State responsibility when the texts of the provisions were identical: it was understandable that the Commission should wish to proceed along those lines.

68. Regarding draft article 16, he said that the proposal to insert the phrase “subject to articles 13 to 15”, which appeared in paragraph 72 of the eighth report, was designed to avoid overlapping and to make draft article 16 into an additional condition. Mr. Nolte had expressed reservations, while Mr. Pellet seemed to take a more favourable view; the Drafting Committee could doubtless discuss the matter and reach a decision. Lastly, as to the main proposal concerning draft article 16—to remove paragraph 2 in the light of the many criticisms voiced by States and international organizations, and of the innovative nature of the provision—he explained that he had made the proposal not because he had changed his mind but because it was up to the Commission to take into account certain concerns expressed by States and international organizations. He had been reproached for proposing too few changes, but he could not make proposals that did not seem convincing to him. He still thought that paragraph 2 should be improved and that the Commission had not yet found satisfactory wording; it was for a policy reason that he had proposed to delete it, so as to show that the Commission had taken into account at least the most critical comments directed at that paragraph. Mr. Nolte, Mr. Petrič, Mr. Wisnumurti and Sir Michael had been in favour of that deletion, Mr. Pellet had firmly opposed it, and Mr. Dugard, Mr. Fomba, Mr. Melescanu, Mr. Saboia and Mr. Vázquez-Bermúdez had preferred that the paragraph be retained but reworked. The Chairperson, speaking as a member of the Commission, had proposed what could be a compromise solution, namely to remove the reference to recommendations so as to retain paragraph 2 while considerably lessening its sting. The Drafting Committee thus had its work cut out for it, as only after considering the issue in depth would it be able to give its opinion on that difficult matter. In conclusion, he proposed that draft articles 1 to 18 should all be referred to the Drafting Committee.

69. The CHAIRPERSON said he took it that the Commission wished to refer draft articles 1 to 18 to the Drafting Committee.

It was so decided.

The meeting rose at 1 p.m.

3083rd MEETING

Tuesday, 3 May 2011, at 10 a.m.

Chairperson: Mr. Maurice KAMTO

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Huang, Ms. Jacobsson, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera,

Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Responsibility of international organizations (*continued*) (A/CN.4/636 and Add.1–2, A/CN.4/637 and Add.1, A/CN.4/640, A/CN.4/L.778)

[Agenda item 3]

EIGHTH REPORT OF THE SPECIAL RAPPOREUR (*continued*)

1. The CHAIRPERSON invited the Commission to resume its consideration of the eighth report of the Special Rapporteur on responsibility of international organizations (A/CN.4/640).

2. Mr. GAJA (Special Rapporteur), introducing the second part of his eighth report, said that chapter V of Part Two of the draft articles on the responsibility of international organizations, concerning circumstances precluding wrongfulness, raised the question of whether the draft articles should encompass circumstances that were unlikely to be encountered by international organizations and for which few examples of practice had been provided. The fact that those circumstances were relevant for only a few organizations was not sufficient reason to ignore them, since the exclusion of a particular circumstance precluding wrongfulness would imply that it could never be invoked. Accordingly, none of the provisions concerning circumstances precluding wrongfulness should be deleted.

3. The opinions of States on draft article 20 (Self-defence) had been divided. The Secretariat of the United Nations, the only international organization to have expressed a view on the subject, had been in favour of retaining it. Some criticism had been levelled at the reference to “international law” as the criterion for assessing whether a measure of self-defence was lawful. That reference did not purport to widen the scope of self-defence but was simply intended to align the text with such rules as international law might contain on the matter.

4. States’ views on draft article 21 (Countermeasures) had also been divided, but the prevailing opinion had been that the Commission should take a “cautious approach”. The Secretariat had been against the inclusion of countermeasures in the draft articles, while the OSCE had accepted the “possibility of countermeasures by and against international organizations”. No other organization had commented on that provision. Countermeasures were also dealt with in chapter II of Part Four of the draft articles.

5. With regard to relations between an international organization and its members, draft articles 21 and 51 both stipulated that countermeasures must not be inconsistent with the rules of the organization. One State had encouraged the Commission to retain its restrictive reading of those rules. However, as he had made clear in other places in the report, it was not incumbent upon the Commission to interpret an organization’s rules, and that point should be made throughout the commentaries to the draft articles.

6. On the whole, States had been in favour of maintaining draft article 24 (Necessity). The Secretariat in particular had advocated its retention. On the other hand, opinions had been divided on the proposed amendments to the draft article; a few States had requested a precise definition of the essential interests that an international organization might invoke. One State had endorsed the opinion of some Commission members that an international organization could invoke necessity in order to safeguard an essential interest of its member States.

7. As he had noted at the beginning of his statement, he had not proposed the deletion of any of the draft articles on circumstances precluding wrongfulness. No clear trend in favour of any of the proposed amendments had emerged from the comments. If the draft articles were referred to the Drafting Committee, the latter would no doubt suggest possible improvements to their wording.

8. Turning to Part Three, chapter I, of the draft articles, he noted that various international organizations had suggested that it would be difficult for international organizations to comply with the principle of “full reparation for the injury caused by the internationally wrongful act”, to which reference was made in draft article 30. As indicated in the commentary, that principle, which reflected the need to protect the injured party, was in practice often applied in a flexible manner by States and international organizations. There were hardly any examples of cases in which full reparation had been given. Thus the draft article in question expressed a principle which was unlikely to be applied *in toto* in practice.

9. Several international organizations had been encouraged by draft article 39 (Ensuring the effective performance of the obligation of reparation) but had expressed the hope that it might be amended to “state the obligation of member States to provide sufficient financial means to organizations with regard to their responsibility” (A/CN.4/637 and Add.1, joint submission). Needless to say, several States would have liked the draft article to specify that member States had no obligation under international law other than obligations that might exist under an organization’s rules to provide the organization with the means for effectively making reparation.

10. Two States had suggested the inclusion in the draft articles of an alternative text, originally suggested by Mr. Valencia-Ospina and supported by some members of the Commission, which was reproduced in paragraph (4) of the commentary. On further reflection, he had concluded that that text could be combined with the wording of the draft article itself which, with a few drafting changes, would then read:

“1. The members of a responsible international organization shall take all the appropriate measures that may be required by the rules of the organization in order to enable the organization to fulfil its obligations under this chapter.

“2. The responsible international organization shall take all appropriate measures in accordance with its rules to ensure that its members provide it with the means for effectively fulfilling its obligations under this chapter.”

11. Draft article 31, paragraph 1, had likewise elicited comments from several international organizations, some of which had used the paragraph as a means for launching a more general campaign to give greater weight to the rules of an organization. They had maintained that an international organization could not be held responsible when it complied with its rules. That had been the traditional position of the IMF, and the Organisation for Economic Co-operation and Development (OECD) and the Council of Europe had come to hold the same view.

12. Paragraph 2 addressed those concerns by stating that paragraph 1 was without prejudice to the applicability of the rules of an international organization in respect of the responsibility of the organization towards its member States and organizations. Thus if the rules of the organization contained special rules, the latter would apply in the relations between the organization and its members, but they could not modify the general rules governing relations between the organization and non-members unless the special rules became general rules or were accepted by non-members.

13. The written comments and statements from international organizations had yielded few examples of such special rules. The Secretariat of the United Nations had cited a special rule providing for financial limitations to claims against the United Nations arising out of peacekeeping operations. That rule stemmed from a General Assembly resolution that had been adopted by consensus. While it would affect claims lodged against the United Nations by its Member States, it would not apply *per se* to claims made by other parties unless that special rule had become applicable to them.

14. During the debate on the first part of his eighth report, one member had suggested that the reluctance to address in paragraph 88 of the report the question of functional protection in relations between two international organizations on the grounds that such an issue was unlikely to arise was inconsistent with other parts of the report where a lack of practice had not been regarded as an obstacle to proposing draft articles—for example, concerning certain circumstances precluding wrongfulness. However, the argument underlying paragraph 88 was not that there was a dearth of practice, but that functional protection exercised by an international organization against another international organization was of marginal importance. That was why there was no need to address that issue, whereas circumstances precluding wrongfulness, as he had already explained, had to be dealt with exhaustively in the draft articles because otherwise they could not be invoked.

15. In draft article 48, paragraph 3, concerning the invocation by an international organization of the responsibility of another organization when the obligation breached was owed to the international community as a whole, the Commission's view was that this entitlement depended on whether "safeguarding the interest of the international community [as a whole] underlying the obligation breached is included among the functions of the international organization invoking responsibility". One instance of practice which indirectly confirmed the appropriateness of that approach was to be found in the advisory opinion on *Responsibilities and obligations of*

States sponsoring persons and entities with respect to activities in the Area, delivered in February 2011 by the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea. The Chamber had held that the entitlement of the International Seabed Authority to claim compensation for breaches of obligations in the Area was "implicit in article 137, paragraph 2, of the Convention, which states that the Authority shall act 'on behalf' of mankind". While that finding had been based on a specific provision of the United Nations Convention on the Law of the Sea, in essence it rested on the fact that the relevant international organization had been given certain specific functions. The Chamber had deemed each State party to be entitled to claim compensation for breaches of *erga omnes* obligations in the Area, but had taken the view that the international organization in question was entitled to claim compensation because of those functions. Thus while the Chamber had not made any direct reference to draft article 48, paragraph 3, but only to article 48 of the draft articles on responsibility of States for internationally wrongful acts, it seemed to have taken an approach to the invocation of responsibility by an international organization that was similar to that of the Commission.

16. Turning to Part Five, he observed that, while draft article 60 might be viewed as constituting progressive development, several States had endorsed the Commission's view that a member State incurred responsibility "if it seeks to avoid complying with one of its own international obligations by taking advantage of the fact that the organization has competence in relation to the subject matter of that obligation". Draft article 60, in the version adopted on first reading, did not use the term "*circumvention*", although it implied the existence of a subjective element, or some kind of abuse, on the part of the member State. That position could be further clarified in the commentary, which should emphasize, as three States and the European Commission had suggested, that the specific intent of taking advantage of an international organization's separate legal personality was required in order to establish the responsibility of the member State in question.

17. He suggested that in order to avoid any overlapping with draft articles 57 to 59, draft article 60 should be amended by the insertion, at the beginning of the article, of the phrase "subject to articles 57 to 59".

18. Despite the importance of *lex specialis*, none of the comments submitted on Part Six of the draft articles had provided any examples that could be added to the commentary to draft article 63. However, one new case concerning the question of the attribution to the European Union of the conduct of a member State,³⁴ which he had mentioned in paragraph 116 of his eighth report, should be added to the commentary.

19. The final provision, draft article 66, was a saving clause referring to the Charter of the United Nations. A general statement was needed that the draft articles were without prejudice to the Charter of the United Nations, but draft article 66 had prompted a variety of observations, and it would be better to refrain in the commentary from expressing views that some States regarded as

³⁴ *Coöperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij U.A. v. the Netherlands*.

controversial. He would therefore amend some parts of the commentary to which certain States had objected.

20. Mr. NIEHAUS said that a pall had been cast over the start of the session by the loss of Ms. Escarameia, and he wished to join his voice to those who had expressed deep sorrow at her passing.

21. The lack of rules on the responsibility of international organizations had long been a major deficiency of international law. In the set of draft articles submitted in his eighth report on that topic, the Special Rapporteur had done a masterly job of bringing together all the contributions and additions to his original proposals. Some of the comments made so far on the text, however, went beyond the sort of analysis suited to a second reading, going into details that had largely been addressed during the first reading. He therefore suggested that speakers in plenary should confine themselves to comments that were appropriate to the second-reading phase: most of those heard so far would have been better made in the Drafting Committee. The written comments made by international organizations should obviously be taken into account. To that end, it would be useful to hold a meeting with the legal advisers of those organizations.

22. The draft articles adopted on first reading should now be referred to the Drafting Committee, together with those comments that the Special Rapporteur deemed to be especially relevant to a second reading, so that the text could be adopted in final form before the end of the current session. That would constitute an enormous step forward in the development of international law and a noteworthy achievement by the Commission in fulfilment of its mandate.

23. Mr. VALENCIA-OSPINA joined in the expression of sadness at the passing of Ms. Escarameia and welcomed the new member of the Commission, Ms. Escobar Hernández.

24. He congratulated the Special Rapporteur on responsibility of international organizations on his efforts of nearly 10 years, which would come to an end at the current session with the completion of the Commission's work on an important topic. All the elements the Commission needed to finalize the text in conformity with its usual practice were now in place. He endorsed the eighth report and thanked the Special Rapporteur for citing him as the author of a proposal that, after due consideration, he had incorporated in draft article 39, paragraph 2.

25. Mr. CANDIOTI agreed that the second reading was indeed the final stage of the Commission's work and should thus culminate in the adoption of the text. He, too, was grateful to the Special Rapporteur for incorporating Mr. Valencia-Ospina's proposal in draft article 39. He likewise welcomed the fact that the eighth report reflected the Commission's views on how to deal with countermeasures. The Commission could now send the text to the Drafting Committee.

The meeting rose at 10.40 a.m.

3084th MEETING

Thursday, 5 May 2011, at 10.05 a.m.

Chairperson: Mr. Maurice KAMTO

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escobar Hernández, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Huang, Ms. Jacobsson, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Filling of a casual vacancy in the Commission (article 11 of the statute) (*continued*)* (A/CN.4/635 and Add.1-3)

[Agenda item 14]

1. The CHAIRPERSON, welcoming the new member Ms. Concepción Escobar Hernández, said that he was sure that her recognized experience and ability would enhance the Commission's deliberations.

2. Ms. ESCOBAR HERNÁNDEZ said that, as there had not been a Spanish member of the Commission for more than 25 years, she was very honoured to join such eminent colleagues who were making an outstanding contribution to the development of international law. It was also a privilege to succeed Ms. Paula Escarameia, who had been an excellent jurist and also a friend of long standing. She therefore sincerely thanked all her colleagues for their support and was pleased to be able to offer her modest contribution to the Commission's work.

Responsibility of international organizations (*continued*) (A/CN.4/636 and Add.1-2, A/CN.4/637 and Add.1, A/CN.4/640, A/CN.4/L.778)

[Agenda item 3]

EIGHTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

3. The CHAIRPERSON invited the Commission to continue its consideration of the eighth report of the Special Rapporteur on the responsibility of international organizations (A/CN.4/640).

4. Mr. PERERA said that he would confine himself to a few general comments focusing mainly on chapter V of Part Two of the draft articles, on circumstances precluding wrongfulness, which had prompted some very lively discussions within the Commission.

5. He supported the suggestion made by several Commission members that an introductory section should clarify three important issues which had come to light during the debates. First, the relationship between the

* Resumed from the 3082nd meeting.