Document:-

A/CN.4/SR.2802

Summary record of the 2802nd meeting

Topic:

Responsibility of international organizations

Extract from the Yearbook of the International Law Commission:-

2004, vol. I

70. Mr. CHEE said that the Special Rapporteur had been wise to draw on the Commission's previous work on State responsibility since, as ILA had pointed out at its 2002 New Delhi Conference, it was widely accepted that the principles of State responsibility were applicable, with some variations and by analogy, to the responsibility of international organizations[8]. As stated in paragraph 34 of the report, most of the practice concerning attribution of conduct in case of a State organ placed at an organization's disposal related to peacekeeping operations. As such operations increased in volume, one way to control the responsibility of international organizations would be to establish *sui generis* legal regimes by means of special agreements between the relevant international organizations and the States involved. The Commission should explore the extent to which attribution overlapped with and differed from a simple linkage between an act and its author.

71. Turning to the detail of the text, he said that he was in favour of the formulations "acts of the organization" and "established practice", in article 4, paragraph 3. With regard to article 5, the question as to whether effective control existed was a matter to be determined on a case-by-case basis. Reference to the criterion of "degree of effective control", as used by the United Nations Secretary-General,[9] seemed the best way of describing the emerging practice of the United Nations.

72. With regard to article 6, while it was easy to conceive of an *ultra vires* act by the agent or official of a State, one might wonder whether it could also apply to international organizations, the agents or officials of which were expected to be devoted to the interests of the international community. However, that question was satisfactorily elucidated in paragraph 52 of the report. He therefore endorsed draft article 6.

73. Lastly, as international organizations such as the United Nations developed their own rules and practices, their law-making role would inevitably be enhanced to respond to new realities in international relations. He therefore believed that the draft articles should not take too hard a line on the question of responsibility of international organizations.

74. Mr. RODRÍGUEZ CEDEÑO said he shared the view expressed in the report that in some cases conduct could be attributed concurrently to an international organization and to a State; the Special Rapporteur had given several examples to that effect, such as that in paragraph 7 of his report. The general thrust of article 4 was clear and acceptable. He himself had some doubts, however, concerning the words "organ", "official" and "another person entrusted with part of the organization's functions". As used by ICJ, the term "agent" referred to a person acting on behalf of an organization, whether or not that person was an official from the strictly administrative point of view. While article 4 spelled out the categories of person whose conduct could be attributed to the organization, its scope should be further broadened to include all officials with a contractual relationship, such as external consultants. As the text stood, such persons were not covered, even though they could act on behalf of the organization. Furthermore, the phrase "acts of the organization", in paragraph 3 of the draft article, was to be preferred to the phrase "decisions and resolutions", since it covered all acts, including recommendations, resolutions and decisions. Indeed, it could also cover administrative acts, such as the hiring of an external consultant who could act for the organization.

75. As for the draft article on *ultra vires* conduct, in accordance with both the literature and case law, an organization, by contrast with a State, possessed a limited competence, governed by the principle of speciality. Draft article 6 was acceptable, although he was doubtful whether it applied equally in all cases, namely in relation to organs, officials and other persons. The 1999 advisory opinion of ICJ in the *Difference relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* case was not, in his view, enough to establish that an organization could incur responsibility for *ultra vires* acts of persons other than officials, as suggested in paragraph 54 of the report.

76. Lastly, draft article 7 seemed fully justified. An organization could undoubtedly acknowledge and adopt conduct as its own. Such conduct would constitute a unilateral act, though it must be formulated in accordance with the organization's rules. The draft articles as a whole should be referred to the Drafting Committee.

The meeting rose at 1 p.m.

2802nd MEETING

Friday, 21 May 2004, at 10 a.m.

Chairperson: Mr. Teodor Viorel MELESCANU

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

Responsibility of international organizations[10] (*continued*) (A/CN.4/537, sect. A, A/CN.4/541,[11] A/CN.4/545,[12] A/CN.4/547,[13] A/CN.4/L.648 and Corr.1)

[Agenda item 2]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

[8] ILA, *Report of the Seventieth Conference* (London, 2002), p. 794.

[9] A/51/389, para. 18.

[10] 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.

[11] Reproduced in *Yearbook ... 2004*, vol. II (Part One).

[12] *Ibid.*

[13] *Ibid.*

1. Mr. KOLODKIN said that he basically agreed with the tenor of the excellent report submitted by the Special Rapporteur (A/CN.4/541), on which he wished to make some general comments, especially in the context of the discussion to which it had given rise.

2. The wide variety of international organizations and of their methods of operation and relations with States was not an obstacle to the codification of general rules on responsibility or, in particular, of rules on the attribution of conduct. The Commission should not try to take account of absolutely all the specific features of every single international organization. The European Union, for example, seemed to be a special case and it differed considerably from the vast majority of international organizations. There was thus no reason why rules drafted by the Commission should deal comprehensively with all the particular features of the European Union in respect of its relations with member States and third parties in the field of responsibility. The draft articles on the responsibility of international organizations would, like the draft articles on responsibility of States for internationally wrongful acts,[1] probably contain saving clauses to ensure that other rules of international law on the responsibility of international organizations would come into play.

3. The joint responsibility of an international organization and its members was possible. Such responsibility could arise both in the case where the same conduct was attributed to an organization and to its member States and in the case where conduct could be attributed, for example, to only one member State, but where the organization's responsibility was based on different legal foundations (such as a treaty that it had signed or the rules of the organization itself). In paragraph 9 of his report, the Special Rapporteur stated that other situations in which the organization could be held responsible for the conduct of another subject of international law would be examined separately. As far as international organizations were concerned, such circumstances could be rather different from those dealt with in Part One, chapter IV, of the draft articles on State responsibility. Those differences might be the result of the separation of the jurisdiction of an organization from that of its members. The example referred to in paragraphs 10 to 12 of the report was an interesting one.

4. The Special Rapporteur had rightly made control a fundamental criterion of the attribution of conduct. Yet even the use of that criterion might not make it possible to attribute conduct and hence responsibility to an organization alone or to one member State. The report of the Secretary-General on financing of the United Nations peacekeeping operations, on which the Special Rapporteur had largely predicated his argument, stated that "the liability of the Organization for combat-related damage … is limited in cases where combat operations are conducted by forces not constitutionally or effectively under the exclusive command and control of the United Nations".[2] That meant that it was possible that the responsibility of the United Nations might not be exclusive, but only limited, when the Organization did not exercise sole control over the forces taking part in an operation. In that case, the limited responsibility of the United Nations existed alongside the responsibility of the Member State, even if the latter had only partial control over those forces.

5. With regard to control over and, consequently, the attribution of conduct, he noted that, according to paragraphs 38 to 40 of the report on the question of troop-contributing States' control over discipline and criminal jurisdiction, the Special Rapporteur held that it would be going too far to take the view that the existence of disciplinary power and criminal jurisdiction on the part of the contributing State totally excluded the possibility of forces being considered to be at the disposal of the United Nations. That formula was too vague. The mere fact that a State exercised disciplinary control and criminal jurisdiction over a military contingent placed at the disposal of the United Nations did not mean that that State controlled that contingent's activities during operations undertaken by the Organization. The State's prerogatives in respect of discipline and criminal jurisdiction could not, in themselves, form the basis for attributing the wrongful conduct of the contingent, or responsibility for it, to that State. That being so, there was naturally nothing to prevent that State acknowledging its responsibility for its contingents' acts on that basis alone.

6. A distinction was also drawn in the draft articles on State responsibility between the attribution of conduct and the attribution of responsibility. Part One, chapter IV, of those draft articles dealt with situations in which the responsibility of a State arose for an act that it had not committed, and draft articles 55 and 56 might also cover such situations. There was no direct link between the existence of grounds for establishing responsibility other than the attribution of conduct, on the one hand, and the distinction between responsibility and liability, on the other. Whatever the grounds used for establishing the responsibility in question—either attributed conduct or, for example, an international treaty—the point at issue was the organization's responsibility for an internationally wrongful act, not its liability for activities not prohibited by international law. Perhaps the commentary to article 3 should indicate that, together with the wrongfulness of conduct, the attribution of the conduct was the most important, but not the sole, basis for attributing responsibility and that the question of the other grounds would be examined at a later stage.

7. The draft articles under consideration could be referred to the Drafting Committee.

8. With regard to article 4, the phrase "part of the organization's functions" contained in paragraph 1 did not seem very felicitous and he agreed with the comments Ms. Escarameia had made in that regard. The same also applied to article 6. Article 4, paragraph 1, gave rise to another question, which had first been mentioned by Mr. Matheson: whether the organ or person was acting in an official capacity. It must be clear from the outset that the attribution of conduct was possible only if the organ or person was acting in an official capacity. Perhaps the Drafting Committee could give some thought to wording along those lines. The amendments proposed by the Special Rapporteur to the definition of the concept of "rules

[1] See 2792nd meeting, footnote 5.

[2] A/51/389, para. 46.

of the organization" warranted further consideration. The term "acts" seemed appropriate. The fact that resolutions could cover decisions as well as recommendations was clear in the case of United Nations Security Council resolutions.

9. He considered Mr. Pellet's comments on article 5 to be relevant. Mention must be made not only of organs, but also of agents placed at the disposal of the organization. It was also important to determine whether the degree of control should be indicated and to ask whether the term "effective" modifying the word "control" was actually necessary; it did not appear in article 8 of the draft articles on State responsibility.

10. With regard to article 6, it made sense, as other members had said, to specify whether an organ or a person was acting in an official capacity with regard not only to excess of authority, but also to the attribution of conduct. That raised another question: whether excess of authority should be mentioned in article 4 and, as a result, be deleted from article 6.

11. Lastly, the idea of transposing article 9 of the draft articles on State responsibility to the draft articles under consideration should be given the attention that it deserved.

12. Mr. NIEHAUS commended the Special Rapporteur on the quality of the report that he had submitted on such a complex subject. With regard to the conduct of organs placed at the disposal of an international organization by a State or another organization, as dealt with in chapter III of the report and in article 5, it was true that United Nations peacekeeping operations where Member States placed troops at the United Nations' disposal were a case apart. Even though the State could retain some kind of disciplinary or administrative authority over its troops, they received their instructions from the United Nations.

13. While the criterion of effective control was broadly applied in practice for attributing violations of international norms to an organization, as shown by the various cases cited by the Special Rapporteur, and was in line with the provisions of article 9 of the draft articles on State responsibility, it raised certain problems. Firstly, on account of the wide range of situations encountered in peacekeeping operations under United Nations command, it was difficult to establish a general rule for determining in which cases the Organization exercised effective control over its forces. It would nonetheless be useful for the Commission to analyse specific cases. Secondly, effective control was not necessarily exclusive control. It was possible for a State which supplied contingents to exercise some form of *de facto* control over them. According to some doctrine in such cases, the State should be held responsible for wrongful acts committed by its armed forces. Some authors even affirmed that, insofar as national contingents were, in the final analysis, always subordinate to their superiors at the national level, the State would be jointly responsible for wrongful acts. At any rate, the United Nations would not be responsible if the contributing State took action and made decisions that were not in line with the instructions issued by the United Nations. On that point, the Special Rapporteur's suggestion that violations of international humanitarian law should be given special treatment by providing for some form of joint responsibility was interesting and should be discussed in depth. Given the many situations in which international humanitarian law—the law primarily applicable in armed conflicts—could be violated, it would be useful to determine on what basis joint responsibility was attributed and if necessary, as indicated in the report, to distinguish between wrongful acts resulting from actions and those resulting from omissions. The same distinction had been drawn by some writers with regard to human rights obligations. An in-depth study of those points was necessary.

14. The question of the attribution of *ultra vires* conduct, dealt with in chapter IV of the report and the proposed article 6, was closely linked to that of the attribution of responsibility for *ultra vires* acts committed by troops placed at the disposal of the United Nations and was particularly important since most of the wrongful acts committed by troops during peacekeeping operations were *ultra vires* acts. As practice showed, the criterion was not so much that conduct was the result of instructions, but rather that the troops had been acting in their official capacity. To be sure, as the Special Rapporteur said in his report (para. 55), "for responsibility to arise there needs to be some connection between the entity's or person's official duties and the conduct in question". The Organization was responsible for acts committed in the normal discharge of the organ's or agent's duties, even if the entity or person concerned exceeded the scope of their duties or did not observe the rules of procedure or follow the instructions received. The difficulty lay in the relationship that must exist between the wrongful act and the activity carried out in an official capacity. The position taken by the Office of Legal Affairs of the United Nations was that "the primary factor in determining an 'off-duty situation' [was] whether the member of a peace-keeping mission was acting in a non-official/non-operational capacity when the incident occurred".[3] From that standpoint, the wrongful conduct of a person wearing the United Nations uniform, but acting outside his official capacity, would not entail the Organization's responsibility. That solution gave rise to two problems. Firstly, it removed from the scope of the Organization's responsibility acts committed off duty, but appearing to be official; for example, when in uniform, during routine troop operations. In his view, the Organization should be responsible for acts committed in those conditions. Secondly, the solution chosen was based on the principles applicable in domestic law to the regime governing the privileges and immunities of the staff of international organizations, but that did not seem appropriate. The Special Rapporteur's conclusion that the regime governing the *ultra vires* conduct of international organizations must not be distinguished from that of States was therefore well founded. It would nonetheless be useful to further clarify which circumstances involved official conduct by an organ of an international organization and which involved "conduct … so removed from the scope of … official functions that it should be assimilated to that of private individuals",[4] and to identify the criteria for determining the official nature of conduct.

[3] United Nations, *Juridical Yearbook 1986* (Sales No. E.94.V.2), p. 300.

[4] Draft articles on responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two), and corrigendum, para.

15. He agreed with most of the members who had already spoken that articles 4 to 7 proposed by the Special Rapporteur should be referred to the Drafting Committee.

16. Mr. MOMTAZ said that several members had referred to the case of "infringements of international humanitarian law", as mentioned in paragraph 42 of the report, in which there could be joint attribution of conduct to the organization and the State concerned. He wondered to what extent the criminal responsibility arising from infringements of international humanitarian law could be attributed to an international organization.

17. Mr. YAMADA said that, according to the Special Rapporteur, one could envisage cases in which conduct could be simultaneously attributable to an international organization and to one or more member States. Such a situation was conceivable, but he wondered whether it happened very often and whether it was possible that conduct could be governed by both article 4 of the draft articles on State responsibility and the article 4 proposed by the Special Rapporteur. He understood and endorsed the distinction drawn by the Special Rapporteur between the attribution of conduct and the attribution of responsibility. It seemed to him that, for the time being, it would be better to consider conduct as being attributed either to a State or to an international organization, since the simultaneous attribution of conduct would complicate the regime of responsibility. The fact was that an international organization or a State could accept responsibility for conduct that was not attributable to it.

18. With regard to the case of NATO, he pointed out that member States participated in the planning and command of military operations on the basis of internal arrangements, but that when NATO launched military action, it was, from the point of view of outsiders, action undertaken by the national forces of its member States. It was accordingly natural that an injured State should demand compensation from the States in question, especially since it could not sue NATO before ICJ. The so-called mixed agreements of the European Union, given as an example by the Special Rapporteur (paragraph 8 of the report), were a specific case from which one could not generalize. In some international organizations, specific competences could be transferred from one member State to the organization, but it was not certain that that State was completely relieved of its responsibility for acts that arose from such transferred competence. Rather, as long as that State was still involved in the organization's decision-making process, it would probably shoulder some responsibility. Furthermore, if the State caused damage to parties outside of the organization, it would be held responsible for its conduct, regardless of the legal basis for its conduct. In that regard, it could be argued that the organization and the State were jointly responsible, but that the State could not be freed from its responsibility.

19. With regard to the conduct of organs placed at the disposal of an international organization by a State or another international organization, a wide range of approaches was possible. Even within the framework of United Nations peacekeeping operations, there did not seem to be a clear-cut rule on how responsibility arising from conduct related to operations was to be attributed, although the criterion of "effective control" cited by the Special Rapporteur seemed to be a useful tool in that regard. The Special Rapporteur quoted the position taken by the Secretary-General of the United Nations according to which responsibility for damages caused by members of United Nations forces was attributable to the Organization. Nonetheless, responsibility could be attributed only on a case-by-case basis.

20. As to conduct acknowledged and adopted by an international organization, he agreed with the Special Rapporteur that it would seem unreasonable for the Commission to take a different approach from the one that had led it to adopt article 11 of the draft on State responsibility. While an international organization could certainly assume responsibility for the wrongful conduct of its member States, he feared that an injured State which was not a member State of the organization and which had not accepted that decision might be placed in a disadvantageous position. Even if the wrongful conduct was wholly attributed to an international organization, member States of the organization still had a certain responsibility by virtue of being members. That subject had been raised by the Special Rapporteur in his first report[5] and incorporated in article 1, paragraph 2.[6] He himself wondered whether it was an internal matter for the organization concerned or whether it had to be regulated by general rules. Having made those comments, he supported the referral of articles 4 to 7 to the Drafting Committee.

21. Mr. ECONOMIDES said that, like other members of the Commission, he was in favour of establishing joint responsibility, or joint and several responsibility, depending on the case, of international organizations and States. He fully shared the view expressed by the Special Rapporteur in paragraph 7 of his report that the attribution of conduct to an international organization did not necessarily exclude its attribution to a State, nor did, vice versa, attribution to a State rule out attribution to an international organization. Indeed, he believed that it could not be otherwise, at least in some cases where action was taken jointly by States and the international organization. For example, when an international organization exercised exclusive jurisdiction as part of a peacekeeping mission and, in the exercise of that jurisdiction, committed an internationally wrongful act, it was that international organization, and not its member States, that bore exclusive responsibility for that act. However, if, in a given situation, the command of a peacekeeping operation was exercised in full or in part by a member State, that State's responsibility had to come into play jointly, in parallel with that of the international organization. Another example drawn from United Nations practice was that of armed action taken by member States with the authorization of the Security Council. Such action was not undertaken by members of United Nations forces but by members of national forces, which were, moreover, commanded and controlled by the States to which the members belonged. It was natural that the primary responsibility should lay with those States. However, in such cases, he believed that the joint

(7) of the commentary to article 7, p. 46.

[5] *Yearbook ... 2003*, vol. II (Part One), document A/CN.4./532, p. 105.

[6] See footnote 1 above.

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 organizations[7] (*continued*) (A/CN.4/537, sect. A, A/CN.4/541,[8] A/CN.4/545,[9] A/CN.4/547[10], 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.*