

Document:-  
**A/CN.4/3084**

**Summary record of the 3084th meeting**

Topic:  
**<multiple topics>**

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

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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.

draft articles under consideration and the articles on State responsibility for internationally wrongful acts<sup>35</sup> must be preserved while retaining the stand-alone character of the articles that would be adopted on the responsibility of international organizations. The related question of the paucity—or complete lack—of practice often obliged the Commission to draw analogies. He agreed with the Special Rapporteur that provisions not backed by practice should be treated as progressive development of international law, but that approach should be limited to essential aspects which would leave lacunae in the regime that the Commission was proposing to establish if they were not addressed. Lastly, the diversity of international organizations was a matter of no less importance. In that context, as Mr. Pellet had proposed, the draft articles would have to distinguish between the principle of speciality and *lex specialis*, which was the subject of draft article 63.

6. Draft article 20 on self-defence as a circumstance precluding wrongfulness had received a mixed reception, to say the least. The concerns expressed by Governments and international organizations were such that the Commission should perhaps review its position on retaining that draft article. One State had noted that “the substance [of the right of self-defence] with respect to international organizations was not well established under international law, and its scope and the conditions for exercising it were far less clear than in the case of States” (see the last footnote to paragraph 61 of the report). Another State had commented that: “it would be risky to make too general an inference concerning the analogy between the State’s natural right to self-defence against armed aggression ... and any right of any international organization or of its organs or agents to resort to force in a variety of circumstances” (para. 62). Although the Secretariat of the United Nations had not been opposed to the inclusion of such a provision in the draft articles, it had envisioned instances of self-defence solely in the context of an armed conflict where peacekeeping forces were present. In that connection, attention had been drawn to the fact that the extent to which forces operating under the auspices of the United Nations could resort to force depended on primary rules delimiting the scope of their mission. The above-mentioned difficulties strengthened his conviction and that of a number of other Commission members that that draft article should be deleted.

7. Draft article 21 on countermeasures touched on a matter which, in the opinion of some States, should be approached with extreme caution owing to the scarcity of practice, the uncertainty surrounding the relevant legal regime and the risk of abuse (see paragraph 65 of the report). The Secretariat had emphasized the fundamental difference between international organizations and States and expressed the opinion that the draft article should be deleted on account of the nature of the special relationship existing between an international organization and its member States.

8. Since most Governments had submitted comments along similar lines, the Commission must devote its

full attention to the crucial question of the consistency of countermeasures with an organization’s rules. That was undoubtedly a challenging task, but one which the Commission must undertake.

9. With regard to draft article 24 on necessity, he agreed with the approach taken in the commentary to article 25 of the articles on State responsibility, namely that “[t]he extent to which a given interest is ‘essential’ depends on all the circumstances, and cannot be prejudged”.<sup>36</sup> It would also be preferable to retain the current wording of draft article 24, paragraph 1 (a). The scope of the principle of necessity in the relationship between an organization and its members and the possibility of dealing with it in an organization’s rules *qua* special rules should perhaps be clarified in the commentary.

10. Several international organizations had welcomed the retention of draft article 39 on ensuring the effective performance of the obligation of reparation and they had hoped that it would be strengthened as an exercise in the progressive development of international law. The Commission had amply discussed that draft article, an alternative version of which had even been proposed (see paragraph (4) of the commentary to article 39<sup>37</sup>). The discussion had clearly shown that an organization’s member States had no obligations under international law other than those which might exist under the organization’s rules to supply it with the effective means of complying with its obligation to make reparation. Since several States had clearly endorsed that approach, there seemed to be no reason to depart from it. He therefore approved of the recasting of the draft article proposed in paragraph 84 of the Special Rapporteur’s report and the referral of the new wording to the Drafting Committee. He was in favour of sending all the draft articles in the second cluster to the Drafting Committee. As for draft article 20, he would go along with the majority opinion.

11. Sir Michael WOOD said that the general comments which he had made a few days earlier also applied to draft articles 19 to 66, to which he would refer at the current meeting. He had listened carefully to what the previous speaker had said about draft article 20; while it was a finely balanced question, he would still be in favour of retaining that provision as it stood.

12. He would consider draft article 21, which concerned the difficult issue of countermeasures, together with draft articles 50 to 56. The Secretariat’s suggestion that the provisions on countermeasures be omitted had great merit, since there was very little practice and experience on which to base provisions on what was a very complex field. Perhaps the draft articles in question could be replaced by a saving clause which would read: “The draft articles are without prejudice to any question of countermeasures taken by an international organization.” Countermeasures by an international organization might fall into three categories: first, those taken by an international organization in response to a breach of international law by a non-member of an organization; secondly, those taken by an international organization in

<sup>35</sup> General Assembly resolution 56/83 of 12 December 2001, annex. The draft articles adopted by the Commission and the commentary thereto are reproduced in *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, paras. 76–77.

<sup>36</sup> *Ibid.*, p. 83, para. (15) of the commentary.

<sup>37</sup> *Yearbook ... 2009*, vol. II (Part Two), chap. IV, p. 57.

response to a breach by a member of the organization of a rule of international law that was binding on the member other than by reason of its membership; and thirdly, those taken by an international organization in response to a breach by a member of the organization of a rule of international law that was binding on the member because of its membership (for example failure to pay its assessed contributions).

13. In the first and second categories, the international organization ought to be able to take countermeasures under the same strict conditions as States. As difficulties arose in relation to the third category, where there was little available experience, it might be better to deal with it in a saving clause.

14. Turning to draft article 24 on necessity, he would have preferred there to be no such article either there or in the draft articles on State responsibility. The concepts of “an essential interest of the international community as a whole” and of an organization which had “the function to protect that interest” were far from clear. In any event, it seemed wrong to limit the right to invoke necessity in such a way as to exclude virtually all organizations, in particular specialized and regional organizations. Since there was no reason to subject an international organization’s right to invoke necessity to conditions different from those that applied to States, draft article 24, paragraph 1 (a), should be aligned with the corresponding provision of the articles on State responsibility (article 25, paragraph 1 (a)).

15. He approved of the current formulation of draft article 30 on reparation. The example given by the Secretariat, where the General Assembly had apparently sought to limit payments in respect of claims against the Organization, did not seem to be particularly relevant, since it concerned breaches of obligations under domestic law. Presumably, the United Nations had to reach agreements with States so that the matter could be dealt with under domestic law. He likewise supported the retention of draft article 31. That draft article did not deal with questions concerning primary rules, because international organizations’ obligations under those rules were likely to be very different from those of States. Some of the concerns of international organizations seemed to arise from their supposition that the draft articles implied the application of certain primary obligations. For example, draft article 48 might be misinterpreted as implying that, in the Commission’s view, international organizations, like States, had obligations towards the international community as a whole. It was therefore important to indicate clearly in the commentary that the Commission was not adopting a position on the primary rules by which particular international organizations might be bound, that the draft articles dealt exclusively with secondary rules of international law and that they had no bearing on the primary rules, applicable to any particular organization.

16. He endorsed the Special Rapporteur’s comments on draft articles 32, 36 and 37. He approved of the revised version of draft article 39 which was to be found in paragraph 84 of the eighth report, although paragraph 2 thereof still needed some improvement. The Commission should not go as far as imposing a legal obligation upon the General Assembly to adopt a particular budgetary

decision, for that was something about which States were very sensitive. He therefore proposed that the wording of paragraph 2 be amended to read: “The responsible organization should take all appropriate measures in accordance with its rules in order to encourage its members to provide it with the means to meet its obligations under this chapter.”

17. As far as chapter I of Part Four was concerned, he fully agreed with the Special Rapporteur’s comments on draft article 44.

18. Moving on to Part Five of the draft articles entitled “Responsibility of a State in connection with the act of an international organization”, he said that draft articles 57 to 59 did not call for any comments at that stage. The commentaries to those articles would be particularly important and should replicate and, as necessary, update those to the corresponding articles on State responsibility. As the Special Rapporteur had noted, draft article 60 might overlap with draft articles 57 to 59 and should therefore be deleted, especially as the meaning of the word “prompting” was unclear and should be replaced with a word with a clearer legal meaning such as “causing”.

19. The text would be better organized if draft articles 60 and 61 were placed in chapter IV of Part Two (where they would replace the current draft article 17). In Part Five they could then be repeated (in order to avoid a cross reference) or a provision along the same lines as the current draft article 17 could be included, so as to avoid the rather awkward cross reference to a subsequent provision which the current draft article 17 contained.

20. In conclusion, he supported the suggestion from one State, as recorded in paragraph 117 of the eighth report, to include a “provision requiring the special characteristics of a particular organization to be taken into account in applying the draft articles”, although draft article 63 was not necessarily the right place for it. In fact, that idea was already expressed to some degree in paragraph (14) of the commentary to draft article 2. It was to be hoped that the Special Rapporteur would find a way of highlighting it either in a new provision or in a general commentary. All the remaining draft articles could be sent to the Drafting Committee.

21. Mr. PELLET said that, without revisiting the questions of principle that he had already raised in respect of the first and second clusters of draft articles, he would comment on draft articles 19 *et seq.* which the Special Rapporteur had presented at the previous meeting.

22. On the whole, he welcomed the idea that chapter V of Part Two, on circumstances precluding wrongfulness, reflected the rules on international responsibility. There was no reason why those circumstances should not preclude the responsibility of international organizations, as they did in the case of any other subject of international law. He was, however, still firmly opposed to the inclusion of self-defence in draft article 20, because it was part not of the general rules governing responsibility, but of the law of the Charter of the United Nations. He was therefore in favour of its deletion, which the Special

Rapporteur had proposed in his previous report,<sup>38</sup> as he stated in paragraph 63 of his eighth report.

23. As far as countermeasures were concerned, he had no objection to retaining the current wording of draft article 21, although he wondered whether paragraph 2 (*a*) might not be a good place to reflect the principle of international organizations' speciality. It could state that countermeasures must not be inconsistent with the rules of the organization and specify that they must be carried out within the framework of the functions conferred on them by their constituent instrument. In any event, notwithstanding the view expressed by the Special Rapporteur in paragraph 95 of his eighth report, unless that were done expressly in draft article 21, paragraph 2, it would be essential to explain in draft article 50, paragraph 1, that the injured international organization could take countermeasures only in the context of the functions conferred on it by its constituent instrument, in accordance with the principle of speciality. There was probably no need to mention that fact expressly in the text; an explanation in the commentary would suffice. Austria had made a proposal to the same effect and Germany was also aware of the issue.

24. There was something extremely worrying about the linkage between draft article 21 and chapter III of Part Three. Draft article 21, paragraph 2, laid down the circumstances in which an international organization could take countermeasures against another international organization and against a State. That was a good thing, as it helped to fill the well-known lacuna in respect of States' responsibility towards international organizations. However, it was not enough, even with regard to countermeasures, for that paragraph concerned only the responsibility of member States of an international organization towards that organization. Admittedly, it was probably possible to infer *a contrario* from paragraph 2 that the general rule set forth in paragraph 1 applied to non-member States. What was no good at all were draft articles 50 to 56 which provided for countermeasures only against international organizations, but not against States, irrespective of whether they were members, thereby giving no effect to the principle established in draft article 21. Apart from that very important aspect, he was not opposed in principle to maintaining what was said about countermeasures in the draft articles although, as he had already said, it was absurd that there was such obstinate resistance to filling the above-mentioned lacuna. In substance, he was not in favour of deleting the provisions on countermeasures, or of replacing them with a saving clause. On the other hand, he had been very interested by Sir Michael's breakdown of the various kinds of countermeasures. The Drafting Committee would be well advised to follow that approach when it examined the provisions on countermeasures.

25. With regard to Part Three of the draft articles on the content of the international responsibility of an international organization, he still thought that assurances and guarantees of non-repetition were out of place in draft article 29, as they were a form of satisfaction, the subject of draft article 36. Of course, the draft articles merely repeated the mistake made in the articles on State responsibility—*perseverare diabolicum*. The most

significant issue in that respect was reparation. Once again, there was no doubt that the responsible entity must make full reparation for the consequences of the injury caused by its internationally wrongful act. That was true of States, international organizations or any other author of such an act. Nevertheless, he approved of the main thrust of the provisions in Part Three of the draft articles, including those on reparation. He wished, however, to draw the attention of the Special Rapporteur and Commission members to the very serious concerns which the legal advisers to international organizations had about the resources which organizations had, or to be more precise did not have, to cope with the consequences of their responsibility. Those concerns, which he had always shared and which, in his opinion, should have formed the basis of the thinking on the responsibility of international organizations, were reflected in the reactions of international organizations to draft articles 30 and 39 in particular. In order to make sure that a deaf ear was not turned to those worries, he wished to read out some significant passages. The ILO wrote that international organizations

have to rely on funds allocated to them. If they were to provide funds for contingent obligations such as a possible compensation, they would have reduced funds for fulfilling their original mandates. By imposing such a parallel obligation on international organizations, the Commission risks limiting effectively their future operations. The requirement of "full reparation" may lead, in the case of compensation, to the disappearance of the international organization concerned (A/CN.4/637 and Add.1, comments and observations of the ILO on draft article 30, para. 3).

26. The 13 organizations that had presented a joint submission wrote that they were

concerned that limited attention seems to have been paid by the Commission to the special situation of international organizations in relation to the obligation to compensate. If international organizations are "under an obligation to make full reparation for the injury caused by the internationally wrongful act", this could lead to excessive exposure taking into account that international organizations in general do not generate their own financial resources but rely on compulsory or voluntary contributions from their members. This could be unrealistic (*ibid.*, joint submission on draft article 30).

Although he had signed that document in a different capacity, he thought that the conclusions of the international organizations were wrong. International organizations must make full reparation for the consequences of their internationally wrongful acts. The contrary would be the very negation of international law. Draft article 30 could therefore not be amended. The only margin for manoeuvre was with regard to the resources which must be made available to international organizations to enable them to honour an obligation inherent in the very idea of law.

27. It was therefore essential not to abandon the principle set forth in draft article 21. At the same time, draft article 39 was the vital complement to the principle of full reparation, which must not be forsaken. As he had said before, contrary to what Sir Michael had seemed to suggest, the principle set forth in draft article 39 had by no means been invented by the Commission. It was the logical, normal and unavoidable consequence of the fact that the member States of an international organization, by conferring legal personality on the latter, necessarily accepted that it could incur responsibility, once again in accordance with the principle of speciality, and that

<sup>38</sup> *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/610.

it must bear the consequences thereof. But the States which had created that entity must naturally bear those consequences.

28. In paragraph 84 of his eighth report, the Special Rapporteur proposed the retention of the current text of draft article 39, for which he personally was grateful, and the addition of proposed wording that had been rejected by a straw vote on first reading in 2009. He was not opposed to combining that wording as the two ideas were complementary. The reason that proposal had been rejected on first reading was because its author, who had introduced it somewhat stealthily, had been against the combination of both texts. The text proposed by the Special Rapporteur showed that such a combination was perfectly possible.

29. On the other hand, what Sir Michael had said at the current meeting about paragraph 2 was rather unconvincing. When States gave international organizations the wherewithal to meet their obligations, perhaps they were not prompted by legal considerations. Nevertheless, it was the Commission's task to tell States what international law dictated. They were then free to vote differently but, by refusing to give an international organization the means to honour its obligation to make full reparation for the consequences of an injury caused by an internationally wrongful act, States would be breaching a legal rule and the Commission should not encourage them to do so.

30. He endorsed the regrets expressed about the lack of any mention of functional protection in draft article 44. That silence was a further manifestation of the unfortunate lacuna to which he had already referred at some length. That lacuna also lay at the root of the main problems posed by Parts Five and Six of the draft articles which, when all was said and done, consisted in a string of saving clauses. Those problems obviously had to be addressed directly and not circumvented in such a strange manner.

31. Mr. MELESCANU said that he had already had occasion to express his support for the draft articles under consideration. The comments and observations received from States and, above all, from international organizations appeared to be very general or purely editorial. In his opinion, that should encourage the Commission to pursue the approach it had mapped out in the text adopted on first reading.

32. In draft article 29, subparagraph (b), Part Three of the draft articles, he also supported the proposal to include a reference to the offer by international organizations of appropriate assurances and guarantees of non-repetition. International organizations could not be exempted from an obligation that was incumbent upon States pursuant to article 30, subparagraph (b), of the articles on State responsibility. The final version of the draft article proposed by the Special Rapporteur had the very important advantage of offering some flexibility. The last phrase of draft article 29, subparagraph (b), which spoke of offering appropriate guarantees "if circumstances so require" would make it possible not to create huge difficulties for international organizations.

33. With regard to the question of full reparation, the fact that draft article 30 had prompted very lively reactions

from international organizations, especially the WHO and the ILO, and even the Secretariat of the United Nations, spoke volumes. The main argument was that such a provision could expose international organizations to excessive risk, an argument that had been echoed at the current meeting by some Commission members. That rationale was equally applicable to a number of States, but that had not prevented the Commission from including similar provisions in the draft articles on State responsibility. Of course, international organizations could not be placed on exactly the same footing as States, but it was necessary to retain some consistency when applying the principle of international responsibility. He therefore expressly supported the Special Rapporteur's proposals which, moreover, had been accepted by the Commission on first reading.

34. Another observation that had triggered some comment at the current meeting had been the statement of the Secretariat of the United Nations that it was the Organization's practice not to accept the principle of full reparation in the context of peacekeeping operations, but to offer limited reparation through the conclusion of bilateral agreements with the States where such operations took place. Sir Michael had put forward a very interesting idea, namely that that could be seen as a way of setting a ceiling to responsibility, which would then be governed by the country's domestic law and would no longer be based on the organization's internationally wrongful act.

35. As for the financial resources to ensure the effective performance of the obligation to make reparation, a crucial question for international organizations, several of them had submitted comments on draft article 39 in which they had virtually called for the inclusion of a provision requiring member States to supply the organization with the necessary funds to meet its obligation to make reparation. Although he could well understand that international organizations might find themselves in an awkward situation, there was no legal basis or international practice to support such a step. As far as he knew, whenever an international organization had faced a financial quandary, including in areas other than the obligation to make reparation, it had been solved on the basis of a single principle, which might be deemed a customary norm of international organizations, namely that States could make voluntary contributions. For example, during the crisis in funding peacekeeping operations in the Republic of Korea, whose effects were still being felt, the accepted rule had been that States should pay voluntary contributions to cover needs. There was therefore nothing which could give international organizations the right to demand such a provision. For that reason, he approved of the wording proposed by the Special Rapporteur in paragraph 84 of his report, since it satisfied international organizations in part, but did not contain specific obligations that would be very hard for member States to accept. It was also very well balanced, because it accompanied the obligation for an international organization to do its best to solve these questions with the corollary obligation for States to do everything in their power to assist the international organization. The inclusion of that wording in the draft article might alleviate the concerns expressed by international organizations about the idea of making full reparation for an injury caused by an internationally wrongful act.

36. In Part Four of the draft articles, which concerned the implementation of the international responsibility of an international organization, most of the observations that had been submitted related to countermeasures and had been general in nature. In the final analysis, it seemed unnecessary to recast draft articles 50 and 52, but he was prepared to consider the various views expressed during the current meeting. In Part Five, on the responsibility of a State in connection with the act of an international organization, he endorsed the proposal made by the Special Rapporteur in paragraph 107 of the report to insert the phrase “subject to articles 57 to 59” at the beginning of draft article 60. With regard to the responsibility of a State due to its conduct as a member of an international organization, he also thought that a State bore no responsibility if its conduct complied with the rules of the organization. He had greatly appreciated Sir Michael’s ideas on countermeasures and their classification into three categories. Generally speaking, it was hard to imagine the adoption of countermeasures against member States, primarily because it was they that made up the legal fiction that was the international organization. He fully endorsed the idea that it would be better to refer to sanctions, for which provision was made in the internal rules, rules of procedure and statute of an international organization, rather than to countermeasures. In fact, it was regarding relations between an international organization and a third State that one might speak of countermeasures. It remained to be seen whether the Commission would have the time to reword the draft article along those lines. In conclusion, he was in favour of sending the draft articles to the Drafting Committee.

37. Mr. DUGARD said that he had only a few comments to make on the provisions of the draft articles. However, as States and international organizations had called for the inclusion of further information in the commentaries, generally speaking there seemed to be a need to expand the commentaries on a number of draft articles. The Special Rapporteur should err on the side of lengthy rather than short commentaries, because many of the draft articles constituted progressive development of international law. In the chapter on circumstances precluding wrongfulness, he concurred with the Special Rapporteur that draft article 20 on self-defence should be retained as it stood. It was preferable to include a general reference to international law, rather than to the Charter of the United Nations, because some States were not Members of the United Nations. As far as draft article 21 on countermeasures was concerned—the same remark also applied to draft articles 52 to 56—it was necessary to remember that countermeasures were a necessary evil. When they had been included in the articles on State responsibility, some members of the Commission had been strongly in favour of their deletion, on the grounds that, although they were a part of international law, they were such an unfortunate element of it, that it would have been better to omit them. Obviously that path could not be taken, and the Commission had rightly opted for the cautious approach advocated by one State. With regard to draft article 24 on necessity, he supported the suggestion in paragraph 71 that the commentary should provide fairly detailed examples of the practice of the North Atlantic Treaty Organization (NATO), the United Nations and the Organization of American States (OAS). The new wording

of draft article 39, proposed in paragraph 84, made member States’ obligations much clearer and he endorsed it for the reasons given by Mr. Melescanu. He agreed with the criticism by El Salvador of draft article 44, which seemed to be the most questionable provision. In his opinion, as he had stated on a previous occasion, paragraph 1 did not deal with a situation where a claim was brought by an uninjured State after the violation of an *erga omnes* obligation. As he had already observed, by failing to deal with that eventuality in the articles on State responsibility, the Commission had committed an error which he saw no reason to perpetuate. According to the Special Rapporteur, it was plain from draft article 48, paragraph 5—what he probably meant was draft article 48, paragraph 5, read together with draft article 48, paragraph 2—that draft article 44, paragraph 1, did not apply to an uninjured State, but it would be preferable to say so expressly. He therefore urged the Special Rapporteur to give serious attention to that issue in the Drafting Committee. With respect to paragraph 88, Commission members would recall that during the debate on the draft articles on diplomatic protection, he had proposed that the Commission should deal with the subject of the exercise of functional protection, but the general view had been that it constituted a separate topic.<sup>39</sup> He therefore repeated the suggestion that this subject should be covered in a special set of draft articles.

38. Lastly, he was delighted that draft articles 48 and 56 had given rise to little criticism, although the provisions on uninjured States and the interests of the international community as a whole had been considered to be the most controversial when they had been inserted into the draft articles on State responsibility. It was gratifying to see that States seemed to have accepted those provisions, because they had not opposed their inclusion in the draft articles on the responsibility of international organizations. In conclusion, he supported the referral of the draft articles to the Drafting Committee.

39. Mr. PETRIČ said that it was most encouraging that States and, in particular, international organizations had reacted to the draft articles by submitting comments and suggestions. It was to be hoped that the next phase of work would also prompt some reactions, so that a dialogue could be maintained and the final result would reflect the interest shown in the Commission’s deliberations and would include all the proposals that were deemed to be useful. He congratulated the Special Rapporteur on his extremely detailed comments on the recommendations and proposals put forward by States and international organizations. Having analysed the replies that had been received, above all in paragraphs 72, 86, 102, 113 and 122 of his eighth report, the Special Rapporteur had proposed some amendments, all of which he personally supported. The text of draft article 20 on self-defence had formed the subject of a lengthy debate during which all the opinions that had been expressed had been examined. That was why the Special Rapporteur was right to abandon his proposal to delete that draft article. In paragraph 72, the Special Rapporteur had presented a new draft article 16 which took account of the changes proposed in paragraphs 51, 55

<sup>39</sup> See *Yearbook ... 2006*, vol. II (Part Two), chap. IV, p. 26, paragraph (3) of the general commentary on the draft articles on diplomatic protection, adopted by the Commission at its fifty-eighth session.

and 58 of the report. That draft article was quite acceptable. If it proved necessary to alter it, it was up to the Drafting Committee to do so. The only amendment proposed in the section of the report from paragraphs 29 to 86 concerned draft article 39, which had likewise been debated at length in the Commission. In paragraph 84, the Special Rapporteur proposed a text which was a synthesis of all the opinions that had been expressed, including the minority view defended by Mr. Valencia-Ospina. It was a very good solution. He also fully agreed with the amendment of draft article 60 proposed in paragraph 107, which concerned only its form. He had hoped that draft article 44 would be amended. The Special Rapporteur had not submitted any proposals, but the Drafting Committee could look into the matter.

40. In conclusion, he was in favour of sending all the draft articles to the Drafting Committee. Since the text had been approved by the Commission on first reading after some lengthy debate, the Drafting Committee should concentrate on the comments and proposals made by States and international organizations and, if possible, it should not revisit questions that had been decided five or more years earlier. He fully agreed with Mr. Dugard and, like him, he hoped that the Special Rapporteur would flesh out the commentaries on draft articles which represented progressive development of international law.

*The meeting rose at 11.30 a.m.*

### 3085th MEETING

*Friday, 6 May 2011, at 10 a.m.*

*Chairperson:* Mr. Maurice KAMTO

*Later:* Ms. Marie G. JACOBSSON (Vice-Chairperson)

*Later:* Mr. Maurice KAMTO (Chairperson)

*Present:* Mr. Caflisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escobar Hernández, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Huang, 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.

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

[Agenda item 1]

1. The CHAIRPERSON drew attention to the programme of work for the next two weeks of the session. If he heard no objection, he would take it that the Commission wished to adopt the proposed programme of work.

*It was so decided.*

\* Resumed from the 3081st meeting.

### 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 (*concluded*)

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

3. Mr. NOLTE, after welcoming Ms. Escobar Hernández to the Commission, said that he had little to criticize in the second part of the eighth report on responsibility of international organizations. He was in favour of retaining draft article 20 (Self-defence), particularly as the Special Rapporteur had indicated that the resorting by an international organization to self-defence was not a purely hypothetical situation. However, he agreed with other members that the limited likelihood of such an occurrence should be emphasized in the commentary to the draft article.

4. He expressed support for draft article 21 (Countermeasures), welcoming the suggestion in paragraph 67 of the report that some international organizations did exclude the possibility of countermeasures against their members. He found useful the distinction drawn between three contingencies which existed with regard to countermeasures: the relationship between an international organization and non-members; the relationship between an international organization and its members with respect to the members' rights; and the relationship between an international organization and its members in respect of treaties concluded by member States in a capacity other than as members of the organization. However, the Commission should not draw too great a distinction with regard to the latter category, for if a State was a member of an international organization it assumed additional responsibilities for supporting the organization, and those responsibilities could also affect treaties that it had concluded outside the context of its membership of the international organization.

5. A case in point was Switzerland, which upon joining the United Nations had agreed to abide by Article 2, paragraph 5, of the Charter of the United Nations, which set out a general obligation to support the Organization. Yet there were surely situations in which that provision could affect the interpretation of treaties concluded by Switzerland or the responsibility of Switzerland as a State, and from that perspective the country could not be viewed merely as a third party.

6. He was also in favour of draft article 30 (Reparation). With regard to draft article 31 (Irrelevance of the rules of the organization), he welcomed the emphasis placed in paragraph 77 of the report on the fact that international organizations could not be relieved by their rules from complying with their obligations. He supported the Special Rapporteur's balanced proposal in paragraph 84 of the report regarding draft article 39 (Ensuring the effective performance of the obligation of reparation). The Special Rapporteur had recognized the ambiguity that existed in the original version of draft article 39, which could be