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**Summary record of the 3080th meeting**

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# INTERNATIONAL LAW COMMISSION

## SUMMARY RECORDS OF THE FIRST PART OF THE SIXTY-THIRD SESSION

*Held at Geneva from 26 April to 3 June 2011*

### 3080th MEETING

*Tuesday, 26 April 2011, at 10.05 a.m.*

*Outgoing Chairperson:* Mr. Nugroho WISNUMURTI

*Chairperson:* Mr. Maurice KAMTO

*Present:* Mr. Al-Marri, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Mr. Gaja, Mr. Galicki, Mr. Huang, Ms. Jacobsson, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Sir Michael Wood.

#### Opening of the session

1. The OUTGOING CHAIRPERSON declared open the sixty-third session of the International Law Commission.

#### **Tribute to the memory of Ms. Paula Escarameia, former member of the Commission**

2. The OUTGOING CHAIRPERSON said that the session was beginning on a sad note owing to the death of Ms. Paula Escarameia, of which he had informed the Commission members in October 2010. Ms. Escarameia had contributed immensely to the Commission's work as a keen advocate of respect for and the progressive development of international law, especially with a view to ensuring the protection of the most vulnerable. Her friendly, positive and charming disposition would be deeply missed.

*At the invitation of the Outgoing Chairperson, the members of the Commission observed a minute of silence in memory of Ms. Paula Escarameia.*

#### **Statement by the Outgoing Chairperson**

3. The OUTGOING CHAIRPERSON provided a brief overview of the Sixth Committee's debates on the Commission's report on the work of its sixty-second

session,<sup>1</sup> a topical summary of which had been prepared by the secretariat and published in document A/CN.4/638. In order to enhance exchanges between the Commission and the Sixth Committee, delegations, encouraged by paragraph 12 of General Assembly resolution 59/313 of 12 September 2005, had made it their practice to complement their discussions by holding a dialogue with some of the members and special rapporteurs of the Commission who were present in New York. That dialogue had become an integral feature of International Law Week, which had been established by the General Assembly in its resolution 58/77 of 9 December 2003 and had focused in 2010 on the topics of reservations to treaties, the effects of armed conflicts on treaties and on the future of the codification and progressive development of international law. Emphasis had been placed on the Commission's future role and mandate and on its relationship and interaction with Member States in the Sixth Committee. The dialogue had been pursued at meetings with legal advisers. As a consequence of the Sixth Committee's consideration of the Commission's report, the General Assembly had adopted resolution 65/26 of 6 December 2010, paragraph 4 of which had invited Governments to submit to the secretariat of the Commission, by 31 January 2011, any further observations on the entire set of draft guidelines constituting the Guide to Practice on Reservations to Treaties, provisionally adopted by the Commission at its sixty-second session, with a view to finalizing the Guide at the sixty-third session; paragraph 5 of the resolution had again drawn the attention of Governments to the importance of the Commission receiving by 1 January 2011 their comments and observations on the draft articles and commentaries on the topic "Responsibility of international organizations" adopted by the Commission on first reading at its sixty-first session (2009). In paragraph 6, the General Assembly had invited the International Law Commission to give priority to its consideration of the topics "Immunity of State officials from foreign criminal jurisdiction" and "The obligation to extradite or prosecute (*aut dedere aut judicare*)". In paragraph 7, it had taken note of the report of the Secretary-General on assistance to special rapporteurs of the International Law Commission<sup>2</sup> and of paragraphs 396 to 398 of the report of the Commission on

<sup>1</sup> *Yearbook ... 2010*, vol. II (Part Two).

<sup>2</sup> A/65/186.

the work of its sixty-second session,<sup>3</sup> and had requested the Secretary-General to continue his efforts to identify concrete options for support for the work of special rapporteurs, additional to those provided under General Assembly resolution 56/272 of 27 March 2002.

### Election of officers

*Mr. Kamto was elected Chairperson by acclamation.*

*Mr. Kamto took the Chair.*

4. The CHAIRPERSON thanked the members of the Commission for the honour they had conferred upon him and paid tribute to Ms. Xue and Mr. Wisnumurti, the successive Chairpersons of the sixty-second session, and to the other officers of the sixty-second session for their outstanding work. He also thanked the members of the Group of African States for proposing his candidature, in particular Mr. Dugard who had refrained from standing in his favour.

*Ms. Jacobsson was elected first Vice-Chairperson by acclamation.*

*Mr. Niehaus was elected second Vice-Chairperson by acclamation.*

*Mr. Melescanu was elected Chairperson of the Drafting Committee by acclamation.*

*Mr. Perera was elected Rapporteur by acclamation.*

### Adoption of the agenda (A/CN.4/634)

*The agenda was adopted.*

*The meeting was suspended at 10.30 a.m. and resumed at 11.10 a.m.*

*On a proposal from the Bureau, after consultation with Mr. Pellet, a Working Group on reservations to treaties was constituted. It would be chaired by Mr. Vázquez-Bermúdez.*

**Reservations to treaties<sup>4</sup> (A/CN.4/638,<sup>5</sup> sect. A, A/CN.4/639 and Add.1,<sup>6</sup> A/CN.4/647 and Add.1,<sup>7</sup> A/CN.4/L.779,<sup>8</sup> A/CN.4/L.793,<sup>9</sup> A/CN.4/L.795<sup>10</sup>)**

[Agenda item 2]

5. Mr. PELLET (Special Rapporteur) said that, at its previous session, the Commission had provisionally

<sup>3</sup> *Yearbook ... 2010*, vol. II (Part Two), pp. 203–204.

<sup>4</sup> At its sixty-second session (2010), the Commission completed the provisional adoption of the Guide to Practice on Reservations to Treaties, which comprises 199 draft guidelines and the commentary thereto (*Yearbook ... 2010*, vol. II (Part Two), chap. IV, pp. 31 *et seq.*, paras. 105–106) and indicated that it intended to adopt the final version of the Guide to Practice at the current session (*ibid.*, p. 19, para. 45).

<sup>5</sup> Mimeographed; available from the Commission's website.

<sup>6</sup> Reproduced in *Yearbook ... 2011*, vol. II (Part One).

<sup>7</sup> *Idem.*

<sup>8</sup> Mimeographed; available from the Commission's website.

<sup>9</sup> *Idem.*

<sup>10</sup> *Idem.*

adopted the Guide to Practice on Reservations to Treaties. It had been understood that, in view of the particular nature of the text, which was not destined to become a convention, the Commission would follow a special procedure. The document that had been adopted was therefore a provisional text which should be finalized at the current session, once States' comments had been taken into account. It had been questionable whether the General Assembly would agree with the Commission's approach, since the Sixth Committee was a creature of habit, but those fears had proved to be unfounded, since the General Assembly had asked the Commission to complete the drafting of the Guide to Practice in 2011. That had been made clear in paragraph 4 of resolution 65/26 in which the General Assembly had invited "Governments to submit to the secretariat of the Commission, by 31 January 2011, any further observations on the entire set of draft guidelines constituting the Guide to Practice on Reservations to Treaties, provisionally adopted by the Commission at its sixty-second session, with a view to finalizing the Guide at the sixty-third session".

6. That was no mean task, since the Commission must definitively adopt a Guide to Practice comprising no less than 199 guidelines together with their commentaries which formed part and parcel of the Guide. Fifteen States—Australia, Austria, Bangladesh, El Salvador, Finland, France, Germany, Malaysia, Norway, New Zealand, Portugal, the Republic of Korea, Switzerland, the United Kingdom of Great Britain and Northern Ireland, and the United States of America—which constituted a fairly representative cross section, had submitted written comments within the time limit set by the General Assembly (A/CN.4/639 and Add.1). It would have been inadvisable to consider no more than those written comments; it had also been necessary to take account of all the comments made by States since work had begun on the topic of reservations to treaties. All the comments submitted since 1995 had been collected and collated in files, most of them in French, but a few in English, on the basis of which he had modified the draft guidelines. In doing so, he had also recorded whether or not he endorsed States' proposals. In that connection, he drew attention to the meagre resources the Secretariat made available to special rapporteurs. It was not right that a special rapporteur should have to collect and distribute States' comments and that session documents were not published in at least two working languages.

7. At that stage in its labours, the Commission had at its disposal written comments from Governments, files summarizing the comments made by States on each of the guidelines which had been provisionally adopted at the previous session, amendments proposed on that basis and explanations in support of those proposals. The Working Group would propose to the Commission meeting in plenary session the final text of the draft guidelines of the Guide to Practice (A/CN.4/L.779). They would have to be adopted before the end of the first part of the session in order for him to finalize the commentaries during the period between the two parts of the session, so that they could be adopted by the close of the session on 12 August 2011. In addition, he would present a seventeenth report (A/CN.4/647 and Add.1) comprising three parts, one on the reservations dialogue, another on

the settlement of disputes concerning reservations and a third comprising instructions for the use of the Guide to Practice and some definitions of general notions differing from those defined in the first section of the Guide. In conclusion, he invited all the members of the Commission to ensure the success of the project in as consensual a spirit as possible.

### Organization of the work of the session

[Agenda item 1]

8. The CHAIRPERSON drew the members' attention to the programme of work for the following two weeks. In addition to the subject of reservations to treaties, which had already been mentioned, the Commission would consider the topic of responsibility of international organizations at the current meeting and at the following plenary meetings. That afternoon, the Drafting Committee would hold a meeting on "The effects of armed conflicts on treaties" and the Working Group on reservations to treaties would convene that afternoon. The Bureau proposed that the following meeting be dedicated to the memory of Ms. Paula Escarameia.

9. Sir Michael WOOD said that it was essential to complete work on reservations to treaties at the current session. It would therefore be necessary to ensure that the Working Group on reservations to treaties had enough time during the first part of the session to look carefully at all the issues raised in States' comments. Sufficient time would also have to be allowed, during the second part of the session, for a thorough examination of the commentaries, which were as important as the guidelines themselves.

*The programme of work for the first two weeks of the session was adopted.*

### Responsibility of international organizations<sup>11</sup> (A/CN.4/636 and Add.1–2,<sup>12</sup> A/CN.4/637 and Add.1,<sup>13</sup> A/CN.4/640,<sup>14</sup> A/CN.4/L.778<sup>15</sup>)

[Agenda item 3]

#### EIGHTH REPORT OF THE SPECIAL RAPPORTEUR

10. The CHAIRPERSON invited Mr. Gaja, the Special Rapporteur, to present his eighth report on responsibility of international organizations (A/CN.4/640).

11. Mr. GAJA (Special Rapporteur) said that he would introduce the first half of his eighth report on responsibility of international organizations at the current meeting and that he would deal with the provisions relating to circumstances precluding wrongfulness and the rest of the draft articles at a later stage. As it was his last report, since he was not seeking re-election, he greatly hoped

that it would be the final report on the topic and that the Commission would be able to adopt the draft articles on second reading at the current session.

12. While several States had urged the Commission to complete what they regarded as a useful, or even very useful, exercise, some international organizations had expressed doubts as to its merits, given the scarcity of practice. Most States and international organizations had been unable, or unwilling, to disclose aspects of their practice which might have had some bearing on the Commission's work. That was not, however, a reason to abandon the study which had begun in 2002.<sup>16</sup> As one State had argued, the activities of international organizations had multiplied and affected both international relations and the daily life of private individuals. It was therefore necessary to have a system in place, a set of general rules, even though practice might not be extensive. The elaboration of rules on responsibility of international organizations was a vital step in the development of the international legal order.

13. The very existence of the current draft articles had furthered the development of practice relating to the responsibility of international organizations. One recent example had been the internal document of the United Nations Legal Counsel which had been leaked to the press,<sup>17</sup> part of which was quoted in paragraph 47 of the eighth report. Further criticism from international organizations had stressed the diversity of international organizations and what some of them called "the principle of speciality", implying that the responsibility of each international organization was governed by specific rules, most of which were supposedly embodied in the rules of the relevant organization. Insofar as special rules existed, they took precedence over general rules of international law, as indicated in draft article 63. It could not, however, be held that they covered many of the matters considered in the draft articles. In any event, the comments submitted by international organizations had provided very few examples of such rules.

14. As one State had observed, the draft articles on responsibility of international organizations were sufficiently general to cover the wide variety of existing international organizations. It would be wrong to assume that the existing wide variety of international organizations should require a similar wide variety of rules on responsibility for those organizations. According to the definition contained in draft article 2, the draft articles applied to international organizations possessing legal personality. As international legal persons, those organizations bore rights and obligations and, since they could have obligations under international law, the possibility that they might violate them could not be ruled out. If that happened, it must be possible to hold them responsible. That was true of any international organization with legal personality.

<sup>11</sup> For the draft articles and the commentary thereto adopted on first reading by the Commission, see *Yearbook ... 2009*, vol. II (Part Two), pp. 19 *et seq.*

<sup>12</sup> Reproduced in *Yearbook ... 2011*, vol. II (Part One).

<sup>13</sup> *Idem.*

<sup>14</sup> *Idem.*

<sup>15</sup> Mimeographed; available from the Commission's website.

<sup>16</sup> At its fifty-fourth session (2002), the Commission decided to include the topic in its programme of work, constituted a Working Group on the topic and named Mr. Gaja Special Rapporteur (*Yearbook ... 2002*, vol. II (Part Two), p. 93, paras. 461–463). The Working Group presented its report at the same session (*ibid.*, pp. 93–96, paras. 465–488).

<sup>17</sup> Jeffrey Gettleman, "U.N. told not to join Congo army in operation", *The New York Times*, 9 December 2009.

15. The Organization for Security and Co-operation in Europe (OSCE) and a group of other international organizations had suggested moving the provision on *lex specialis* from draft article 63 to make it a new draft article 3. That change of position would not alter the content of the provision in question. In his own opinion, it was preferable to keep draft article 63 where it was, since it was more logical for the draft articles to begin by setting forth general rules before mentioning the possible existence of different rules. Moreover, the inclusion of the *lex specialis* article in Part Six (General Provisions) was consistent with the pattern adopted for the articles on responsibility of States for internationally wrongful acts,<sup>18</sup> adopted by the Commission in 2001.

16. Another general point that had been made with regard to the relationship between the articles on State responsibility for internationally wrongful acts and the current draft articles was that the latter were modelled too closely on the former. In that connection, he had nothing to add to what he had said on the subject in paragraph 5 of his report.

17. Before moving on to specific draft articles, he noted that neither he nor the secretariat of the Commission had been consulted about some editorial changes that had been introduced in the text of his report. He particularly regretted that references in the text to the Secretariat of the United Nations had often been shortened to “the Secretariat”.

18. Some international organizations had wanted to hold further consultations with the Commission on the draft articles. That was hardly warranted, since the Commission intended to adopt not the text of a draft convention, but a set of draft articles which would then be submitted to the General Assembly. Most international organizations had availed themselves of the ample opportunity they had been afforded to submit their comments.

19. Opinions had diverged on whether the Commission should examine the invocation of the responsibility of a State by an international organization. It seemed preferable to postpone any decision in that regard, since it would not affect the content of any of the current draft articles. The Commission could then consider whether to undertake a study which might lead it to amend several articles on State responsibility. In that context, it might also wish to consider whether the articles on State responsibility and the current draft articles should be supplemented in order to address issues concerning the responsibility of States and international organizations towards individuals and other entities.

20. The definitions of “international organization” and “rules of the organization” had elicited few comments. Most observations had been confined to the definition of “organ” and the revision of the definition of “agent”. Given the diversity of approaches followed in the constituent instruments of international organizations, a definition of “organ” based on the rules of each

organization would be a source of discrepancy, whereas a uniform definition that departed from the rules of organizations could be confusing. If a decision were taken to include a definition of “organ” in the draft articles, it would be logical to place it before the definition of “agent”. Paragraph 20 of the report proposed the wording “‘Organ of an international organization’ means any person or entity which has that status in accordance with the rules of the organization”. According to draft article 2 (c), “agent” included officials and other persons or entities through whom the organization acted. Another longer definition, which the Commission had not adopted, explained that the person or entity in question was “charged by an organ of the organization with carrying out, or helping to carry out, one of its functions”.<sup>19</sup> Both sets of wording stemmed from the advisory opinion of the International Court of Justice (ICJ) on *Reparation for Injuries*. If the idea of including a definition of “organ” were accepted, it would be preferable to avoid any overlapping of the categories of organs and agents. For that reason, the definition could be reformulated to read: “‘Agent’ means an official or other person or entity, other than an organ, through whom the organization acts and who is charged by the organization with carrying out, or helping to carry out, one of its functions”. That wording contained no reference to “the rules of the organization” which might give rise to an overly restrictive definition of “agent”.

21. Draft article 6 concerned the conduct of an organ of a State or an international organization which had been placed at the disposal of another international organization. Several States and the Secretariat of the United Nations had endorsed the Commission’s criticism of the decision of the European Court of Human Rights in *Behrami and Saramati*, but one State had dissociated itself from it. Draft article 6 made the decisive criterion for attributing conduct “the effective control” exercised over the conduct in question. The Secretariat of the United Nations had drawn attention to the fact that, for a number of reasons, notably political ones, the practice of the United Nations had been to maintain the principle of United Nations responsibility *vis-à-vis* third parties in connection with peacekeeping operations, although it was in favour of “the inclusion of draft article 6 as a general guiding principle in the determination of responsibilities between the United Nations and its Member States with respect to organs or agents placed at the disposal of the Organization” (A/CN.4/637 and Add.1, observations on draft article 6, para. 6). On 8 December 2010, an interesting example of practice had been furnished by the judgment of the Court of First Instance of Brussels in the *Mukeshimana-Ngulinzira and Others v. Belgium and Others* case, which had found that the decision of the Belgian contingent of the United Nations Assistance Mission for Rwanda (UNAMIR) to abandon a *de facto* refugee camp in Kigali in April 1994 had been taken under the aegis of Belgium and not UNAMIR.

22. Draft article 7, on *ultra vires* acts, was modelled on the corresponding provision of the articles on State responsibility for internationally wrongful acts. It did not therefore expressly require the act to have been committed in an official capacity. Paragraph (4) of the commentary

<sup>18</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>19</sup> *Yearbook ... 2009*, vol. II (Part Two), p. 18, para. 36, footnote 18.

was fairly clear in that respect. As the Secretariat of the United Nations had suggested, the commentary could explain that the organ or agent was acting “within the overall functions of the organization” (*ibid.*, observations on draft article 7, para. 2). A group of international organizations had maintained that draft article 7 should take account of the practice related to privileges and immunities, which it deemed to be more restrictive with regard to *ultra vires* acts (*ibid.*). In his opinion, the privileges and immunities granted by a headquarters agreement covered only acts within the functions of an organ or agent, but that did not necessarily mean that *ultra vires* acts should not be attributed to the international organization.

23. With regard to draft article 8, concerning conduct acknowledged and adopted by an international organization as its own, the Secretariat of the United Nations had sought clarification of “the form of the acknowledgement” (*ibid.*, observations on draft article 8, para. 1), and had asked whether the act of acknowledgement should be made in full knowledge of the unlawful character of the conduct and of the legal and financial consequences of such acknowledgement. He intended in paragraph (5) of the commentary to provide a more detailed explanation of the role that the rules of an organization could play in ascertaining the validity of the acknowledgement of an act.

24. The only provision of chapter II which had given rise to very few comments was draft article 9. The substance of that provision had not been criticized. For the sake of clarity, the commentary could specify that, as the Secretariat of the United Nations had proposed, “only breaches of international law obligations contained in the rules, and not breaches of the rules as such, would be considered breaches of an international obligation within the meaning of draft article 9” (*ibid.*, observations on draft article 9, para. 3).

25. The commentaries to draft articles 13 and 14 obviously needed to be developed by drawing on the commentaries to articles 16 and 17 of the draft articles on State responsibility for internationally wrongful acts. Paragraph (5) of the commentary to article 16 of the draft articles on State responsibility, stating that “the aid or assistance must be given with a view to facilitating the commission of the wrongful act and must actually do so”<sup>20</sup> would be difficult to reconcile with draft article 13 on the responsibility of international organizations, which mentioned only knowledge of the circumstances of the wrongful act and did not imply in any way that the organization must have intended to facilitate its commission.

26. The opinion expressed by the United Nations Legal Counsel, which was reproduced in paragraph 47 of the eighth report, did not contend that international responsibility presupposed an intention to facilitate the commission of a wrongful act. Notwithstanding the strength of the argument resting on the commentary to article 16 of the draft articles on State responsibility, there were no grounds for reproducing the passage in question in the commentary to draft article 13, whose scope was considerably narrower.

27. One State had suggested, in order to avoid any overlapping of draft articles 13, 14, 15 and 16, that the phrase “subject to articles 13 to 15” should be inserted at the beginning of draft article 16.

28. Another minor amendment to the text of draft article 16 would be to include a general reference to a “member” instead of a “member State or international organization”, as an international organization might adopt a decision binding on a member which was neither a State nor an international organization. Draft article 16, paragraph 1, would then read:

“Subject to articles 13 to 15, an international organization incurs international responsibility if it adopts a decision binding a member to commit an act that would be internationally wrongful if committed by the former organization and would circumvent an international obligation of the former organization.”

29. The term “circumvent” had elicited a number of comments. The question had been raised of whether the phrase “and would circumvent an international obligation” was really necessary, or whether it amounted to no more than an explanation which would be better placed in the commentary. However, it seemed that an international organization would not incur responsibility unless it had intentionally misused its powers.

30. Draft article 16, paragraph 2, had given rise to criticism from several States, the International Monetary Fund (IMF), the Secretariat of the United Nations, the International Labour Organization (ILO) and the European Commission. Two arguments had been put forward. First, the provision’s scope was said to be too wide given the number of recommendations issued by international organizations. Secondly, it was held that there should be a closer link between the recommendation and the member’s conduct. In response, he suggested—and it was probably the most radical proposal he had made in his eighth report—that paragraph 2 should simply be deleted (para. 58 of the report). The two paragraphs of draft article 16, which were designed to prevent an international organization from taking advantage of the separate legal personality of its members, were certainly not based on practice and could therefore be regarded as attempts at progressive development. Hence it was probably preferable to retain only paragraph 1, which had been generally endorsed despite its innovative character.

31. Mr. NOLTE said that the topic of responsibility of international organizations was central to the Commission’s current agenda. As the Special Rapporteur had been able to complete his work on time, the Commission might be able to finalize its work on the subject 10 years after its adoption of the articles on responsibility of States for internationally wrongful acts. It would be a great achievement for the Commission, and for international law in general, if the law of the responsibility of the most important subjects of international law could be articulated authoritatively. The Special Rapporteur’s eighth report offered an excellent basis for the remaining work and provided the key to a successful outcome. His own statement would be confined to some general comments on the introduction and first part of the report.

<sup>20</sup> *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 66.

32. He agreed with most of the Special Rapporteur's analysis and conclusions. The draft articles were all well-crafted and formed a coherent, cohesive whole. It was unnecessary to change radically the approach which had been adopted. All that was needed was some finishing touches.

33. That meant, for example, that there was no need to ask whether the "principle of speciality" should be expressed in a manner different to that proposed by the Special Rapporteur, which was modelled on the articles on State responsibility. That principle was clearly set forth in draft article 63. Altering the overall structure of the articles and putting the principle of speciality in the chapter devoted to general principles could give rise to misunderstanding and suggest that the Commission was uncertain about their authoritative force. That could lead to the practice of "special pleading", which would undermine the whole regime of responsibility of international organizations.

34. It was unnecessary to revisit the question of whether the draft articles rested on a sufficient amount of State or organizational practice. The law of responsibility of international organizations was not as self-contained as, for example, the law of diplomatic relations among States, since it was closely related to the law of State responsibility. That justified the Special Rapporteur's general approach which consisted in asking, with regard to rules resting on little practice, whether there were any good reasons for departing from the approach adopted for the articles on State responsibility. If there were none, the need to preserve the consistency of the law of responsibility and the principle of responsibility itself called for adherence to the rule established for States. The same approach had been followed successfully when the Commission had drafted the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (hereinafter "1986 Vienna Convention").<sup>21</sup>

35. At that juncture, it was preferable not to try to solve the question of rules on the invocation of the responsibility of a State by an international organization. While it was regrettable that this issue had not been addressed in either the articles on State responsibility for internationally wrongful acts or the draft articles on responsibility of international organizations, since no clear trend had emerged, either in the Commission or among States and international organizations, in favour of deciding the initial question of whether rules on that matter should be included in the draft articles under consideration, it was too late to attempt, for the sake of completeness, to formulate rules which had not been properly researched. He therefore agreed with the Special Rapporteur's proposal to contemplate a separate study and not to delay the completion of work already under way. Draft article 1 should therefore remain unaltered.

36. As far as draft article 2 was concerned, he still agreed with the Special Rapporteur that the definition of

"international organization" should not be confined to intergovernmental organizations, but he wondered if the commentary could explain that not every association of one or more States with private entities was necessarily an international organization. That status also presupposed that the association had a public function and that the participating State(s) had a special position within it.

37. He concurred with the Special Rapporteur that the Commission should not seek to narrow the definition of "rules of the organization", because the great variety of rules might not be fully appreciated if some were highlighted and others omitted.

38. He supported the Special Rapporteur's proposal to include a definition of "organ" in draft article 2, but the term should not be defined in such a way as to exclude the possibility of an "agent" being an "organ" and vice versa. In proceedings before the ICJ, for example, the agent of a Government could be an organ of the State. The difference between an "organ" and an "agent" lay primarily in the focus on various aspects of the same phenomenon: the term "organ" referred to the specific legal competence of an entity, including a natural person, to act, whereas the term "agent" referred primarily to the person with specific legal competence to act. The difference between "organ" and "agent" was not that an "agent" operated on the basis of being charged *ad hoc* with a function, while an "organ" exercised a certain function continually. That distinction was often difficult to make in practice and was unnecessary for the purposes of the draft articles under consideration. He therefore proposed that "organ" and "agent" should be defined in the following manner:

"(c) 'organ of an international organization' means any person or entity which has a legal capacity to act in accordance with the rules of the organization;

"(d) 'agent' means an official or other person or entity through whom the organization acts and who is charged by the organization with carrying out, or helping to carry out, one of its functions."

39. It was not necessary to define "organ" as any person "who has that status". A reference to "that status" might have been advisable in the context of the law of State responsibility to bring out the fact that it was up to States to define their organs. Technically, however, that reference was not only superfluous, it made the definition circular.

40. Mr. AL-MARRI thanked the Special Rapporteur for his presentation of his eighth report on responsibility of international organizations. That complex subject had triggered great controversy as the comments and observations from States and international organizations had shown. Despite the difficulties which had been encountered, the Special Rapporteur had worked ably with wisdom and perseverance and there was no doubt that the Commission would add the requisite final touches to the draft articles at second reading.

41. Mr. PETRIČ endorsed the comments of members who had congratulated the Special Rapporteur on the excellent work he had done. He was sure that the consideration of the subject, which was of fundamental

<sup>21</sup> For the draft articles adopted on second reading by the Commission and the commentary thereto, see *Yearbook ... 1982*, vol. II (Part Two), chap. II, sect. D, pp. 17 *et seq.*, para. 63.

importance, would be completed during the current quinquennium. He supported the proposal of the Special Rapporteur and Mr. Nolte to keep draft article 1 as it stood, in order to avoid reopening the debate on the responsibility of member States of international organizations. Mr. Nolte's proposal regarding the definition of "organ" and "agent", which provided useful clarification, deserved closer scrutiny. He approved of the proposal to delete paragraphs 2 and 3 from draft article 16 in view of the particularly sharp criticism which paragraph 2 had elicited from international organizations.

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

[Agenda item 1]

42. Mr. VÁZQUEZ-BERMÚDEZ (Chairperson of the Working Group on reservations to treaties) announced that the Working Group on reservations to treaties comprised Mr. Candiotti, Mr. Gaja, Mr. Huang, Mr. McRae, Mr. Nolte, Sir Michael Wood and Mr. Perera (*ex officio*).

*The meeting rose at 12.55 p.m.*

## 3081st MEETING

*Wednesday, 27 April 2011, at 10.05 a.m.*

*Chairperson:* Mr. Maurice KAMTO

*Present:* Mr. Al-Marri, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Huang, Ms. Jacobsson, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

### Tribute to the memory of Ms. Paula Escarameia, former member of the Commission (*continued*)

1. The CHAIRPERSON recalled that at the previous meeting the Commission had observed a minute of silence in memory of Ms. Escarameia. Following her election to the Commission in 2002, she had made a substantial contribution, with competence and enthusiasm, to its work. Deeply committed to the development of the rules of international law, she had had a special regard for the ways in which the law could help to protect the weak and vulnerable. With her warm and friendly manner and positive attitude, she would long be remembered by the members of the Commission.

2. Mr. WISNUMURTI said that Commission members had had first-hand experience of Ms. Escarameia's expertise in international law, her analytical mind and the intellectual rigour with which she had defended her views. Her warm personality had helped them to reach consensus on many occasions. Speaking first on many topics, she had often set the tone of their discussion. As an advocate for

human rights, gender equality and humanitarian causes, she had demonstrated her commitment to promoting social justice. Among her many achievements in the field of international law was the instrumental role she had played in the negotiation of the Rome Statute of the International Criminal Court.

3. Mr. SABOIA said that among Ms. Escarameia's many fine qualities had been her deep knowledge of international law, her dedication to the Commission's work and her combative spirit, which had been tempered by a sense of humour. She had shown a strong interest in environmental issues and a genuine enthusiasm for bringing young people along in the study of international law.

4. Mr. PELLET said that Ms. Escarameia had been a truly "good person", a phrase he was using advisedly, and not in its usual saccharine sense. As a former Commission member, Mr. James Crawford, had once written about another colleague, Ms. Escarameia had made Special Rapporteurs think hard and twice about their topics, thereby bettering their work. He himself was sure that his own work on reservations to treaties had benefited substantially from her remarks.

5. Ms. Escarameia had had a natural aptitude for the defence of good causes, as demonstrated by her work as a founding member of the International Platform of Jurists for East Timor, and she had often combined her scientific legal knowledge with her desire to fight for human rights. She had been the moral conscience and heart of the Commission, constantly reminding its members that the law was not some abstract game but a tool for justice and progress.

6. The law was a sad and arid thing if it lacked a soul, and she had known how to endow it with one. He was certain that, if they listened carefully, her colleagues could catch the echoes of her vibrant and vigorous voice in the conference room, which would be a much less exciting place without her.

7. Mr. DUGARD agreed that Ms. Escarameia had had a profound impact on the Commission. As one of the first women elected to serve on it, she had injected a new spirit into its work, sharing her belief in a new legal order in which the individual occupied an important place. While she had been a strong individualist, she had also been a good team player. In his work as Special Rapporteur on diplomatic protection, he had learned to appreciate her lively and intelligent contributions. Her best legacy was the Commission's continuing awareness that there was always a place for principles and conviction in its debates.

8. Mr. COMISSÁRIO AFONSO said that Ms. Escarameia had been a highly valued member of the Commission whose solid contribution to its work would remain a true monument to what she had stood and fought for. She had challenged some of the Commission's traditions in the interest of generating a better working environment. His own friendship with her had been based, not on their common Portuguese language and culture, but on mutual respect, an eagerness for learning and a shared desire for dialogue. He was grateful to have known and worked with her.