

Document:-
A/CN.4/3081

Summary record of the 3081st meeting

Topic:
<multiple topics>

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

*Downloaded from the web site of the International Law Commission
(<http://legal.un.org/ilc/>)*

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.

9. Mr. GALICKI said that although he had met Ms. Escarameia only recently, he felt as if he had always known her. She had been an unusual woman with a deep knowledge of and passion for public international law. Even when she had disagreed with others, she had done so without antagonizing them and with a will to find common ground. She had been not only a prominent specialist in international law but also a dedicated and sensitive teacher. Her admission to the Commission as one of its first female members had been a historic event.

10. Mr. NOLTE said that Ms. Escarameia had combined impressive competence in international law with warmth and generosity—heart with reason, to paraphrase Mr. Pellet's remarks. In a sense, she had been the Commission's conscience. With her capacity to be critically constructive and a civilized fighter for her ideals, she had seen the bad but had projected the good.

11. Mr. AL-MARRI said that it would be unfortunate if Commission members' tributes to Ms. Escarameia did not gain a wider hearing. He therefore proposed that a record of the statements made should be sent via the Embassy of Portugal in Geneva to Ms. Escarameia's family and community in Portugal, who could then see how her larger family, the international community, cherished her memory.

12. Ms. JACOBSSON endorsed the comments of members who had praised Ms. Escarameia as a colleague who had influenced the course of the Commission's work and as a special person who had combined exceptional integrity with a generous heart. It was the view of some members that an event should be organized to honour Ms. Escarameia's intellectual contribution to the Commission. Accordingly, in conjunction with the Graduate Institute of International and Development Studies of Geneva and with the support of the Commission secretariat, she was in the process of coordinating a commemorative event to be held later during the current session. It was hoped that colleagues who were not members of the Commission, as well as Ms. Escarameia's husband, would be able to attend the event. As soon as she was in a position to do so, she would inform members of the date of the proposed event.

13. The CHAIRPERSON said that he would take note of the proposal and looked forward to receiving details of the event.

14. Mr. PELLET announced that another event in commemoration of Ms. Escarameia was being organized by some of her assistants and students with the support of the Fundação Calouste Gulbenkian. A conference was to be held in Lisbon in late October 2011 at which participants would discuss the various topics of international law that had been of particular interest to Ms. Escarameia. The members of the Commission were warmly invited to participate in that event.

15. Mr. HUANG said that, as a new member of the Commission, he wished to join others in expressing regret at the passing of Ms. Escarameia. Although he had worked with her for only one brief week the previous year, she had left a lasting impression on him. Listening to

the tributes paid to her memory by other members, he had also been impressed by the high degree of competence and professionalism exhibited by all the Commission's members. He was honoured to be included in such a body yet sobered at the responsibility that it entailed, and he would spare no effort in helping to achieve the Commission's objectives.

16. The CHAIRPERSON said that even when speaking with great passion and conviction, Ms. Escarameia had always maintained a spirit of friendship. If he had to sum up her contribution to the Commission in one sentence, it would be that her strong convictions had literally impelled the Commission towards the progressive development of international law, which lay at the very heart of its mandate. Consistently seeking out the rules of international law that would support the weakest and most vulnerable, she had raised members' awareness of the need to transcend the narrow confines of legal reasoning in order to develop new standards of protection. The Commission owed her a debt of gratitude, and he was certain that her memory would remain uppermost in the minds of members throughout the morning's meeting.

The meeting was suspended at 10.50 a.m. and resumed at 11.25 a.m.

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)

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

18. Mr. McRAE said that, although it would be hard to emulate the rigour that had typically characterized Ms. Escarameia's assessments of the reports of Special Rapporteurs, his own comments were intended to challenge the Special Rapporteur on several points, and he liked to think that Ms. Escarameia's critical spirit was still present within the Commission.

19. He welcomed the Special Rapporteur's incorporation of comments from States and international organizations in the draft articles that had been submitted for second reading. However, some of those comments reflected fundamental concerns that deserved to be addressed by the Commission in greater depth than had been suggested by the Special Rapporteur in his eighth report and in his introductory statement at the previous meeting, particularly if the final version of the draft articles was to embody an exhaustive analysis of the issues raised.

20. The first concern was that the Commission was producing draft articles whose underlying assumption was that all international organizations had the same legal status—namely, that they possessed international legal personality—and could therefore be treated equally. Yet such an assumption of similarity was not borne out

in fact, since international organizations were actually characterized by diversity, or “speciality”, a point that had been mentioned by the United Nations Secretariat in its comments on the draft articles. Although many of the large, multifaceted international organizations that had responded to the Commission’s request for comments were perhaps the kind to which uniform rules might apply, there were a vast number of international organizations that had not commented on the draft articles. They differed significantly from those that had, yet would be covered by the same provisions of the draft articles.

21. Another aspect of the issue of speciality was the question of the extent to which the uniqueness of a particular organization, as evidenced by its internal rules (referred to in the draft articles as the “rules of the organization”), affected the manner in which responsibility attached to the organization. Although the Commission had addressed that issue in draft article 63, he was not certain that it had dealt with it adequately.

22. A second concern related to the recurrent criticism that the draft articles on the responsibility of international organizations were little more than a “carbon copy” of the articles on State responsibility for internationally wrongful acts,²² giving rise to questions of methodology and outcome. The Special Rapporteur had correctly responded in paragraph 5 of his report that the draft articles paralleled the articles on State responsibility in certain cases because the Commission had concluded that there was no reason in those cases to make a distinction between States and international organizations. However, a further question was whether that conclusion could stand up to scrutiny in all cases.

23. In that connection, he did not find compelling the argument made by the Special Rapporteur in paragraph 26 of his report that damage should not be included among the elements of an internationally wrongful act since that notion had been rejected in the articles on State responsibility. Furthermore, the Special Rapporteur’s reference to the need for coherence among the instruments on international responsibility prepared by the Commission suggested that it had been the Commission’s strategy all along merely to follow the articles on State responsibility. He also disagreed with the invocation of the articles on State responsibility in paragraph 99 of the report to justify the retention of the term “fundamental human rights” in draft article 52. Since the Commission had rejected that concept in the context of the topic of expulsion of aliens, he did not believe it should be retained in draft article 52, regardless of what had been done in the articles on State responsibility.

24. At the previous meeting, Mr. Nolte had argued that if the rules applicable to treaties between States were to serve as the model for treaties between international organizations, then it stood to reason that the rules governing the responsibility of States should apply also to the rules governing the responsibility of international organizations. While the point was an interesting one, he

himself was not sure that the correlation between the two sets of rules was quite that clear-cut, since responsibility could vary depending on the nature of the actors concerned, whereas the applicability of treaties could not.

25. In his view, the current draft articles and commentary did not adequately address the relationship between the rules of State responsibility and those of the responsibility of international organizations, and failed to clearly establish the separate identity of the articles on the responsibility of international organizations. While he appreciated the Special Rapporteur’s efforts to avoid undermining the articles on State responsibility, that goal should not be achieved at the expense of the credibility and legitimacy of the draft articles on the responsibility of international organizations. Further consideration should therefore be given to that issue.

26. A third concern related to the frequent observation by international organizations that the draft articles were based in many instances on inadequate or non-existent practice. That fact had been freely acknowledged by the Commission, and the onus was thus on international organizations to divulge their practice—something they had done only sparingly. The extent to which the draft articles were based on practice had an impact on how the Commission characterized the outcome of its work: draft articles that were based on widespread or generally accepted practice of international organizations represented a form of codification. In the case of draft articles not based on practice, however, the question arose as to what constituted their basis: was it assimilation of an international organization to a State, common sense or the progressive development of international law? And if all the draft articles represented an exercise in progressive development, should the Commission include a disclaimer concerning all of them?

27. The Special Rapporteur’s approach to the lack of practice in certain circumstances appeared to be inconsistent. Whereas in paragraph 60 he had stated that the infrequent occurrence of an act was not a reason for not including a draft article on the subject, in paragraph 88 he argued that the rare exercise of functional protection was a reason for not addressing it specifically in a draft article. Such inconsistency reinforced the need to delve deeper into the question of the role of the practice of international organizations in the elaboration of the draft articles.

28. He had a number of suggestions as to how the Commission might address those concerns. First, with regard to the principle of speciality, it should be noted that the term was used in two senses in the context of the current topic: to refer to areas of divergence between the draft articles on responsibility of international organizations and the articles on State responsibility, and to refer to differences between international organizations *inter se*. Both the United Nations Secretariat and the European-based international organizations had emphasized the importance of the principle of speciality and had suggested that two clarifications be made. The first would make clear that the Commission’s methodology did not involve a simple transposition of the articles on State responsibility for internationally wrongful acts with minor amendments, but constituted an independent analysis of

²² 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.

the practice and needs of international organizations. The second clarification would show how differences between international organizations had been taken into account in the text of the draft articles and would be accommodated in the application of the articles. Both clarifications needed to be debated in the Commission, and he believed that the Commission should pursue the suggestion made by international organizations in their comments to include an introduction to the draft articles that would elucidate in detail what had been only vaguely expressed in draft article 63. The Special Rapporteur's recognition in paragraph 3 of his eighth report of the greater practical importance that the principle of speciality might have in the case of international organizations was a further argument for addressing speciality at the outset. That could be accomplished either in a separate introduction to the draft articles or in article 1, on the scope of the draft articles.

29. He suggested that an entire meeting of the Commission be set aside to discuss the scope and content of speciality in the proposed introduction. The Commission might also wish to follow up on the proposal made by legal advisers to European-based international organizations that both they and a representative of the United Nations Secretariat be invited to such a meeting. Guest participants could be presented with a series of questions developed by the Special Rapporteur, who could be assisted by a working group in preparing for the meeting.

30. Consideration should be given at the meeting as to whether international organizations had differing levels of international responsibility, depending on their nature and functions, and as to the role that the rules of an organization played in determining the scope of that responsibility. For example, the Special Rapporteur's indication in paragraph 4 of his report that some draft articles were hardly relevant to certain organizations might be elaborated further in the introduction. The technical organizations referred to in that paragraph needed to know why they could not invoke certain circumstances precluding wrongfulness as well as the circumstances in which their own responsibility could be invoked.

31. The proposed introduction to the draft articles should describe the relationship of the present draft articles to the articles on State responsibility, making express reference to their autonomous status and to areas of overlap. The Commission needed to show that it had independent reasons for adopting a particular draft article; it should consequently revise or remove from the commentaries any statement that implied that it had adopted a particular formulation because it paralleled what was found in the articles on State responsibility for internationally wrongful acts. Coherence among the instruments prepared by the Commission was not a very compelling reason for adopting a particular formulation.

32. The question of how to deal with the lack of practice in relation to some draft articles posed a problem. He was not in favour of including a general disclaimer, as that would diminish the value of those draft articles that did have a solid basis in practice. Perhaps the Commission could take the unusual step of identifying certain draft articles as having been explicitly based on the notion of progressive development where that was deemed

necessary. Further discussion was needed on that question, and it, too, should be placed on the agenda of the proposed meeting with the legal advisers of international organizations. As they were in many respects the most important consumers of the Commission's work, the legal advisers to international organizations should be able to refer to the draft articles in the same way that legal advisers to States referred to the articles on State responsibility. It was therefore critical for the Commission to respond to them and to be seen as taking their views into account.

33. He realized that the suggestions he had made might constitute a departure from the way the Commission had functioned in the past. Nevertheless, he believed that they would help to ensure widespread acceptance of the draft articles.

34. Lastly, he agreed with the Special Rapporteur that the Commission should take up separately the issue of the invocation by an international organization of the responsibility of a State, and that it should undertake an analysis of the relevant practice and law before taking a position on the issue.

35. The CHAIRPERSON said that he had taken note of the suggestion to organize a meeting with the legal advisers of international organizations and would refer the suggestion to the Special Rapporteur.

36. Mr. NOLTE said that as he had commented on Part One of the eighth report on responsibility of international organizations at the previous meeting, he would now focus on Part Two of the report. He endorsed the Special Rapporteur's approach to draft articles 4 to 9, in particular his remark in paragraph 43 that the application of international law was not entirely excluded even in areas covered by European Union law. He did, however, have some concerns regarding draft articles 13 to 16.

37. The most important element of Part Two of the report was the suggestion made in paragraph 58 to delete draft article 16, paragraph 2, whereby the responsibility of international organizations would be incurred for recommendations addressed to member States and international organizations to commit an internationally wrongful act. Having always been critical of the idea of such responsibility for recommendations, he was in favour of the suggestion; however, he considered that the Special Rapporteur had not fully explained the implications of that step.

38. The decision not to accept responsibility for recommendations also affected the responsibility incurred in the provision of aid or assistance in the commission of an internationally wrongful act, which was covered by draft article 13. Care must therefore be taken to ensure that the principle of responsibility for recommendations was not reintroduced indirectly by providing the possibility for considering recommendations as a form of aid and assistance.

39. His main concern, however, was the commentary to draft article 13. He had no objections to transposing the principle of responsibility for aid or assistance from the law of State responsibility to the law of responsibility of

international organizations, and he had no problem with the wording of the draft article. However, the potentially far-reaching and novel form of responsibility for aid or assistance should be carefully limited, similarly to what had been done in the commentaries to the articles on State responsibility. Otherwise, important forms of cooperation and innovation in international relations might be unduly inhibited by concerns of potential liability. For instance, it might sometimes be apparent to a United Nations peacekeeping operation that its actions could provide support for the commission of war crimes, and such conduct should not be permissible; however, the World Bank should not be placed under a regime that would require it to verify or ensure that its loans were properly used. He was therefore in favour of the approach adopted by the Commission in its commentary to the parallel draft article on State responsibility (draft article 16) with respect to the requirement of intent.²³ The Commission should not only follow the suggestion made by the European Commission, referred to in paragraph 49 of the Special Rapporteur's eighth report, to add to the commentary some limitative language (intent) in line with the commentaries of the draft articles on State responsibility, in his view, it should go a step further and strengthen the subjective requirement by including language calling for some form of intent or, in some cases, even conscious misuse.

40. A reference to the subjective element of intent was not the only addition that should be made to the commentary to draft article 13. The Special Rapporteur recognized that the commentary was very short and needed to be supplemented, but the Commission needed to decide what direction such additions should take. In his view, they should generally be of a limitative nature. He therefore endorsed the idea of establishing a "*de minimis* criterion", mentioned in paragraph 45 of the report, which could be formulated positively as a requirement that the wrongful act had "contributed significantly to that end".

41. The same general approach should be taken when supplementing the commentary to draft article 14 on direction and control exercised over the commission of an internationally wrongful act. He therefore endorsed the Special Rapporteur's suggestion made in paragraph 50 of his report that the commentary indicate that the simple exercise of oversight was not sufficient to generate responsibility.

42. The Special Rapporteur had acknowledged that draft articles 13 to 16 were closely interrelated and overlapped in part. It was therefore important to explain their interrelationship, primarily by explaining the purpose of the individual articles and by giving appropriate examples. However, it would be helpful to describe the relationship between the articles by inserting the words "subject to articles 13 to 15" at the beginning of draft article 16, as suggested in paragraph 51 of the report. It was not clear whether such an inclusion was meant to imply that draft articles 13 to 15 should have priority and, if so, what that priority would entail. Would it mean that even if draft article 16 did not establish responsibility for

recommendations, such responsibility could be derived from draft articles 13 to 15? His sense was that once the reference to responsibility for recommendations was deleted from draft article 16 there would no longer be any need to explain how the provision related to draft articles 13 to 15.

43. He wished to make a few comments on Mr. McRae's statement, since it went against the general thrust of the statement he himself had made at the previous meeting. When discussing the diversity of international organizations, it was important to focus on when such diversity was really relevant. There were two dimensions to the project under consideration. The first was the relationship of the international organizations to their members. In that relationship, diversity played an extremely important role, and there were many references in the draft articles to "the rules of the organization", which was a reaffirmation of the principle of diversity. However, in the relationship between an international organization and a third State subjected to an internationally wrongful act, such diversity should not be overstated; it was not of paramount importance whether the international organization in question was large or small, technical or general in nature.

44. As far as the "carbon copy" criticism was concerned, his statement at the previous meeting had been misunderstood if it had been interpreted as meaning that the Commission's work on the law of treaties was similar to its work on the responsibility of international organizations. It was in fact more difficult to take a carbon copy approach in the area of the law of treaties because parliaments were required to ratify treaties, whereas international organizations did not have analogous bodies.

45. Similarly, there were certain norms that he considered as being close to general principles of international law and for which it was not necessary to give numerous examples of practice, even though such practice was assumed to exist. Responsibility was one area in which the notion of a general principle was more inherent than in other areas of international law, such as diplomatic law. The distinction between codification and progressive development in that particular area of the law was not as clear-cut as it was in other areas, and it should not be made so artificially.

46. As to whether damage ought to be included as an element of an internationally wrongful act, the reasons that it had not been included in the draft articles on State responsibility had nothing to do with the nature of States but related to the nature of certain rules of international law which did not require the payment of damages in the event of their violation. He did not see why the same should not apply to international organizations. Sometimes relying on a general underlying principle was a legitimate approach to follow, and he did not feel it was necessary to seek instructions or further advice from representatives of international organizations on the matter.

47. Lastly, while he had no objection to the idea of adding an introduction to the draft articles that would outline the concerns raised, he believed it was important to keep things in perspective and not to reopen the debate on a project that was close to fruition.

²³ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 65–67 (paras. (3)–(5) of the commentary).

48. Sir Michael WOOD endorsed the eloquent comments made by previous speakers about Ms. Escarameia.

49. With regard to the responsibility of international organizations, he commended the Special Rapporteur for his eighth report. It was user-friendly and timely, notwithstanding certain practical difficulties, such as the late submission of comments, including indications of practice, by international organizations and States. He also wished to thank the Special Rapporteur for his introduction of the report at the previous meeting. Although what he had to say might sound rather critical, he wanted to be clear about two things: first, any criticism was not directed at the Special Rapporteur, whose work he greatly appreciated; and, secondly, his doubts did not simply reflect views he might have expressed on behalf of the Government of the United Kingdom in the Sixth Committee several years previously, when the topic had been relatively new.

50. The Commission faced a dilemma, having received, late in the process, what might be termed a barrage of adverse comments from Governments and from virtually all the international organizations that had responded. There had also been strong reactions from experts speaking in a private capacity, for example at seminars organized by the World Bank and by Chatham House.²⁴ Writings on the subject, such as those of José Alvarez,²⁵ had also raised many questions. The Commission needed to reflect carefully on what had been said, react to it appropriately and, where necessary, continue the dialogue with those most concerned. In that connection, he endorsed Mr. McRae's suggestion that a meeting should be held with the legal advisers of the various international organizations.

51. The adverse comments were both general and specific. They might not be well founded and they might be self-interested, but they were not necessarily wrong. If the Commission's work was to be useful, it had to be accepted by practitioners. The Commission was under considerable pressure to complete its work on the topic within the coming weeks. Yet such pressure had been resisted in the past, with topics of great importance, like the present one, taking many years to mature and benefiting from reflection and a variety of views from within and outside the Commission.

52. To reconcile those competing pressures, he urged the Commission not to be dismissive, even if some members believed that the comments received were misguided. The Commission could not simply say that comments ought to have been submitted earlier or that there was no room for further dialogue. Many of the comments had been made previously, particularly those referred to as "recurrent themes" by the Special Rapporteur. While he would welcome the completion of the topic during the present session, he was not in favour of rushing to an unsatisfactory outcome. The implications of an unsatisfactory text

that failed to meet the needs of States and international organizations were considerable. The topic itself had far-reaching implications for the future of international cooperation, particularly for the many organizations whose *raison d'être* was to assist Governments.

53. Another dilemma was that there was little relevant practice. Yet it was not sufficient to fall back upon some general theory of international responsibility, however convincing it might seem in the abstract. The Commission must pay close attention to what happened in the daily life of international organizations.

54. He had a number of general suggestions to make. First, the Commission should set out clearly in an opening general commentary to the draft articles its views on the central issues of methodology raised by the topic, thus acknowledging the key concerns of States and international organizations. The commentary should include the points covered in paragraphs 3 to 6 of the report. The United Nations Secretariat and the Geneva-based organizations had suggested something along those lines, and the Special Rapporteur had indicated that he was open to that suggestion. A precedent existed, since the draft articles on State responsibility also opened with a general commentary, although the commentary to the draft articles on the responsibility of international organizations would need to be more elaborate.

55. Secondly, the Commission must set out as clearly as possible its views on where the various draft articles stood in relation to existing international law. As the Special Rapporteur had indicated, the draft articles under consideration did not enjoy the same level of authority as the articles on State responsibility for obvious reasons: the lack of relevant practice and case law, the fact that 10 years had elapsed since the adoption of the articles on State responsibility for internationally wrongful acts in 2001 and the generally favourable reception those articles had received from States and international courts and tribunals. The status of the draft articles was an essential point and was also related to any recommendation the Commission might make to the General Assembly concerning its handling of the text. Unless the Commission made its views on the standing of the draft articles explicit, there was a risk that lawyers and judges, especially national judges, might be misled, with unfortunate consequences.

56. Thirdly, the general introductory commentary should also address in detail the differences between the responsibility of international organizations and State responsibility. The matter was touched upon lightly in paragraph 4 of the report, where the Special Rapporteur noted that a recurrent theme in the comments received was the great variety of international organizations. He agreed with the Special Rapporteur that it would serve little purpose to move draft article 63 to an earlier part of the text. However, there was an important point underlying the suggestion, namely that the diversity of international organizations and the consequences that this diversity might have for the application of the draft articles needed to be stated prominently early on in the text; otherwise the point risked being overlooked. It was not sufficient to respond that the "principle of speciality" referred to by the ICJ in its advisory opinion concerning the *Legality of*

²⁴ "Legal responsibility of international organisations in international law", summary of the International Law Discussion Group meeting held at Chatham House on 10 February 2011 (available from www.chathamhouse.org).

²⁵ For example, "International organizations: accountability or responsibility?", in J. McManus (ed.), *Responsibility of Individuals, States and Organizations: Proceedings of the 35th Annual Conference of the Canadian Council on International Law, Ottawa, 26–28 October 2006*, Ottawa, Canadian Council on International Law, 2007, pp. 121–134.

the Use by a State of Nuclear Weapons in Armed Conflict meant only that international organizations had limited functions compared with States, and that those functions differed from one organization to another.

57. International organizations differed from States in many respects. They had no territory; even when they engaged in so-called “international territorial administration”, their relationship to the territory in question was different from that of a State and was specific to each case. International organizations had no nationals and no legal system in the sense that States did; even the corpus of international law that was binding on them was not the same as that which bound States. International organizations were party to few international conventions. The extent to which the rules of customary international law binding on States were—or could be—binding on international organizations was a largely unexplored field. International organizations and States were subject to compulsory dispute settlement to quite different degrees. International organizations had different structures and facilities available to them, and their relations with other international legal persons, not least their member States, had a significant impact on the applicable law. To draw an abstract distinction between primary and secondary rules, and to say that none of this mattered, hardly constituted a sufficient answer to all those differences. Responsibility did not exist in a vacuum but in the context of the day-to-day life of the organizations concerned.

58. Fourthly, the Commission needed to pay as much attention to the commentaries as to the draft articles: they constituted a whole, and one could not be understood or applied without the other. Indeed, particular draft articles might not be acceptable unless read in conjunction with the commentaries. However, the commentaries to the draft articles on the responsibility of international organizations should not simply reproduce the commentaries to the articles on State responsibility, although they might draw on them where appropriate. They could not simply reproduce them because of the many differences in practice between organizations and States and because of developments that had taken place since 2001, which included experience gained in the application of the articles on State responsibility that ought to be reflected in the commentaries. If the Commission was to complete its work on the topic during the current session, it needed to set aside at least one week during the second part to consider the Special Rapporteur’s revised draft commentaries.

59. Lastly, much remained to be done with regard to the substance of the draft articles. It was not simply a matter of adding “finishing touches”, as had been suggested in the debate the previous day. While he may have misunderstood what had been said in that debate, he believed that the parallel drawn with the law of treaties was far from convincing. It could not be the right approach to assume that in matters of responsibility the position of international organizations was the same as that of States unless the contrary was shown.

60. Turning to the text of draft articles 1 to 18, he welcomed the amendments proposed by the Special Rapporteur in his report, subject to their consideration by the Drafting Committee. He welcomed in particular

the important amendment proposed to draft article 16. If accepted, it would eliminate a major problem that had arisen during the first reading of the draft articles. He also appreciated the Special Rapporteur’s indication that the commentaries needed to be developed in a number of respects and that it was not the time to reopen the question of the scope of the draft articles. Nevertheless, it was striking how few amendments were proposed in the eighth report, notwithstanding the numerous critical comments and observations received from States and organizations. While comments made before 2009 had to some extent been taken into account in the seventh report,²⁶ and thus in the first reading of the draft articles,²⁷ the amendments introduced at that time had been quite modest and did not necessarily absolve the Commission from reviewing those earlier comments again.

61. Many of the comments received concerning draft articles 1 to 18 were essentially of a drafting nature and would be taken up by the Drafting Committee. However, he wished to make a few points regarding the substance of those articles. He was not certain that draft article 1, and in particular paragraph 2 thereof, captured clearly enough the scope of the draft articles. It was rather misleading to say that “the present draft articles ... apply to the international responsibility of a State”. It was true that the draft articles contained a section on that subject, but it was not the case that the draft articles as a whole were relevant to State responsibility. The Drafting Committee might therefore wish to consider that point, together with the title of the whole set of draft articles, which ought to reflect their scope.

62. Draft article 13, on aid or assistance in the commission of an internationally wrongful act, would become one of the most important provisions in practice. The concerns of the international financial institutions and organizations whose *raison d’être* was to aid and assist had been loud and clear. He agreed with Mr. Nolte that the commentary to the draft article would be crucial. However, he did not share the Special Rapporteur’s doubts concerning the discussion of intention in the commentary to the articles on State responsibility. Indeed, it was essential that the matter be reflected in the commentary to draft article 13 in more or less the same terms as the commentary to the equivalent article on State responsibility (article 16). Like Mr. Nolte, he was in favour of going even further and expanding the scope of the commentary to draft article 13.

63. In conclusion, he wished to thank the Special Rapporteur for his tireless efforts, and he looked forward to working closely with all members of the Commission with a view to reaching consensus on the draft articles during the current session.

64. Mr. MELESCANU endorsed the tributes paid by previous speakers to the memory of Ms. Escarameia.

65. Turning to the eighth report on responsibility of international organizations, he congratulated the Special Rapporteur on his lucid presentation of the comments made by States and international organizations on the

²⁶ *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/610.

²⁷ *Ibid.*, vol. II (Part Two), chap. IV, sect. C, pp. 19 *et seq.*

draft articles adopted on first reading at the Commission's sixty-first session (2009). He would begin his statement with some general observations before addressing some specific points.

66. During the current debate he had not heard any convincing arguments for radically altering the Commission's approach to the topic. Most of the comments from international organizations had been editorial in nature and had been prompted by the organizations' specific interests. As they did not concern the substance of the text proposed by the Special Rapporteur, it ought to be possible to adopt the final version of the draft articles at the current session.

67. While he had no objection to holding a meeting with the legal advisers or other representatives of the international organizations that had submitted comments, it was ultimately up to the Commission to decide whether to accept those comments and to incorporate the suggested amendments in the draft text. The Commission should naturally bear the concerns of international organizations in mind, even though they mainly reflected unease about situations that could potentially arise and were not actually based on existing practice.

68. Prefacing the draft articles with an introductory commentary or an introduction that formed part of the draft articles was problematic. He had nothing against the inclusion of more detailed commentaries on certain issues, but in a draft international convention it would be unwise to combine a first part expounding philosophical viewpoints with a text consisting of individual articles and, possibly, expanded commentaries thereto.

69. Much depended on whether the Commission thought that the draft articles should be debated solely in the General Assembly or whether comments should be invited from international organizations or specialists, whose views might run counter to those of the Commission. Whatever the answer to that question might be, it would not prevent the draft articles from being applied: the crucial test was whether international judicial bodies took them into consideration, since that would show how pertinent the draft text was. Although some members had held that the inclusion of an introductory commentary would facilitate the finalization and adoption of the draft articles, he believed that the Commission should not spend time exploring a new avenue but should concentrate on producing a final version of the draft text.

70. The approach taken by the Commission to the responsibility of international organizations in the draft articles was reasonable. Although it was plain that the draft articles were closely related to the articles on State responsibility, neither the text of nor the commentaries to the draft articles under consideration automatically replicated the articles on State responsibility for internationally wrongful acts—rather, they were the result of debate and the Special Rapporteur's analysis of that debate. It was nevertheless true that the Commission had benefited from its earlier work, and it had therefore been able to incorporate rules that had already been adopted in the draft articles on State responsibility and had been well received at the international level.

71. As for the recurrent theme of diversity, it was obvious that international organizations varied greatly in size and type; the European Union, for example, was quite different from a small, highly specialized technical organization. He nevertheless agreed with Mr. Nolte that, when it came to the responsibility of States, their size, economic status and geographical location did not matter; they all had to abide by the same legal rules because States, like people, were or should be equal before the law. The question of diversity was an interesting philosophical topic, but it was of no relevance to the codification of the responsibility of international organizations. Once an international organization had legal personality, it had to be responsible for its acts. The extent of that responsibility was determined by *lex specialis*. In that connection, he agreed with the Special Rapporteur that the article which set out that principle was best placed at the end and not at the beginning of the draft text. If the text began by tackling the question of diversity, the conclusion might be drawn that international organizations' disparity made it impossible to adopt draft articles on their responsibility. In order to move forward, the Commission would first have to lay down some commonly agreed rules and then find a means of addressing huge differences in organizations. That subject might well need to be discussed by the Commission meeting in plenary session.

72. He concurred with the Special Rapporteur that issues not covered in the draft articles should form the subject of subsequent study by the Commission. He welcomed the suggestion contained in paragraphs 20 and 24 of the eighth report that draft article 2, subparagraph (c), should include a definition of the term "organ" and that the definition of "agent" should be reworded accordingly. In the context of draft article 16, several comments had been received regarding the possibility of extending an international organization's responsibility if it recommended that a member State or international organization commit an internationally wrongful act. Some organizations had expressed the opinion that this article went too far and would lead to an unacceptable widening of the notion of the responsibility of international organizations that was not supported by practice. Although the Special Rapporteur had proposed the retention of draft article 16, paragraph 2, the Commission should study the matter more carefully, since recommendations could have far-reaching consequences. For example, more thought might be given to the legal force that recommendations could have.

73. Mr. Nolte had referred to international organizations' concerns about having to accept liability. While that question did merit further consideration, the Commission should not dwell on it because the very aim of the draft articles was clearly to limit responsibility along the lines of State responsibility for internationally wrongful acts. It seemed unlikely that a recommendation made in good faith by an international organization in accordance with its rules could be deemed an internationally wrongful act entailing responsibility.

74. Mr. DUGARD said that he would like to hear the Special Rapporteur's views on the advisability of convening a special meeting of legal advisers to international organizations. The Commission should take a decision on the matter immediately, because if such a meeting was to be held, the Commission would have to postpone its consideration of the topic.

75. Mr. GAJA (Special Rapporteur) said that holding a meeting with the legal advisers of international organizations in the very near future would be an unprecedented and problematic move. In fact, few of the comments that had been submitted concerned the substance of the draft articles. Moreover, some of the concerns voiced about their wording could be accommodated to a greater extent than he had suggested in his eighth report.

76. Although the draft articles would be of interest not only to the legal advisers of international organizations but also to the legal advisers of States which had problems with international organizations, it would not be good policy to dismiss their request to be further involved out of hand. Perhaps the text of the commentaries should include a general statement, in particular about diversity and the principle of speciality. There was no reason why the opinion of legal advisers should not be sought on such a text, because it would be only a provisional draft. It would show that the Commission was prepared to build bridges towards the legal advisers of international organizations, some of whom had displayed a fairly radical approach to the draft articles, even implying that the Commission should drop the whole exercise.

77. There were in fact some precedents for a commentary starting with a general introduction. He therefore proposed to draft a text which could be submitted to the Geneva-based legal advisers towards the end of May.

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

[Agenda item 1]

78. Mr. MELESCANU (Chairperson of the Drafting Committee) said that the Drafting Committee on the effects of armed conflicts on treaties would consist of Mr. Candioti, Mr. Fomba, Mr. Galicki, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. McRae, Mr. Murase, Mr. Petrič, Mr. Saboia, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood and Mr. Perera (*ex officio*).

79. The Drafting Committee on responsibility of international organizations would comprise Mr. Candioti, Mr. Fomba, Mr. Huang, Ms. Jacobsson, Mr. Kamto, Mr. McRae, Mr. Murase, Mr. Petrič, Mr. Saboia, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood and Mr. Perera (*ex officio*).

The meeting rose at 12.55 p.m.

3082nd MEETING

Thursday, 28 April 2011, at 10 a.m.

Chairperson: Mr. Maurice KAMTO

Present: Mr. Al-Marri, Mr. Candioti, 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. Wisnumurti, Sir Michael Wood.

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

[Agenda item 14]

1. The CHAIRPERSON said that the Commission was to hold an election to fill a casual vacancy. The election would take place, as was customary, in a private meeting.

The public meeting was suspended at 10.05 a.m. and resumed at 10.15 a.m.

2. The CHAIRPERSON announced that Ms. Escobar Hernández (Spain) had been elected to fill the seat that had become vacant following the death of Ms. Paula Escarameia.

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 members of the Commission to continue their consideration of the eighth report on responsibility of international organizations (A/CN.4/640).

4. Mr. PELLET said, first of all, that he was in an awkward position: he had always criticized members of the Commission who combined the role of independent expert with that of legal adviser to their country's ministry of foreign affairs, or even of minister. It was now he who wore two hats, that of an independent expert and that of a legal adviser to an international organization, the World Tourism Organization. In that capacity, he had attended meetings of legal advisers of international organizations within the United Nations system and had signed a joint submission from 13 international organizations on the draft articles on the responsibility of international organizations (A/CN.4/637 and Add.1). The situation seemed less objectionable, however, since, in many respects, the concerns expressed in that document echoed the comments he had made as a Commission member in the course of the work on the topic.

5. It was a matter of concern that in his extremely interesting and lucid introductory statement, the Special Rapporteur had paid little heed to the critical remarks elicited by the draft articles and had not really taken account of them in the amendments he had proposed. That was particularly regrettable because, although the remarks had been formally submitted by the international organizations only a short time earlier, many of them had been formulated long ago by legal advisers. He therefore agreed with Mr. McRae and Sir Michael Wood that it