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Summary record of the 3082nd meeting

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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 Escarameira.

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

would be very useful to hold another meeting with the legal advisers of specialized agencies. The draft articles would be much more satisfactory and more generally acceptable if the opinions of legal advisers were taken into serious consideration, and it was not too late to do so. As the advisers would be meeting in Basel on 26 and 27 May 2011, they could be invited to make a stopover in Geneva or, if that proved to be too complicated, a special meeting could be convened with the legal advisers of international organizations with headquarters in Geneva and those who were prepared to make the journey. Several advisers had done that when the World Health Organization (WHO) had invited them to the meeting which had culminated in the joint submission just mentioned, which attested to their interest in the matter. The Commission could not complain that insufficient practice was available, yet at the same time refuse to hear what practitioners had to say. At the previous meeting, the Special Rapporteur had rightly emphasized the fact that the draft articles were not a negotiating text, but the purpose of the meeting would not be to negotiate. The aim would be to exchange very specific views in order to arrive at a text that was satisfactory and of practical use. Although he had always harboured serious doubts about the methodology used by the Special Rapporteur, the legal advisers would have to be told in plain terms that there could be no revisiting the issues at that stage of the work.

6. With regard to that methodology, he said he did not entirely endorse the reproaches directed at the Special Rapporteur by some legal advisers and Commission members who assumed that he was aiming to produce a carbon copy of the articles on State responsibility for internationally wrongful acts.²⁸ It was not unreasonable to use those articles, which offered an excellent starting point. While it was true that international organizations were very different entities compared to States, there was just one unequivocal notion of responsibility in international law and in law in general. As for the example cited by Mr. McRae at the previous meeting, the reasons given by Roberto Ago²⁹ in the late 1960s for removing damage from the definition of State responsibility were valid in all particulars for the responsibility of international organizations. It was a known fact that international responsibility was not purely civil or criminal, but combined both aspects. That being so, he agreed with Mr. McRae that the commentary should highlight that positive reasoning rather than repeat the usual argument about the lack of differences. However, while the common feature of the draft articles under consideration and the 2001 articles on State responsibility was that they both dealt with a subject that was central to international law, namely responsibility, the two sets of articles concerned dissimilar holders of responsibility. That was where the question of methodology became one of substance, because the great disparity between States

²⁸ 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.

²⁹ See, *inter alia*, the history of the work of the Commission on the topic of State responsibility in *Yearbook ... 1973*, vol. II, document A/9010/Rev.1, pp. 165–168, paras. 14–30, the general comments on the scope of the draft articles (*ibid.*, pp. 169–170, paras. 37–42) and chapter II of the draft articles (*ibid.*, pp. 170–172, paras. 46–51), as well as paragraph (13) of the commentary to draft article 1 (*ibid.*, p. 176).

and international organizations raised the issue of the principle of speciality, a matter on which, in some respects, he disagreed strongly with the Special Rapporteur.

7. There was no doubt that international organizations formed a special category of entities to which a number of common rules applied, including those on responsibility. One of the main differences between States and international organizations was that, while the former were global institutions possessing the totality of the competences recognized by international law, as the ICJ had clearly explained in its advisory opinion of 11 April 1949 on *Reparation for Injuries*, the competencies of international organizations were limited by the principle of speciality, under which they could exercise only such powers as they needed to perform the mission with which they were entrusted by their constituent instrument. Those powers were thus not inherent to international organizations but were derived and functional, a fact that inevitably had a bearing on responsibility. On that subject, he disagreed with the opinion expressed by Mr. Melescanu at the previous meeting. Unlike the equality before the law of States and human beings, despite their differences, the notion of equality before the law was meaningless when it came to international organizations, and that should be reflected in the draft articles. That was in fact one of the principles which should inform the whole text: it was not sufficient to refer, as was done in paragraphs 3 and 4 of the report, to draft article 63 on *lex specialis*, or to move that provision to the beginning of the draft articles. The principle of speciality and the principle of *lex specialis* were two quite distinct notions. Under the principle of *lex specialis*, it was always possible that rules might derogate from the general rules that normally applied in the absence of special rules. The principle of speciality, on the other hand, implied that this was possible only within the framework set by the constituent instrument of each organization: it was not that something went against a general rule, but that something informed its very content. The principle of speciality should therefore have pride of place in the draft articles, which should expressly state that international organizations incurred international responsibility only when they acted within the framework of the functions conferred upon them by their constituent instrument. A number of practical consequences would have to be drawn from that principle. For one thing, the question of *ultra vires* acts—of great concern to the legal advisers—would have to be re-examined. Although he had initially agreed with the Special Rapporteur that there was no reason to depart from article 7 of the draft articles on State responsibility, which was reproduced *mutatis mutandis* in article 7 of the draft articles on the responsibility of international organizations, he now thought that draft article 31 ought to be revised and that the inclusion in draft article 6 of the criterion of the exercise of the functions of the organization, as proposed by Austria, would be a step in the right direction (A/CN.4/636, observations on draft article 6). Generally speaking, the whole set of draft articles should be thoroughly scoured, in order to make sure that the principle of speciality was taken into account throughout.

8. As for the scope of the draft articles, it was surprising that the Special Rapporteur and a number of speakers had finally come round to the view that it might be wise to address the question of responsibility *towards* international

organizations—a step he himself had advocated for many years to no avail—but that it was too late to think about that now. While States might hold divided opinions on the matter, a fair number of them supported his point of view, as did the legal advisers to international organizations. The response provided in paragraph 11 of the Special Rapporteur's eighth report did not seem satisfactory. The joint comments from international organizations suggested that the Commission's approach was inconsistent, which it was. The Commission had gone along with the Special Rapporteur, who had adopted an overly formalistic approach, claiming that he was just keeping to the title of the topic, "Responsibility of international organizations", and not responsibility *towards* them. On the other hand, the draft articles explicitly and sometimes implicitly tackled issues related to State responsibility *vis-à-vis* international organizations. That was true of draft article 1, paragraph 2, which stated that "[t]he present draft articles also apply to the international responsibility of a State for the internationally wrongful act of an international organization".³⁰ The subject was thus very definitely the responsibility of the State, but that did not at all square with the Special Rapporteur's general excommunication of the small pockets of State responsibility still requiring codification.

9. The same comment could be made with reference to draft article 32, paragraph 2, and to draft articles 38, 49 and 57 to 61: they were about the responsibility of the State and not the responsibility of international organizations. He endorsed those provisions, but did not think one could say that the subject was limited to the responsibility of international organizations: it was responsibility in relation to international organizations, and it included elements of the responsibility of the State that the Commission had not codified. In paragraph 12 of the report, the Special Rapporteur displayed unusual flexibility in proposing that the Commission embark on a study of those issues in order to complete its work on responsibility. He warmly welcomed that proposal and fervently hoped that that positive mindset would be followed by action.

10. Several members of the Commission, including Mr. McRae and Sir Michael, had suggested that a general introduction to the draft articles on the responsibility of international organizations should be orchestrated by the Special Rapporteur. He could agree to that proposal if it received wide support, although he did so without enthusiasm, and with some trepidation. If he understood correctly, the introduction to the commentary to the draft articles was to be modelled on the introduction to the commentary to the draft articles on State responsibility. It would define the scope and limits of the current draft articles and make it clear that the Commission had adopted a set of draft articles resting on very limited practice; that the text had given rise to much criticism; and that it did not measure up by a long shot to the 2001 draft articles on State responsibility. While that was undoubtedly true, it would be a rather masochistic exercise, and the compromise introduction should not salve the Commission's conscience to such an extent that it failed to make what seemed to be the requisite improvements to the draft articles. The Commission's statute required it to make a recommendation

to the General Assembly as to the action to be taken on its draft texts: it was at that point that it would have to arrive at a final decision. Although he would personally find it very difficult to go along with a categorical recommendation at the current stage of the work, that was no reason to oppose progress towards the desired goal. The worst was not always a foregone conclusion, and it was still possible to make considerable improvements to the draft articles. The Commission had the special rapporteur best suited to that task who would, it was to be hoped, bring to bear on it all his talents and energy.

11. He wished to say a few words about the existing draft articles that he saw as the most questionable, although it was the articles yet to come that caused him the greatest concern: some of those which had not yet been introduced would seem to call for the most criticism. First of all, it would be most regrettable if the Special Rapporteur's proposal to delete draft article 16, paragraph 2 (A/CN.4/640, para. 58), a proposal which unfortunately enjoyed the support of some members of the Commission, were to be adopted. It was surprising that, in contrast to his position on a number of other points, the Special Rapporteur should suddenly attach an excessive amount of importance to the criticisms elicited by that provision, although they were neither as numerous nor as radical as he claimed. Draft article 16, paragraph 2, was criticized for being too categorical, but nothing suggested that anyone was asking for its deletion. Even that fairly moderate position rested on a misreading of the provision in question. Contrary to the view which seemed to be held by a number of its detractors, including the ILO and Austria, draft article 16 laid down the principle of the responsibility of an international organization, not solely because the latter issued a recommendation, but because a State followed that recommendation. It was the combination of the two which generated responsibility. Moreover, that was quite logical, for it would be disastrous to contend that recommendations were immaterial and that international organizations could freely make them, with no resulting obligations or consequences: irresponsibility would then become the rule. The idea set forth in draft article 16, paragraph 2, should therefore be retained. He was particularly against its deletion since it was one of the few provisions in the draft articles that were specific to international organizations. An attempt could be made to establish a stronger link between the recommendation and the conduct of the member, as suggested by several States and by the Special Rapporteur in paragraph 57 of his report, but it was unnecessary to go so far as to delete draft article 16, paragraph 2.

12. He was in favour of including a definition of the term "organ" in draft article 2 but had no particular preference for either the wording proposed by the Special Rapporteur or that suggested by Mr. Nolte. On the other hand, he saw no reason whatsoever why draft article 2 (d) (A/CN.4/640, para. 24) should rule out the possibility that an agent might be an organ: the secretary-general of an organization, for example, was both an organ and an agent. The dual reference might be unnecessary from an intellectual standpoint, but it reflected reality and there were no grounds not to retain it. He regretted the fact that in draft article 7, the Special Rapporteur had not heeded the serious concerns expressed by the legal advisers to

³⁰ *Yearbook ... 2009*, vol. II (Part Two), p. 19.

the specialized agencies. He also failed to understand why, at the end of paragraph 49 of his report, the Special Rapporteur said that in view of the conflicting comments on draft article 13, it seemed preferable not to include in the commentary to that provision a discussion of the relevance of intention on the part of the assisting or aiding international organization. On the contrary, those comments must be addressed precisely because they were conflicting, even if that meant leaving the question open, something he was not particularly in favour of doing. Lastly, he had no particular objection to the inclusion of the phrase “subject to articles 13 to 15” at the beginning of draft article 16, as suggested in paragraph 51 of the report.

13. Mr. WISNUMURTI congratulated the Special Rapporteur on his eighth report on responsibility of international organizations, which covered some instances of recent practice and contained a summary of views expressed in the literature. The Special Rapporteur had produced an excellent analysis of the most relevant and important comments and observations from Member States and international organizations on a number of draft articles. Most of the critical comments from international organizations had focused on the lack of practice, the need to take into account the great diversity of international organizations and the recurrent theme of the extent to which the draft articles should differ from the articles on State responsibility. Some of the comments and observations from international organizations also related to the commentaries to some of the draft articles.

14. In the light of the views expressed by some international organizations on the structure of the draft articles, the Special Rapporteur suggested that the Commission should examine the possibility of moving draft article 63 on *lex specialis* to Part One (Introduction) of the draft articles as a new draft article 3. He himself had noted the arguments put forward by the Special Rapporteur in favour of keeping draft article 63 where it was now located, and he fully subscribed to them. There were occasions when it was appropriate to retain some consistency between the current draft articles and those on State responsibility. The draft article on *lex specialis* was placed towards the end of the current text as a kind of “without prejudice” clause.

15. Some international organizations, including the Secretariat of the United Nations, considered that it was necessary to take into account the specificities of the various international organizations. Different types of international organizations did exist, but it would be too risky and impractical to embark on an exercise of clearly distinguishing between those that fell within the scope of the draft articles and those that did not. The definition of “international organization” set forth in draft article 2 was sufficient to designate the type of organizations concerned. As the Special Rapporteur said in paragraph 4 of his report, the draft articles under consideration would apply to an organization only if the required conditions were met.

16. The importance of draft article 1 on the scope of the draft articles must not be underestimated: he, too, thought they should cover State responsibility *towards* international organizations. Regarding paragraph 2 of this draft article, there was merit in the proposal by Ghana, referred to in paragraph 13 of the report, that the draft

articles also apply to the international responsibility of a State for an act by an international organization that was wrongful under international law.

17. In response to suggestions that the definition of “agent” should be accompanied by that of “organ”, the Special Rapporteur proposed such a definition and made the requisite adjustments to subparagraph (c), even though he took the view that the distinction between the two terms was of limited significance. He himself thought that Mr. Nolte’s proposal to draw a stronger distinction between them deserved serious consideration by the Drafting Committee.

18. As far as draft article 9, paragraph 2, was concerned, he supported the opinion of the Secretariat of the United Nations (see paragraph 42 of the report) that “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”.

19. The possible overlapping of draft articles 13 to 15 with draft article 16 was unlikely to give rise to any inconsistencies, since each provision addressed quite different situations or circumstances. If, however, it were deemed necessary to remove any appearance of inconsistency, he would have no objection to the inclusion of the phrase “subject to articles 13 to 15” at the beginning of draft article 16.

20. Draft article 16, paragraph 2, on international responsibility arising out of non-binding acts or recommendations, had raised concern. Some considered it to be an exercise in progressive development and thought that it would extend the notion of responsibility far beyond the scope of previous practice. He endorsed that opinion and would be in favour of the deletion of the paragraph.

21. Mr. FOMBA said that some contentious issues that had arisen during the previous day’s debate seemed to be philosophical in nature and to belong to the sphere of legal policy. Such was the case, for example, with the recurrent themes of what made international organizations different from States and of the lack of practice.

22. As far as the second point was concerned, it was too late to reopen a substantive debate; the aim should be to complete the work as soon as possible by adopting the most practical approach. In his view, there were no real questions of principle to be decided, and the draft articles and proposed amendments should therefore be referred to the Drafting Committee.

23. The proposal regarding Part One made by the Special Rapporteur in paragraph 25 of his report seemed acceptable and might circumvent some potential difficulties with respect to approach.

24. In Part Two, the recommendation concerning draft article 16 seemed to be a step in the right direction. Paragraph 1 of that provision did not raise any particular difficulties and its scope might be clarified by paragraph 2.

25. Mr. SABOIA said he agreed with Mr. Fomba, Mr. Melescanu and Mr. Wisnumurti that any remaining problems could be settled in the Drafting Committee.

26. With regard to the principle of specificity, he concurred with Mr. Wisnumurti that it would be too complicated to divide international organizations into categories and, in any case, when the articles were applied, the diversity of international organizations would be taken into account. He supported the text proposed by Mr. Pellet regarding specificity.

27. The dearth of practice, which was one of the recurrent comments made, might be caused by the scarcity of rules on the subject and perhaps by international organizations' preference for the greatest possible degree of independence. But those organizations tended to overstep their mandate, especially in respect of the use of force or the imposition of adjustment policies.

28. He agreed with Mr. Pellet that the draft articles should also deal with the responsibility of member States of the organizations and that the proposal by Ghana, referred to in paragraph 13 of the report, had merit.

29. Draft article 16, paragraph 2, should be retained, as it was essential for the balance of that provision.

30. Mr. DUGARD said that he agreed with Mr. Pellet about the title of the draft articles: it would indeed be more accurate to speak of responsibility regarding international organizations, of which the responsibility of States was a part.

31. He agreed with Mr. Nolte that draft article 63 should remain where it was. He would not be averse to the insertion in the text of an introductory note on the principle of speciality, as proposed by Mr. Pellet.

32. It was not only inevitable, but also desirable, that the draft articles under consideration closely follow the pattern set by the articles on State responsibility: it would be very unfortunate if they did not.

33. While State practice was not very abundant, the draft articles could not be seen solely as an exercise in progressive development. State practice had clearly informed the practice of international organizations, and it was therefore quite legitimate for the Commission to borrow from the articles on State responsibility. It would be fortunate if the Commission could complete the draft articles on responsibility of international organizations faster than it had produced the articles on State responsibility.

34. He was not sure about the advisability of including a definition of "organ" in draft article 2. If it was decided to do so, a clear distinction would have to be drawn between the notions of "agent" and "organ". The term "organ" applied to a legal person or an entity, whereas "agent" applied more to a natural person. The word "person" should therefore be deleted from the definition of the first term and the word "entity" removed from the definition of the second term. It would be better not to use the expression "charged with", because it suggested that agents of the United Nations were given a specific task to perform, whereas in fact they were given a general mandate.

35. Paragraph 2 (b) should not be deleted from draft article 16. The arguments in support of doing so were not

persuasive. He was in favour of retaining the provision, because some elements of progressive development would inevitably come into the exercise.

36. Mr. VÁZQUEZ-BERMÚDEZ said he was pleased that the Commission was about to adopt the draft articles on responsibility of international organizations on second reading. Given the proliferation of international organizations and their growing influence in the world today, the international legal order must be equipped with a set of systematic rules governing their responsibility for breaches of international obligations.

37. While it was true that international organizations were quite diverse, they were all subjects of international law, and general rules should apply to them. However, it was important to remember that, as the Special Rapporteur had said, in each specific case the various articles would apply only if the necessary conditions were met. That was, of course, without prejudice to the principle of speciality and *lex specialis*, and in particular the rules of the organization, which governed relations between international organizations and their members.

38. As the Special Rapporteur had mentioned in his report, the draft articles on responsibility of international organizations followed the articles on State responsibility closely whenever there was no reason to make a distinction between those two subjects of international law. Obviously, the responsibility of subjects of international law must form a coherent system while being flexible enough to respond appropriately to the elements specific to international organizations.

39. He thought that, for reasons of logic, draft article 63 on *lex specialis* should remain where it was.

40. He had no difficulty with the proposal to organize new consultations with the legal advisers of international organizations, as long as the draft articles could still be adopted on second reading during the current session. The Special Rapporteur's proposal to draft some introductory notes on the main aspects of the draft articles that had piqued the interest of international organizations, with a view to submitting them to the legal advisers for review in the weeks to come, was reasonable and welcome. The Commission could then take into account the legal advisers' views before concluding the second reading.

41. In draft article 1, on the scope of the draft articles, paragraph 2 stated that "[t]he ... draft articles also apply to the international responsibility of a State for the internationally wrongful act of an international organization".³¹ That issue, covered in Part Five of the draft articles, had not been covered in the articles on State responsibility. There were others that had not been explicitly addressed either in the articles on State responsibility or in the draft article under review—for example, the invocation of a State's international responsibility by an international organization. He supported the Special Rapporteur's suggestion that those matters should be studied further so as not to delay the consideration of the draft articles adopted on first reading.

³¹ *Ibid.*, p. 25.

42. The Special Rapporteur's proposal to include a definition of the term "organ" in draft article 2 was pertinent, and it should be examined in the light of Mr. Nolte's suggestion.

43. He was pleased that many of the comments and observations made by States and international organizations were reflected not only in the draft articles but also in the commentaries. He supported the idea of developing the latter, which were too succinct, as it would certainly be useful for all concerned.

44. He was opposed to the removal from draft article 16 of paragraph 2, which he had supported on first reading and which dealt with the international responsibility of an international organization with regard to an internationally wrongful act committed by one of its members because of an authorization or recommendation from the organization. It would not be fair for the member who had committed the internationally illegal act to incur international responsibility when that member had acted with the authorization or recommendation of an organization which would itself escape all responsibility.

45. With the reservations he had just expressed, he endorsed the referral to the Drafting Committee of all the draft articles submitted by the Special Rapporteur.

46. Mr. HUANG said that the Commission should already have definitively adopted the draft articles by now. The topic of the responsibility of international organizations had been placed on the Commission's agenda in 2002, and from 2002 to 2009, the Special Rapporteur had submitted seven reports³² and developed a set of draft articles that had been unanimously approved by the Commission at its sixty-first session in 2009. It was important not to reopen the debate, at least on substantive issues, without good reason.

47. While it was true that the Commission should duly consider the comments and observations submitted by international organizations (21 in all), it was not necessary to organize a meeting of those organizations' legal advisers, as some members had recommended, given that the comments clearly expressed the official positions.

48. He recommended establishing a drafting committee as soon as possible to ensure that the Commission could adopt all the draft articles under review during its current session.

49. The CHAIRPERSON, speaking as a member of the Commission, said that he wished to make four general observations. First, the responsibility of international organizations, like that of any subject of law, stemmed from their legal status. That was really the starting point for the codification or progressive development by the Commission of any specific regime.

50. Indeed, as soon as one acknowledged that international organizations had a legal status and that that status affected not only States members of the organizations, but also third parties, it was clear that an international organization had obligations that it could violate and that it could therefore commit an internationally wrongful act. Consequently, the rules of international responsibility, adjusted as required by the specific nature of international organizations, were applicable to those organizations. Concepts such as "obligation", "lawfulness", "internationally wrongful act", "injury or damage", "reparation" and the like remained constant whether one was dealing with States or international organizations. Any differences had more to do with the way in which they were used. Thus, there was no need for undue concern over the absence of practice with regard to the responsibility of international organizations.

51. Secondly, with regard to the diversity of international organizations, the main points that he wished to make had already been made by Mr. Melescanu at the previous meeting. He himself agreed that there was no reason to draw distinctions among international organizations based on their size or even the nature of their activities. Such distinctions were not even appropriate among States which, despite the fiction of sovereign equality, ranged from major Powers to "micro-States".

52. Furthermore, the fact that the responsibility of an international organization came into play only for an internationally wrongful act that it had committed—and solely for such an act—was generally accepted.

53. Thirdly, it was important not to confuse the principle of speciality and *lex specialis*. The principle of speciality had substantive and functional content. It had to do with the international organization's specific area of activity and the fact that, unlike a State, an organization had, not general powers, but rather derivative legal personality, and could act only in its area of activity. The principle of *lex specialis*, on the other hand, was essentially prescriptive and limited the scope of certain legal rules, a limitation that in general was *ratione loci*. Thus, from the perspective of the principle of speciality, the competence of the WHO was limited to health at a general and global level, whereas the rules of the Central African Economic and Monetary Community, or those governing the relationship between the African, Caribbean and Pacific Group of States and the European Economic Community, constituted *leges speciales* against the background of the rules of the World Trade Organization (WTO). As a consequence of that distinction, an international organization could apply the general rules of international law instead of *lex specialis* in its specific area of activity, defined on the basis of the principle of speciality. It followed that the general rules of responsibility could and should be applied to all international organizations with regard to any internationally wrongful act that they might have committed in the context of their specific activities. The introduction of a draft article on the principle of speciality would be all the more inappropriate given that the responsibility of an international organization must *a fortiori* be firmly established if that organization had acted outside its specific area of activity, defined on the basis of the principle of speciality.

³² *Yearbook ... 2003*, vol. II (Part One), document A/CN.4/532 (first report); *Yearbook ... 2004*, vol. II (Part One), document A/CN.4/541 (second report); *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/553 (third report); *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/564 and Add.1–2 (fourth report); *Yearbook ... 2007*, vol. II (Part One), document A/CN.4/583 (fifth report); *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/597 (sixth report); and *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/610 (seventh report).

54. Fourthly, and paradoxically, practice on the part of international organizations with regard to responsibility was non-existent, meaning that rules governing responsibility were supposed to emerge from the practice of entities that essentially sought to ward off all responsibility. It was more properly for the States that created international organizations to establish such rules. If the draft articles under consideration were approved, whether in the same form as the draft articles on State responsibility for internationally wrongful acts in 2001 or in the form of a convention, it would be for States, and not the international organizations themselves, to take that initiative. Such had been the case with the 1986 Vienna Convention, of which it could not be said that all the provisions were grounded in firmly established practice.

55. He thought that the Commission should not put off finalizing the draft articles for too long. He also wished to make some observations on draft articles 13 and 16, though he had no particular comments on the other draft articles introduced by the Special Rapporteur at the first meeting of the current session: the solutions proposed by the Special Rapporteur in response to the concerns of States and international organizations seemed to him satisfactory.

56. He only wished to mention draft article 13 because of his concern regarding a statement made at the previous meeting. Mr. Nolte had said that the text could apply to an organization such as the United Nations, but that an institution like the World Bank should not be held to constant vigilance over the proper use of the funds it made available to States. It was important to remember that the World Bank, like other institutions in its category, was not a philanthropic institution. It was aptly named: it was a bank, albeit one operating on a global scale. Furthermore, no legal system had ever held a bank responsible for the use of the money it lent to its clients, unless the bank was shown to have knowingly agreed to a loan that was clearly to be used, for example, to facilitate the organization of a crime against humanity.

57. That was the meaning of draft article 13, whose *chap-eau* mentioned an international organization that “aids or assists a State or another international organization in the commission of an internationally wrongful act”. The reference was specifically to aid or assistance in the commission of an internationally wrongful act, not to just any aid or assistance. Draft article 13 was thus very useful and very much in the spirit of the laws governing international responsibility. It deserved to be retained as currently worded.

58. His opinion regarding draft article 16 differed from that of the international organizations that had called for the removal of paragraph 2. He regretted that the Special Rapporteur had given in to their urgings, as it seemed to him that the entire draft article could be salvaged through a few amendments. Removing paragraph 2 would amount to abandoning an important facet of the responsibility of international organizations, which it was all the more essential to address given that international practice of the past 15 years had shown an increasing risk of deviation.

59. He therefore proposed to delete only the references to recommendations in the draft article’s title and in

paragraphs 2 and 3. The title would then read: “Decisions and authorizations addressed to member States and international organizations”. Paragraph 2 (a) and (b) would read:

“An international organization incurs international responsibility if:

“(a) it authorizes a member State or international organization 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;

“(b) that State or international organization commits the act in question because of that authorization.”

Paragraph 3 would end with the words “to which the decision or authorization is directed”.

60. Draft article 16 could then be retained in its entirety.

61. Mr. NOLTE explained, in order to dispel any confusion, that he had not intended to make a distinction between the various international organizations in suggesting that the United Nations should be subject to a stricter regime than the World Bank. In taking up the two examples used in the Special Rapporteur’s report, he had sought to stress the difference between two cases: in the first, the provision of aid or assistance was closely linked to the commission of wrongful acts, for example, during peacekeeping operations, when violations of humanitarian law were known to occur and getting involved entailed complicity in the associated violations; in the second example, however, the World Bank lent money and one of its branches knew that the money was to be used for or would facilitate the commission of wrongful acts, and there, the responsibility of the World Bank would come into play. The two cases were very different, and it was important to take those differences into account, because in the second case, where the causal link was less direct, the more distant the relationship between what might ultimately facilitate a wrongful act and the act itself, the greater the risk of refraining from carrying out useful activities, out of fear that they might give rise to responsibility. It was thus important not to develop rules that might have an inhibiting effect on the useful activities carried out by international organizations, whether the World Bank or the United Nations. That point concerned, not draft article 13, but the commentary thereto, which should clearly cover the two cases. As for the reference to recommendations in paragraph 2 of draft article 16, he recalled that, as the Chairperson had said, the fact that a State recommended that another State do something did not suffice to cast doubt on its responsibility.

62. Mr. GAJA (Special Rapporteur) said that the main issue at the current stage of the debate was what to do with draft articles 1 to 18, namely, whether the Commission should send them to the Drafting Committee or wait for further developments. Unless his role of Special Rapporteur had affected his understanding of the situation, it would seem that many of the Commission’s members were in favour of sending the draft articles to the Drafting

Committee to finalize the text and enable the Commission to complete its consideration thereof on second reading during the current session. Some draft articles required merely editorial amendments; even if he himself did not necessarily support them, the decision was for the Drafting Committee to make. At least 10 speakers—Messrs. Al-Marri, Fomba, Huang, Kamto, Melescanu, Nolte, Petrič, Saboia, Vázquez-Bermúdez and Wisnumurti—had clearly indicated during the debate that work on the draft articles should proceed in the Drafting Committee, and others had privately expressed the same view. Mr. McRae and Sir Michael had requested, not that the draft articles remain unchanged, but that an introductory chapter be added to the commentary to permit a more detailed analysis of what he himself termed “recurrent” themes: he had expressed support for that approach at the previous meeting. That chapter—in which the Commission should not express undue remorse, given what Mr. Pellet had said at the current meeting—should be drafted on the basis of informal consultations. If the text was ready early enough, it should be possible to submit it at least to the United Nations legal advisers, with whom the Commission would shortly meet, so as to see their reactions and decide how to proceed. Before examining in plenary the rest of the commentary, which was to be drafted in May 2011 if the Drafting Committee provisionally adopted the draft articles, it would be useful to establish a working group along the lines of the one on responsibility of States for internationally wrongful acts which Mr. Melescanu had chaired in 2001. All members were invited to put forth their proposals, since the drafting of commentaries was a collective undertaking whereby the Commission could make greater strides than he could on his own.

63. Before turning to the examination of those draft articles which had elicited comments, he wished to quickly outline his vision of the introductory chapter, subject to later contributions and comments. The draft articles on the responsibility of international organizations would be placed in the context of the articles on State responsibility but would be defined as standing alone, based on an analysis of existing practice and on the consideration of issues that specifically concerned international organizations. It would be emphasized that they were far from being, as rumour had it, a “carbon copy” of earlier articles, even if the same solutions had been retained for some issues. Where the two texts were identical, footnote 66 to the report of the Commission on the work of its sixty-first session was relevant (“[t]o the extent that provisions of the present articles correspond to those of the articles on the responsibility of States, reference may also be made, where appropriate, to the commentaries on those earlier articles”³³). That principle could be set out in the introductory chapter, followed by a discussion of the diversity of international organizations and mention of the fact that this diversity could lead to the formulation of special rules. Most of those special rules appeared in the rules governing the organization in question and thus applied only to relations between the organization and its members. Even then, one could not assume that the organization’s rules could be applied so comprehensively that all the general rules changed and a wrongful act did not entail responsibility. Furthermore, those rules, which were quite singular, could not be taken into consideration

in the current study. That was why, in the commentary to draft article 63, he had used the example of the attribution to the European Community of behaviour adopted by its States members when they implemented a binding decision of the Community—an example that was perhaps not very relevant since, in the negotiations on the adoption by the European Union of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), the European Commission seemed to have taken the opposite view. He would give another example, although it would be difficult to find one, when he introduced the second part of his report. Regarding the principle of speciality, which would also be mentioned in the introductory chapter, it seemed that the text mentioned by Mr. Pellet did indeed express the idea that an international organization’s constituent instrument established the limits of its responsibility, yet he did not see how an international organization could assert to a non-member that its responsibility was not engaged because the wrongful act that it had committed was not connected to its functions. That point, to which he would return in his discussion of draft article 31, could also be clearly presented in the introductory chapter.

64. The last part of the introductory chapter would deal with the dearth of practice. The rumours that some States and international organizations had supplied new examples of practice were greatly exaggerated: he had found the passage quoted in paragraph 47 of his eighth report, not in the comments of the Secretariat of the United Nations, but on the website of *The New York Times*. The dearth of practice inevitably weakened the draft articles, which would be more authoritative if they were more firmly grounded in practice. Perhaps in the longer term the text would become more authoritative; for the moment some draft articles were simply based on the principle that there was no reason to draw a distinction, “positive” or otherwise (to borrow Mr. Pellet’s term), between an international organization and a State. It would also be necessary to indicate that some other draft articles—like some of those on State responsibility—represented progressive development of the law, and, if necessary, to specify which ones: in his view, draft articles 16 and 60 were good examples. During the discussion, the comments made by States and international organizations about certain draft articles had been characterized as hostile. In reality, as Mr. Vázquez-Bermúdez had pointed out, most of the provisions had been endorsed or had not been mentioned at all: most of the comments concerned the commentaries to the draft articles. Some concerned the texts of the draft articles themselves, but those would in any case be re-examined in their entirety by the Drafting Committee.

65. Regarding draft article 1, several speakers—Mr. McRae, Mr. Nolte, Mr. Petrič and Sir Michael—had supported the proposal to leave for later examination the problem of the responsibility of a State being invoked by an international organization. It had arisen relatively late in his work, and the States and international organizations consulted had provided differing answers, though those of the latter had tended to be favourable. In his view, the issue—Mr. Pellet’s pet subject—should be the focus of another study, which could also cover the even thornier cases in which a State or an international organization bore responsibility towards an individual or an entity

³³ *Yearbook ... 2009*, vol. II (Part Two), p. 30.

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

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

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

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

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

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

It was so decided.

The meeting rose at 1 p.m.

3083rd MEETING

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

Chairperson: Mr. Maurice KAMTO

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