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Summary record of the 1698th meeting

Topic:
Other topics

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INTERNATIONAL LAW COMMISSION

SUMMARY RECORDS OF THE THIRTY-FOURTH SESSION

Held at Geneva from 3 May to 23 July 1982

1698th MEETING

Monday, 3 May 1982, at 3.15 p.m.

Outgoing Chairman: Mr. Doudou THIAM

Chairman: Mr. Paul REUTER

Opening of the session

1. The OUTGOING CHAIRMAN declared open the thirty-fourth session of the International Law Commission.

Statement by the outgoing Chairman

2. The OUTGOING CHAIRMAN welcomed old and new members of the Commission and said that the increase in the membership further to the decision by the General Assembly¹ attested to the international community's growing interest in the Commission. That interest was also apparent in the discussions in the Sixth Committee, in the course of which the Commission's work had been the subject of careful scrutiny. In its resolution 36/114 of 10 December 1981, the General Assembly displayed its concern that there should be an improvement in the Commission's methods of work. At the thirty-sixth session of the General Assembly, in the Sixth Committee, he had underlined the special character of the Commission and, consequently, the special features of its methods of work.² The Commission should none the less seek out new methods whenever the effectiveness of its work so required.

3. In resolution 36/114, the General Assembly accorded priority to the second reading of the draft articles on treaties concluded between States and international organizations or between international organizations and to the preparation of part 2 of the draft articles on responsibility of States for internationally wrongful acts, without prejudice to the work on the other subjects currently under consideration. The Assembly also stressed that it would be desirable for the Commission to appoint, at the commencement of its present session, a new special rapporteur on the topic of the law of the non-navigational uses of international watercourses. He hoped that, during their five-year term of office, the

members of the Commission would accomplish fruitful work.

4. Over the past year, the Commission had been represented at sessions of the European Committee on Legal Co-operation and the Inter-American Juridical Committee, two bodies which hoped to enter into closer co-operation with the Commission. In addition, the European Committee on Legal Co-operation would like the representatives of the various bodies that co-operated with the Commission to meet in Geneva, with a view to establishing multilateral contacts.

5. Lastly, on behalf of the Commission, he conveyed all good wishes to Mr. Bedjaoui, a former member of the Commission who had now been elected a Judge of the International Court of Justice.

Tribute to the memory of Sir Humphrey Waldock, Mr. Abdullah El-Erian, Mr. Mustapha Kamil Yasseen and Mr. Shushi Hsu

6. The OUTGOING CHAIRMAN paid tribute to the memory of four former members of the Commission who had recently died: Sir Humphrey Waldock, Mr. El-Erian, Mr. Yasseen and Mr. Hsu.

At the invitation of the outgoing Chairman, the members of the Commission observed a minute of silence in tribute to their memory.

Statement by the Under-Secretary-General for Legal Affairs, the Legal Counsel

7. Mr. SUY (Under-Secretary-General for Legal Affairs, the Legal Counsel) said that, by increasing the number of the Commission's members to 34 in accordance with an agreed set pattern of regional distribution of seats, the General Assembly had sought to achieve more faithful compliance, in the light of present-day conditions, with article 8 of the Commission's Statute. Thus, it had once again assured representation in the Commission of the main forms of civilization, which were now defined not only on political and cultural grounds but also in economic and social terms and in terms of the principal legal systems of the world. All of the outgoing members who had stood for election had indeed been re-elected, but the Commission now consisted in the main of members who had been elected for the first time. On behalf of the Secretary-General, he welcomed them and wished them every success in the performance of their important duties.

¹ General Assembly resolution 36/39 of 18 November 1981.

² *Official Records of the General Assembly, Thirty-sixth Session, Sixth Committee, 50th meeting, paras. 50-55.*

8. The recent election of M. Bedjaoui, a former member of the Commission, to the International Court of Justice was extremely gratifying. As a result of that election, the majority of the Court still consisted of former members of the Commission, something which was renewed proof of the great value which the representatives of sovereign States attached to the fact of membership in the Commission.

9. He shared in the sorrow felt by the international legal community at the recent loss of several former members of the Commission. Their valuable contributions to the noble goals of legal science already occupied their rightful place in contemporary public international law.

10. The Commission was meeting for the first time in its expanded form, and it might therefore be appropriate to recall that in 1975 the Commission had considered a set of proposals for completing, by the end of the Commission's five-year term of office in 1981, the first or second readings of draft articles on the topics then included in its programme of work.³ Those objectives, reaffirmed in 1977 at the start of the last five-year term of office of the Commission,⁴ had been largely achieved. In 1980, at its thirty-second session, the Commission had completed the first reading of the draft articles on treaties concluded between States and international organizations or between international organizations and also the articles constituting Part 1 of the draft on State responsibility. Furthermore, at its thirtieth session, in 1978, and its thirty-third session, in 1981, the Commission had concluded the second reading of the draft articles on the most-favoured-nation clause and the draft articles on succession of States in respect of State property, archives and debts. Those two drafts were now before the General Assembly and, at its thirty-sixth session, the Assembly had decided to convene early in 1983 a conference of plenipotentiaries to consider the draft on succession of States with a view to concluding a convention that would develop and codify the law on those aspects of the subject covered by the draft.⁵ The adoption of such a convention would undoubtedly constitute a notable addition to the already long list of legal instruments based on the work done by the Commission.

11. As the Commission itself had acknowledged at its thirty-third session:

The establishment, in conformity with relevant General Assembly resolutions, of general objectives and priorities guiding the programme of work to be undertaken by the Commission during a term of its membership, or for a longer period if appropriate, appears to be an efficient and practical method for the planning and timely carrying out of the work programme of the Commission.⁶

Thus, the Commission had then anticipated establishing such general objectives and priorities at its thirty-fourth session, so as to guide its study of the topics on its cur-

rent programme of work for forthcoming sessions in the light of the relevant General Assembly recommendations.⁷ The conclusion reached by the Commission in that regard had been specifically endorsed by the General Assembly in paragraph 4 of resolution 36/114 of 10 December 1981.

12. At its thirty-third session, the Commission, emphasizing its essential character as a permanent body and without wishing to prejudice the freedom of action of its membership as newly constituted in 1982, had reached some conclusions regarding the work to be carried out at the thirty-fourth session with a view to ensuring the continuity of the work on the topics on its current programme of work. In so doing, the Commission had once again reaffirmed its decision that a special rapporteur re-elected by the General Assembly as a member of the Commission should continue his work on his topic unless and until the Commission, as newly constituted, decided otherwise.⁸

13. At the close of the Commission's thirty-third session, the current programme of work had consisted of the following seven topics: (1) Question of treaties concluded between States and international organizations or between two or more international organizations; (2) State responsibility; (3) International liability for injurious consequences arising out of acts not prohibited by international law; (4) Jurisdictional immunities of States and their property; (5) Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier; (6) Relations between States and international organizations (second part of the topic); and (7) The law of the non-navigational uses of international watercourses. Except in the case of the special rapporteur for the last-mentioned topic, the members of the Commission who had previously been chosen as special rapporteurs for the other topics had all been re-elected by the General Assembly. They had thus been in a position to continue their work on their respective topics, and their new reports had already been or would be submitted to the Commission at the present session.

14. As far as the law of the non-navigational uses of international watercourses was concerned, due to the resignation of the Special Rapporteur, Mr. Schwebel, because of his election to the International Court of Justice, the Commission had not taken up the topic at its thirty-third session, but had stated that it intended to appoint a new special rapporteur. The General Assembly had noted that intention in resolution 36/114 and had stressed that it was desirable for the Commission to appoint a new special rapporteur at the commencement of the present session, thereby ensuring the continuity of the work on the topic. Despite the lack of a special rapporteur, the Commission had before it a third report on the topic submitted by the former Special Rapporteur (A/CN.4/348), who had begun the preparation of that report before he had resigned from the Commission.

³ *Yearbook ... 1975*, vol. II, p. 184, document A/10010/Rev. 1, chap. VI, sect. B, paras. 139-147.

⁴ *Yearbook ... 1977*, vol. II (Part Two), pp. 127-129, paras. 98-106.

⁵ General Assembly resolution 36/113 of 10 December 1981.

⁶ *Yearbook ... 1981*, vol. II (Part Two), p. 164, para. 258.

⁷ *Ibid.*, p. 163, para. 254.

⁸ *Ibid.*, para. 253.

15. In considering in 1981 the question of the programme of work for the present session, the Commission had also taken into account the general objectives and priorities which, with the approval of the General Assembly, it had established at previous sessions and the recommendations contained in General Assembly resolution 35/163, of 15 December 1980, as well as the progress achieved so far in the study of the topics considered at the thirty-third session. It had reached conclusions regarding its work on each of the seven topics constituting its current programme of work. The Commission had nevertheless indicated that, in the time available, it might not be able to take up all of those topics at the present session and had also expressed the belief that it could do better work and, in the long run, achieve greater results by concentrating its attention on a smaller number of topics at any one session.⁹

16. The Commission's conclusions had been generally supported in the Sixth Committee at the thirty-sixth session of the General Assembly and endorsed by the Assembly in resolution 36/114. Thus, the General Assembly had recommended that, as the first priority for the thirty-fourth session, the Commission should complete the second reading of the draft articles on treaties concluded between States and international organizations or between international organizations. As members were aware, the Commission had already adopted on second reading articles 1 to 26 of that draft. In resolution 36/114, the Assembly, taking into account the progress of work on other topics, had also differentiated between its recommendations concerning the second part of the topic of relations between States and international organizations, on the one hand, and the remaining five topics on its programme of work, on the other. It had indicated that the Commission should continue its study of that second part of the aforementioned topic, and should continue its work on the preparation of draft articles on the other five topics. In that connection, it should be borne in mind that the General Assembly had recommended that the Commission should continue with the preparation of draft articles on part 2 of the draft on responsibility of States for internationally wrongful acts and bear in mind the need for the second reading of the draft articles constituting part 1; the first reading of part 1 had been completed at the thirty-second session, in 1980. The Commission now had before it the comments and observations on the five chapters comprising part 1 that Governments had been invited to submit by 1 March 1982 (A/CN.4/351 and Add.1-3).

17. By its resolution 36/106 of 10 December 1981, the General Assembly had also invited the Commission "to resume its work with a view to elaborating the draft Code of Offences against the Peace and Security of Mankind and to examine it with the required priority in order to review it, taking duly into account the results achieved by the process of the progressive development of international law." The Assembly had further re-

quested the Commission to consider at its present session the question of the draft Code in the context of its five-year programme and to report to the General Assembly at its thirty-seventh session on the degree of priority it deemed advisable to accord to the draft Code, and the possibility of presenting to the Assembly at its thirty-eighth session a preliminary report on, *inter alia*, the scope and the structure of the draft Code. In adopting those decisions, the General Assembly had indicated that, because the Commission had just accomplished an important part of its work on succession of States, its programme of work was now lighter; it had also taken into consideration the Commission's increase in size and the new five-year mandate of its membership.

18. In dwelling at some length on the current situation, and endeavouring to portray it as clearly as possible, he had sought to facilitate the Commission's consideration of its programme and its methods of work from the standpoint of both the session that was now beginning and the new five-year term of office, which was to end on 31 December 1986. Members would have noted that, in carefully working its recommendations on the Commission's current programme of work in resolution 36/114, subparagraph 3 (b), and resolution 36/106, the General Assembly had allowed for the necessary flexibility and had encouraged the Commission to arrange its future work, thereby giving effect to the conclusions of an organizational character arrived at by the Commission itself and echoed in the discussions in the Sixth Committee. The Commission should thus be in a position to proceed effectively by establishing a specific and viable programme for the five-year term of office of its present members.

19. In determining its general objectives and priorities concerning the current programme of work, the Commission might find it opportune to consider a review of its long-term programme. As members were well aware, at its first session, in 1949, the Commission had examined, pursuant to the relevant provisions of its Statute, 25 matters for possible inclusion in a list of topics for study and had drawn up a provisional list of 14 topics selected for codification. Those topics, together with additional topics or items referred to the Commission by the General Assembly, had constituted the Commission's long-term programme of work. However, the inclusion of a particular topic or item in that programme did not necessarily mean that it was immediately considered by the Commission. It was the General Assembly and the Commission that decided whether or not active work on the topic or item in question should be undertaken at a given time. The topics or items on the long-term programme that were selected for active consideration constituted, while under study, the "current programme of work".

20. The Commission had from time to time reviewed its long-term programme of work with a view to bringing its current programme up to date in the light of recommendations by the General Assembly and the present needs of the international community and dis-

⁹ *Ibid.*, paras. 253-257.

carding the topics that were no longer suitable for treatment. In recent years, it had done so on the recommendation of the Enlarged Bureau of the Commission and of the Planning Group. Thus, two of the topics now under active consideration had been included in the Commission's current programme in 1977 by a decision of the Commission which had been endorsed by the General Assembly in resolution 32/151 of 19 December 1977. The Commission had concluded that it was advisable to place in its current programme the topic found in the 1949 list entitled "Jurisdictional immunities of States and their property", and also the topic entitled "International liability for injurious consequences arising out of acts not prohibited by international law", which had been added in 1974 to the Commission's long-term programme pursuant to General Assembly resolution 3071 (XXVIII) of 30 November 1973. The Commission had also agreed that two other topics on its long-term programme, namely, the "Right of asylum", which had appeared in the 1949 list, and the "Juridical regime of historic waters, including historic bays", which had been added later, would not require active consideration by the Commission in the near future.¹⁰

21. Bearing in mind that, at its thirty-third session, the Commission had completed its work on succession of States in respect of State property, archives and debts and that, at the thirty-fourth session, it was expected to complete its draft on treaties concluded between States and international organizations or between international organizations, the Commission might wish to activate one or more of the topics remaining in its long-term programme. However, the Commission was not necessarily limited by the programme in its present form. It might take the view that, as most of the topics included in the programme had been or were in the process of being studied, it was now time to consider, for possible recommendation to the General Assembly, what new items might be added for future study. In carrying out such an assessment, the Commission should bear in mind the fact that it had nearly completed its long-term programme, at a time when it was starting its new term of office with an expanded membership and when far-reaching events were having an impact on the development of international law. The near-completion of the decolonization process, the institutionalization of the international community through a growing number of international organizations, the awareness of the need to establish a new international economic order, the new dimensions in the position of the individual in the international legal system and the rapid advances of science and technology in such areas as energy, outer space and the sea-bed were some of the factors in an ever-expanding international law-making effort.

22. Activities previously regarded as falling squarely within the sovereign discretion of States were now being brought within the ambit of international law. Moreover, the present needs of the international com-

munity and their novelty and magnitude were such that States were now readier than before to seek legal settlement of problems and more inclined towards the progressive development of international law as a concerted and continuous diplomatic activity being undertaken in a growing number of specialized bodies. As the General Assembly had reaffirmed as far back as its resolution 1505 (XV) of 12 December 1960:

the conditions prevailing in the world today give increased importance to the role of international law—and its strict and undeviating observance by all Governments—in strengthening international peace, developing friendly and co-operative relations among the nations, settling disputes by peaceful means and advancing economic and social progress throughout the world.

23. In resolution 36/114, the General Assembly had emphasized the need for the progressive development of international law and its codification,

in order to make it a more effective means of implementing the purposes and principles set forth in the Charter of the United Nations and in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations and to give increased importance to its role in relations among States.

The International Law Commission was the principal subsidiary organ established by the General Assembly to discharge its Charter mandate, in Article 13, paragraph 1, "encouraging the progressive development of international law and its codification". Throughout the thirty-four years of its existence, the Commission had amply demonstrated that it played the central role in the development and codification of international law under the auspices of the United Nations. Within the comprehensive framework of its Statute, the Commission could not but continue to play the pivotal role accorded to it by Article 13 of the Charter. As part of that role, the Commission should serve as the focal point for the co-ordination of all United Nations activities of an international law-making character. The Commission's present composition was the best guarantee that that would prove to be the case.

24. The Office of Legal Affairs, and particularly the Codification Division, which acted as the secretariat of the Commission, stood ready to continue to render the Commission all the substantive assistance it required. He was certain that he also spoke for the Geneva Office of the United Nations, which had always been effective in providing the Commission with all the necessary conference facilities and services to facilitate its task.

25. Before he had left New York, he had held several meetings with some members of the Commission who had been prevented by circumstances from attending the present meeting. Thus, Mr. Lacleta Muñoz, Mr. Koroma, Mr. Jagota and Mr. Illueca had requested him to ask the Chairman to excuse their absence and had assured him that they would try to be present as soon as the international situation and their duties permitted.

26. He wished the Commission every success in its endeavours.

¹⁰ *Yearbook ... 1977*, vol. II (Part Two), pp. 129-130, paras. 108-110.

Election of officers

Mr. Reuter was elected Chairman by acclamation.

Mr. Reuter took the Chair.

27. The CHAIRMAN thanked the members of the Commission for electing him Chairman. After paying tribute to his predecessor, he extended a welcome to the new members of the Commission. As now constituted, the Commission was more representative of the international community and, with all the means that were available to it, it should be in a position to fulfil the many tasks that lay ahead.

Mr. Díaz González was elected first Vice-Chairman by acclamation.

Mr. Flitan was elected second Vice-Chairman by acclamation.

Mr. Sucharitkul was elected Chairman of the Drafting Committee by acclamation.

Mr. Njenga was elected Rapporteur by acclamation.

Adoption of the agenda (A/CN.4/349/Rev.1)

28. Mr. NI said that, as a new member of the Commission, he would like to ask two questions concerning agenda item 10, on the "Programme and methods of work", two terms that, in his view, were highly specific. However, General Assembly resolution 36/114, referred to by the Legal Counsel, endorsed the establishment of "general objectives and priorities" which would guide the Commission's study of the topics on its programme of work. Those were, in fact, guidelines, a much broader concept. He would also like to know whether the thirteen items on the provisional agenda had to be considered in their numerical order. If that was so, he believed that item 10 should be brought forward.

29. The CHAIRMAN said, in reply, that the adoption of the agenda did not prejudice the order in which the items were to be considered. With regard to the Commission's programme and methods of work, it was precisely the task of the Planning Group, under the chairmanship of the first Vice-Chairman, to prepare for a very general exchange of views on that extremely important point, which would certainly not be defined until the end of the session. The members of the Commission would thus be required to take a decision on the matter, without any restriction on their right to make proposals or to participate in the discussion. But they must also take certain decisions, forthwith, regarding their immediate work.

The provisional agenda (A/CN.4/349/Rev.1) was adopted.

Organization of work

The Commission decided to start its work with item 2 of the agenda (Question of treaties concluded between States and international organizations or between two or more international organizations)

30. Mr. ROMANOV (Secretary to the Commission) said that, in accordance with established practice,

the Secretariat had prepared two conference room documents concerning item 2 of the agenda. The first (ILC(XXXIV)/Conf. Room Doc. 1) set out articles 1 to 26 of the draft articles on treaties concluded between States and international organizations or between international organizations, as adopted on second reading at the Commission's thirty-third session. The second (ILC(XXXIV)/Conf. Room Doc. 2) contained the text of article 2, subpara. 1 (h), and articles 27-80 of the draft, adopted on first reading. Those documents would be circulated at the following meeting.

The meeting rose at 5.35 p.m.

1699th MEETING

Tuesday, 4 May 1982, at 11 a.m.

Chairman: Mr. Paul REUTER

Organization of work (continued)

1. The CHAIRMAN, reporting briefly on the outcome of the Enlarged Bureau's discussion regarding the Commission's work for the immediate future, said the Bureau took the view that the Commission should allot two weeks to consideration of agenda item 2 (Question of treaties concluded between States and international organizations or between two or more international organizations), beginning at the present meeting. It should then proceed to consider agenda item 6 (Jurisdictional immunities of States and their property) for a further two weeks, and afterwards revert to agenda item 2 with a view to completing it in the first week of June.

2. If there were no objections, he would take it that the Commission agreed to that proposal.

It was so decided.

APPOINTMENT OF SPECIAL RAPPORTEURS

3. Mr. CALERO RODRIGUES said that at its previous session the Commission, despite strong criticism, had decided to postpone the appointment of a new special rapporteur on the topic of the law of the non-navigational uses of international water courses. It had had good reasons for that decision. However, in resolution 36/114 the General Assembly had stressed the desirability of the Commission's appointing a special rapporteur at the commencement of the thirty-fourth session. He feared that if that was not done, the Commission could expect further criticism in the General Assembly. Again, prompt appointment of a special rapporteur would allow him time to become familiar with Mr. Schwebel's report (A/CN.4/348).

4. The CHAIRMAN said the Enlarged Bureau's view was that the Commission should not delay in appointing