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Summary record of the 1250th meeting

Topic:
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INTERNATIONAL LAW COMMISSION

SUMMARY RECORDS OF THE TWENTY-SIXTH SESSION

Held at Geneva from 6 May to 26 July 1974

1250th MEETING

Monday, 6 May 1974, at 3.20 p.m.

Chairman: Mr. Jorge CASTAÑEDA

Later: Mr. Endre USTOR

Present: Mr. Ago, Mr. Calle y Calle, Mr. El-Erian, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Yasseen.

Opening of the Session

1. The CHAIRMAN, after declaring open the twenty-sixth session of the International Law Commission, expressed his deep sorrow at having to begin the proceedings in the absence of their highly esteemed and respected colleague, Mr. Milan Bartoš, the sad news of whose death, which had occurred in his native Yugoslavia on 11 March 1974, had been received by all the members through the Secretary-General of the United Nations.

2. Mr. Bartoš had completely identified himself with the International Law Commission. He had shared with two other members, Mr. Ago and Mr. El-Erian, the distinction of seniority of membership, having served on the Commission since 1957. His connexion with the Commission, however, went back even further, for he had been a member of the Committee on the Progressive Development of International Law and its Codification—the “Committee of Seventeen”—which had been set up by the General Assembly in 1947 and had initiated the establishment of the International Law Commission as a permanent subsidiary body of the General Assembly.

3. During his sixteen years on the Commission, Mr. Bartoš had rendered outstanding services, not only as an assiduous member, but also as Rapporteur and Vice-Chairman, and as Chairman of the seventeenth session. In addition, he had made an outstanding contribution to the work of the Commission as Special Rapporteur on the topic of special missions, an office to which he had been appointed in 1963. On the basis of four

reports submitted by Mr. Bartoš between 1963 and 1967, the Commission, at its nineteenth session, had submitted to the General Assembly a final draft on special missions consisting of 50 articles, and had recommended to the General Assembly “that appropriate measures be taken for the conclusion of a convention on special missions”.¹ At the twenty-third and twenty-fourth sessions of the General Assembly, held in 1968 and 1969, the Sixth Committee, with the participation of Mr. Bartoš as Expert Consultant, had examined the item “Draft Convention on Special Missions” on the basis of the draft prepared by the Commission. On the recommendation of the Sixth Committee, the General Assembly, by its resolution 2530 (XXIV) of 8 December 1969, had adopted the Convention on Special Missions—one of the concrete results of the work of the codification which would always be associated with the memory of their illustrious and lamented colleague.

4. But the contribution made by Mr. Bartoš to the task of codification and progressive development of international law certainly could not be measured solely in terms of his work on special missions, for he had always participated actively and constructively in the discussion of all the great topics with which the International Law Commission had dealt. His statements, as reflected in the records of the commission, would be consulted in the future as eloquent examples of the product of a powerful intellect and an open mind, which combined learning virtually without parallel on both the practice and the theory of international law with a keen awareness of the changing needs of the modern world, in particular those needs which had resulted from decolonization and underdevelopment.

5. From consultations with members, he had gathered that there was a unanimous wish to hold a special meeting of the Commission to pay tributes to the memory of Mr. Bartoš. Meanwhile, the new Chairman, as soon as he was elected, would no doubt send telegrams of condolence on the Commission’s behalf to Mr. Bartoš’s widow and to the Yugoslav Government.

6. He warmly welcomed Mr. Suy, the newly appointed Legal Counsel of the United Nations, who was attend-

¹ See *Yearbook ... 1967*, vol. II, p. 347, para. 33.

ing the Commission for the first time as representative of the Secretary-General, and invited him to address the Commission.

7. Mr. SUY (Representative of the Secretary-General) said that the grievous news of the recent death of Mr. Bartoš had saddened the whole of the United Nations. All international lawyers knew what an eminent position Mr. Bartoš had held in modern legal science. He had owed that position to his teaching, to a considerable volume of writing and to his fruitful activity in numerous learned societies and in the International Law Commission. An ambassador as well as a teacher, he had played a leading part in contemporary diplomacy. As representative of Yugoslavia to major conferences of plenipotentiaries and to several United Nations bodies, he had strongly impressed his personality on post-war international relations. As a delegate to the "Committee of Seventeen", set up by the General Assembly to study methods of promoting the progressive development of international law and its codification, he had been one of the founders of the International Law Commission, of which he had subsequently become a member, Special Rapporteur, General Rapporteur, Vice-Chairman and Chairman.

8. Everywhere and at all times Mr. Bartoš had shown himself to be a fearless champion of the cause of law, peace and understanding among peoples. His colleagues had esteemed him for his great intellect, his eloquence, his legal erudition and his exceptional culture, which had made him a truly complete man of the twentieth century.

9. His intellectual qualities had been matched by a keen sense of what was human and by great kindness. To members of the Secretariat, he had always shown great generosity and courtesy. All United Nations officials who had had the honour of knowing him—those of the Legal Office and of the Conference Services—cherished an undying memory of Milan Bartoš.

10. He conveyed to the Commission the heartfelt condolences of the Secretary-General and of the entire United Nations Secretariat.

11. The CHAIRMAN read out the text of a telegram of condolence sent to the Commission by Mr. Thiam, who was unable to attend the meeting.

On the proposal of the Chairman, the members of the Commission observed a minute's silence in tribute to the memory of Mr. Milan Bartoš.

Statement by the outgoing Chairman

12. The CHAIRMAN, reporting on the discussion of the Commission's report at the twenty-eighth session of the General Assembly, said that the text of his own statement to the Sixth Committee had already been circulated to members of the Commission, so he would confine his remarks to the main conclusions reached. At the beginning of the Committee's discussion there had been some legitimate complaints about the delay in distributing the Commission's report, which had reached delegations only a few days previously. A senior official of the United Nations had given what had

seemed to be a satisfactory explanation, and had said that a special effort would be made to ensure that in future the Commission's report would be distributed in good time—say, a month before the debate in the Sixth Committee. A suggestion that the report might be taken up later in the session had been opposed by most speakers, who believed that its early consideration provided useful material and ideas for subsequent debates. The report would therefore continue to be the first item on the Sixth Committee's agenda.

13. Many comments had been made on the Commission's future work. There was considerable support for the view expressed in the report that the Commission was the best forum for the codification of international law, because the interplay between the expertise of its members and the reactions and views of governments produced results of great practical value. Asked whether the Commission's work took sufficient account of current trends in world affairs, he had replied that the Commission was aware of those trends and had not been insensitive to the feelings of developing countries. He had cited as examples the excellent reports prepared by Sir Humphrey Waldock on succession of States in respect of treaties. The drafts prepared by the Commission had been very favourably received in developing countries.

14. Many speakers had emphasized the provisional nature of the six articles on State responsibility submitted in the report, and some had felt unable to express any views on the substance of the articles without more background information on the Commission's deliberations and the comments made by its members. He hoped that Mr. Ago would bear that in mind in his future work on the topic. There had been some discussion about whether objective liability should be included in the topic of State responsibility or treated as a separate subject.

15. Mr. Bedjaoui and Mr. Ustor had been praised for their reports and encouraged to continue their work. In commenting on Mr. Ustor's report many speakers, especially speakers from developing countries, had emphasized that the interests of those countries should be borne in mind in studies on the most-favoured-nation clause, particularly in the context of chapter IV of the General Agreement on Tariffs and Trade (GATT).²

16. Many delegations had expressed the view that the law of non-navigational uses of international water-courses could now be codified by the Commission, which had accordingly been invited by the General Assembly to begin that work. However, as Mr. Sette Câmara had pointed out, the Commission would have to await completion of the Secretary-General's report on the subject.

17. References had been made to the long period which often elapsed between the completion of codification and the signature and ratification of the resultant instruments. The reasons given by States for that delay were not always valid. He had reported Mr. Ago's com-

² United Nations, *Treaty Series*, vol. 55, p. 194.

ments on the subject³ and there had been some discussion, but no conclusions had been reached.

18. He had attended a special plenary meeting held by the General Assembly to commemorate the Commission's twenty-fifth anniversary. Eloquent statements had been made about the Commission's work by Mr. Lachs, a former member, and Mr. Benites of Ecuador. The Secretary-General had discussed the Commission's report and the representatives of the various geographical groups had paid tributes. On behalf of the Commission, he had thanked the General Assembly for holding the commemorative meeting.⁴

19. The General Assembly had endorsed the suggestion made by the Advisory Committee on Administrative and Budgetary Questions that the Commission might shorten its sessions by holding more frequent meetings—say, seven a week. He had explained that, although the Commission generally held five formal meetings a week, groups of members, special rapporteurs and the officers of the Commission also met two or three times a week. However, the number of formal meetings held was not important, since the codification of international law was meticulous work requiring concentration, research and reflection, which could not be speeded up by increasing the number of meetings. A fuller programme of meetings would in fact reduce the time available for such work. He had made that clear to the General Assembly, pointing out that the Commission could not be assimilated to the many other specialized bodies in the United Nations and treated on the same financial basis. Its members had very high intellectual and professional qualifications and their attendance at the Commission's sessions involved considerable personal sacrifice, since the remuneration was inadequate for even a modest standard of living and they had to drop their own work to serve the Commission. The remuneration received by special rapporteurs was often insufficient to cover the material cost of preparing their reports, and he had therefore asked the General Assembly to consider the possibility of improving the conditions under which the Commission's members were required to work. He invited the Commission to discuss the subject and prepare recommendations for submission to the General Assembly. The Fifth Committee of the General Assembly had agreed to extend the Commission's present session to twelve weeks, but not to fourteen weeks.

20. On behalf of the Commission, he had attended a session of the Asian-African Legal Consultative Committee at Tokyo, where the main topic had been the law of the sea. It had not been possible for the Commission to be represented at the last session of the Inter-American Juridical Committee, but Mr. Bilge had attended, at some inconvenience to himself, the recent session of the European Committee on Legal Co-operation at Strasbourg.

21. Mr. KEARNEY thanked the Chairman for defending the Commission's interests in the General

Assembly and especially for drawing attention to the inadequacy of the remuneration paid to special rapporteurs. The preparation of the Commission's report in time for the General Assembly was unfortunately an endemic problem, since the time available between the end of the Commission's session and the opening of the General Assembly was short and would indeed be shorter after the present longer session. He had helped with the preparation of the previous year's report, and it might be useful if two or three members of the Commission could remain in Geneva after the session to help the Secretariat put the report into its final form in the different languages.

22. Mr. AGO congratulated the Chairman on the masterly way he had represented the Commission at the General Assembly and said that it would be useful to be able to read the full text of his statements. The sometimes conflicting views expressed in the General Assembly concerning the Commission's work in 1973 showed that the Commission had followed the only course capable of gaining support from all sides, in particular where the question of State responsibility was concerned.

23. Above all, the Chairman should be congratulated on the manner in which he had answered certain remarks which had been repeated for some time in the General Assembly. In the first place, he had had to explain the financial aspect; it was undeniable, for example, that the fees paid to a member of the Commission, and particularly to a Special Rapporteur, were quite insufficient to meet the costs of research and secretarial assistance incurred in his work. That aspect, however, was, after all, only secondary, for the members of the Commission devoted themselves to the cause of international law with enough enthusiasm to be willing to incur personal expenses.

24. What was more serious was that some people seemed to be insinuating that the Commission was not working hard enough or that it was too slow to take decisions. That showed misunderstanding of the Commission's work. The codification of international law was a delicate task which, even more than in the past, had to be carried out with due reflection. Not a single article could be drafted without taking into account the interests of all States, including those of the increasingly numerous new States. Codification was not something that could be done in a hurry. It was also necessary to realize that many members of the International Law Commission made great sacrifices in their professional lives in order to perform their duties. He hoped that future Chairmen would be able to defend the Commission in the General Assembly as spiritedly as the outgoing Chairman had done.

Election of officers

25. The CHAIRMAN called for nominations for the office of Chairman.

26. Mr. USHAKOV nominated Mr. Ustor, a man who was not only a distinguished jurist in his own country, but also a diplomat, a teacher and a well-known scholar. In the Commission he had held with

³ See *Yearbook ... 1968*, vol. II, p. 172, paras. 4 *et seq.*

⁴ For verbatim record see A/PV. 2151.

distinction the offices of Vice-Chairman and Special Rapporteur, and among his personal qualifications were his great patience and kindness.

27. Mr. TABIBI seconded the nomination and associated himself with the tributes paid to the outgoing Chairman.

28. Mr. HAMBRO and Mr. EL-ERIAN supported the nomination of Mr. Ustor and also congratulated the outgoing Chairman on the manner in which he had represented the Commission at the General Assembly.

Mr. Ustor was unanimously elected Chairman and took the Chair.

29. The CHAIRMAN thanked the Commission for the honour it had done him in electing him Chairman. He knew that he could rely on the members' spirit of friendship and co-operation, which was a tradition of the Commission. He fully associated himself with the tributes paid to the outgoing Chairman.

30. Mr. YASSEEN, speaking on a point of order, said that, traditionally, the first Vice-Chairman acted as Chairman of the Drafting Committee. He proposed that, in order to relieve the first Vice-Chairman of that arduous task and to overcome certain difficulties regarding the designation of officers, the Commission should elect a Chairman for the Drafting Committee.

31. Mr. TABIBI and Mr. USHAKOV likewise considered that the Chairman of the Drafting Committee should be elected.

It was so agreed.

32. The CHAIRMAN called for nominations for the office of first Vice-Chairman.

33. Mr. ELIAS nominated Mr. Sette Câmara.

34. Mr. YASSEEN and Mr. REUTER seconded the nomination.

Mr. Sette Câmara was unanimously elected first Vice-Chairman.

35. Mr. SETTE CÂMARA thanked the members of the Commission for electing him.

36. The CHAIRMAN called for nominations for the office of second Vice-Chairman.

37. Mr. YASSEEN congratulated the outgoing Chairman on the manner in which he had discharged his duties, in particular on having so ably explained and defended the International Law Commission's work in the General Assembly and on the remarkable statement he had made in connexion with the twenty-fifth anniversary of the Commission. He congratulated the new Chairman on his election.

38. He nominated Mr. Tabibi for the office of second Vice-Chairman.

39. Mr. USHAKOV, Mr. TSURUOKA, Mr. CASTAÑEDA and Mr. RAMANGASOAVINA associated themselves with the congratulations addressed to the outgoing Chairman and to the new Chairman and supported the nomination of Mr. Tabibi.

Mr. Tabibi was unanimously elected second Vice-Chairman.

40. Mr. TABIBI thanked the members of the Commission for electing him.

41. The CHAIRMAN called for nominations for the office of Rapporteur.

42. Mr. EL-ERIAN nominated Mr. Thiam.

43. Mr. MARTÍNEZ MORENO, Mr. ELIAS, Mr. YASSEEN and Mr. RAMANGASOAVINA supported the nomination.

Mr. Thiam was unanimously elected Rapporteur.

44. The CHAIRMAN, acting on the Commission's decision taken on the proposal of Mr. Yasseen, called for nominations for the office of Chairman of the Drafting Committee.

45. Mr. AGO nominated Mr. Hambro.

46. Mr. YASSEEN and Mr. KEARNEY seconded that nomination.

47. Mr. RAMANGASOAVINA proposed that the Drafting Committee should appoint its own Chairman.

48. Mr. EL-ERIAN said he welcomed the nomination of Mr. Hambro, but as a matter of principle he thought the proposal to separate the office of Chairman of the Drafting Committee from that of First Vice-Chairman, which raised some delicate technical issues, should have been the subject of ample preliminary consultations. He suggested that the whole question should be considered by the officers of the Commission before a final decision was taken.

49. Mr. KEARNEY said that on the basis of his own experience, he could strongly support the proposal to appoint a separate Chairman of the Drafting Committee. He had held the office of First Vice-Chairman and had found it something of a burden to have to preside over both the Drafting Committee and the Commission itself when the Chairman happened to be absent.

50. The CHAIRMAN said that the Commission had before it three proposals: first, that a separate Chairman of the Drafting Committee should be elected in the person of Mr. Hambro; second, that the election of the Chairman of the Drafting Committee should be left to that Committee itself; third, that a decision should be postponed until the officers of the Commission had held consultations.

51. Mr. USHAKOV said that the proposal made by Mr. Yasseen and adopted by the Commission had been intended to strengthen and broaden the representative character of the Commission's officers, who would gain the advantage of representing five different legal systems. He warmly supported the nomination of Mr. Hambro.

52. Mr. EL-ERIAN said he had only wished to place on record his feeling that the matter should have been handled by means of prior consultations. He would not press his suggestion.

53. Mr. RAMANGASOAVINA withdrew his proposal.

54. Mr. TSURUOKA stressed that the members of the Commission sat in their personal capacity and not as representatives of their countries or of regional

groups. The Chairman of the Drafting Committee played an important part in the Commission's work in any given year, and in the current year that work would be concerned mainly with the topic of State responsibility; the Special Rapporteur on that topic, Mr. Ago, had himself nominated Mr. Hambro. In his (Mr. Tsuruoka's) opinion Mr. Hambro fulfilled all requirements for the post of Chairman of the Drafting Committee, but he would not have objected to a postponement of the election in order to allow members of the Commission to engage in consultations.

55. Mr. ELIAS said that, as a matter of principle, Mr. Yasseen's proposal was a sound one. Nevertheless, he thought that a proposal to separate two important functions for the first time in the practice of the Commission should have been preceded by adequate consultations.

56. Mr. CALLE Y CALLE urged that Mr. Hambro should be elected Chairman of the Drafting Committee immediately. No disagreement had been expressed regarding the proposal to separate that office from the office of First Vice-Chairman, and it would have the additional advantage of reinforcing the officers of the Commission.

57. Mr. AGO stressed that the Chairman of the Drafting Committee should be one of the Commission's officers.

58. The CHAIRMAN said that, since no objection had been made to Mr. Yasseen's proposal, he took it that the Commission agreed to appoint Mr. Hambro Chairman of the Drafting Committee and, as such, an officer of the Commission.

It was so agreed.

59. Mr. SETTE CÂMARA said he fully concurred with the wise decision to separate the functions of Chairman of the Drafting Committee from those of First Vice-Chairman. In recent years, the Commission's enlarged Bureau had played an increasing role in the organization of its work and the decision just taken would strengthen that body.

60. Lastly, he warmly associated himself with the welcome extended by the Chairman to the new Legal Counsel of the United Nations, who was attending the Commission for the first time as representative of the Secretary-General.

Adoption of the agenda

The provisional agenda (A/CN.4/273/Rev.1) was adopted unanimously.

The meeting rose at 6 p.m.

1251st MEETING

Tuesday, 7 May 1974, at 10.10 a.m.

Chairman: Mr. Endre USTOR

Present: Mr. Ago, Mr. Bilge, Mr. Calle y Calle, Mr. Castañeda, Mr. El-Erian, Mr. Elias, Mr. Hambro, Mr.

Kearney, Mr. Martínez Moreno, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Yasseen.

State responsibility

(A/CN.4/246 and Add.1 — 3; A/CN.4/264 and Add.1; A/9010/Rev.1; A/9334)

[Item 3 of the agenda]

INTRODUCTION BY THE SPECIAL RAPPORTEUR

1. Mr. AGO (Special Rapporteur) summarized the work of the International Law Commission on the draft articles on State responsibility, taking into account the observations and recommendations made by the Sixth Committee at the twenty-eighth session of the General Assembly. He referred, in particular, to chapter II of the report of the International Law Commission on the work of its twenty-fifth session (A/9010/Rev.1)¹ and to paragraphs 25 to 58 of the report of the Sixth Committee on the report of the International Law Commission (A/9334). He also drew the attention of the members of the Commission to General Assembly resolution 3071 (XXVIII), in particular, operative paragraphs 3 (b) and (c).

2. The comments of the Sixth Committee were encouraging and could not fail to facilitate the work of the Commission, because they confirmed the general conclusions members had reached the previous year and the basic criteria they had adopted. Those conclusions and criteria were set out in chapter II of the Commission's report on the work of its twenty-fifth session, under the heading "General remarks concerning the draft articles" (paragraphs 36 to 57). Although the Sixth Committee had considered that the remarks on the form of the draft were self-explanatory, since the International Law Commission had decided to give its work on State responsibility the form of draft articles, with a view to the eventual conclusion of an international convention, it had given particular attention to the remarks concerning the scope of the draft. It had endorsed the distinction made by the Commission between two types of rules, namely, those termed "primary", which, in one sector of inter-State relations or another, imposed obligations on States, and those termed "secondary", not, of course, because they were less important than the primary rules, but because they determined the legal consequences of failure to fulfil obligations established by the primary rules. It had also approved of the Commission's intention to concentrate the current study on the "secondary" rules and to maintain a strict distinction between that task and the task of defining the rules which imposed on States obligations the violation of which could be a cause of responsibility.

3. The Commission had decided to confine its study of international responsibility to State responsibility for internationally wrongful acts. However, in addition to

¹ Reproduced in *Yearbook ... 1973*, vol. II.