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**Summary record of the 2474th meeting**

Topic:  
**Other topics**

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# INTERNATIONAL LAW COMMISSION

## SUMMARY RECORDS OF THE FORTY-NINTH SESSION

*Held at Geneva from 12 May to 18 July 1997*

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### 2474th MEETING

*Monday, 12 May 1997, at 3.30 p.m.*

*Acting Chairman:* Mr. Robert ROSENSTOCK

*Chairman:* Mr. Alain PELLET

*Present:* Mr. Addo, Mr. Baena Soares, Mr. Bennouna, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Illueca, Mr. Kabatsi, Mr. Kateka, Mr. Lukashuk, Mr. Melescanu, Mr. Mikulka, Mr. Operti Badan, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Simma, Mr. Thiam, Mr. Yamada.

#### Opening of the session

1. The ACTING CHAIRMAN declared open the forty-ninth session of the International Law Commission and welcomed members to Geneva. The Commission had just completed an extraordinarily productive quinquennium which, he hoped, would set a standard for the future.

#### Election of officers

*Mr. Pellet was elected Chairman by acclamation.*

*Mr. Pellet took the Chair.*

2. The CHAIRMAN expressed his thanks for the honour conferred upon him and said he hoped that he would prove worthy of the confidence placed in him.

Extending a warm welcome to members, both old and new, he observed that, once again, there was not a single woman among the entire 34 members. Indeed, there had never been one throughout the 49 years of the Commission's existence, a regrettable state of affairs which contrasted with the situation at ICJ and which would need to be remedied before too long.

3. He paid tribute to his predecessor in the Chair, Mr. Mahiou. That the forty-eighth session had been so fruitful had been due in large part to his efforts. Mr. Mahiou's decision not to seek a new mandate had deprived the Commission of one of its wisest and most respected members.

4. The Commission was at a turning point. On the eve of its fiftieth anniversary, the time had come to take stock and to prepare for new challenges. As he saw it, the task of the current session would be to give fresh impetus to the Commission's work.

5. It was customary for the outgoing Chairman to brief members on the discussion of the Commission's report in the Sixth Committee. In the absence of Mr. Mahiou, he invited Mr. Rosenstock, as first Vice-Chairman at the forty-eighth session, to make that presentation.

6. Mr. ROSENSTOCK, noting that communication between the Commission and the Sixth Committee was an area in which there was much room for improvement, said that the debate in the Sixth Committee during the fifty-first session of the General Assembly in 1996 had touched upon most of the main issues and was summarized in the topical summary (A/CN.4/479 and Add.1).

7. As to the topic of State responsibility, the issues which had divided the Commission had also split the Sixth Committee (A/CN.4/479/Add.1, sect. A). On delicts and crimes, some in the Sixth Committee had thought that the distinction was well-founded and had supported its retention, whereas others had felt that it required further consideration and still others that it was unhelpful and should be deleted. With regard to countermeasures, some had agreed with the Commission's position, others had taken the view that the Commission had placed too many limitations and constraints on the notion,

while still others had implicitly or explicitly questioned the Commission's recognition of their legitimacy. Lastly, some had endorsed the provisions on dispute settlement in their current form, whereas others had found them too rigid and still others had had reservations about the need to include any provisions in that regard, urging instead reliance on Article 33 of the Charter of the United Nations. It was to be hoped that States would submit written comments on that important topic over the next six or seven months.

8. With reference to the draft Code of Crimes against the Peace and Security of Mankind, the Sixth Committee had welcomed the achievement of the Special Rapporteur and the draft Code adopted by the Commission on second reading.<sup>1</sup> A decision on further action had been deferred to the fifty-third session of the General Assembly, but there had been widespread recognition of the draft Code's relevance to the work on an international criminal court.

9. Concerning the topic of State succession and its impact on the nationality of natural and legal persons (A/CN.4/479, sect. B), the Commission's recommendations and proposals had all been approved with regard to scope, form and substance, subject to a few matters of detail well covered in the exhaustive second report of the Special Rapporteur, Mr. Mikulka.<sup>2</sup> The sound foundation for the work contained in the third report of the Special Rapporteur (A/CN.4/480 and Add.1)<sup>3</sup> could not have been made more clear.

10. On the topic of international liability for injurious consequences arising out of acts not prohibited by international law (A/CN.4/479, sect. C), some representatives in the Sixth Committee had favoured the basic approach underlying the Commission's draft, whereas others had not thought it feasible to establish a single liability regime for all parties. Some of those holding the latter view had urged that the focus should be limited to ultrahazardous activities. The United States of America, and Sweden on behalf of the Nordic countries, had responded to an invitation for comments, and it was to be hoped that other countries would follow suit in order to help the Commission decide how to proceed with its work on the subject.

11. As to the topic of reservations to treaties (A/CN.4/479, sect. D), the Sixth Committee, endorsing the draft resolution the Special Rapporteur, Mr. Pellet, had proposed in his second report,<sup>4</sup> supported his approach of not destabilizing the "Vienna regime" and his view that the regime did and should apply to all treaties. Different opinions had been expressed on whether treaty bodies should have the authority to determine the acceptability of reservations. Once again, a sound basis existed for pursuing work along the lines proposed by the Special Rapporteur at the forty-eighth session, in 1996.

12. In respect of future activities, the Commission had been invited by the General Assembly to examine the top-

ics of diplomatic protection and unilateral acts of States (A/CN.4/479, sect. E). In sum, the Commission had received a positive response from the Sixth Committee.

13. The CHAIRMAN suggested that the meeting should be suspended in order to give members more time for consultations concerning the membership of the Bureau.

*The meeting was suspended at 3.50 p.m. and resumed at 4.10 p.m.*

*Mr. Baena Soares was elected first Vice-Chairman by acclamation.*

*Mr. Kabatsi was elected second Vice-Chairman by acclamation.*

*Mr. Sreenivasa Rao was elected Chairman of the Drafting Committee by acclamation.*

*Mr. Galicki was elected Rapporteur by acclamation.*

### **Programme, procedures and working methods of the Commission, and its documentation (A/CN.4/479, sect. E, and A/CN.4/L.551)**

[Agenda item 8]

#### **MEMBERSHIP OF THE PLANNING GROUP OF THE ENLARGED BUREAU**

14. The CHAIRMAN said that the Enlarged Bureau proposed that the Planning Group should be composed as follows: Mr. Baena Soares (Chairman of the Planning Group), Mr. Bennouna, Mr. Crawford, Mr. Ferrari Bravo, Mr. Goco, Mr. He, Mr. Lukashuk, Mr. Mikulka, Mr. Operti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sepúlveda, Mr. Simma, Mr. Thiam and, as an ex officio member, Mr. Galicki.

*It was so agreed.*

#### **Adoption of the agenda (A/CN.4/482)**

15. The CHAIRMAN suggested that the provisional agenda (A/CN.4/482) should be adopted on the understanding that it would in no way prejudice the order in which the various items were taken up.

*It was so agreed.*

*The agenda was adopted.*

#### **Organization of work of the session**

[Agenda item 1]

16. The CHAIRMAN said that the Commission must make the best of a new and unique situation. Much had been accomplished.

17. During its previous term, the Commission had completed the second reading of the draft articles on the law of the non-navigational uses of international water-

<sup>1</sup> For the text of the draft articles adopted on second reading, see *Yearbook . . . 1996*, vol. II (Part Two), para. 50.

<sup>2</sup> *Yearbook . . . 1996*, vol. II (Part One), document A/CN.4/474.

<sup>3</sup> Reproduced in *Yearbook . . . 1997*, vol. II (Part One).

<sup>4</sup> *Yearbook . . . 1996*, vol. II (Part One), documents A/CN.4/477 and Add.1 and A/CN.4/478.

courses,<sup>5</sup> which he understood was to be adopted very soon as a convention, and the draft statute for an international criminal court,<sup>6</sup> and he believed there was a good chance that it too would become a draft convention by the end of the century. During the very productive forty-eighth session, it had adopted on second reading the draft Code of Crimes against the Peace and Security of Mankind.<sup>7</sup> In addition, the draft articles on State responsibility, a text of exceptional importance despite its imperfections, had been adopted by the Commission on first reading,<sup>8</sup> and the Commission was duty-bound to finalize it, regardless of the difficulties posed. There would be no detailed report on the subject at the current session, but opinions should be voiced on how to proceed with the second reading. Lastly, the topic of international liability for injurious consequences arising out of acts not prohibited by international law had been the subject of a comprehensive report produced by the Working Group on the topic at the forty-eighth session of the Commission, in 1996.<sup>9</sup> The Commission might want to consider where to take the topic from there.

18. The two remaining topics formally on the agenda, namely nationality in relation to the succession of States and reservations to treaties, were not enough to keep the Commission busy for the entire session. However, two other projects lay close at hand. Pursuant to paragraph 13 of General Assembly resolution 51/160, the Commission further should examine the topics “Diplomatic protection” and “Unilateral acts of States” and indicate their scope and content. The Commission might wish to create a working group to that end. It would also need to consider whether to hold split sessions in the future.

*The meeting rose at 4.35 p.m.*

<sup>5</sup> See *Yearbook . . . 1994*, vol. II (Part Two), p. 88, para. 219.

<sup>6</sup> *Ibid.*, p. 26, para. 90.

<sup>7</sup> See footnote 1 above.

<sup>8</sup> See *Yearbook . . . 1996*, vol. II (Part Two), chap. III, sect. D.

<sup>9</sup> *Ibid.*, annex I.

## 2475th MEETING

*Tuesday, 13 May 1997, at 10.05 a.m.*

*Chairman:* Mr. Alain PELLET

*Present:* Mr. Addo, Mr. Baena Soares, Mr. Bennouna, Mr. Brownlie, Mr. Candiotti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Illueca, Mr. Kabatsi, Mr. Kateka, Mr. Lukashuk, Mr. Melescanu, Mr. Mikulka, Mr. Operti Badan,

Mr. Pambou-Tchivounda, Mr. Rodriguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Thiam, Mr. Yamada.

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

[Agenda item 1]

1. The CHAIRMAN, reporting to the Commission on the proposals made by the Enlarged Bureau, said that, with regard to the topics “Nationality in relation to the succession of States” and “Reservations to treaties”, the Enlarged Bureau had unanimously agreed that high priority should be given to the consideration of the third report of the Special Rapporteur on nationality in relation to the succession of States (A/CN.4/480 and Add.1)<sup>1</sup> in order to adopt the part of the draft articles on first reading relating to the nationality of natural persons, if possible by the end of the current session. That meant that, for at least two weeks, all plenary meetings would be devoted to examining the text of the draft articles proposed by the Special Rapporteur and that the Drafting Committee would also be able to start work very soon. However, given the technical nature of the subject, it was proposed that, once the Commission had exhausted the discussion in plenary of the first part of the third report, namely, the preamble, the definitions and articles 1 to 16, it should defer its work on the topic and turn to the second report on reservations to treaties (A/CN.4/477 and Add.1 and A/CN.4/478)<sup>2</sup> under the chairmanship of one of the Vice-Chairmen. As the Enlarged Bureau was also of the view that the draft resolution annexed to the second report on reservations to treaties should also be referred to the Drafting Committee, it was suggested that the latter should take up the draft once it had completed its work on part I of the draft on nationality in relation to the succession of States. After spending some time on reservations to treaties, the Commission in plenary and the Drafting Committee might then go on to part II of the draft articles on nationality in relation to the succession of States.

2. As to the draft articles on State responsibility, the Enlarged Bureau proposed that a working group should be set up not to review the drafting of the text, but, pending reactions by States, to hold an exchange of views to determine the main areas of disagreement and possibly to seek ways and means of overcoming them, thereby facilitating the work of the Special Rapporteur, whom the Commission must appoint by the end of the session.

3. For the topics “Diplomatic protection” and “Unilateral acts of States”, the Enlarged Bureau also suggested the establishment of a working group which would, pursuant to paragraph 13 of General Assembly resolution 51/160, help indicate their scope and content, thereby enabling future special rapporteurs to set out on a well-marked path and would be in keeping with the spirit of the

<sup>1</sup> Reproduced in *Yearbook . . . 1997*, vol. II (Part One).

<sup>2</sup> See *Yearbook . . . 1996*, vol. II (Part One).