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Summary record of the 2566th meeting

Topic:
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Mr. Rosenstock was elected Rapporteur by acclamation.

Melescanu, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Yamada.

Adoption of the agenda (A/CN.4/495)

5. The CHAIRMAN invited the Commission to adopt the provisional agenda (A/CN.4/495).

The agenda was adopted.

Filling of casual vacancies (article 11 of the statute) (A/CN.4/494 and Add.1 and 2)

[Agenda item 1]

6. The CHAIRMAN announced that the Commission was required to fill three casual vacancies created by the election of Mr. Ferrari Bravo to the European Court of Human Rights and of Mr. Bennouna to the International Tribunal for the Former Yugoslavia¹ and the appointment of Mr. Mikulka as Director of the Codification Division. The curricula vitae of the four candidates for the vacancies were contained in documents A/CN.4/494/Add.1 and Add.2. After a brief procedural discussion in which Mr. GOCO, Mr. HE, Mr. Sreenivasa RAO, Mr. ROSENSTOCK and the Secretary to the Commission took part, he suspended the meeting in order to enable members to hold informal consultations and, in a closed meeting, to fill the casual vacancies.

The meeting was suspended at 4.35 p.m. and resumed at 6.05 p.m.

7. The CHAIRMAN announced that the Commission had elected Messrs Giorgio Gaja, Maurice Kamto and Peter Tomka to fill the casual vacancies that had arisen. On behalf of the Commission, he would inform the newly elected members and invite them to join the Commission as soon as possible.

The meeting rose at 6.10 p.m.

¹ Reference texts are reproduced in *Basic Documents, 1995* (United Nations publication, Sales No. E/F.95.III.P.1).

2566th MEETING

Tuesday, 4 May 1999, at 12.10 p.m.

Chairman: Mr. Zdzislaw GALICKI

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Kateka, Mr. Kusuma-Atmadja, Mr.

Organization of work of the session

[Agenda item 2]

1. The CHAIRMAN invited the Commission to consider the work plan proposed by the Enlarged Bureau for the first two weeks of the session. Besides the plenary meetings, all of which would be allocated to the topic of State responsibility, the work plan envisaged several meetings of the Working Group on nationality in relation to the succession of States. The Enlarged Bureau was of the view that the Working Group should be re-established in order to make recommendations about the next steps to be taken in respect of that topic. The object was to complete the second reading of the first part of the topic (nationality of natural persons in relation to the succession of States) at the present session. Since the Chairman of the Working Group and Special Rapporteur on the topic was no longer a member of the Commission and since he himself had always taken a lively interest in matters of nationality, he was prepared to take over the chairmanship of the Working Group. Upon completing its work on the first part of the topic, the Commission would have to consider the question of the appointment of a special rapporteur on the second part (nationality of legal persons in relation to the succession of States).

2. Mr. DUGARD said that he had been a member of the Working Group ex officio in his capacity as Rapporteur of the Commission. Now that he was no longer Rapporteur, he wished to withdraw from the Working Group.

3. The CHAIRMAN said that the Working Group on nationality in relation to the succession of States was open to all members interested in the topic.

4. Mr. GOCO said that special circumstances arose with regard to some other topics as well. Thus, the Special Rapporteur on unilateral acts of States had become Chairman of the Drafting Committee and the Chairman of the Working Group on diplomatic protection and Special Rapporteur on that topic was no longer a member of the Commission.

5. The CHAIRMAN said that the Commission had not yet reached a stage in connection with those two topics where it was necessary to re-establish the respective working groups or to appoint special rapporteurs. That could always be done if the need arose.

6. The work plan proposed by the Enlarged Bureau also provided for two meetings of the Planning Group. The Commission had to consider the question of split sessions, a point which needed to be dealt with very carefully in view of the request by the General Assembly in paragraph 9 of resolution 53/102 that the Commission should examine the advantages and disadvantages of such sessions and of the General Assembly's decision to return to the matter at its fifty-fourth session.

7. Mr. SIMMA recalled that the Commission had discussed the matter at length at its two preceding sessions and had placed enough arguments in favour of the split sessions approach before the General Assembly. The opponents of the approach should, in his view, recognize that they were in a minority. It would be helpful to have a background document reflecting the consideration of the question by the General Assembly.

8. Mr. MIKULKA (Secretary to the Commission) said that the secretariat would prepare such a background document with the assistance of the Chairman of the fiftieth session, who had attended the debate in the General Assembly. In any event, the Assembly had clearly not accepted the Commission's request for split sessions as from the year 2000, since it asked the Commission for additional information and intended to return to the matter.

9. Mr. ECONOMIDES said that the present international situation raised a number of new issues which were almost of an emergency nature. The Commission should therefore perhaps adopt a procedure similar to the one which it had adopted at the fiftieth session and which would enable it to propose new subjects to the General Assembly.

10. Mr. HERDOCIA SACASA said that he supported that proposal.

11. The CHAIRMAN said that new subjects formed part of the formulation of the Commission's long-term programme of work, a task which was part of the Planning Group's mandate. Any proposal that might be made would therefore have to be considered by the Planning Group.

12. The Commission also had to take a decision on the response to be given to the request by the General Assembly in paragraph 2 of resolution 53/98 relating to the draft articles on jurisdictional immunities of States and their property and to the appointment of a new special rapporteur on the topic of diplomatic protection. The Enlarged Bureau recommended that those decisions should be taken by the end of the current week at the latest. He invited the Chairman of the Drafting Committee and the First Vice-Chairman of the Commission, as Chairman of the Planning Group, to compose the membership of those two bodies.

13. Mr. MIKULKA (Secretary to the Commission) recalled that the Commission usually appointed the Drafting Committee, whose membership might change from one topic to another, before the Planning Group, which was generally composed of members of the Commission not on the Drafting Committee. It might perhaps be wise to maintain that practice.

14. The CHAIRMAN said that, at the current session, the Drafting Committee must concentrate on the topic of State responsibility and then turn to that of nationality in relation to the succession of States. The Drafting Committee might also take up the topic of reservations to treaties once it had received the relevant report of the Special Rapporteur.

State responsibility¹ (A/CN.4/492,² A/CN.4/496, sect. D, A/CN.4/498 and Add.1-4,³ A/CN.4/L.574 and Corr.1 and 3)

[Agenda item 3]

SECOND REPORT OF THE SPECIAL RAPPORTEUR

15. Mr. CRAWFORD (Special Rapporteur) said that, before submitting his second report on State responsibility (A/CN.4/498 and Add.1-4), he wished to refer to the response to his first report⁴ and to the topic of State responsibility in general both within the Sixth Committee of the General Assembly during its fifty-third session and outside the United Nations.

16. The discussion held in the Sixth Committee, which was outlined in paragraphs 107 to 127 of the topical summary (A/CN.4/496), had been extremely constructive, even though some issues remained very clearly in abeyance, particularly with regard to article 19 of part one of the draft. The Sixth Committee was aware of the fact that the Commission was to revert to those issues and was awaiting its conclusions with interest. No specific criticism had been offered on the other draft articles which had been adopted by the Drafting Committee at the fiftieth session,⁵ and the general view was that they could be approved without major alteration.

17. Following the fifty-third session of the General Assembly, he had organized a number of seminars in Wellington, Sydney, Tokyo, Kyoto, Beijing, Cambridge and London and intended to organize one soon in The Hague. Discussion groups had been set up in the United States of America and Japan, particularly by ILA, and those should give rise to comments that could be put to good use by the Commission in its work. The *European Journal of International Law* had published a special issue on State responsibility which was soon to be made available to the members of the Commission and could also fuel their thinking.⁶

18. A number of comments and observations had been received from Governments, the most recent being those from the Governments of Greece and Japan (A/CN.4/492). None of them appeared to contradict the decisions adopted by the Commission at its fiftieth session on articles 1 to 15 bis and A. The entire set of draft articles would have to be reconsidered before the end of the current quinquennium on the basis of any additional comments and observations received.

19. Introducing his second report, he explained that chapter I of the report consisted of four sections. Section A, relating to chapter III of part one of the draft articles,

¹ For the text of the draft articles provisionally adopted by the Commission on first reading, see *Yearbook ... 1996*, vol. II (Part Two), p. 58, document A/51/10, chap. III, sect. D.

² Reproduced in *Yearbook ... 1999*, vol. II (Part One).

³ *Ibid.*

⁴ *Yearbook ... 1998*, vol. II (Part One), document A/CN.4/490 and Add.1-7.

⁵ For the text of the draft articles, see *Yearbook ... 1998*, vol. I, 2562nd meeting, para. 72.

⁶ *European Journal of International Law* (Oxford University Press), vol. 10 (1999), No. 2.

dealt with the breach of an international obligation; section B, relating to chapter IV of part one of the draft articles, dealt with the implication of a State in the internationally wrongful act of another State; section C focused on a range of extremely important questions relating to chapter V of part one, namely, circumstances precluding wrongfulness. The annex to the report contained a brief comparative review of the delicate and so far unexplored question of interference with contractual rights, a question that was related to chapter IV of part one of the draft articles. Those documents were now available in the Commission's working languages, or would be very soon.⁷

20. He also intended to submit an informal document on the approach to be adopted for the consideration of the draft articles on second reading and, more specifically, five sets of questions concerning which he would like to receive guidance from the Commission at the current session. The questions relating to article 19 of part one that remained outstanding were: what was an obligation to the international community as a whole; what treatment should be given to countermeasures in part two; dispute settlement; what might be the content of a part three; and what form might be taken by the draft articles.

21. He expressed the hope that, at the current session, the Commission could provisionally adopt the entire set of articles in part one and the commentary thereto.

22. Mr. ROSENSTOCK requested the Special Rapporteur to give the broad outlines of the issues to be discussed.

23. Mr. CRAWFORD (Special Rapporteur) said that they could be divided into three major categories. The first related to the articles setting out the fundamental principles involved in the breach of an international obligation, in other words, former articles 16, 17, 18 (paras. 1 and 2) and 19 (para. 1). The second was the distinction between obligations of conduct and obligations of result and where obligations of prevention fell in that context (arts. 20, 21 and 23). The third entailed the fine distinctions to be drawn among the various categories of wrongful acts or breaches: the distinction between completed and continuing wrongful acts, the distinction between a continuing act, a composite act and a complex act, the application of the principles of intertemporal law in the light of those distinctions (art. 18, paras. 3 to 5, arts. 24, 25 and 26) and the issue of the exhaustion of domestic remedies (art. 22).

The meeting rose at 1.05 p.m.

⁷ Section D was submitted at a later date.

2567th MEETING

Wednesday, 5 May 1999, at 10.05 a.m.

Chairman: Mr. Zdzislaw GALICKI

Present: Mr. Addo, Mr. Al-Khasawneh, Mr. Baena Soares, Mr. Brownlie, Mr. Candiotti, Mr. Crawford,

Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Illueca, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Melescanu, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Yamada.

State responsibility¹ (*continued*) (A/CN.4/492,² A/CN.4/496, sect. D, A/CN.4/498 and Add.1-4,³ A/CN.4/L.574 and Corr.1 and 3)

[Agenda item 3]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. CRAWFORD (Special Rapporteur), continuing the presentation of his second report on State responsibility (A/CN.4/498 and Add.1-4), said that chapter III (Breach of an international obligation) of part one of the draft articles sought to elaborate on the basic principle set out in article 3 (Elements of an internationally wrongful act of a State), provisionally adopted by the Commission, whereby responsibility arose on the basis of two—and only two—conditions: first, that the conduct in question, whether an act or an omission, was attributable to the State (attribution being dealt with in chapter II); and secondly, that it constituted a breach by that State of an international obligation. Curiously, in marked contrast to the literature in national law systems, which often treated the subject of breach quite extensively, the literature on State responsibility had very little to say on the matter. Consequently, the formulation of chapter III had constituted something of a pioneering effort by the then Special Rapporteur, Mr. Roberto Ago, who had had little more than the work of the Hague Codification Conference of 1930 on which to base himself. Thus, the fact that more than 20 years after the adoption of most of the articles on first reading⁴ it was now possible to criticize them and to suggest alternatives, implied no special criticism of the effort itself. Much in the articles, and more in the commentaries, was of value and should be retained.

2. Nevertheless, of the chapters comprising part one, chapter III was the one most criticized by Governments, on the grounds that it was over-refined, unduly complicated and sometimes difficult to follow. In dealing with chapter III it was necessary to penetrate its intellectual world. Accordingly, while his own treatment of the subject in his second report might itself appear over-refined and complex, that was necessary if justice was to be done to the issues.

3. Before the articles were discussed individually, mention should be made of some general questions. The first was the basic distinction between primary and secondary

¹ For the text of the draft articles provisionally adopted by the Commission on first reading, see *Yearbook ... 1996*, vol. II (Part Two), p. 58, document A/51/10, chap. III, sect. D.

² Reproduced in *Yearbook ... 1999*, vol. II (Part One).

³ *Ibid.*

⁴ *Yearbook ... 1980*, vol. II (Part Two), pp. 26-63.