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A/CN.4/SR.2667

Summary record of the 2667th meeting

Topic:

State responsibility

Extract from the Yearbook of the International Law Commission:-

2001, vol. I

3. The CHAIRMAN said that the meeting would be adjourned to enable members to hold informal consultations.

The meeting rose at 10.15 a.m.

2667th MEETING

Wednesday, 25 April 2001, at noon

Chairman: Mr. Peter KABATSI

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Simma, Mr. Tomka, Mr. Yamada.

State responsibility[1] (*continued*)* (A/CN.4/513, sect. A, A/CN.4/515 and Add.1–3,[2] A/CN.4/517 and Add.1,[3] A/CN.4/ L.602 and Corr.1 and Rev.1)

[Agenda item 2]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)*

1. The CHAIRMAN invited members to begin their consideration of the fourth report of the Special Rapporteur (A/CN.4/517 and Add.1), with particular reference to dispute settlement and the form of the draft articles.

2. Mr. YAMADA said that dispute settlement could be discussed on its own merits, but it was preferable to comment first on the form of the draft articles, a question with which it was so closely linked. Under article 23 of its statute, the Commission was expected to make a recommendation to the General Assembly on the form its work should take. It had done so in every instance so far, although in some cases the Assembly had not accepted its recommendation. In the case of the draft articles on State responsibility, the form was dependent on the content of the final product. If there were to be a substantial law-making element, the appropriate form would be a multilateral convention, but if the draft articles merely codified existing rules, there would be no real need for a convention. The concept of codification was defined in article 15 of the statute as "the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine".

3. The draft articles adopted on first reading[4] had attracted much criticism from Governments. Many of the provisions were inconsistent and went well beyond prevailing State practice, and were not therefore acceptable to many Governments. For the second reading, the Commission had taken the unusual step of provisionally adopting an entire text, and had canvassed the views of Governments, in order to reflect those views fully in its final product. As he understood it, the Commission was currently endeavouring to produce a text that would be readily acceptable to a majority of Governments. However, the text of the draft provisionally adopted by the Drafting Committee on second reading at the previous session contained provisions that in his own view went beyond a codification of existing rules, especially as regards serious breaches and countermeasures. Many Governments had made comments to that effect. The Commission must at the current time concentrate on achieving a codification of State responsibility. Once it had succeeded in that, it could, under article 23, paragraph 1 (*b*), of its statute recommend to the General Assembly to adopt its report by resolution. The report of the Commission on the work of its fifty-third session would then be an authoritative study of current rules, State practice and doctrine in the field of State responsibility, which the Assembly could endorse in the form of a resolution. Such a resolution would provide sufficient guidance to States on their rights and responsibilities in that field, and would clearly establish the circumstances in which an injured State could invoke the responsibility of another State, thus contributing to legal stability and predictability in international relations. It would serve as a general standard for international courts in settling international disputes, since almost all international disputes entailed State responsibility.

4. He was not, however, seeking to foreclose the possibility of a convention on the topic. If it so wished, the Commission could recommend that form to the General Assembly in accordance with paragraph 1, subparagraph (*c*) or (*d*), of article 23 of its statute. That had been the chosen form of the Commission's work on the law of the non-navigational uses of international watercourses, which had become the Convention on the Law of the Non-navigational Uses of International Watercourses. It was a highly specific technical subject, yet the process of framing a convention had nonetheless taken several years after the Commission's report to the Assembly. Even at the current time, there was no prospect of the Convention coming into force soon. He therefore had serious doubts as to the advisability of opting for a convention on State responsibility.

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* Resumed from the 2665th meeting.

[1] For the text of the draft articles provisionally adopted by the Drafting Committee on second reading, see *Yearbook . . . 2000*, vol. II (Part Two), chap. IV, annex.

[2] Reproduced in *Yearbook . . . 2001*, vol. II (Part One).

[3] *Ibid.*

[4] See 2665th meeting, footnote 5.

5. As for the issue of dispute settlement, if the Commission decided to remain within the bounds of codification there would be no need for any drafting exercise, since the subject was already sufficiently covered by conventional and customary rules.

6. Mr. KUSUMA-ATMADJA said his recollection was that, when the Special Rapporteur was introducing the fourth report, mention had been made of a number of unfinished aspects of the topic and of the possibility of members having a reasonable time to reflect on them. To that end, he would have liked to have the opportunity, in the meantime, to discuss other topics on the agenda of the current session.

7. Mr. LUKASHUK said that the Commission's current session would take a special place in history, because no legal system could function properly without a law on responsibility. Issues of State responsibility were at the current time being resolved on an extremely primitive level, and small States especially suffered as a result. That placed a special burden of responsibility on the Commission, which must exert all its efforts to discharge the duty of completing the draft articles. If it was to do so successfully, certain factors must be borne in mind. For almost half a century in which the Commission had been working on the topic, eminent jurists had served as rapporteurs, and the work of the Special Rapporteur had been endorsed and praised by Governments. It should be emphasized that comments and observations received from Governments had always been carefully noted by the Commission, and that the draft articles as they currently stood reflected the views not only of experts, but also of a wide range of States. That circumstance was especially significant at the current concluding stage of the work.

8. From a study of the discussions in the Sixth Committee of the General Assembly (A/CN.4/513, Sect. A) and the comments and observations received from Governments (A/CN.4/515 and Add.1–3) it was possible to reach certain conclusions. First, it was evident that Governments attached great importance to the work on the draft articles, while pointing to the complexity of the problems still to be resolved. Secondly, they mentioned the advanced state of the work and emphasized the Commission's duty to complete it at the current session. The statement by South Africa on behalf of the South African Development Community[5] encapsulated those views. Other States, such as India and the Nordic countries, emphasized that the Commission should have every opportunity to complete the second reading of the text during the current session. The considerable improvements in the draft articles and their advanced state of preparation had been favourably commented on, and it had been noted that, to a large extent, the progress in the work was a result of the special attention paid to the comments and observations received from Governments and to State practice.

9. As to the final form of the draft, some States favoured a binding convention, while others preferred a resolution or declaration by the General Assembly. The preference of some Governments for a convention was quite understandable, but it conflicted with the desire of a majority of States to adopt rules on State responsibility as soon as possible. However, there was no real contradiction in principle: the Commission could recommend adoption of a declaration and the subsequent elaboration of a convention. As a word of warning, he would urge the Commission, in its report, to avoid presenting a divided view to the Sixth Committee by describing the two options as mutually exclusive. Like any other jurist, he would himself prefer a convention, but he certainly would not wish to see the adoption of rules on the subject postponed for decades. As the Government of Cyprus had pointed out, the work of international law-making was the "art of the possible"; although it would prefer a convention, it did not as a result object to an alternative form.

10. The second general issue to be resolved was that of countermeasures, which were essential to international legality. Countermeasures were not the same as sanctions, which international organizations were entitled to impose within the limits of their competence, whereas only States could take countermeasures. The views of Governments on countermeasures were divided. Some Governments were altogether opposed to the inclusion of an article on them. Others felt it was very important to make provision for countermeasures, because placing limits on them could help to protect the rights of less powerful States. The importance of countermeasures was recognized both by States and by international legal institutions. It was felt that, although there were customary rules of international law governing countermeasures, they were so vague and indeterminate as to open the door to widespread abuse, as could be seen from the countless examples in State practice. It was therefore the Commission's duty to place such limits on countermeasures as would serve to prevent such abuse. The views of the developing countries were especially important in that respect, because they were so often the victims of misconceived countermeasures. The United Republic of Tanzania, for instance, argued that the countermeasures were used chiefly by a group of Western countries. Thus it was possible that some non-Western countries might regard the draft articles as being primarily designed to legitimize the practice. There was, however, general recognition of the need to frame rules to limit the use of countermeasures.

11. Summing up the factors that should be in the forefront of the Commission's thinking at the present juncture, he would emphasize the advanced stage in the work on the topic and the absence of any real dissension among Governments. However, it would be no easy task to complete the work, in view of the lack of time. Serious steps must be taken to organize the Commission's work in such a way that it could discharge the duty placed on it by the General Assembly.

12. Mr. HE congratulated the Special Rapporteur on his excellent fourth report, which, in addition to dealing with other outstanding issues, summarized the important substantive problems that had to be settled before amendments were made to the entire set of draft articles.

[5] See *Official Records of the General Assembly, Fifty-fifth Session, Sixth Committee*, 14th meeting (A/C.6/55/SR.14), and corrigendum, paras. 24-26.

13. The question of the form to be taken by the draft was an important one, requiring an early decision at the current session. A wide range of views had been expressed, both in the Commission and in the Sixth Committee. The crux of the problem was whether the Commission should opt for a binding legal instrument in the form of a treaty or something non-binding like a General Assembly resolution. The advantages and disadvantages were fairly evenly balanced.

14. In view of the reluctance of States to ratify treaties, particularly when they contained as many controversial issues as did the draft articles, and of the time-consuming preliminaries to any diplomatic conference that would lead to a treaty, he was inclined to the view that a General Assembly resolution was the more practical approach. He agreed, however, that the Assembly should do more than simply take note of the text. The status of the instrument should be enhanced, but whether that could be done by endorsement or consensus without lengthy and divisive discussion in the Sixth Committee was hard to predict. It would depend on many factors, including whether the draft articles struck the proper balance. The Commission could make recommendations on the form of the draft articles, but how the substance of the text was reviewed was entirely in the hands of the Sixth Committee. He would like to hear the views of other members of the Commission on that subject.

15. The Commission had so far refrained from proposing in the articles any provisions on dispute settlement. If the draft was envisaged as an international convention, then there was some point to including such provisions. It had been suggested that the question of dispute settlement should be reviewed on its own merits, and paragraph 20 of the fourth report set out another idea that was worthy of consideration.

16. Part Three of the draft as adopted on first reading had consisted of a set of articles on dispute settlement, but the procedures had involved excessive detail and had in many respects been unbalanced. They had drawn criticism from Governments and had been discarded on second reading. States were in general reluctant to accept compulsory dispute settlement, but the total absence of such provisions in a legal instrument such as the one on State responsibility was not appropriate. State responsibility was a topic of exceptional importance, involving the rights and obligations of States as well as their vital interests. It covered a broad and sensitive area of international law in which disputes could easily arise. To deal with that situation, it seemed proper to include in Part Four a general provision on dispute settlement, modelled on Article 33 of the Charter of the United Nations and laying emphasis on the principles of free choice and peaceful settlement. Such an addition would make the whole set of draft articles more complete, even if it took the form not of a treaty but of a General Assembly resolution.

17. Mr. BROWNLIE, addressing the question of form, said that two specific factors strongly militated against adopting a convention. The draft articles included major elements of progressive development and the response of a number of States would clearly be problematic. In fact, not only major Powers but also small States would have reasons for caution. The proposed adoption of a convention could be expected to result in the convening of a preparatory conference or some other arrangement that might seriously threaten to unravel the carefully devised scheme of the draft.

18. Two further considerations were in order. The 1969 Vienna Convention did not provide a useful or, indeed, accurate analogy to the draft articles. Its adoption as a convention had been impressive at the time, but its content could not be likened to that of the draft articles. Just as the Commission did not ignore the views of individual Governments, it should certainly not ignore the possible reaction of the collectivity of Governments known as the General Assembly.

19. He agreed with the Special Rapporteur's conclusions on the question of dispute settlement, especially as set out in paragraphs 17 to 19 of the fourth report. In general terms, he did not consider that there was a practical necessity to include provisions on compulsory settlement. Such inclusion would not change the attitude of States in general or of individual States to compulsory jurisdiction by ICJ or other tribunals. A provision along the lines of Article 33 of the Charter of the United Nations was an attractive option but not strictly necessary, since the position under the Charter was preserved by article 59 of the draft.

The meeting rose at 12.45 p.m.

2668th MEETING

Thursday, 26 April 2001, at 10 a.m.

Chairman: Mr. Peter KABATSI

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Idris, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Momtaz, Mr. Opertti Badan, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Simma, Mr. Tomka, Mr. Yamada.