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Summary record of the 2751st meeting

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INTERNATIONAL LAW COMMISSION

SUMMARY RECORDS OF THE FIRST PART OF THE FIFTY-FIFTH SESSION

Held at Geneva from 5 May to 6 June 2003

2751st MEETING

Monday, 5 May 2003, at 3.05 p.m.

Outgoing Chair: Mr. Robert ROSENSTOCK

Chair: Mr. Enrique CANDIOTI

Present: Mr. Addo, Mr. Al-Marri, Mr. Baena Soares, Mr. Brownlie, Mr. Chee, Mr. Comissário Afonso, Mr. Dugard, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kemicha, Mr. Koskenniemi, Mr. Mansfield, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Sepúlveda, Mr. Yamada.

Opening of the session

1. The OUTGOING CHAIR declared open the fifty-fifth session of the International Law Commission and extended a warm welcome to all members.

Tribute to the memory of Valery Kuznetsov, member of the Commission

2. The OUTGOING CHAIR said it was sad to recall that Valery Kuznetsov had passed away the previous year. Valery Kuznetsov had been the head of the international law department of the Diplomatic Academy of the Ministry of Foreign Affairs of the Russian Federation and a member of the Permanent Court of Arbitration and had served on several important international bodies. He had combined the talents of the practitioner of international law with the erudition of the academic. He had been elected to the Commission in 2002 and had served as its Rapporteur.

3. On behalf of the Commission, he would send a letter of condolences to Valery Kuznetsov's family.

At the invitation of the Outgoing Chair, the members of the Commission observed a minute of silence.

4. The OUTGOING CHAIR said that the topical summary of the discussion on the Commission's report held in the Sixth Committee of the General Assembly during its fifty-seventh session, prepared by the Secretariat, was contained in document A/CN.4/529. Delegations in the Sixth Committee had expressed an interest in enhancing the dialogue between the Committee and the Commission. Mr. Dugard, representing the Commission, had been able to respond to several questions regarding the topic of diplomatic protection. The proceedings had been held in a very positive atmosphere.

Election of officers

Mr. Candiotti was elected Chair by acclamation.

Mr. Candiotti took the Chair.

5. The CHAIR thanked the members of the Commission for the honour they had done him and said that he would make every effort to deserve their trust and make the session a success.

6. Since the position of first Vice-Chair was to be filled by a member from an Eastern European country, the election of that officer should perhaps be deferred until after the elections to fill casual vacancies.

7. Mr. GALICKI supported that suggestion. Currently, he was the only Eastern European member of the Commission, and vacancies for two more members from Eastern European countries were to be filled.

It was so decided.

Mr. Chee was elected second Vice-Chair by acclamation.

Mr. Kateka was elected Chair of the Drafting Committee by acclamation.

Mr. Mansfield was elected Rapporteur by acclamation.

Adoption of the agenda (A/CN.4/528)

8. Mr. DUGARD said that consultations were currently taking place on the possibility of proposing an additional agenda item. He asked whether the adoption of the provisional agenda would preclude such a possibility.

9. The CHAIR said that additional issues could be considered under item 13, "Other business", but that the proposal would first have to be considered by the Bureau and the Planning Group.

The agenda was adopted.

Organization of work of the session

[Agenda item 2]

10. The CHAIR drew attention to the proposed programme of work for the first two weeks of the Commission's session. If he heard no objection, he would take that the Commission decided to adopt the proposed programme.

It was so decided.

11. The CHAIR invited members to join the Drafting Committee and the Planning Group. Since the Drafting Committee would be taking up the topic of reservations to treaties the following afternoon, he urged its Chair to form its membership as soon as possible.

Filling of casual vacancies in the Commission (article 11 of the statute) (A/CN.4/527 and Add.1-3)

[Agenda item 1]

12. The CHAIR announced that the Commission was required to fill three casual vacancies that had arisen as a consequence of the death of Valery Kuznetsov and the election of Mr. Bruno Simma and Mr. Peter Tomka to ICJ. The curricula vitae of the five candidates for the vacancies were contained in document A/CN.4/527/Add.1. He would suspend the meeting to enable members to hold informal consultations.

The meeting was suspended at 4.10 p.m. and resumed at 4.45 p.m.

13. The CHAIR announced that the Commission had elected Mr. Roman Kolodkin, Mr. Teodor Melescanu and Mr. Constantine Economides to fill the casual vacancies which 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 responsibility of international organizations (A/CN.4/529, sect. E, A/CN.4/532,¹ A/CN.4/L.632)

[Agenda item 7]

FIRST REPORT OF THE SPECIAL RAPPORTEUR

14. Mr. GAJA (Special Rapporteur), introducing his first report on the responsibility of international organizations (A/CN.4/532), said that it built on the report of the Working Group on Responsibility of International Organizations adopted by the Commission at its fifty-fourth session² and attempted to take the Commission's work a few steps further. After a historical survey, the report addressed the scope of the work on the responsibility of international organizations and the related question of the definition of an international organization.

15. The report then discussed what the draft articles on State responsibility for internationally wrongful acts adopted by the Commission at its fifty-third session³ had termed "General principles". Following the framework used in those articles, the next question to be dealt with would be attribution. In 2002 he had indicated his intention to cover in his first report attribution of conduct to international organizations. He had not been able to fulfil that part of his plan because international organizations had been slow responding to the request for information on their practices addressed to them by the Secretariat in accordance with the recommendation in paragraph 488 of the Commission's report to the General Assembly on the work of its fifty-fourth session.⁴ The request had been sent in September 2002 and answers had reached the Secretariat only recently. Since the Commission had enlisted the support of organizations in providing information, it must take their answers into account, even if such a course took more time. All questions of attribution of conduct to an international organization, or to a State, when there was any uncertainty about the matter, would be dealt with in the next report.

16. As the consideration of questions of attribution had been postponed, only a few matters were now being proposed for discussion by the Commission, but they were far from secondary ones. For example, the determination of the scope of the work was of particular importance for the drafting of articles on substantive issues, since it would indicate which organizations' practice must be taken into account.

17. A number of elements relating to scope could already be gleaned from the Working Group's report, but the Commission had adopted that report at the very end of the previous session and had had little opportunity to discuss it in full. Moreover, the Working Group had examined the issues on a preliminary basis and had not had to grapple with the difficult questions that often arose when one was required to write an accepted solution as a normative proposition. The Working Group's conclusions did not entirely reflect his views, but he sincerely hoped they would not be reversed. He did, however, think there was room for refining and clarifying them.

18. He referred in his report to the Commission's specific contributions to the study of the responsibility of international organizations under international law. Much

² Reproduced in *Yearbook ... 2002*, vol. II (Part Two), chap. VIII, sect. C, p. 93.

³ *Yearbook ... 2001*, vol. II (Part Two), pp. 26-30.

⁴ *Yearbook ... 2002*, vol. II (Part Two), p. 96.

¹ Reproduced in *Yearbook ... 2003*, vol. II (Part One).

more in the Commission's previous work was no doubt relevant as well, but a general survey of all the materials would be difficult to carry out at the present stage. The relevant materials would be taken into account in future work whenever the discussion so warranted, but for the time being it seemed appropriate to consider only contributions that he would term "specific". He accordingly mentioned in the report the saving clause contained in article 57 of the draft articles on State responsibility for internationally wrongful acts and the related commentary. Most of the other "specific" materials concerned attribution of conduct. The report referred in some detail to two draft articles which had been adopted on first reading but, for various reasons, dropped from the final text. It was the commentary to those draft articles that was particularly interesting, as was the discussion of questions that would undoubtedly arise in the Commission's future work. Attribution of conduct was an area in which international law had developed considerably in the past few years.

19. Many elements of interest could also be gathered from the work of other institutions. For example, in 1995, at its Lisbon session, the Institute of International Law had adopted a resolution entitled "The Legal Consequences for Member States of the Non-fulfilment by International Organizations of Their Obligations toward Third Parties".⁵ The preparatory work, in particular the reports by Ms. Rosalyn Higgins, and the debates⁶ were important.

20. Special mention should be made of work paralleling the Commission's now being undertaken by ILA, which had a Committee on the Accountability of International Organizations. The topic was undoubtedly broader than the Commission's, for it comprised good governance, for example. The Committee, chaired by Sir Franklin Berman, had presented its third report⁷ in New Delhi in 2002, including a number of proposals on the responsibility of international organizations under international law. A series of articles had already been drafted, but the work was not yet finished. In a letter, the Chair of the Committee had informed him of the Committee's plans for a series of private seminars with groups of international organizations and had noted that there might be some useful overlap between that activity and the Commission's request to international organizations to provide information about their internal practices. Of course, cooperation between the Commission and ILA would have to be considered in a wider context, perhaps in the Planning Group, and not solely with reference to the responsibility of international organizations, but the situation did seem to offer an important opportunity for a concrete discussion on cooperation with learned institutions of a non-governmental character.

21. To speak of the responsibility of an international organization was to presuppose that the organization had legal personality. Otherwise, its conduct would have to be attributed to other entities, probably the member States. Article 1 of the resolution adopted by the Institute of International Law at its Lisbon session stated, "This Resolu-

tion deals with issues arising in the case of an international organization possessing an international legal personality distinct from that of its members."⁸

22. It had traditionally been held that many organizations did not meet the legal personality requirement. The requirement had thus limited the scope of study to a small number of organizations, the most significant ones, starting with the United Nations and branching out to its larger family and to certain regional organizations. That approach was no longer tenable in view of the trend towards recognizing the legal personality of individuals, as was highlighted by the decision of ICJ in the *LaGrand* case and the Commission's own commentary on the draft articles on State responsibility for internationally wrongful acts. If individuals had legal personality, it was difficult to deny legal personality to organizations, whether their members were States or individuals or both States and individuals. The only proviso was that the organization should act in its own capacity, not merely as an instrument of another entity.

23. That left the need to look for other elements in defining organizations for the purpose of discussing international responsibility. It would be difficult to deal simultaneously with governmental organizations of a universal character and organizations composed of individuals. Obviously, different rules should be applied, and the Commission should focus on those that were more clearly a part of international law. Yet the references to international organizations contained in a number of codification instruments, starting with the Vienna Convention on the Law of Treaties (hereinafter "the 1969 Vienna Convention"), which merely defined them as intergovernmental organizations. One might well ask whether that was a definition at all. Such a definition conveyed the idea that some members must be States, but did not necessarily say that the international organization must be established by treaty, and it did not make any distinction among the organizations created by States, which might also deal exclusively with commercial or private law matters. The definition of an international organization as an intergovernmental organization had been endorsed by the Commission, albeit briefly, in its commentary on article 57 of the draft articles on State responsibility for internationally wrongful acts. One alternative would be for the Commission to reproduce the definition contained in several codification conventions; "intergovernmental organization" could then be defined in greater detail in the commentary. As was pointed out in paragraph 14 of his report, the meaning was less obvious than might appear at first glance, particularly in view of the existence of several organizations whose members included not only States but subjects that could be individuals, territories or international organizations.

24. His report explored alternatives to the current definition. The Commission should try to produce a functional definition covering a relatively homogeneous category of organizations, so that it could establish one set of rules with just a few variations, rather than a number of different rules depending on the type of organization concerned. A new, more precise definition would in any case make an elucidation in the commentary superfluous.

⁵ *Annuaire de l'Institut de Droit International*, vol. 66-II (1996), p. 444.

⁶ *Ibid.*, pp. 233–320.

⁷ ILA, *Report of the Seventieth Conference* (London, 2002), pp. 772–806.

⁸ See footnote 5 above.

25. He had proceeded on the premise that the present work was a sequel to the draft articles on State responsibility. The Commission should try to define the category of organizations that exercised functions similar to those of States. In English, such functions might be referred to as governmental. He was aware that the use of that term might raise drafting problems in other languages. If the definition referred to governmental functions, then non-governmental organizations, which usually did not exercise those functions, were left out, apart from a few exceptions, such as ICRC, which exercised some governmental functions in the broad sense. The Commission might discuss what to do about those exceptions. His decision to rule out non-governmental organizations was in keeping with the views expressed by many delegations in the Sixth Committee in response to the Commission's request for comments. The proposed definition would also leave out governmental organizations whose conduct was less likely to give rise to questions of responsibility under international law. International human rights rules were of relevance to all organizations, whether governmental or non-governmental, but there were many rules of international law which concerned entities only insofar as they exercised governmental functions. For an organization to be covered by the draft articles, the definition might specify that some of its members must be States, but the presence of other subjects—other international organizations, territories or individuals—was not a reason for excluding it.

26. The definition in draft article 2 proposed by the Special Rapporteur in his report contained three elements: (a) the organization included States among its members; (b) it exercised functions in its own capacity and not as an instrument of other subjects; and (c) those functions might be regarded as governmental. The definition of "organization" related to the scope of the draft articles, but it might be preferable to follow the precedents referred to in paragraph 28 of the report and place the definition in draft article 2, while draft article 1 specified the general scope. It seemed appropriate to make it clear from the outset what the draft articles were about, namely issues relating to the responsibility of international organizations under international law. That would exclude the sometimes interrelated questions of the civil liability of international organizations. One reason was that at the present time there were very few rules of general international law on the civil liability of international organizations. Thus dealing with civil liability would constitute solely an exercise in progressive development of the law, which would be difficult to carry out on a general scale. The other reason for omitting civil liability was that the questions were heterogeneous. Rules of international law existed on the civil liability of States which operated a nuclear plant, but that did not mean the resulting civil liability was analogous to responsibility under international law. Referring to responsibility under international law would make it clear that the draft articles did not cover international liability for injurious consequences arising out of acts not prohibited by international law, the topic assigned to Mr. Sreenivasa Rao as Special Rapporteur. In suggesting that such liability should not be included in the present draft articles, he had again followed the view expressed by a large number of representatives in the Sixth Committee in response to the Commission's request for comments.

He did not wish to query the usefulness of a study on international liability for injurious consequences also in the case of international organizations, nor did he wish to increase the burden on Mr. Sreenivasa Rao. The Commission should perhaps decide that the questions which might arise in the case of international organizations were really more analogous to questions concerning States, and that it should deal with them as a sequel to the present study, or possibly within the scope of the work on liability.

27. Another point needed to be considered in an introductory provision. Article 57 of the draft articles on State responsibility for internationally wrongful acts expressly left aside not only "any question of the responsibility under international law of an international organization" but also any question of the responsibility of "any State for the conduct of an international organization". The study in hand would be inadequate if it did not attempt to fill that gap and cover responsibility for the conduct of an organization incurred by States as members or otherwise. The scope of the draft articles should include an express reference to that issue in draft article 1.

28. He would like to defer his presentation of draft article 3, on general principles, as it sought to encompass the substance of articles 1 to 3 of the draft articles on State responsibility for internationally wrongful acts.

Organization of work of the session (*continued*)

[Agenda item 2]

29. Further to consultations, the CHAIR announced the composition of the Drafting Committee for the topic of reservations to treaties: Mr. Kateka (Chair), Mr. Pellet (Special Rapporteur), Mr. Comissário Afonso, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Kamto, Mr. Rodríguez Cedeño, Mr. Rosenstock and Mr. Yamada (members), and *ex officio* Mr. Mansfield (Rapporteur). Membership was still open to other members of the Commission.

The meeting rose at 5.50 p.m.

2752nd MEETING

Tuesday, 6 May 2003, at 10.05 a.m.

Chair: Mr. Enrique CANDIOTI

Present: Mr. Addo, Mr. Al-Marri, Mr. Baena Soares, Mr. Brownlie, Mr. Chee, Mr. Comissário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kemicha, Mr. Koskenniemi, Mr. Mansfield, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao,