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Summary record of the 2095th meeting

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INTERNATIONAL LAW COMMISSION

SUMMARY RECORDS OF THE FORTY-FIRST SESSION

Held at Geneva from 2 May to 21 July 1989

2095th MEETING

Tuesday, 2 May 1989, at 3.15 p.m.

Outgoing Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Chairman: Mr. Bernhard GRAEFRATH

Present: Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Boutros-Ghali, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Illueca, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

Opening of the session

1. The OUTGOING CHAIRMAN declared open the forty-first session of the International Law Commission and welcomed the members of the Commission and its secretariat, particularly its new Secretary, Mr. Vladimir Kotliar.

Statement by the outgoing Chairman

2. The OUTGOING CHAIRMAN said that, as instructed by the Commission, he had attended the forty-third session of the General Assembly to introduce to the Sixth Committee the Commission's report on its fortieth session (A/43/10).¹ The text of the statement he had made on that occasion,² as well as the summary records of the meetings the Sixth Committee had devoted to the report and the topical summary of the debate prepared by the Secretariat (A/CN.4/L.431), were available to members of the Commission, who would thus see that the discussion had on the whole been very positive and that most delegations had expressed a favourable opinion of the Commission's work.

3. Some aspects of the Sixth Committee's discussions nevertheless called for comment. First, it should be noted that some delegations—admittedly very few in number—had spent more time criticizing the Commission's procedures and methods of work than objectively assessing the results achieved in the past 40 years precisely by means of those methods. After so many debates on the Commission's procedures and methods of work, however, it should be obvious by now that, although the ones it used were

not ideal, they were the best suited to its needs and to its specific features, and thus the most effective.

4. It should also be noted that very few delegations had responded to the appeal made by the Commission, in accordance with a request by the General Assembly, for comments on the specific points on which the Commission would like Governments to give it the necessary guidance in its work. He himself had not failed to stress that point in the statement he had made to the Sixth Committee.

5. There had, moreover, been a misunderstanding in connection with the Commission's report: many representatives had referred in their statements not to the report of the Commission itself, but to the reports of special rapporteurs or to proposals by the Drafting Committee. That misunderstanding might well be the result of the way in which the Commission's report was presented. It had to be made clear that what the Commission submitted to the General Assembly was the outcome of its discussions in plenary meetings, in other words the proposals, draft articles and commentaries adopted by the Commission as a whole. It was inadmissible for the Sixth Committee's debates to deal with proposals that were contrary to what the Commission as a whole had decided in its report, and any possible misunderstanding on that score must be avoided in the future.

6. There had been a further misunderstanding with regard to the Commission's methods of work, which some delegations had, for reasons that were not always very clear, taken as their central theme. They had apparently assumed that the International Law Commission was a working group of the Sixth Committee and had thus been unaware, or pretended to be unaware, of the fact that, although the Commission was a subsidiary body of the General Assembly, it had the distinctive characteristic of having been given considerable independence and of having its own statute, so that its members were elected in their personal capacity and not as representatives of Governments, making it the master of its own procedure.

7. One of the criticisms made by that same small group of delegations concerned the Commission's output and the way in which it made use of the time allocated to it—a strange criticism coming from a Committee that was not exactly a model of punctuality. It was paradoxical, too, that the Commission was reproached for submitting unduly voluminous reports, in particular so far as the historical background to the various topics under consideration was concerned, when the complaint was also made that it was difficult for persons who had not followed the Commission's work for several years to understand the content of its report precisely because they did not know the origins and purpose of all the proposals put forward in it. Admittedly, representatives of Governments in the General Assembly changed frequently. Perhaps the Commission should therefore reflect on what could be done to solve the following problem: how could it discharge its obligation to the General Assembly by submitting the results of its

¹ See *Yearbook* . . . 1988, vol. II (Part Two).

² See *Official Records of the General Assembly, Forty-third Session, Sixth Committee, 25th meeting*, paras. 1-71.

work to it in as comprehensive and analytical a manner as possible and thus provide Governments with all the elements necessary for taking a position on the proposals submitted to them, while ensuring that, as it was entitled to expect, the General Assembly would consider its report with the required care and attention? It should not be forgotten in that connection that the Commission's report was also a working tool much appreciated by specialists in international law and that it had at times even been cited in judgments of the ICJ.

8. For his part, he would suggest two solutions to the problem, on the understanding that the matter would be considered by the Planning Group if the Commission decided to re-establish it at the current session. The first solution would be for the Commission's report to be considered by the Sixth Committee not in the year in which it was submitted, but the following year, so that Governments would have sufficient time to study it in depth and give the necessary instructions to their delegations in full knowledge of the facts. The obvious drawback to that solution was that the special rapporteurs and the Commission itself would not be able to take the comments of the Sixth Committee into account at the following session; but to overcome that, the Commission could stagger or alternate the consideration of the various topics before it. The other possibility would be for Governments to submit their comments in writing within a fairly brief period so that the Secretariat could make a summary of them; that would, incidentally, not prevent delegations in the Sixth Committee from making any comments, if necessary, during its meetings.

9. As to the *Ad Hoc* Working Group established by the Sixth Committee under paragraph 6 of General Assembly resolution 42/156 of 7 December 1987, it had been obliged, after a number of meetings, to acknowledge the obvious fact that its objective could not be to lay down rules or impose guidelines on the Commission with regard to its methods and procedures, which were governed by the Commission's statute. The text of the report made by the Chairman of the Group to the Sixth Committee³ had been circulated to members of the Commission.

10. Referring to the question of co-operation with other bodies, he informed the Commission that he had attended, as an observer, the session of the European Committee on Legal Co-operation held at Strasbourg in November-December 1988, at which it had been suggested that a session of the European Committee should be held concurrently with the Commission's session in order to deal with questions of joint interest to both bodies. He had also represented the Commission at the meeting of the Asian-African Legal Consultative Committee held at Nairobi in February 1989. At that meeting, the Legal Advisers of Sweden and Finland had proposed that a seminar should be held, under the auspices of the United Nations and during the forty-fourth session of the General Assembly, on a question of concern to the Asian-African Legal Consultative Committee, namely pollution and the environment.

11. In addition, Mr. Koroma had represented the Commission at a meeting on river and lake basin development organized by the Economic Commission for Africa at Addis Ababa in January 1989; and Mr. Pawlak had represented

the Commission at the meeting of the International Law Association held at Warsaw in August 1988.

12. Mr. KOROMA said that, while he shared most of the views expressed by the outgoing Chairman, he regarded the criticism by the Sixth Committee as a way of encouraging the Commission to improve its methods of work and procedures. It was also encouraging to note that the participants in the meeting at which he had given a detailed account of the Commission's work on the law of the non-navigational uses of international watercourses had broadly agreed with the recommendations made by the Commission on that topic.

The meeting was suspended at 4 p.m. and resumed at 4.20 p.m.

Election of officers

Mr. Graefrath was elected Chairman by acclamation.

Mr. Graefrath took the Chair.

13. The CHAIRMAN thanked the Commission for the honour it had paid his country and himself by electing him Chairman and for the confidence it had thus shown in him. He would endeavour to follow the example of objectivity and impartiality set by his predecessors. He expressed his gratitude to the outgoing Chairman for the talent with which he had conducted the work of the previous session and represented the Commission at the forty-third session of the General Assembly and said he was convinced that the Planning Group would pay the closest attention to his interesting suggestions.

14. He appreciated the opportunity he had been given to preside over the current session, which marked the fortieth anniversary of the Commission's establishment. The Commission's drafts and proposals, as well as the reports of its special rapporteurs, represented an extremely important contribution to the development of international law and to the legal order of today's international community. At its first session, in 1949, the Commission had included among the topics selected for codification two that were central to its current work, namely jurisdictional immunities of States and their property, and State responsibility, and had appointed a special rapporteur to prepare a draft code of offences against the peace and security of mankind, another topic that was still on its agenda. Those three topics were particularly qualified to consolidate the international legal system.

15. It was also at its first session that the Commission had prepared the draft Declaration on Rights and Duties of States,⁴ which had greatly influenced the later work that had led to the adoption of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,⁵ a body of rules which had lost none of their topicality.

16. He was sure that, thanks to the competence, experience and co-operation of its members, the Commission would succeed in making good progress in its work at the current session.

⁴ See *Yearbook* . . . 1949, pp. 286 et seq.

⁵ General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

³ *Ibid.*, 40th meeting, paras. 10-18.

Mr. Sreenivasa Rao was elected First Vice-Chairman by acclamation.

Mr. Roucounas was elected Second Vice-Chairman by acclamation.

Mr. Calero Rodrigues was elected Chairman of the Drafting Committee by acclamation.

Mr. Bennouna was elected Rapporteur by acclamation.

Adoption of the agenda (A/CN.4/418)

17. The CHAIRMAN invited the Commission to adopt the provisional agenda (A/CN.4/418), on the understanding that its adoption would be without prejudice to the order of consideration of the topics, which would be decided later.

The provisional agenda (A/CN.4/418) was adopted.

18. The CHAIRMAN, drawing attention to General Assembly resolution 43/169 of 9 December 1988, suggested that the request in paragraph 5 of that resolution should be taken up under agenda item 9 (Programme, procedures and working methods of the Commission, and its documentation), which was to be referred to the Planning Group.

It was so agreed.

Organization of work of the session

[Agenda item 1]

19. The CHAIRMAN said that, in addition to the officers of the current session, the Enlarged Bureau would be composed of the special rapporteurs and members who had formerly been Chairman of the Commission, namely Mr. Arangio-Ruiz, Mr. Barboza, Mr. Díaz González, Mr. McCaffrey, Mr. Ogiso, Mr. Thiam, Mr. Yankov, Mr. Francis and Mr. Reuter.

20. Mr. KOROMA said that, in future, the Commission should have before it at the beginning of the session a summary table showing the stage reached in the preparation of each of the reports to be discussed.

The meeting was suspended at 5.15 p.m. and resumed at 5.55 p.m.

21. The CHAIRMAN, referring to the reports to be discussed by the Commission, said that four had still not been issued and would be distributed between 17 May and 1 June. The Commission would also have before it the second report by Mr. Ogiso on jurisdictional immunities of States and their property and would consider it together with his preliminary report, which it had been unable to discuss at the previous session. Because the reports would be available at different times, the Enlarged Bureau recommended that the Commission should consider the items on the agenda in the following provisional order:

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| 1. Draft Code of Crimes against the Peace and Security of Mankind (item 5) | 7 meetings |
| 2. State responsibility (item 2) | 7 meetings, plus a further two meetings later |
| 3. International liability for injurious consequences arising out of acts not prohibited by international law (item 7) | 5 meetings, plus one further meeting later |

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| 4. Jurisdictional immunities of States and their property (item 3) | 7 meetings |
| 5. The law of the non-navigational uses of international watercourses (item 6) | 6 meetings |
| 6. Relations between States and international organizations (second part of the topic) (item 8) | 2 meetings |

The Commission would set aside four meetings for consideration of the reports of the Drafting Committee and would also make time available for receiving the representatives of the legal bodies with which it co-operated.

22. If there were no objections, he would take it that the Commission agreed to adopt that provisional plan of work.

It was so agreed.

Programme, procedures and working methods of the Commission, and its documentation

[Agenda item 9]

MEMBERSHIP OF THE PLANNING GROUP OF THE ENLARGED BUREAU

23. The CHAIRMAN said that the Enlarged Bureau proposed that the Planning Group should be composed as follows: Mr. Sreenivasa Rao (Chairman), Prince Ajibola, Mr. Al-Qaysi, Mr. Barsegov, Mr. Beesley, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Illueca, Mr. Jacovides, Mr. Mahiou, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Roucounas, Mr. Thiam, Mr. Tomuschat and Mr. Yankov. The Group was not restricted and other members of the Commission would be welcome to attend its meetings.

It was so agreed.

24. The CHAIRMAN recalled that, at its previous session,⁶ the Commission had decided to establish a Working Group which would suggest topics for inclusion in the Commission's long-term programme of work. The Enlarged Bureau proposed that the members of the Commission from the five regional groups should meet to appoint one representative from each as a member of the Working Group, which would elect its own chairman.

The meeting rose at 6.30 p.m.

⁶ See *Yearbook* . . . 1988, vol. II (Part Two), p. 110, para. 557.

2096th MEETING

Wednesday, 3 May 1989, at 10 a.m.

Chairman: Mr. Bernhard GRAEFRATH

Present: Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley,