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**Summary record of the 2295th meeting**

Topic:  
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# INTERNATIONAL LAW COMMISSION

## SUMMARY RECORDS OF THE FORTY-FIFTH SESSION

*Held at Geneva from 3 May to 23 July 1993*

### 2295th MEETING

*Monday, 3 May 1993, at 3.25 p.m.*

*Outgoing Chairman:* Mr. Christian TOMUSCHAT

*Chairman:* Mr. Julio BARBOZA

*Present:* Mr. Arangio-Ruiz, Mr. Bowett, Mr. Calero Rodrigues, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. Idris, Mr. Kabatsi, Mr. Koroma, Mr. Kusuma-Atmadja, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Rosenstock, Mr. Shi, Mr. Szekely, Mr. Thiam, Mr. Vargas Carreño, Mr. Vereshchetin, Mr. Villagrán Kramer, Mr. Yamada.

#### Opening of the session

1. The OUTGOING CHAIRMAN declared open the forty-fifth session of the International Law Commission.

#### Statement by the outgoing Chairman

2. The OUTGOING CHAIRMAN, speaking on behalf of the Commission, presented his sincere condolences to Mr. de Saram following the assassination of the President of Sri Lanka, Mr. Ramasinghe Premadasa.

3. He welcomed the members of the Commission and the fact that so many of them were present at the opening of the session.

4. The most important development since the last session had undoubtedly been the discussion by the Sixth Committee of the General Assembly of the Commission's report on the work of its forty-fourth session.<sup>1</sup> The sections of the report on the possible establishment of an international criminal jurisdiction had, of course, aroused the greatest interest among delegations, some of which had been of the opinion that a draft statute could be completed within one year, while others had taken the more cautious view that Governments had to be able

to give in-depth consideration to all the implications of the establishment of such a court. A clear-cut majority had been in favour of not automatically linking an international criminal court and the Code of Crimes against the Peace and Security of Mankind, although it had been generally recognized that, once completed, the Code should be one of the instruments to be applied by the court. Because of the principle *nullum crimen sine lege—lex* being understood as written law—the court should not be called upon to base its decisions on rules of customary law. With regard to jurisdiction *ratione personae*, the proposition that the jurisdiction of the court should apply only to individuals, and not to States, had received unchallenged support. For further details, the topical summary (A/CN.4/446) faithfully reflected the Sixth Committee's debate.

5. The General Assembly, in its resolution 47/33, which was carefully drafted, had given the Commission a clear mandate. In paragraph 6 of that resolution, the General Assembly:

*Requests* the International Law Commission to continue its work on this question by undertaking the project for the elaboration of a draft statute for an international criminal court as a matter of priority as from its next session, beginning with an examination of the issues identified in the report of the Working Group and in the debate in the Sixth Committee with a view to drafting a statute on the basis of the report of the Working Group, taking into account the views expressed during the debate in the Sixth Committee as well as any written comments received from States, and to submit a progress report to the General Assembly at its forty-eighth session.

6. That mandate obviously involved an element of urgency, since the international community expected the Commission to come up with tangible results in the form of a progress report to be submitted to the General Assembly at its forty-eighth session, that is to say before the end of the year. As a rule, the Commission did not work under conditions of urgency and carefully weighed any suggestions before giving them the shape of draft articles, but, under the mandate entrusted to it, it had to establish mechanisms to fit into the time-frame determined by the General Assembly. The matter was of great political importance and the objective to be achieved was clear. The project for the statute of an international criminal court could not be dealt with by the Commission's traditional methods, whereby the time required for the completion of a draft had hardly ever been less than five years. In recent years, only the draft articles on the prevention and punishment of crimes against diplo-

<sup>1</sup> Reproduced in *Yearbook . . . 1992*, vol. II (Part Two).

matic agents and other internationally protected persons had been prepared more expeditiously, in only one session.<sup>2</sup>

7. The draft statute of an international criminal court was, of course, far more complex than the 1972 draft articles which had become the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents. However, the Commission already had a sound basis for its work: (a) the excellent reports of Mr. Doudou Thiam, Special Rapporteur on the draft Code of Crimes against the Peace and Security of Mankind, who would, if only because of the close relationship between the draft Code and the international criminal court, play a major role in drawing up the statute; (b) the draft prepared by the 1953 United Nations Committee on International Criminal Jurisdiction<sup>3</sup> which was not totally outdated, even though the undertaking had increased in complexity; (c) in 1981, a statute of an international criminal court had been drawn up for the crime of apartheid;<sup>4</sup> and (d) in connection with the decision of the Security Council to establish an international tribunal for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991,<sup>5</sup> several drafts had been prepared, including the French and Italian proposals, the CSCE draft prepared by Mr. Corell, Mr. Türk and Mrs. Thune, and the suggestions of the United States contained in a non-paper, all of which had, moreover, been influenced by the work done in 1992 by the Working Group on the question of an international criminal jurisdiction.<sup>6</sup> The task of preparing a draft statute of an international criminal court was thus feasible, even within a short period of time.

8. Referring briefly to the other items on the agenda for the current session, he said that, as far as the topic "State responsibility" was concerned, the General Assembly had not reached a consensus on two basic aspects of the work to be done by the Drafting Committee in the next two weeks, namely, the need to include provisions on countermeasures in the draft articles and the link between countermeasures and procedures for the peaceful settlement of disputes. If the Commission were to take account of all the views expressed by delegations, it would have to come up with constructive wording which, while not granting any privilege to the wrongdoer, would prevent any possible abuses and thereby safeguard peace.

9. With regard to the topic "International liability for injurious consequences arising out of acts not prohibited by international law", he said that, while most delega-

tions had expressed satisfaction with the decisions taken at the last session, a criticism made in nearly all statements had been that, although the Commission had been working for 14 years to solve the complex problems involved in the topic, it had not definitively adopted one single provision. Delegations had nevertheless stressed that it might be possible to make rapid progress in the context of the new orientation and the Commission could certainly make one of the best contributions to the United Nations Decade of International Law<sup>7</sup> by completing a set of draft articles on transboundary harm during its members' current term of office.

10. All delegations but one had welcomed the Commission's decision not to continue the consideration of the topic "Relations between States and international organizations (second part of the topic)", since the international community's needs had changed in a way that could not have been foreseen at the time the topic had been included in its programme of work.

11. Much sympathy had also been expressed for the serious and constructive efforts the Commission was making to search for new topics.

12. The fact that the Commission's report had been well received by the General Assembly might be the result of the many promises of future action which it contained. The Commission now had to honour those commitments.

13. As part of its traditional policy of cooperation with other legal bodies, the Commission had been represented in the European Committee on Legal Cooperation in Strasbourg by Mr. Eiriksson, who had made a statement supported by a report distributed to all participants. He himself had gone to Kampala to represent the Commission at the annual meeting of the Asian-African Legal Consultative Committee, whose work had impressed him and to which he had described in detail the activities of the Commission at its forty-fourth session. Members of the Commission had also taken part in a number of conferences on the question of the establishment of an international criminal court, including the World Conference on the Establishment of an International Criminal Tribunal to Enforce International Criminal Law and Human Rights which had taken place from 2 to 5 December 1992 at the invitation of the International Institute of Higher Studies in Criminal Sciences at Syracuse, Italy. He himself had attended the International Meeting of Experts on the Establishment of an International Criminal Court, which had been held in Vancouver from 22 to 26 March 1993, at the invitation of the International Centre for Criminal Law Reform and Criminal Justice Policy, at which he had been accompanied by Mr. Crawford, Mr. Eiriksson, Mr. Sreenivasa Rao and Mr. Villagrán Kramer, but, unfortunately, not by Mr. Thiam. The final document of that Meeting might be useful to the Commission in its work.

14. He thanked all the members of the Commission for the confidence they had shown in him. He also expressed his gratitude to the members of the Bureau and the secretariat and explained that Mr. Kotliar had left the Commission to become the Secretary of the Commission of Experts to examine and analyse the information on

<sup>2</sup> See *Yearbook . . . 1972*, vol. II, document A/8710/Rev.1, pp. 312-323.

<sup>3</sup> See *Report of the 1953 Committee on International Criminal Jurisdiction, 27 July-20 August 1953 (Official Records of the General Assembly, Ninth Session, Supplement No. 12 (A/2645))*, annex.

<sup>4</sup> See United Nations draft Convention on the Establishment of an International Penal Tribunal for the Suppression and Punishment of the Crime of Apartheid and Other International Crimes ("Study on ways and means of ensuring the implementation of international instruments such as the International Convention on the Suppression and Punishment of the Crime of Apartheid, including the establishment of the international jurisdiction envisaged by the Convention", document E/CN.4/1426, p. 21).

<sup>5</sup> Security Council resolution 808 (1993) of 22 February 1993.

<sup>6</sup> See footnote 1 above.

<sup>7</sup> Proclaimed by the General Assembly in its resolution 44/23.

war crimes in the former Yugoslavia.<sup>8</sup> He welcomed Mrs. Dauchy, who was now taking over from Mr. Kotliar.

15. Mr. de SARAM said that he appreciated the condolences presented by the Chairman and assured the Commission that he would transmit them to the authorities of his country.

16. Mr. THIAM, referring to his absence at the International Meeting in Vancouver, said that he had in fact received an official invitation and that, despite a very heavy schedule, he had also officially agreed to take part in that meeting. However, about two weeks before the Meeting, he had received another letter stating that what the Meeting would consider was not the statute of an international criminal court, but that of a court with jurisdiction to try the crimes being committed in the former Yugoslavia. In those circumstances, his presence had no longer seemed necessary.

#### **Tribute to the memory of Mr. Motoo Ogiso**

17. The OUTGOING CHAIRMAN informed the members of the Commission of the death of their former colleague, Mr. Motoo Ogiso, a few days before.

*At the invitation of the outgoing Chairman, the Commission observed a minute of silence in tribute to the memory of Mr. Motoo Ogiso.*

#### **Election of officers**

*Mr. Barboza was elected Chairman by acclamation.*

*Mr. Barboza took the Chair.*

18. The CHAIRMAN thanked the members of the Commission for the confidence they had shown in him by electing him Chairman of the International Law Commission at its forty-fifth session. Although its membership was fairly new, the Commission had displayed an excellent team spirit in 1992 which would, together with the eminent qualities of each of its members, make it possible to hope that the current session would be as fruitful as the preceding one.

*Mr. Eiriksson was elected First Vice-Chairman by acclamation.*

*Mr. Idris was elected Second Vice-Chairman by acclamation.*

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

*Mr. de Saram was elected Rapporteur by acclamation.*

#### **Adoption of the agenda (A/CN.4/445)**

19. The CHAIRMAN suggested that the provisional agenda (A/CN.4/445) should be adopted, on the understanding that the order in which the various items would be considered would depend on the way in which the

Commission organized its work. He also suggested that the requests made by the General Assembly in paragraph 9 of its resolution 47/33 should be considered under agenda item 6 (Programme, procedures and working methods of the Commission, and its documentation).

*It was so decided.*

20. The CHAIRMAN suggested that the meeting should be suspended so that the Enlarged Bureau might consider the organization of the Commission's work and so that the Chairman of the Drafting Committee might draw up the list of that Committee's members.

*The meeting was suspended at 4.15 p.m. and resumed at 6 p.m.*

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

[Agenda item 1]

21. The CHAIRMAN, drawing the Commission's attention to the decisions taken by the Enlarged Bureau, said that, in accordance with paragraph 372 of the Commission's report on the work of its forty-fourth session,<sup>9</sup> the first two weeks would be entirely devoted to the work of the Drafting Committee on the articles on State responsibility. On 7 and 14 May, however, the Commission would hold two plenary meetings at which it would be informed of the progress of that work. At the beginning of the third week, it would take up the item on the statute of an international criminal court, to which it would devote three or four plenary meetings and then possibly refer it to a working group. As of 25 May, it would go on to consider in plenary meeting the report of the Special Rapporteur on international liability for injurious consequences arising out of acts not prohibited by international law. If he heard no objection, he would take it that the Commission adopted the programme of work proposed by the Enlarged Bureau.

*It was so decided.*

22. Mr. MIKULKA (Chairman of the Drafting Committee) said that, following the consultations he had just held and in accordance with the guidelines the Commission had adopted in paragraph 371 of the report on the work of its forty-fourth session,<sup>10</sup> he had drawn up the following list of members of the Drafting Committee: Mr. Al-Baharna, Mr. Barboza, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. Eiriksson, Mr. Kabatsi, Mr. Mikulka, Mr. Pellet, Mr. Rosenstock, Mr. Shi, Mr. Szekely, Mr. Vereshchetin and Mr. Villagrán Kramer. The other members of the Commission were invited to take part as observers in the Drafting Committee during its first two weeks of intensive work.

*The meeting rose at 6.10 p.m.*

<sup>9</sup> See footnote 1 above.

<sup>10</sup> Ibid.

<sup>8</sup> The Commission of Experts was established by Security Council resolution 780 (1992) of 6 October 1992.