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Summary record of the 1958th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
1986, vol. I

areas of the fourth report of the Special Rapporteur, and which areas he had in mind.

62. Mr. FRANCIS said that it would be for the Special Rapporteur to select the areas to be discussed with the general principles.

63. Mr. McCAFFREY said that the fourth report of the Special Rapporteur was indeed very comprehensive and his own first reaction had been that, in the time available, it would not be possible to deal in depth with all its aspects. He was inclined to agree that the Commission should proceed to a general discussion of the whole report, devoting, as Mr. Calero Rodrigues had suggested, one week to the general principles and one week to the substantive issues. He had no preference as to which the Commission discussed first. Clearly, the Commission could not make an exhaustive study of the fourth report at the present session. The general discussion it was about to hold should therefore not preclude the possibility of an examination in depth at a later session.

64. Mr. JACOVIDES stressed that the Commission should not hold over any part of the fourth report of the Special Rapporteur until the following session. It should divide the available time in such a way as to devote one week to certain aspects of the report and the other week to the remainder.

65. Sir Ian SINCLAIR said that the order in which the various parts of the fourth report were taken up was not very important. His own marginal preference would be to begin with the general principles, now that the Commission had the whole draft before it. As suggested, however, the general debate could be divided into two parts. During the current week the Commission could deal with parts I, II and III of the report; the following week it could deal with part IV, illustrated by examples taken from the other parts. The Commission would thus be able, at its next session, to examine in greater detail the formulation of the draft articles submitted by the Special Rapporteur.

66. Chief AKINJIDE said that he supported the suggestions made by Sir Ian Sinclair, which appeared to meet with general agreement.

67. Mr. THIAM (Special Rapporteur) proposed that the Commission should first consider war crimes and the "other offences" before passing on, if there was time, to a study of the general principles.

68. Mr. DÍAZ GONZÁLEZ said that he fully agreed with the Special Rapporteur, who had, moreover, never suggested that the Commission should make a detailed examination of each article. The essential need was to study the general trends of the fourth report.

69. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to examine the Special Rapporteur's fourth report (A/CN.4/398) in two stages in a general debate, and not article by article. Parts I, II and III would be examined first, and then part IV, on general principles.

It was so agreed.

The meeting rose at 1 p.m.

1958th MEETING

Tuesday, 3 June 1986, at 10 a.m.

Chairman: Mr. Julio BARBOZA

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Huang, Mr. Illueca, Mr. Jacovides, Mr. Jagota, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Malek, Mr. McCaffrey, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Thiam, Mr. Tomuschat.

Draft Code of Offences against the Peace and Security of Mankind[1] (*continued*) (A/CN.4/387,[2] A/CN.4/398,[3] A/CN.4/L.398, sect. B, ILC(XXXVIII)/Conf.Room Doc.4 and Corr.1-3)

[Agenda item 5]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

PART I (Crimes against humanity)

PART II (War crimes) *and*

PART III (Other offences)

1. Mr. MALEK congratulated the Special Rapporteur on his fourth report (A/CN.4/398), his brilliant oral introduction and, in particular, the efforts he had made to put an end to the long-standing controversy concerning how much priority should be given to the consideration of the general principles of criminal law that might be included in the draft code.

2. He intended to make some comments on crimes against humanity and war crimes, and more particularly on the definitions thereof, and reserved the right to speak at a later stage on other questions discussed in the report. On a point of detail, he would like the Special Rapporteur to explain why the report dealt with the various questions under consideration in the same order as in the 1954 draft code. In part I, on crimes against humanity, the Special Rapporteur noted (*ibid.*, para. 3) that that term had first appeared in the London Agreement of 8 August 1945 establishing the Nürnberg International Military Tribunal and explained (*ibid.*, para. 5) that crimes against humanity had been defined as offences separate from war crimes in the Nürnberg Charter, in Law No. 10 of the Allied Control Council and in the Charter of the International Military Tribunal for the Far East. In all those instruments, the three categories of crimes appeared in the same order: crimes against peace, war crimes and crimes against

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[1] The draft code adopted by the Commission at its sixth session, in 1954 (*Yearbook ... 1954*, vol. II, pp. 151-152, document A/2693, para. 54), is reproduced in *Yearbook ... 1985*, vol. II (Part Two), p. 8, para. 18.

[2] Reproduced in *Yearbook ... 1985*, vol. II (Part One).

[3] Reproduced in *Yearbook ... 1986*, vol. II (Part One).

humanity. In 1950, the Commission had followed that order in formulating the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal.[4] The 1954 draft code enumerated the acts constituting offences against the peace and security of mankind without indicating the category in which they fell. The enumeration did not seem to be based on any particular criterion, not even on the seriousness of the act. The Special Rapporteur had therefore been right to propose draft article 10, which drew a distinction between those three categories of offences.

3. Two alternative definitions of war crimes, one general and the other both general and enumerative, were now being proposed to the Commission (draft article 13). In the 1954 draft code, the Commission had spoken of war crimes simply as "acts in violation of the laws or customs of war" (art. 2, para. (12)). Murder and killing were to be defined as acts in violation of criminal law. The Commission had been of the opinion that it was not possible to draw up an exhaustive list of acts constituting violations of the laws and customs of war. Naturally, it had not been unaware of the four Geneva Conventions of 1949, which appeared to list all serious war crimes, but, in its draft, it had wanted all violations of the laws and customs of war, not just serious acts or acts of some gravity, to be categorized as offences. At the present stage in its work, the Commission had taken extreme gravity as the criterion for characterizing an offence against the peace and security of mankind.[5]

4. In his view, the definition of war crimes had to take full account of the four Geneva Conventions of 12 August 1949[6] and reproduce the relevant provisions. In that connection, he recalled that the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva Convention I) had replaced the relevant Conventions of 22 August 1864, 6 July 1906 and 27 July 1929; that the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva Convention II) had replaced Hague Convention X of 18 October 1907 for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 1906; that the Geneva Convention relative to the Treatment of Prisoners of War (Geneva Convention III) had replaced the Convention of 27 July 1929 and was complementary to Chapter II of the Regulations annexed to Hague Convention II of 29 July 1899 and Hague Convention IV of 18 October 1907 respecting the Laws and Customs of War on Land; and that the Geneva Convention relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV) had supplemented Sections II and III of those Regulations.[7]

5. The list of grave violations referred to in the four Geneva Conventions included many of what were commonly known as "war crimes". In any case, it appeared to cover all the war crimes referred to in the Charter of the Nürnberg Tribunal and in Law No. 10 of the Allied Control Council. War crimes, or at least the most serious, were thus defined by the four Geneva Conventions, which, by 1966, had had binding force for 108 States.

6. In the light of those considerations, he proposed that war crimes should be defined in the following way:

"The following, *inter alia*, shall be regarded as war crimes, in other words as [serious] offences committed in violation of the laws and customs of war:

"(*a*) any of the following acts, if committed against persons or property protected by the laws and customs of war relative to the amelioration of the condition of the wounded and sick in armed forces in the field and to the amelioration of the condition of wounded, sick and shipwrecked members of armed forces at sea: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

"(*b*) any of the following acts, if committed against persons or property protected by the laws and customs of war relative to the treatment of prisoners of war: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed by the laws and customs of war;

"(*c*) any of the following acts, if committed against persons or property protected by the laws and customs of war relative to the protection of civilian persons in time of war: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer, unlawful confinement, compelling a protected person to serve in the forces of the hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed by the laws and customs of war, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly."

Consideration might also be given to the possibility of drafting a subparagraph (*d*) which would refer to the use of nuclear weapons, as mentioned in subparagraph (*b*) (ii) of the second alternative of draft article 13 (Definition of war crimes) submitted by the Special Rapporteur.

7. Subparagraph (*a*) of his proposal was based on the enumeration of grave breaches contained in article 50 of Geneva Convention I and in article 51 of Geneva Convention II, which were identical. Subparagraphs (*b*) and (*c*) were based on the enumeration of grave breaches contained in article 130 of Geneva Convention III and in article 147 of Geneva Convention IV. The proposed definition thus covered all the acts listed as breaches in the four Geneva Conventions and,

[4] *Yearbook ... 1950*, vol. II, pp. 374-378, document A/1316, paras. 95-127.

[5] See 1957th meeting, footnote 6.

[6] United Nations, *Treaty Series*, vol. 75.

[7] For the Hague Conventions, see J. B. Scott, ed., *The Hague Conventions and Declarations of 1899 and 1907* (New York, Oxford University Press, 1918).

in so doing, implicitly incorporated the law established by those Conventions, the law whereby the provisions on the acts in question would be interpreted and applied.

8. Obviously, opinions might differ about the type of definition that would be appropriate for war crimes and about whether the definition should cover only serious war crimes. Perhaps the wording used in the 1954 draft code would be enough. If it were deemed unnecessary to formulate new definitions, a text simply referring to definitions already recognized in international law might also be enough. It could none the less be argued that there was no point in stating rules or, in the present case, formulating definitions by way of *renvoi* and that it would be better to produce precise and comprehensive definitions. It could even be maintained that the definition of war crimes to be included in the draft code should be designed not to make any distinction between serious crimes and non-serious or less serious crimes. The very fact that an act was regarded as a war crime would mean that it was a serious offence.

9. His proposed definition would obviate such problems, since an illustrative list of specific serious acts was grafted into a general definition that might well not expressly take account of the criterion of seriousness. Hence, the general wording of the first part meant that the definition could reflect the development of international law in that field, while the enumeration gave useful indications on the degree of seriousness, which would play a decisive role in the determination of acts covered by the draft code. The definition he was proposing was, on the whole, identical to that contained in the Charter of the Nürnberg Tribunal, which drew no distinction between serious and non-serious offences. The Commission should bear in mind that the latter definition had been intended to apply to "major war criminals". His own definition applied to all the cases listed in the Nürnberg definition, which had been confirmed by General Assembly resolutions 3 (I), 95 (I) and 170 (II). The list had, moreover, already been universally accepted, since it was based on the Geneva Conventions, which were binding on a very large number of States.

10. With regard to acts constituting crimes against humanity, he proposed the following definition:

"The following shall be regarded as crimes against humanity:

"(*a*) in general:

inhuman acts, such as murder, extermination, enslavement, deportation or persecutions, committed against any civilian population on social, political, racial, religious or cultural grounds by the authorities of a State or by private individuals acting at the instigation or with the toleration of such authorities;

"(*b*) in particular:

"(1) genocide,* namely the following acts committed by the authorities of a State or by private individuals with intent to destroy, in whole or in part, a national, ethnic, racial or religious group as such:

"(i) killing members of the group;

"(ii) causing serious bodily or mental harm to members of the group;

"(iii) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

"(iv) imposing measures intended to prevent births within the group;

"(v) forcibly transferring children of the group to another group;

"(2) *apartheid*, namely [followed by the text of the definition contained in article II of the International Convention on the Suppression and Punishment of the Crime of *Apartheid*, which was reproduced as the second alternative of the definition of *apartheid* contained in paragraph 2 of draft article 12 submitted by the Special Rapporteur]."

11. The text he was proposing defined crimes against humanity in general and the crimes of genocide and *apartheid*, which were special cases or cases of special gravity. Subparagraph (*a*) was not identical to the corresponding provision proposed by the Special Rapporteur (art. 12, para. 3), since it was based on the definition contained in the Charter of the Nürnberg Tribunal and developed subsequently by the Commission in the 1954 draft code. Like the two definitions on which it was based, it was both general and enumerative, but not exhaustive. It stated in general terms the characteristics of a crime against humanity and, by way of illustration, listed specific and typical acts falling within the overall category of such crimes. The acts in question, as the Special Rapporteur pointed out in his fourth report (A/CN.4/398, para. 80), could constitute crimes against humanity even if they were committed against fellow countrymen. In the definition appearing in the Charter of the Nürnberg Tribunal (art. 6, para. (*c*)), the formulation "on political, racial or religious grounds" seemed to relate solely to "persecutions", whereas his own definition was applicable to all the acts concerned. Like the definition in the 1954 draft code and the one proposed by the Special Rapporteur, it removed any doubts in that regard. The feature of crimes against humanity was that they took the form of "persecutions" of a group as such or the form of "murder", "extermination", "enslavement" or "deportation" of any civilian population. The motive for such crimes was that the victims belonged to a particular religion, a particular race, and so on.

12. The proposed definition characterized inhuman acts committed on social, political, racial, religious or cultural grounds as crimes against humanity. Accordingly, although it was identical to the one suggested by the Special Rapporteur, it differed from the definition contained in the Charter of the Nürnberg Tribunal, in which crimes against humanity included inhuman acts committed only on political, racial or religious grounds. It retained the motives listed by the Commission in the 1954 draft code, which implied that there were some inhuman acts which could be committed other than on

* Definition based on articles II and IV of the Convention on the Prevention and Punishment of the Crime of Genocide.

political, racial or religious grounds but still aroused condemnation by the conscience of mankind.

13. His proposed definition, like the one in the 1954 draft code, on which it was based, contained no provision similar to the provision in the Charter of the Nürnberg Tribunal (art. 6, para. (*c*)) whereby crimes against humanity were regarded as such whether or not they were committed "in violation of the domestic law of the country where perpetrated". Immediately after the Second World War, crimes against peace and war crimes had already been recognized as international crimes, but doubt had still remained with regard to crimes against humanity. In the Charter of the Nürnberg Tribunal, the definition of crimes against humanity was closely bound up with warfare. It characterized crimes against humanity only as inhuman acts committed in connection with crimes against peace or war crimes. Yet legal thinking and the jurists who had examined and clarified the concept of crimes against humanity had been virtually unanimous, since the Nürnberg Tribunal, in recognizing that such crimes should be detached from warfare and should no longer be regarded as a category of offences incidental to crimes against peace and war crimes. Indeed, the Commission had done so in the 1954 draft code. Moreover, that idea had been embodied in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide—which came into force in 1951—in which article I stated that genocide "whether committed in time of peace or in time of war" was a crime under international law that the contracting parties undertook to prevent and to punish. It would be useful to mention that idea in the commentary to the definition of crimes against humanity.

14. Subparagraph (*b*) (1) of his proposed definition of crimes against humanity reproduced in substance the definition of the crime of genocide contained in article II of the 1948 Convention, which was, by and large, also reproduced in the 1954 draft code and in the draft now before the Commission. Subparagraph (*b*) (2) reproduced the definition of the crime of *apartheid* contained in article II of the 1973 International Convention on the Suppression and Punishment of the Crime of *Apartheid*. The opening words of subparagraph (*b*) underscored the specific character of the crimes defined therein and brought out the fact that they fell within the general category of crimes against humanity. As the Special Rapporteur noted (A/CN.4/398, para. 54), for reasons that were based "on the specific nature of the crime of genocide, the latter should be assigned a separate place among crimes against humanity".

15. In connection with the perpetrators of the crime of genocide, his own definition simply stated, as did article IV of the 1948 Convention, that the crime could be committed either by the authorities of a State, namely Governments or officials, or by private individuals. Unlike subparagraph (*a*), it did not specify that, in the case of private individuals, it was necessary to establish that they had acted at the instigation or with the toleration of the authorities of a State, for such a condition would call for a change in the 1948 Convention and would be superfluous in view of the nature, scope and dimensions of the crime of genocide. How was it possible to conceive that such a crime could be committed by individuals without an order from or the toleration of the authorities of a State? On the other hand, independently of, or even against the will of, a State, individuals could commit other inhuman acts capable of being characterized as crimes against humanity. It was in order to prevent all inhuman acts committed by individuals from being regarded as crimes under international law that the Commission had deemed it necessary to indicate, in the 1954 draft code, that an inhuman act committed by an individual constituted a crime under international law only if the individual had acted at the instigation or with the toleration of the authorities of a State (art. 2, para. (11)), a useful clarification that the Commission should retain in any definition of a crime against humanity in general.

16. In his fourth report (A/CN.4/398, para. 23), the Special Rapporteur raised the question of the mass nature of crimes against humanity, in other words the number of perpetrators and the number of victims. The Commission should come to a decision on that point and should not, as it had done in 1954, leave it in abeyance. Regrettably, in draft article 12, dealing with genocide, *apartheid* and inhuman acts, and then serious damage to the environment, the definitions of those crimes did not indicate their constituent elements, although the Special Rapporteur had emphasized in his introductory statement (1957th meeting) the provisional nature of the definitions.

17. In short, crimes against humanity, crimes against peace and war crimes, as the essential subject of punitive international law, should be viewed only in the context of the international agreements in which they were clearly identified, agreements which acted as the point of departure for the development of that law. Only through the three concepts of a crime against peace, a war crime and a crime against humanity was it possible to grasp the meaning of the various offences enumerated in the draft code, and more particularly the most odious offence in the modern world, namely international terrorism.

18. He reserved the right to speak again on other aspects of the fourth report, more particularly the parts on other offences and on general principles.

19. Mr. FLITAN congratulated the Special Rapporteur on his clear and comprehensive fourth report (A/CN.4/398), which contained a wealth of ideas. Part I traced the slow development of the concept of a crime against humanity, which had for a long time been linked with war crimes before it had become autonomous. Needless to say, at the present stage the question had to be treated separately, as the Commission had already agreed. With regard to the "twinning" of crimes against humanity and war crimes, he wondered whether the Commission should not consider concurrent offences that merged war crimes and crimes against humanity, although it might be better to do so in connection with the part of the report concerning general principles.

20. It was clear that the definition of the expression "offences against the peace and security of mankind" should cover only the most serious acts. As Mr. Malek had said, the Commission should decide in connection

with the exact meaning of the term "crime against humanity" whether or not such a crime had to be of a mass nature. In doing so, it would have to be logical and hence should not forget article 19 of part 1 of the draft articles on State responsibility.

21. In the case of crimes against humanity, the first crime on the Special Rapporteur's list was genocide, although it was not expressly mentioned in the 1954 draft code. Without wishing to go further into the exact meaning of "genocide", he thought that the Commission should bear in mind and keep to the existing Convention on the subject. The second crime against humanity, namely *apartheid*, must obviously appear in the list, since it was a very serious offence with consequences for the peace and security of the whole of mankind, not just of those living in the region concerned.

22. In draft article 12, genocide, *apartheid* and serious breaches of international obligations of essential importance for the safeguarding and preservation of the human environment were treated separately from "inhuman acts", which formed the subject of paragraph 3. Yet the former three crimes were also inhuman acts. Consequently, paragraph 3 should speak of "other inhuman acts". Similarly, account should be taken of international instruments which had emerged since 1954, more particularly the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, of 10 December 1976,[8] before speaking of other serious breaches causing harm to the environment.

23. With reference to war crimes, the Special Rapporteur had, on the problem of terminology, explained (*ibid.*, paras. 69-76) why the concept of war in the traditional sense had been shattered and why a more modern meaning had to be used in the draft by speaking of armed conflicts in the actual definition, if it was not possible to alter the expression "war crimes" used in the title. With regard to the substantive issues, he endorsed the conclusions drawn by the Special Rapporteur (*ibid.*, para. 80). On the question of methodology, the Special Rapporteur described (*ibid.*, paras. 81-88) how difficult it was to draw up an exhaustive list of each and every war crime and to work out the most concise definition possible. In view of those factors, the definition contained in subparagraph (*b*) of the second alternative of draft article 13 was satisfactory. If the Commission chose the enumerative method, it would necessarily have to mention the use of nuclear weapons among other war crimes. It should take a decision on that point as a body consisting of jurists, acting without regard for any political consideration. As in the case of the Convention of 10 December 1976, it would also have to take account of the Declaration on the Prevention of Nuclear Catastrophe.[9]

24. With regard to part III of the fourth report, the Commission should adopt the extended meaning of complicity in international law (*ibid.*, paras. 106-112). It was essential not only to take action against complicity by leaders, but also to extend the notion of complicity to concealment, in the light of the two cases mentioned by the Special Rapporteur (*ibid.*, paras. 113-114), and also to membership of an organization and participation in the execution of a common plan (*ibid.*, paras. 115-117). All those matters had to be dealt with in the draft code. In that regard, it would be noted that conspiracy to commit genocide, for example, fell under the Convention on the Prevention and Punishment of the Crime of Genocide.

25. On the subject of attempt, the Special Rapporteur illustrated (*ibid.*, paras. 133-141) the various interpretations of that concept in internal law. There, too, the Commission had to come to a decision, make a choice between the various solutions afforded by internal law and determine the yardstick for attempt. In any event, attempt should not fall outside the scope of the draft code. In some systems of internal law, attempt was not punishable for insufficiently serious offences; but the draft code related to the most serious offences, and accordingly attempt must necessarily be penalized. The matter should be dealt with not in the commentary, but in the actual text of the draft article, on the basis perhaps of the 1954 draft code, so that it would also be possible to mention preparatory acts.

Co-operation with other bodies

[Agenda item 10]

Statement by the Observer for the Asian-African Legal Consultative Committee

26. The CHAIRMAN invited Mr. Sen, Observer for the Asian-African Legal Consultative Committee, to address the Commission.

27. Mr. SEN (Observer for the Asian-African Legal Consultative Committee) recalled that, at the Commission's previous session,[10] he had given an account of the Committee's growth and activities and had outlined the gradual shift in the emphasis of its work programme from that of an advisory body on legal issues to one which now covered major areas of international co-operation, including such matters as protection of the environment and the refugee problem. In the process, the Committee had established close links with the United Nations and such co-operation had become the subject of an annual review by the General Assembly since the latter's adoption of resolution 36/38.

28. In the context of that co-operation, the Committee's secretariat had prepared for the fortieth anniversary of the United Nations a paper on the strengthening of the role of the General Assembly by improving its functional modalities.[11] As a follow-up, the Committee had established a working group to identify areas in which concrete steps were required in the immediate future; the group was expected to finalize its recommendations in the forthcoming week, with a view to presenting them to the General Assembly at its forty-first ses-

[8] United Nations, *Juridical Yearbook 1976* (Sales No. E.78.V.5), p. 125.

[9] General Assembly resolution 36/100 of 9 December 1981.

[10] See *Yearbook ... 1985*, vol. I, pp. 166-167, 1903rd meeting, paras. 12 *et seq.*

[11] A/40/726.

sion. Moreover, in 1983, the Committee had made some suggestions for rationalizing the work and functions of the Sixth Committee of the General Assembly, including the modalities for consideration of the work of the Commission.

29. Also in connection with the fortieth anniversary of the United Nations, the Committee had submitted to the General Assembly a document on a possible wider role for the ICJ.[12] It had recommended recourse to the Court by agreement between States parties and use of the Chamber procedure under the new Rules of the Court, in preference to recourse to arbitration.

30. The Committee had, of course, maintained its traditional links with the Commission, links that dated back to 1961 when the Chairman of the Commission at that time had attended the fourth session of the Committee. The co-operation between the two bodies had grown in the context of a provision in the Committee's statute that required it to consider at each of its sessions the work done in the Commission. Many eminent members of the Commission had been active participants and even leaders of their countries' delegations at the Committee's annual sessions, a continuing link between the members of the two bodies over the years that had been extremely fruitful for the work of both the Committee and the Commission.

31. The Committee's deliberations at its regular sessions enabled the representatives of its member States to become better acquainted with the Commission's work, which was invariably included in its agenda; moreover, the programme initiated by the Committee since 1982 had helped to create wider interest in the Commission's work among the developing countries and to facilitate their participation in the Sixth Committee's debates on the Commission's report. Consequently, it was most gratifying that the Commission continued to be represented at each of the Committee's annual sessions and that the Commission had requested Mr. El Rasheed Mohamed Ahmed to attend the Committee's twenty-fifth session, held at Arusha in February 1986.

32. The Arusha session had been an important landmark in the Committee's growth. The participants had discussed a number of issues in the field of international law and other areas of international co-operation. As in previous years, the agenda had included the law of the sea, a branch of law that had first been taken up by the Committee in 1970 and had remained a priority topic throughout the Third United Nations Conference on the Law of the Sea. The Committee had gradually emerged as a useful forum for a continuing dialogue and inter-regional consultations on some of the major aspects of the subject. Since the adoption of the United Nations Convention on the Law of the Sea in 1982, the Committee had been asked to study selected matters relating to practical application of the Convention: delimitation of the exclusive economic zone and the continental shelf, the right of transit for land-locked States, determination of the allowable catch in the exclusive economic zone and questions relating to the Preparatory Commission for the International Sea-Bed Authority. A study had also been requested on the question of historic bays and historic waters, with special reference to the Gulf of Sirte. In regard to the question of delimitation, the Committee's secretariat had been requested to monitor developments by examining the general principles of international law, State practice and judicial decisions, and in connection with the right of access of land-locked States, to examine the bilateral, subregional or regional agreements concerning the exercise of freedom of transit in the region. It had also been asked to prepare a further study on the determination of the allowable catch and was instructed to provide assistance, if so requested, to interested Governments in the conduct of negotiations between land-locked States and neighbouring coastal States on the exploitation of the living resources of the exclusive economic zone.

33. Another important topic discussed at the Arusha session was the concept of a peace zone in international law and its framework. The Committee's study in that regard was aimed at focusing attention on the efforts made within the United Nations on such matters as the elimination of foreign military bases in Asia, Africa and Latin America, the Declaration of the Indian Ocean as a zone of peace,[13] the initiatives to declare the Mediterranean as a zone of peace and also matters concerning the nuclear-free zones in Latin America, Africa, the Middle East, South Asia and the South Pacific. Reference had also been made to the Treaty of Tlatelolco.[14]

34. Another topic discussed at the same session was the status and treatment of refugees, particularly in the context of the applicability of the principle of burden-sharing and the doctrine of State responsibility. The subject of refugees had been considered by the Committee in its early years and, in 1966, it had adopted a set of principles known as the Bangkok Principles. The topic had been reintroduced at the request of the United Nations High Commissioner for Refugees for the purpose of supplementing the Bangkok Principles in the light of new developments. A set of principles, primarily on the question of burden-sharing, would be considered by the Committee at its next session. Some member Governments had also called for a study of the doctrine of State responsibility in the context of refugee problems and of matters concerning safety zones for displaced persons in the country of origin.

35. Other questions dealt with at the same session had included mutual co-operation on judicial assistance, the debt burden of developing countries, environmental protection and the nuclear-free zone in Africa, and the framework for joint ventures in the industrial sector. As usual, the report of the Commission had been before the Committee. Two of the topics dealt with by the Commission at its thirty-seventh session were of particular concern to the Committee's member countries, namely jurisdictional immunities of States, and international watercourses, both of which had been taken up as substantive items on the Committee's agenda.

36. The question of the jurisdictional immunities of States had first been considered at a meeting of the Legal Advisers of the Committee's member States in

[12] A/40/682.

[13] General Assembly resolution 2832 (XXVI) of 16 December 1971.

[14] Treaty for the Prohibition of Nuclear Weapons in Latin America (United Nations, *Treaty Series*, vol. 634, p. 281).

November 1983 in the light of the concern about the interpretation and application of the United States *Foreign Sovereign Immunities Act of 1976*.[15] At the time, the Legal Advisers had taken the view that the Committee should await the final outcome of the work of the Commission before making any recommendation. At its 1985 session, however, the Committee had decided to examine the matter at the earliest possible opportunity. The two main concerns of its member Governments were, first, the extent to which a country's courts could exercise jurisdiction over foreign Governments or governmental agencies in respect of transactions which were to be performed chiefly outside the country, and secondly, the question whether the term "commercial transaction" could be taken to include cases in which the purpose of the transaction was directly bound up with the exercise of governmental functions.

37. Personally, he considered that a restrictive doctrine was perhaps not out of place, in view of the extension of governmental activity in numerous fields. The problem was to determine the extent to which restrictions would be reasonable. At some stage, it might prove necessary for Governments to decide on a firm policy and enact legislation or issue rules on the matter, instead of leaving it to the judicial branch to decide in each case. In that respect, the Commission's work would be of immense assistance, regardless of whether a convention ultimately emerged from the draft articles, which were, by and large, a balanced compromise formula and afforded a sound basis for those engaged in drafting national legislation.

38. The Committee had taken up the topic of international watercourses as early as 1967, but had suspended work on it in 1973, because it had been included in the Commission's agenda. At its 1983 session, the Committee had decided to place the item on its agenda again, but even then the majority of the members had thought it better to await the final recommendations of the Commission. He therefore sincerely hoped that the Commission would complete its work on the topic in the near future.

39. Since he would shortly be relinquishing his duties as Secretary-General of the Committee, he wished to express his gratitude to the Chairman, previous chairmen, officers and members of the Commission, and to the Secretary of the Commission, for all the co-operation extended to the Committee for so many years. It had been for him a unique and most rewarding experience to promote the continuing and close co-operation between the two bodies and he hoped that the relationship between the Commission and the Committee would continue to grow and prosper.

40. The CHAIRMAN thanked Mr. Sen for the interesting information he had provided on the role and activities of the Asian-African Legal Consultative Committee and on the outcome of the Committee's session at Arusha. The initiatives by the Committee to strengthen still further the ties of co-operation with the United Nations were most gratifying. The active collaboration between the Committee and the Commission on such matters as the jurisdictional immunities of States and the situation of refugees viewed from the standpoint of the doctrine of State responsibility could not fail to be beneficial to the progressive development and codification of international law.

41. Sir Ian SINCLAIR said that he had had the privilege of attending two sessions of the Asian-African Legal Consultative Committee as the Observer for the United Kingdom Government. As someone familiar with its work, he could testify to the thoroughness and ability with which the Committee considered the topics that came before it. Mr. Sen had played a paramount role in the Committee's achievements and he wished to pay a warm and sincere tribute to him on the occasion of his retirement from the office of Secretary-General. At the same time, he wished the Committee itself every success in its work on issues which were so closely related to the topics on the Commission's own agenda.

42. Mr. SUCHARITKUL said that he was one of the longest-standing members of the Asian-African Legal Consultative Committee and could affirm that the devoted work of Mr. Sen had played a very important part in the extraordinary growth of the Committee, from a body with a very small membership in the early years to one that was now a very great undertaking.

43. Chief AKINJIDE said that he wished to join in the tributes paid to Mr. Sen, with whom he had been privileged to work for four years. It was interesting to note that the Asian-African Legal Consultative Committee was considering the grave question of the debt burden of the developing countries. Asia and Africa included some of the poorest nations in the world, but also some of the richest. It was to be hoped that a more equitable distribution of wealth would be achieved some day. He expressed the hope that the Committee's work would help in finding an acceptable solution to the very serious problem of the debt burden of the developing countries.

The meeting rose at 12.40 p.m.

1959th MEETING

Wednesday, 4 June 1986, at 10 a.m.

Chairman: Mr. Julio BARBOZA

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Boutros Ghali, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Huang, Mr. Illueca, Mr. Jacovides, Mr. Jagota, Mr. Koroma, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Thiam, Mr. Tomuschat.

[15] See 1944th meeting, footnote 5.