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Summary record of the 2350th meeting

Topic:
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of obeying the orders of a superior, for instance, those issuing blatantly illegal orders were considered responsible, without extenuating or aggravating circumstances: that had been recognized even by national courts, such as a court in the United States of America which had had to try a famous case of that kind during the Viet Nam War.

39. How could an aggressor exercise the right of self-defence? The Commission had thus to choose between a rigid system of correspondence between crimes and punishments, which would make it necessary to provide for extenuating or aggravating circumstances, and a system of minimum and maximum penalties, which left it to the court to evaluate the circumstances. As to defences, it was difficult, not in legal, but in human terms, to admit that such crimes could be justified and, for that reason, it was best not to mention that matter.

40. Mr. MAHIOU said that the proposed new wording of article 14 raised more problems than it solved. None of the defences it mentioned could justify an act such as genocide, for instance. The clear-cut text might make it seem that such crimes could be justified. The ambiguity could at least be mitigated somewhat by incorporating into the article the conditions of admissibility set forth in the Special Rapporteur's twelfth report. Paragraph 159 of the report also introduced a further ambiguity between the self-defence provided for in Article 51 of the Charter of the United Nations, which could be invoked by States, and individual self-defence as provided for in criminal law. Possible confusion between those two types of self-defence might lead to serious consequences and article 14 therefore had to be clarified and supplemented; otherwise, the defences in question could not legitimately be invoked.

41. Mr. THIAM (Special Rapporteur) said that the self-defence referred to in article 14 applied only to aggression and not to any other crime. Short of leaving the way open for all kinds of abuses, it was entirely legitimate for the leaders of a State accused of aggression to invoke self-defence if that State had been attacked. The same self-defence invoked by the attacked State should be able to be invoked by the leaders of that State.

42. Mr. MIKULKA said that the Special Rapporteur's reply clarified even less the ambiguity pointed out by Mr. Mahiou because it completely contradicted the first sentence of paragraph 159 of the report, which stated that the self-defence referred to in the article was not related to the international responsibility of the State provided for in Article 51 of the Charter of the United Nations. He agreed with the third sentence of that paragraph, which indicated basically that, where the leaders of a State ordered the exercise of the right of self-defence, that act did not constitute a crime within the meaning of the Code, but he did not believe that that should be considered as a general justification. Humanitarian law was applicable to all and, in the case of aggression, it applied both to the aggressor and to the victim. The concepts of coercion and state of necessity referred to in that paragraph applied to acts by individuals and not to acts by States; self-defence must therefore be understood in the national law sense and was perhaps not justified in the context of article 14. Self-defence was, moreover, always subject to the rule of proportionality, so that the defence of physical integrity in the event of aggression could not justify genocide, colonialism or apartheid. The Special Rapporteur's basic idea was that, because national legislation provided for defences, the draft Code should do the same, but the wording of article 14 was none the less hardly satisfactory.

43. The CHAIRMAN said that the Special Rapporteur might wish to include his reply to Mr. Mikulka in the general statement that he would make on the topic as a whole at the next meeting, after which the Commission would decide whether to refer the draft articles to the Drafting Committee.

The meeting rose at 1.10 p.m.

2350th MEETING

Tuesday, 7 June 1994, at 10.10 a.m.

Chairman: Mr. Vladlen VERESHCHETIN

Present: Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Elaraby, Mr. Fomba, Mr. Güney, Mr. He, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

Welcome to Mr. Nabil Elaraby

1. The CHAIRMAN extended a warm welcome to Mr. Elaraby, the new member of the Commission.

2. Mr. ELARABY thanked the Chairman for his welcome and said that he greatly looked forward to working with his fellow members of the Commission.

Draft Code of Crimes against the Peace and Security of Mankind[1] (*continued*) (A/CN.4/457, sect. B, A/CN.4/458 and Add.1-8,[2] A/CN.4/460,[3] A/CN.4/L.491 and Rev.1 and 2 and Rev.2/Corr.1 and Add.1-3)

[Agenda item 4]

TWELFTH REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

3. The CHAIRMAN invited the Special Rapporteur to sum up the debate.

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[1] For the text of the draft articles provisionally adopted on first reading, see *Yearbook ... 1991*, vol. II (Part Two), pp. 94 *et seq.*

[2] Reproduced in *Yearbook ... 1994*, vol. II (Part One).

[3] Ibid.

4. Mr. THIAM (Special Rapporteur), thanking his colleagues for their continued interest in the topic despite 13 years of discussion, said the reason why the topic was so difficult was that it lay at the crossroads of criminal law, which was very strict, and politics, which was a field in which the vocabulary was vague and imprecise, hence the problems that had arisen in drafting a text acceptable to all members of the Commission. Yet progress had been made, because the text was now being considered on second reading, and he hoped to be able to present his final report at the forty-seventh session in 1995.

5. As to the main issues that had emerged during the debate, one of the first was the actual title of the draft Code. Mr. Tomuschat (2344th meeting) had argued that the title had been drafted immediately after the end of the Second World War and had thus been influenced by the ideas of the time. According to Mr. Tomuschat, the title should be more modern and less closely linked to the events of the Second World War. In his own opinion, the subject continued to be topical, as could be seen by the recent events in the former Yugoslavia, in Rwanda and elsewhere, where crimes against humanity and war crimes were still being committed. If the title were to be changed, he did not see what it could be replaced with. A "Code of International Crimes" would be too broad, because the draft Code was restricted to the most serious crimes that constituted a danger for mankind and universal civilization.

6. With regard to article 1 (Definition), he had explained in a number of previous reports why the Commission had adopted a definition of crimes by enumeration rather than a general definition. Nevertheless, some members of the Commission still favoured a general, or as they sometimes called it, conceptual, definition. He had no objection, but for the past 13 years not one general definition had been proposed. An enumeration was a valid definition too. The Government of Bulgaria had suggested a general definition followed by an indicative, and not limitative, enumeration. He liked that idea and had retained it for the time being, but he was also open to other proposals.

7. Article 2 (Characterization) confirmed the independence of international law, as opposed to internal law. While there was general agreement on the first sentence, the second sentence, which read: "The fact that an act or omission is or is not punishable under the international law does not affect this characterization," had met with opposition, some members of the Commission contending that it was redundant and did not add anything new. He did not object to it being deleted, but it did explain and underpin the first sentence and he was therefore in favour of keeping it.

8. Once it was admitted that international criminal law was a separate science, it must be possible to characterize the acts punished under that law. Characterization was usually a matter for the court. When someone accused another of a particular act, he did not have to characterize the act, but simply to describe its consequences. For example in complaints for murder, the court must verify if the characterization given by the complainant was correct in accordance with the facts contained in the complaint. That was sometimes very difficult.

9. With regard to article 3 (Responsibility and punishment), it was not enough to find that a crime had been committed: the link between the act and the perpetrator's responsibility must also be established. A number of members had contested the use of the word *châtiment* in the French version and proposals had been made to replace it by *punition* or *sanction*, which were more or less synonymous. He would abide by the Drafting Committee's decision.

10. The concept of "attempt" in paragraph 3 had been discussed at some length. He had been asked which crimes under the Code could be regarded as an attempt and which could not. Unfortunately, he could not draw such a distinction. Engaging in such an exercise was pointless, as it was a matter for the courts to decide. They were in a better position to do so, and in that regard he endorsed the opinion of the Government of Belarus (A/CN.4/460, para. 27).

11. Article 4 (Motives) was difficult and he did not see why the draft Code should devote a separate article to the subject. Motives varied greatly. Crimes could be committed for money, but also out of jealousy or pride and even for more noble sentiments, such as honour. The members of the Commission had thought that the subject could be treated under article 14, on defences and extenuating circumstances, and he had therefore asked for article 4 to be deleted, especially as it was, in its present form, confusing, complicated and superfluous. He believed that he had broad support on that point.

12. One member had argued that article 5 (Responsibility of States) was incomplete. It was, in fact, limited to crimes committed by representatives of a State. When a State official committed a wrongful act, the State was usually held responsible for that act. Some members of the Commission contended that the State could not always be held responsible, because some individuals committed acts independently of the State. That was true, but he had in mind those responsible who were connected with the State in one form or another. Admittedly, an individual could sometimes commit very serious international crimes without having any direct link to a State. For example, some terrorist groups with no visible link whatsoever to the State had committed crimes against the peace and security of mankind. But even leaving aside cases in which the State was an accomplice to terrorist crimes, the State still had special obligations: terrorists did not act in a vacuum. It was difficult to conceive how terrorist groups present in one State could commit serious crimes in another State without the first State being involved. If a State had a sound security system, it could not ignore the presence in its territory of terrorist groups that were fomenting crimes in the territory of another State. Article 7 of the Draft Declaration on Rights and Duties of States,[4] provided that every State had the duty to ensure that conditions prevailing in its territory did not menace international peace and order. Whenever a crime was committed against the

[4] Adopted by the Commission at its first session, in 1949. *Yearbook . . . 1949*, pp. 286 *et seq.*

peace and security of mankind, there was a State behind it, either through negligence or complicity. In any event, that did not change article 5 as it now stood, because it was confined to the responsibility of States for the acts of its officials.

13. The question of criminal State responsibility had been constantly raised. Article 5 covered State responsibility resulting from acts committed by its officials. Some members had interpreted that to mean that States must be held criminally responsible. He was not a partisan of State criminal responsibility, for reasons that he had evoked on a number of occasions. Those who defended article 19 of part one of the draft on State responsibility should reread it: at no point did the provision itself or the commentary refer to such responsibility.[5]

14. Lastly, he did not see how a State could incur criminal responsibility. Sanctions against a State were another matter, because they were political in nature and were taken by political bodies, for example the embargoes imposed by the Security Council or the political sanctions imposed by a State that had conquered another. In short, State responsibility as understood under article 5 was international, but not criminal.

15. In principle, the obligation to try or extradite, set out in article 6, was universal. When an exceptionally serious crime was committed and violated the fundamental interests of mankind, all States were concerned. The State in whose territory the crime was committed had jurisdiction to judge. The purpose of paragraph 2 of the provision was to anticipate cases in which several States wanted to try a case. Paragraph 3 provided for the subsequent establishment of an international criminal court, which would retain jurisdiction in the event of a disagreement with a State about which body should try a case. No order of priority had been established in regard to extradition, but the Drafting Committee had given special consideration to the State in whose territory the crime had been committed, leaving open the possibility that an international criminal court might one day be established.

16. As to article 7, on the non-applicability of statutory limitations, there had been a difference of opinion. Some members thought that absolute non-applicability was too strict and might prevent national reconciliation and amnesty. Others argued that, given the seriousness of the crimes under consideration, statutory limitations must not apply. In his opinion, the Commission should not take a position until the drafting of the Code was completed. He had already explained in earlier reports why he was in favour of keeping the number of crimes to a strict minimum. Once the crimes were determined, the Commission could then decide whether or not statutory limitations applied. For example, the draft Code currently included threat of aggression and crimes related to the environment. It was difficult to see why there should be no statutory limitation for them. The example illustrated why he had not wanted to begin with the general principles governed by the Code: he would need to know first what crimes were involved.

17. There had not been much debate on article 8, the general consensus being that the accused must enjoy judicial guarantees. One member thought that, in addition to the International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights,[6] the draft should also make reference to regional conventions. Personally, he disagreed. In the drafting of an international instrument, documents that were universal in scope, not regional texts, should be taken as the basis.

18. Article 9 involved the transposition of the *non bis in idem* principle, which was essentially a rule of internal law, to international law. At the internal level, there was no problem as the national courts had to abide by the rule. In the case of international law, however, difficulties arose because of the lack of any supranational authority which could impose its decisions on States. The rule had therefore been introduced into international law gradually, first at the regional level by means of treaties or agreements between several States which provided that a decision handed down in one State would have legal effect in another State, and then, at the universal level, by virtue of the International Covenant on Civil and Political Rights. The draft Code could not now ignore the important issues raised by the rule. In the Drafting Committee, two opposing schools of thought had emerged. Some members, who considered that the rule was so important that it amounted to a subjective right of the individual, were strongly in favour of it being included in the Code. Others were opposed to it, for practical reasons: a State could, such members argued, circumvent the rule to the benefit of an individual who, for instance, took refuge in the State with which he had political affinities and whose courts were more likely to be indulgent to ensure that he was not tried in another State where the courts might be more severe. In the light of the two differing views, it had been necessary to find a compromise, and that compromise was reflected in article 9, which first set forth the basic rule and then provided for the two exceptions in paragraphs 4 (*a*) and 4 (*b*). There was, however, a third exception which could arise because of a possible mistake in characterization, as, for example, where a person was tried for murder but it subsequently transpired that his real motive had been genocide.

19. There was one serious mistake in the terminology used in the French text of the article and it pertained to the words *de droit commun*, which had no place in the article since all crimes against the peace and security of mankind were crimes *de droit commun*. Indeed, he had proposed that the term *crimes ordinaires* should be used instead. If the crimes under the Code were treated not as crimes *de droit commun* but as political crimes, there would be significant consequences because accused persons who were tried for political crimes enjoyed a better regime in prison than that imposed on prisoners *de droit commun*. He would therefore ask the Drafting Committee to re-examine the term *de droit commun*. He had also been asked about the word "impartial", which appeared in the statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Terri-

[5] *Yearbook . . . 1976*, vol. II (Part Two), pp. 95 *et seq.*

[6] General Assembly resolution 217 A (III).

tory of Former Yugoslavia since 1991.[7] He agreed that that word was not correct in the context inasmuch as one State could not judge the impartiality of another, at least by law.

20. Article 10 had been accepted by the Commission as a whole and therefore called for no comment. Article 11 differed only slightly from the provision in the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal,[8] on which it was based. There was just one problem with the article, while the order of a Government or a superior could not generally be invoked to escape criminal responsibility, everything depended on the nature of the order. Some orders were so manifestly illegal that any person who obeyed them would be criminally responsible. That was not always the case, however. It would be very difficult for a private in the army, for instance, to know whether an order he had received was in conformity with the norms of international law. The matter could none the less be taken care of in the commentary.

21. He recognized that his proposed new article 14, which dealt with self-defence, coercion and state of necessity, was extremely brief. It would perhaps have been better to deal, on the one hand, with self-defence, which was indeed a defence, and on the other, with coercion and state of necessity, which were not defences but elements that mitigated the responsibility of the person who committed the crime, without, however, removing the criminal nature of the act itself. It was widely acknowledged, and it was also clear from part one of the draft on State responsibility, that self-defence precluded wrongfulness. He had simply intended to say, that, if a State charged with aggression invoked self-defence, and that was accepted, the wrongfulness of the act would be precluded. Consequently, the leaders of the State would not be tried for aggression. It had not sought to suggest that it was possible to respond to aggression by genocide.

22. Coercion, on the other hand, did not preclude wrongfulness, but it could be taken into consideration in removing responsibility. Thus if a person charged with a crime had acted as a result of coercion which it had been impossible for him to resist, he would be relieved of criminal responsibility. A state of necessity was to be distinguished from coercion in that it involved an element of choice. The most common example cited was that of a mother who stole a piece of bread to save her child who was dying of hunger. The mother was faced with a choice, and decided to steal the bread. The wealth of judicial practice cited in his fourth report[9] also showed that coercion and state of necessity could be taken into consideration in removing or mitigating responsibility and therefore justified the inclusion of a reference to such circumstances in the draft Code.

23. Extenuating circumstances formed the subject of a new article 15. There was, of course, no obligation to include a provision on extenuating circumstances in the draft Code, but it was generally recognized that the courts were entitled to examine any circumstances—personal, family or other—that diminished the responsibility of the accused.

24. As stated in his twelfth report, he did not believe it appropriate to discuss aggravating circumstances, since the crimes covered in the Code were the most serious of the most serious crimes. How then was it possible to envisage circumstances that would aggravate the crimes still further? If the Commission none the less considered that such a provision should be incorporated in the Code, the Drafting Committee could no doubt attend to the matter.

25. With regard to the settlement of disputes, he had requested the secretariat to distribute a text in French prepared by the International Association of Penal Law, which might serve as a useful basis for discussion in the Commission or in the Drafting Committee.

26. Mr. ARANGIO-RUIZ, referring to the proposed article on dispute settlement circulated by the Special Rapporteur, suggested that the phrase "an international criminal court, if one exists or" (*une juridiction pénale internationale, s'il en existe une, ou devant*) should be deleted.

27. The CHAIRMAN said that, having considered the question of the way in which the work on the draft Code and on the draft statute for an international criminal court should proceed, the Enlarged Bureau recommended that articles 1 to 14 of the draft Code, together with the revisions proposed by the Special Rapporteur, should be referred to the Drafting Committee for a second reading in the light of the Commission's discussion, on the understanding that the Special Rapporteur would, together with the Chairmen and members of the Working Group on a draft statute for an international criminal court and of the Drafting Committee, ensure that the parallel provisions of the draft Code and the draft statute were consistent. It further recommended that the Draft Committee should not consider articles 1 to 14 at the present session.

28. Mr. BENNOUNA, thanking the Enlarged Bureau for its efforts to find a solution to a difficult problem, said that, unfortunately, he was not altogether satisfied with its recommendation. The whole situation was far from clear, but the main question was whether the Commission should continue to proceed on the basis of two separate assumptions rather than one, namely, that there would be a code and it would be implemented by an interactional criminal court. That approach had, in fact, been endorsed by the General Assembly, at any rate implicitly. He noted that some members of the Commission favoured an international criminal court which could meet the need of States to try specific crimes—he was thinking, in particular, of the aerial incident at Lockerbie[10]—especially where there was an impasse because

[7] Hereinafter referred to as the "International Tribunal". For the statute, see document S/25704, annex.

[8] *Yearbook... 1950*, vol. II, pp. 374-378, document A/1316, paras. 95-127. Text reproduced in *Yearbook... 1985*, vol. II (Part Two), para. 45.

[9] *Yearbook... 1986*, vol. II, (Part One), p. 53, document A/CN.4/398.

[10] See *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992*, p. 3.

the accused could not be tried for the crime either in the State of which they were nationals or in the State on whose territory the crime had been committed, as both States were suspected of not being impartial. Such a court, which would have to be extremely flexible, would be constituted as and when the need arose. There was, however, an alternative model which would fill a permanent need to act as a deterrent and impose punishment for serious crimes on the basis of rules laid down in a code that could be supplemented in line with developments in international law.

29. The members of the Enlarged Bureau had, in his view, displayed an ostrich-like attitude, hiding their heads in the sand rather than tackling the problems head on. Perhaps it was all part of the constructive ambiguities—to borrow the language of the United Nations—which supposedly made for progress. Specifically, however, he thought the Commission should decide which model to adopt before turning to the question of harmonizing the work on the draft Code and the draft statute.

30. The CHAIRMAN said that he would be grateful if Mr. Bennouna could propose a specific amendment to the Enlarged Bureau's recommendation.

31. Mr. BENNOUNA said that the draft Code and the draft statute could not be separated and must be treated as one. Indeed, that was the approach the Commission had originally adopted. The Commission should also decide that the purpose of the court was to give authority to the Code and, to that end, efforts should be directed at achieving harmonization. Specifically, he would propose that the draft articles under consideration should be analysed along with the provisions of the draft statute and, once progress had been made, the draft as a whole should be referred first to the Working Group on a draft statute for an international criminal court and then to the Drafting Committee.

32. Mr. VILLAGRÁN KRAMER said he wished to place on record that no Latin American members of the Commission had adopted, or ever would adopt, an ostrich-like attitude to the problems under discussion. Latin American jurists had a very clear picture of reality. Each and every one of the points raised by Mr. Bennouna had been discussed in the Working Group on a draft statute for an international criminal court. The Special Rapporteur had also been present at all times and had ensured that the provisions of both texts were compatible. The Chairman of the Working Group had submitted a document distilling the essence of the views expressed over the past month during the Working Group's deliberations. All the problems mentioned by Mr. Bennouna—the nature of the future legal institution, its interrelations with the United Nations and the mechanisms by which it would be set up—had been thoroughly discussed in the Working Group. Special emphasis had been placed on the most crucial issue, namely the list of the crimes to fall under the court's jurisdiction, and articles 22 and 27 had been drafted in an effort to address that issue. The Enlarged Bureau's decision was simply intended to enable the Commission to examine the draft Code and draft statute together, with a view to ensuring compatibility.

33. Mr. CRAWFORD pointed out that the Working Group on a draft statute for an international criminal court had been given a timetable by the Enlarged Bureau, with the Commission's approval, envisaging the submission of its final report on 26 June 1994. In order to meet that deadline it had had to proceed on the basis of the assumptions set out in the reports of the Working Group at the forty-fourth and forty-fifth sessions[11] and the discussion thereon in plenary. To reopen the question of the links between the draft Code and the draft statute would be to take a step backwards rather than to advance the Commission's work. The ties between the two instruments were indeed important; when the Code came into force, it was to be one of the matters within the jurisdiction of the court—but not the only one, and the Commission had now been working for three years on that assumption.

34. An additional problem of coordination was to ensure that the provisions of the Code relating to basic guarantees of due process—*non bis in idem*, *nullum crimen sine lege*, and so on—should be phrased identically in the draft Code and in the draft statute. The Working Group, with the assistance of the Special Rapporteur, would do everything possible to achieve that end, but it was also essential for such concordance to be pursued by whatever body was entrusted at the Commission's next session with completing the work on the draft Code.

35. The Working Group on a draft statute for an international criminal court was to have ceased to exist after the present session came to an end. If the Commission would prefer the draft Code to be dealt with in future by a working group rather than the Drafting Committee, arrangements could be made for that approach. However, he saw no reason why the Drafting Committee would not be the appropriate body for making good progress on the draft Code at the forty-seventh session.

36. Mr. TOMUSCHAT said the criticism levelled by Mr. Bennouna was not justified. The Commission's work had been based on decisions adopted two years previously. The idea of moving ahead with the elaboration of a draft statute for an international criminal court independently of the work on the draft Code of Crimes against the Peace and Security of Mankind had been approved by a large majority in the General Assembly, and the Sixth Committee had responded very positively as well.

37. True, there was a link between the Code and the court, but it was unidirectional: a court could exist without a code of international crimes, for many such crimes were already defined in existing instruments, such as the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and the Convention on the Prevention and Punishment of the Crime of Genocide. On the other hand, a code could not be envisaged without the existence of a court.

38. The Commission's subsidiary bodies were working with full cognizance of the overriding need for harmonization of the Code and the statute. The Special Rappor-

[11] *Yearbook... 1992*, vol. II (Part Two), p. 58, document A/47/10, annex, and *Yearbook... 1993*, vol. II (Part Two), p. 100, document A/48/10, annex.

teur on the draft Code was personally overseeing the work on the draft statute, with a view to consistency in both endeavours. There was no need to create yet another body to be responsible for coordination. The Working Group should continue its efforts as originally envisaged.

39. Mr. MAHIOU said that Mr. Bennouna's comments usefully highlighted the three problems before the Commission: the link between the Code and the statute, coordination of the work on both instruments, and designation of a body to be responsible for such coordination. On the first problem, the Commission had decided to pursue its work on the two topics independently, in the knowledge that a link would have to be established at some point before that work was completed. He agreed with Mr. Tomuschat that a Code without a court would be of very little use. On the second problem, it was true that articles 6, 8, 9 and 10 of the draft Code had to be harmonized with the corresponding provisions of the draft statute. The Working Group was apparently fully aware of that imperative and was arranging its efforts accordingly.

40. As to the third problem, now that the draft Code was ready for consideration on second reading, it was the Drafting Committee, and not the Working Group, that should take responsibility for future work on it. He believed the Drafting Committee should take up the draft Code at the present session, but that it should leave aside articles 6, 8, 9 and 10, which parallelled provisions in the draft statute, on the understanding that the Working Group would pursue its efforts to ensure concordance with the wording of the draft statute.

41. Mr. BENNOUNA, replying to a query from the CHAIRMAN, said he still thought it unrealistic to refer the draft Code to the Drafting Committee at the present session. He welcomed Mr. Mahiou's comments and recalled that the Special Rapporteur himself had said he could not finalize some of the general principles until the list of crimes was completed. He would therefore urge the Commission to await its next session and the submission of the next report by the Special Rapporteur before sending the draft articles to the Drafting Committee.

42. Mr. THIAM (Special Rapporteur), responding to a question from the CHAIRMAN, noted that, even if the draft articles were sent to the Drafting Committee at the present session, the Committee need not take action on them right away: it could await the submission of the remainder of the articles the following year. That way, the Commission would be acting in keeping with its established practice, which was to refer draft articles to the Drafting Committee once it had completed consideration of them in plenary, and the Committee would also be able to benefit from the additional material to be submitted at the next session. His main concern was to ensure coordination of the work on the draft Code and on the draft statute.

43. Mr. BENNOUNA said he could endorse the referral of the draft articles to the Drafting Committee at the present time, on the understanding that they would be taken up only at the next session, when additional material would shed new light on the whole topic. The question raised by Mr. Mahiou remained unresolved, however. Should articles 6, 8, 9 and 10, which were closely related to the work on the draft statute, be sent to the Drafting Committee at the present time? He thought not. Lastly, he firmly opposed submitting the draft Code directly to the General Assembly without prior consideration by the Drafting Committee.

44. Mr. CRAWFORD, referring to Mr. Mahiou's proposal for consideration in the Working Group of the articles in the draft Code that parallelled those in the draft statute, said he did not think a formal decision had to be taken. The Working Group would do everything possible to avoid divergences between the texts.

45. The CHAIRMAN said that he would take it that the Commission agreed with the proposal by the Enlarged Bureau that the work on the draft Code and on the draft statute should be coordinated by the Special Rapporteur on the draft Code and by the Chairmen and members of the Drafting Committee and the Working Group, and that the draft articles should be referred to the Drafting Committee on the understanding that not all of them would be dealt with at the current session.

It was so agreed.

46. Mr. BARBOZA said he hoped the decision would not overburden the Drafting Committee, which would be called upon to consider a number of articles of the topic for which he was Special Rapporteur, namely international liability for injurious consequences arising out of acts not prohibited by international law.

Cooperation with other bodies

[Agenda item 8]

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

47. The CHAIRMAN invited Mr. Tang, Secretary-General of the Asian-African Legal Consultative Committee, to address the Commission.

48. Mr. TANG (Observer for the Asian-African Legal Consultative Committee) said he was honoured to address the Commission for the first time on behalf of the Asian-African Legal Consultative Committee (AALCC), especially in the presence of the Committee's current President, Mr. Yamada. The secretariat of the Committee attached great significance to its traditional and long-standing ties with the Commission. The presence of the current Chairman of the Commission at the Committee's thirty-third session, held at Tokyo at the beginning of 1994, had underscored the spirit of cooperation between the two bodies.

49. All the topics being considered by the Commission were of great interest to the Committee's member Governments. Careful analysis of the discussions at the thirty-third session of the Committee on the report of the Commission on the work of its forty-fifth session[12] revealed three distinct trends, namely, endorsement, a

[12] *Yearbook... 1993*, vol. II (Part Two), document A/48/10.

more cautious approach, and a wish to reserve comment until the Commission adopted a full set of draft articles on a particular topic.

50. The question of international watercourses, as well as appearing prominently on the Commission's agenda, also formed part of the work programme of the Committee. The debate in the Committee had reflected the difficulties of developing a set of legal norms to regulate the non-navigational uses of international watercourses, a subject which touched upon several important issues, such as the national economies of watercourse States, ecological balance and environmental protection. It had been felt that the diversity of circumstances and characteristics pertaining to different river systems and the vastly divergent interests of States had to be taken into account. The need had been emphasized to integrate law and policy concerning international watercourses with similar concerns in the wider context of environmental conservation and sustainable development. The Committee had expressed its concern at the growing misuse of freshwater resources, and had noted with appreciation the progress being made in the Commission on the second reading of the draft articles on the topic of the law of the non-navigational uses of international watercourses. However, the view had also been expressed that inclusion of confined groundwater in the international watercourses system would complicate the issue and might create many difficulties. In that regard, the Committee was particularly interested in the establishment of a mechanism to settle disputes on the uses of international watercourses among riparian States.

51. The Commission's work on the topic of international liability for injurious consequences arising out of acts not prohibited by international law had been generally thought to bring out the importance of establishing a global regime that would effectively protect human beings and the environment from the rapidly increasing adverse consequences of haphazard or unplanned development. The view had been expressed that, in the formulation and elaboration of the draft articles on preventive measures, the Commission should give due consideration to the special needs of developing countries. In connection with the topic of State responsibility, most delegates had expressed concern about the desirability of formulating a legal regime of unilateral countermeasures, given the inherent danger of abuse with such a regime. One delegate had opposed recourse to reprisals on the ground that they were inequitable and could involve abuses of power. Another had raised the question whether the dispute settlement procedures envisaged in the draft articles furnished an effective remedy in situations of resort to unlawful or disproportionate countermeasures. The Committee secretariat thought that those questions required consideration.

52. In connection with the question of the jurisdiction of the proposed international criminal court, the view had been expressed that, pending the elaboration of a code of crimes against the peace and security of mankind, jurisdiction should initially be restricted to well-defined crimes under universally accepted international conventions, it being pointed out in that regard that the concept of crime under general international law lacked specificity. It had been proposed that the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances should be treated on a par with other international conventions in the sense that breaches of the Convention should be considered international crimes rather than undesirable conduct.

53. Several members of the Committee had endorsed the Commission's decisions on the selection of two new topics for its programme of work, "The law and practice relating to reservations to treaties" and "State succession and its impact on the nationality of natural and legal persons". They had concurred with the Commission's view that those topics responded to a need of the international community and that the international climate was propitious for them to be considered. The Committee secretariat would continue to prepare notes and comments on substantive items considered by the Commission with a view to assisting representatives of the Committee's member States in the Sixth Committee in their deliberations on the report of the Commission. An item entitled "Report on the work of the International Law Commission at its forty-sixth session" would be placed on the agenda of the thirty-fourth session of the Committee.

54. Reviewing some of the substantive items considered at the Committee's thirty-third session and the current work programme, he said that an item entitled "Decade of International Law" had been on the agenda of the Committee since the adoption by the General Assembly of resolution 44/23 in which it proclaimed the United Nations Decade of International Law. The Chairperson of the Sixth Committee had addressed the Committee on the subject, and the item remained on the Committee's programme of work as well as on its active agenda. On his return to New Delhi he would give priority to finalizing and forwarding to the Legal Counsel a summary of AALCC activities in connection with the realization of objectives for the current phase of the United Nations Decade of International Law. The Committee secretariat had actively cooperated with the Government of Qatar in convening an International Conference on Legal Issues Arising under the United Nations Decade of International Law, in March 1994.

55. The items considered at the thirty-third session had included a report on the progress of work of the Preparatory Commission for the International Seabed Authority and for the International Tribunal for the Law of the Sea,[13] as well as a report on the informal consultations convened by the Secretary-General of the United Nations. The Committee had noted with satisfaction that the United Nations Convention on the Law of the Sea was to enter into force in November 1994 and had reminded member States to give consideration to the need to adopt a common policy and strategy for the period before commercial exploitation of deep seabed minerals became feasible. The Committee secretariat would continue to cooperate with relevant international organizations in ocean and marine affairs and would endeavour to assist member States in formulating and adopting municipal legislation for the exploration and exploitation of the national resources of the exclusive economic zone. The former Secretary-General of the

[13] Document LOS/PCN/130 and Add.1.

Committee, Mr. Njenga, had participated in the Regional Leadership Seminar on Marine and Ocean Affairs, held at Addis Ababa at the beginning of 1994, and his paper, entitled "An outline on the implementation of strategy and programme of action", had been adopted by the Seminar and was now under consideration by ECA and the International Ocean Institute.

56. The Committee, one of the first organizations to consider the question of the establishment of a safety zone for refugees, was in the process of examining other issues relating to the status and treatment of refugees, a problem of particular concern to the Governments of the region. At its thirty-third session, held at Tokyo, the Committee had considered a brief on "Model legislation on refugees" and, following an offer by UNHCR, had seconded an officer to work at UNHCR Headquarters. The Committee secretariat had drafted detailed model legislation on the rights and duties of refugees in the light of codified principles of international law and of the practice of States in the region. It was to be transmitted to all member States for comments at the Committee's next session. The AALCC secretariat was also working closely on the matter not only with UNHCR but also with OAU.

57. Three years previously, the Committee secretariat had been mandated to undertake an in-depth study on the privatization of public sector undertakings and the liberalization of economic activities as a means of increasing economic efficiency, growth and sustainable development in the context of economic restructuring programmes. A special meeting on developing institutional and legal guidelines for privatization and post-privatization regulatory framework had been held at the Committee's thirty-third session. The IBRD had assisted in convening the Special Meeting and had sent two experts to facilitate the deliberations. The Committee secretariat had prepared the proceedings of the Special Meeting and the report for publication, and they would be widely distributed so as to ensure extensive dissemination of the guidelines throughout the Asian-African region.

58. Recognizing the utility and importance of joint ventures as instruments of foreign investment and transfer of technology from transnational corporations and medium-sized enterprises in both developed and developing countries to private and public sector enterprises in many developing countries, the Committee secretariat had prepared a guide on legal aspects of industrial joint ventures in Asia and Africa. The Committee had adopted the Guide and had requested the secretariat to update it periodically in the light of relevant amendments that might be introduced in the national laws of member States. Accordingly, the secretariat was continuing to monitor developments in that field.

59. The secretariat's advisory role included assistance to member States in preparing for codification conferences convened by the United Nations. In that connection, the secretariat had been represented at the meeting of the Intergovernmental Negotiating Committee for the Elaboration of an International Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa; and at the thirty-third session, the Committee had considered a brief on the proposed convention. At the same session, it had also had before it secretariat studies on the Convention on Biological Diversity and the United Nations Framework Convention on Climate Change. Following the establishment of the Commission on Sustainable Development, the AALCC secretariat had been monitoring the work of that Commission as a follow-up to the United Nations Conference on Environment and Development. The secretariat was proposing, jointly with UNEP, to organize a meeting in 1994 of a group of experts to consider environmental issues, including the question of the implementation of Agenda 21[14] and, in particular, the question of problems faced by developing countries in implementing international agreements on environmental matters.

60. Other items on the Committee's work programme included the preparation of documents and studies on such diverse subjects as the deportation of Palestinians as a violation of international law, particularly the Geneva Conventions of 12 August 1949; an Agenda for Peace;[15] extradition of fugitive offenders; the debt burden of developing countries; and international trade law matters. Work on all those topics was in progress, and they were among those to be considered at the Committee's thirty-fourth session, scheduled to be held at Doha, in March 1995. He wished to take the present opportunity to extend to the Chairman of the Commission, on behalf of the Committee and on his own behalf, an invitation to participate in that session.

61. The CHAIRMAN thanked the Secretary-General of AALCC for his interesting statement. Having been deputed by the previous Chairman of the Commission, Mr. Barboza, to attend the Committee's thirty-third session, held at Tokyo in January 1994, he wished to report briefly on his impressions. Mr. Yamada's unanimous election to the office of President of the Committee had been particularly gratifying. A substantial report on the Commission's activities had received an attentive hearing, a particularly lively discussion which took place in connection with the Commission's work on the topic of the law of the non-navigational uses of international watercourses. As reported by Mr. Tang, considerable attention had been given to the problem of privatization, as well as to the question of the status and treatment of refugees and displaced persons, and other important matters. It had been his impression that, as Mr. Yamada had pointed out in his closing remarks, the session had been too overloaded with work to be able to give sufficient in-depth consideration to some of the questions on the agenda. He hoped Mr. Tang would receive the observation in the friendly and constructive spirit in which it was intended.

62. An important organizational decision taken at the thirty-third session had been the transfer of the Committee secretariat from New Delhi to Doha. It was to be hoped that the practical difficulties of the transfer would

[14] *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992* (A/CONF.151/26/Rev.1 (Vol. I, Vol.I/Corr.1, Vol. II, Vol. III and Vol. III/Corr.1)) (United Nations publication, Sales No. E.93.I.8 and corrigenda), Vol. I: *Resolutions adopted by the Conference*, resolution 1, annex II.

[15] Document A/47/277-S/24111, para. 40.

not stand in the way of the very efficient and useful work being done by the secretariat. Another important organizational decision had been the appointment of Mr. Tang to succeed the former Secretary-General, Mr. Njenga. He wished to address the warmest congratulations to Mr. Tang on his appointment and express his confidence that the useful links between the two bodies would continue in the future.

63. Mr. YAMADA, speaking as the current President of AALCC, said that the Committee's achievements as an advisory body on legal matters to the participating States in Asia and Africa were impressive. In the 1970s the Committee had made an active contribution to the development of the law of the sea. In recent years, as a permanent observer to the United Nations, it had been closely involved in the Organization's work and, in particular, in the United Nations Conference on Environment and Development and the World Conference on Human Rights, and had endeavoured to coordinate a common approach among its participating member States at those conferences and to watch carefully their implementation of the decisions taken at those important events.

64. The Chairman, who had represented the Commission at the Committee's thirty-third session, appeared to share some of his own misgivings about the current status of the Committee. In his view, the Committee had not in recent years been able to conduct in-depth legal deliberations on topics of common interest to its member States, because its agenda included too many items of interest to only a few members. Moreover, the discussions had often been plagued by politicization. The Committee was also confronted with serious financial constraints as a result of non-payment of dues by a large number of member States. He strongly felt that the Committee should embark on a new phase under the leadership and guidance of the new Secretary-General and, in that connection, wished to make two suggestions for the new Secretary-General's consideration.

65. First, the Committee should focus its activities on legal matters by making the best use of its strong point as a forum for legal specialists and as the only intergovernmental organization of its kind in Asia and Africa. It was important, from that point of view, for the Committee to avoid politicization of its agenda and to keep the number of issues to be discussed at its annual sessions to a minimum, so that a professional and detailed discussion could take place on each item. The main objective of the deliberations should be a frank exchange of views on the legal aspects of each problem, possibly leading to a harmonized approach to questions of common concern. The project of drawing up model legislation on refugees seemed to be a good initiative, and he hoped to see the text completed at the Committee's next annual session.

66. The second suggestion concerned the relationship between the Committee and the Commission, two bodies which had maintained close cooperation for more than 30 years. Under article 4 of its statute, the Committee was required to examine questions that were under consideration by the Commission and to arrange for the view of the Committee to be placed before the Commission. In his view, that requirement of the statute had not been fully met by the Committee in recent years owing to lack of time during its annual sessions to discuss each of the items under consideration in the Commission. He hoped that the Committee would make full use of that provision to present more inputs from Asian and African perspectives to the work of the Commission and to make its relationship with the Commission more organic and mutually stimulating.

67. He wished Mr. Tang every success in his new post.

68. Mr. de SARAM, speaking on behalf of members of the Commission from the Asian region, thanked the Secretary-General of AALCC for his interesting and enthusiastic statement. AALCC was committed to raising the awareness of Governments in the Asian-African region of the ramifications of the legal subjects under review in the United Nations system. It was gratifying to note that it had chosen to give the deliberations of the Commission special attention in that connection. He wished AALCC all the best in pursuing its impressive programme of work in the development of international law.

69. Mr. KABATSI, speaking on behalf of members of the Commission from the African region, congratulated the Secretary-General of AALCC on his statement. He had rightly noted that, when elaborating topics of international law, the Commission should pay particular attention to the needs of developing countries, for no development or codification of international law would receive general acceptance unless developing countries were involved. The work of AALCC was of great importance to the Commission, which often drew inspiration from international legal bodies like AALCC in an ongoing process that was bound to continue. He wished the Secretary-General of AALCC every success in his new duties.

70. Mr. TOMUSCHAT, speaking on behalf of members of the Commission from the western European region, thanked the Secretary-General for a clear report. The Commission greatly benefited from AALCC activities: the process of cross-fertilization assisted both bodies in their quest for imaginative solutions to modern problems in international law. Recent world events had once again shown that the law, if just and equitable, was one of the stabilizing factors that could ensure international peace, while inadequate responses to urgent issues could become a threat. AALCC interest in such issues as international environmental law and the status of refugees was commendable, and often shed important light on the Commission's own work. He wished the Committee and its Secretary-General all the best in their future work and hoped that the Committee's close cooperation with the Commission would not only continue, but would grow stronger in the years ahead.

71. Mr. MIKULKA, speaking on behalf of members of the Commission from the eastern European region, said he, too, congratulated the Secretary-General of AALCC on his election and welcomed his report on AALCC activities. He particularly appreciated the attention paid to topics that mirrored those on the Commission's agenda. That interaction had long been shown to be useful and fruitful, and he was convinced that it would

continue in future. He wished to extend his wishes to AALCC for every success in the future.

72. Mr. VILLAGRÁN KRAMER said that the Latin American members of the Commission, on whose behalf he was speaking, wished to thank the Secretary-General of AALCC for his statement. The work of the various regional forums was of great significance and often paralleled that of the Commission. The responses found in one region to challenges of contemporary international life could be compared and shared with other regions. With the end of the cold war, for example, politicization and ideological confrontation were diminishing everywhere, opening the way to progress in humanitarian affairs. He wished the Secretary-General every success in leading AALCC forward.

Organization of work of the session (*continued*)*

[Agenda item 2]

73. The CHAIRMAN informed the Commission that the Special Rapporteur on the topic of international liability for injurious consequences arising out of acts not prohibited by international law was of the view that the time allocated to the consideration of his tenth report (A/CN.4/459) would be more profitably used in the Drafting Committee, which had a number of draft articles on the topic before it, than in the framework of the plenary. The Enlarged Bureau, which had considered the matter, therefore suggested that most of the plenary meeting time allocated to the topic should be set aside chiefly for meetings of the Drafting Committee on the same topic, without precluding the possibility that part of the time thus freed might be allocated, if necessary, to the Working Group on a draft statute for an international criminal court. The proposal meant that there would be no debate on the topic in plenary at the present session.

74. If he heard no objection, he would take it that the Commission agreed to the proposal of the Enlarged Bureau.

It was so agreed.

75. The CHAIRMAN noted that the Commission was beginning to be pressed for time and appealed to the members of the Drafting Committee and of the Working Group on a draft statute for an international criminal court to proceed as expeditiously as possible and to make optimum use of the limited time available to them.

The meeting rose at 1.25 p.m.

* Resumed from the 2335th meeting.

2351st MEETING

Friday, 10 June 1994, at 10.10 a.m.

Chairman: Mr. Vladlen VERESHCHETIN

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Elaraby, Mr. Fomba, Mr. Güney, Mr. He, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Razafindralambo, Mr. Rosenstock, Mr. Szekely, Mr. Thiam, Mr. Tomuschat, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

International liability for injurious consequences arising out of acts not prohibited by international law (A/CN.4/457, sect. C, A/CN.4/459,[1] A/CN.4/L.494 and Corr.1, A/CN.4/L.503 and Add.1 and 2)

[Agenda item 6]

TENTH REPORT OF THE SPECIAL RAPPORTEUR

1. Mr. BARBOZA (Special Rapporteur), introducing his tenth report on international liability for injurious consequences arising out of acts not prohibited by international law (A/CN.4/459), said that it related to the first step in the work on the subject as foreseen by the Commission in the decisions taken on the basis of the recommendations of the Working Group it created at its forty-fourth session.[2] At that time, the Commission had decided that the draft articles[3] should deal first with preventive measures in respect of activities creating a risk of causing transboundary harm, and then with the necessary remedial measures. Once the Commission had completed consideration of the proposed articles on those two aspects, it would decide on the next stage of its work. When consideration of the issue of prevention had been completed, in the context of the response measures proposed in chapter I of the tenth report, the Commission would have to examine the responsibility and liability issues to which the articles would give rise, in other words, the roles of the State and of the operator, as well as the provisions common to both. Lastly, the tenth report considered the issue of the procedural means available to enforce liability.

[1] Reproduced in *Yearbook... 1994*, vol. II (Part One).

[2] *Yearbook... 1992*, vol. II (Part Two), document A/47/10, paras. 344-347.

[3] For the texts of draft articles 1 to 10, see *Yearbook... 1988*, vol. II (Part Two), pp. 9 *et seq.* For the revised articles proposed by the Special Rapporteur, which were reduced to nine, see *Yearbook... 1989*, vol. II (Part Two), para. 311. Further changes to some of those articles were proposed by the Special Rapporteur in his sixth report, see *Yearbook... 1990*, vol. II (Part One), pp. 105-109, document A/CN.4/428 and Add.1, annex; and ibid., vol. II (Part Two), para. 471.