

Document:-
A/CN.4/SR.2654

Summary record of the 2654th meeting

Topic:
Cooperation with other bodies

Extract from the Yearbook of the International Law Commission:-
2000, vol. I

*Downloaded from the web site of the International Law Commission
(<http://www.un.org/law/ilc/>)*

field. Personally, he had no strong feelings about the word “penal”, but if it encountered opposition it could be omitted, because deleting it would not affect the operation of the provision. He had been mildly entertained by the vehemence with which Mr. Pellet had advocated the inclusion of the concept and by his consistency in depriving it of any punitive element whatsoever, whether punitive damages or penal consequences. For his own part, he had no objection, because if the Commission was examining obligations to the international community as a whole, the question of punitive consequences could be left to one side.

61. The question of transparency and the alleged consequence of serious breaches of essential obligations involving individual criminal responsibility had no place in the draft articles, because it raised issues pertaining to the category of individual criminal responsibility of persons or, alternatively, the category of State immunity. He was happy to preserve the current legal position, because the matter had recently been considered in the context of the Rome Statute of the International Criminal Court, which contained two relevant provisions. Article 27, on the irrelevance of official capacity, made it clear that any individual charged with, or guilty of a crime under international law, could not in any respect plead his or her official capacity. There was no question that the responsibility of the State was in any sense a prerequisite for the charge. That person was quite simply individually responsible for breaches of criminal rules relating to individuals under international law, as it had always been understood in the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal.⁶ Article 27 was combined with article 98, which stipulated, *inter alia*, that the Court might not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations with respect to the State or diplomatic immunity of the person of a third State. That article therefore refuted the idea that State immunity somehow disappeared when conduct attributable to the State, but carried out by individuals, was a crime. He was not opposed to the general description of genocide as a crime, but the approach adopted by the Rome Statute to the question of immunity was inconsistent with its abolition. When the Commission had dealt with State immunity the year before, its approach to the question had been extremely conservative. There was therefore a need for consistency. The Commission should not be so carried away by its fondness for the *Barcelona Traction* category of obligations as to attribute to a breach any consequences it was not prepared to allow when discussing other areas of international law.

62. He had been slightly surprised by the favourable response to articles 50 A and 50 B, notwithstanding the concerns expressed by Mr. Sepúlveda and other members. When a State was individually injured and individually entitled to take countermeasures, another State with a legal interest in the norms violated should be able to assist. There was clear practice to that effect. Hence article 50 A was not outside the scope of the current exercise. Article 50 B was obviously quite different, although it was a considerably modified and reduced form of the version which had existed on first reading. It had been broadly

accepted, including by a number of members who had seemed to favour countermeasures only when they were multilateral. He disagreed with Mr. Kateka that such actions could conceivably be limited to multilateral reactions in a single region, although he did accept his point that they might well be a reflection of a local community concern within that area. Nevertheless, inequalities of power existed as much at the regional as at the global level.

63. There had been general approval for the referring of Part Four, as it stood, to the Drafting Committee, even though a number of individual drafting suggestions had been made. For the reasons given by a number of members, he was disinclined to delete article 39 completely, having regard to the massive debate prompted by the earlier version. On the other hand, a simplified version seemed appropriate.

64. With reference to Part Four, the broad approval of article B was gratifying. As far as article 37 was concerned, Mr. Pellet had suggested that the word “exclusively” was unnecessary in the light of the phrase “and to the extent that”. The Commission had to accept, however, that the mere fact that a particular norm entailed a particular consequence was not by itself sufficient to trigger the *lex specialis* principle. He had tried to convey the notion that a further condition was required by the word “exclusively”. Perhaps the word was too strong. That was a matter for the Drafting Committee to resolve.

65. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to refer the draft articles, together with those contained in the footnotes to paragraphs 407 and 413 of the report, to the Drafting Committee.

It was so agreed.

The meeting rose at 11.50 a.m.

2654th MEETING

Thursday, 10 August 2000, at 12.10 p.m.

Chairman: Mr. Chusei YAMADA

Present: Mr. Addo, Mr. Al-Baharna, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Simma, Mr. Tomka.

⁶ *Yearbook . . . 1950*, vol. II, pp. 374–378, document A/1316, paras. 95–127.

Cooperation with other bodies (continued)*

[Agenda item 9]

STATEMENT BY THE OBSERVER FOR THE ASIAN-AFRICAN
LEGAL CONSULTATIVE COMMITTEE

1. The CHAIRMAN invited Mr. Kamil, Secretary-General of the Asian-African Legal Consultative Committee (AALCC), to address the Commission on the Committee's activities.

2. Mr. KAMIL (Observer for the Asian-African Legal Consultative Committee) said that AALCC attached great importance to its traditional and long-standing ties with the Commission and appreciated the role the Commission played in determining the shape and content of contemporary international law. As one of the Committee's main objectives was to examine questions that were under consideration by the Commission and to arrange for the views of its member States to be placed before the Commission, it had become customary for the two bodies to be represented at each other's annual sessions. In recent years, the Commission had also been represented at the meeting of legal advisers of the member States of AALCC, which was convened at United Nations Headquarters in New York during the sessions of the General Assembly. He looked forward in earnest to welcoming the members of the Commission during the fifty-fifth session of the Assembly.

3. The thirty-ninth session of AALCC had been held in Cairo in February 2000. New officers and a new Secretary-General had been elected. Four members of the Commission had attended the session, including Mr. Hafner, who had officially represented the Commission. As many as 14 substantive items had been on the agenda, including that of the work of the Commission at its fifty-first session. That work was of enormous interest to the Governments of the countries of Asia and Africa and to the Committee as a body in the service of its member States. The Committee had wanted the views expressed during its session to be brought to the Commission's attention.

4. With regard to the topic of State responsibility, the view had been expressed that it would be preferable for the Commission to retain as far as possible the substance of the draft articles adopted on first reading. Some preliminary comments had been made on the new texts proposed by the Special Rapporteur. One delegation had stated that it was in favour of the retention of article 20, which drew a distinction between obligations of conduct and obligations of result. That provision was of particular interest to the developing countries, most of which did not have the same means as others of achieving the result required of them. As rightly pointed out in the Commission itself, the obligation of prevention came under the heading of obligations of conduct and any reference to that concept could therefore be deleted from the draft article. Article 26 bis on the exhaustion of local remedies embodied an established rule of general international law. The exhaustion of local remedies was a precondition for an international claim and a breach of an international obligation would therefore

take place only if those remedies had been exhausted. As to article 33 on state of necessity, the AALCC representatives had agreed with the Special Rapporteur's interpretation. As it stood, the article did not cover humanitarian intervention involving the use of force in the territory of another State. With regard to article 30 on countermeasures, one delegation had agreed with the inclusion in the draft articles of a set of rules on those measures. It had also supported the linkage between countermeasures and compulsory dispute settlement. That procedure must, of course, be available to both parties, that is to say, the State which had committed the wrongful act and the injured State.

5. Referring to international liability for injurious consequences arising out of acts not prohibited by international law, he said that delegations in the Committee had commended the Special Rapporteur's work and supported the "polluter pays" principle and the concept of "equity" the Special Rapporteur had adopted. Concerns had been expressed that the decision the Commission had taken at its fifty-first session to suspend the consideration of the topic might delay the completion of its work on that topic. One delegation had expressed the preference that the final outcome should take the form of a framework convention.

6. In respect of reservations to treaties, it had been stated that the 1969 Vienna Convention established a flexible and pragmatic balance between the need to preserve the unity and integrity of treaties and the need to ensure their universal ratification. Against that background, it had been considered that the formulation of a set of guidelines would be a more practical exercise for filling the gaps, if any, in the Vienna regime. As to the idea of enabling human rights treaty monitoring bodies to determine the validity or acceptance of reservations, it had been pointed out that such a role would exceed the mandate of those bodies and thus give them retroactive authority. It had also been considered that there was a need for a flexible system which would integrate human rights agreements in a balanced way. A special meeting on reservations to treaties had been held during the thirty-seventh session of AALCC, in New Delhi, in April 1998. The results had been forwarded to the Commission at its fiftieth session. The Committee would be very happy to organize a similar meeting on another topic on the Commission's agenda.

7. Referring to the topic of unilateral acts of States, he said that the delegations present at the thirty-ninth session of AALCC had been of the opinion that the Commission should take steps to crystallize the applicable articles. It was of primary importance that it should precisely delimit the "unilateral acts" it intended to cover. In that context, emphasis had been placed on the distinction which must be made between "treaty acts" and "unilateral acts". The Committee had also commended the Commission on its adoption of a set of 27 draft articles on nationality of natural persons in relation to the succession of States.

8. On the initiative of the Government of Japan, AALCC had included an item entitled "Jurisdictional immunities of States and their property" on the agenda of its thirty-ninth session. Mr. Hafner, a member of the Commission, had described the Commission's work on that topic. Nearly all the delegations which had spoken had

* Resumed from the 2648th meeting.

acknowledged that it was important and urgently necessary to codify international rules on that question. One of them had highlighted the complexities of the problem, which straddled public international law, corporate law and business practices. The transition from an absolute to a restrictive theory of immunities had been seen as a necessary concomitant of the changing functions of modern States. Reference had been made to the explicit provisions of the draft article on ships owned or operated by a State (art. 17) and the view had been expressed that air transport could also be covered.

9. As to substance, one delegation had expressed the view that States should have a say in the determination of the status of "State enterprises" for purposes of immunity. Differences of view about the "nature" or "purpose" test had suggested that efforts should be made to develop definite criteria to assess whether a particular activity amounted to a commercial transaction. During the preparation of a general convention on the subject, account would have to be taken of State practice and the jurisprudence of various legal systems—civil law, common law and Islamic law.

10. AALCC intended to organize a debate on that subject during the meeting of legal advisers of its member States which would be held in New York during the fifty-fifth session of the General Assembly. That would enable the member States of the Committee to hold an exchange of views on the draft articles on jurisdictional immunities of States and their property and to coordinate their positions in the Sixth Committee. One delegation, which had emphasized the need to strengthen the dialogue between the Sixth Committee and the Commission, had suggested that the report of the Commission should be made available to States well enough in advance. Within AALCC, there was a need to identify ways and means of making a substantial contribution to the Commission's work. As time was short during the annual session, it had been proposed that, in future, the Committee should consider only one of the topics on the Commission's agenda, thereby facilitating the in-depth consideration of crucial issues.

11. The other items considered at the thirty-ninth session had been: the United Nations Decade of International Law;¹ the status and treatment of refugees; the deportation of Palestinians and other Israeli practices, including the massive immigration and settlement of Jews in the occupied territories in violation of international law; the legal protection of migrant workers; the extraterritorial application of national legislation: sanctions imposed on third parties; the follow-up to the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court; the United Nations Conference on Environment and Development; the legislative activities of United Nations agencies and other international organizations concerned with international trade law; the report on the outcome of the Third WTO Ministerial Conference, held in Seattle from 30 November to 3 December 1999; and the report of the Seminar on Issues relating to the Implementation of Intellectual Property Rights, held in New Delhi in November 1999.

¹ Proclaimed by the General Assembly in its resolution 44/23 of 17 November 1989.

12. He had two proposals to make on ways of intensifying the working relationship between AALCC and the Commission. The first was that they should jointly organize a symposium or workshop in which the United Nations Office of Legal Affairs might also take part and the purpose of which would be to determine why States were reluctant to ratify some of the conventions which had been elaborated on the basis of Commission drafts and to devise ways of increasing accessions to those conventions. The second proposal related to the role which the Commission considered that the Committee might play in encouraging States to participate more actively in the work of the Commission and the Sixth Committee of the General Assembly, particularly by replying to questionnaires and requests for comments and observations by the Commission.

13. As to future cooperation between AALCC and the Commission, he said that the AALCC secretariat would continue to prepare notes and comments on the substantive items considered by the Commission in order to assist the representatives of AALCC member States in the Sixth Committee in their discussions of the report of the Commission. An item entitled "Report on the work of the International Law Commission at its fifty-second session" would thus be included on the agenda of the fortieth session of AALCC, which would be held in 2001. On behalf of the Committee, he invited the Chairman and the members of the Commission to participate in that session and expressed the hope that the increasingly closer cooperation between the Committee and the Commission would continue.

14. Lastly, he indicated that one of the Committee's objectives for the years to come was to convince African and Asian member countries of la Francophonie to become members of the Committee. Accordingly, the Committee's statutes and regulations had been translated into French and should be distributed to the French-speaking countries soon.

15. Mr. HE said that he welcomed the tradition that, each year, the Secretary-General of AALCC reported to the Commission on the Committee's activities and that members of the Commission attended the Committee's annual session and other meetings and seminars to report on the Commission's work. He was particularly glad that the Committee had shown an interest, through comments and relevant materials, for example, in the topics on the Commission's agenda. The secretariats of the Commission and the Committee also cooperated on matters of common interest and exchanged documentation. He sincerely hoped that, under the guidance of the Committee's new Secretary-General, cooperation between the Committee and the Commission would be further developed.

16. Mr. MOMTAZ recalled that AALCC was a regional organization to which one quarter of the member States of the international community belonged and which had played and continued to play a very important role in the progressive development of international law.

17. He fully supported the first proposal by the Secretary-General of AALCC, although he was of the opinion that account should be taken not only of "still-born" conventions of which the Commission had pre-

pared the drafts, but also of the Commission's "stillborn" drafts. As to the second proposal, the Committee might encourage its member States to answer the Commission's questionnaires by holding discussions on the topics with which the questionnaires dealt. Lastly, he was of the opinion that the fact that New Delhi was so far away should not be an obstacle to the French-speaking African countries' membership of the Committee.

18. Mr. GOCO said he was convinced that AALCC could play a useful role by urging its 45 members to reply to the questionnaires the Commission sent them on particular topics or drafts. Its assistance might also be especially useful from the viewpoint of the much hoped for entry into force of the Rome Statute of the International Criminal Court, the preparatory work for which the Committee had made a significant contribution during its meeting in Manila in 1996. Since the Rome Statute's entry into force depended on the deposit of 60 instruments of ratification and only about 10 States had ratified it, the Committee might approach its members to encourage them to deposit their own instruments of ratification.

19. Mr. Sreenivasa RAO thanked the Observer for the Asian-African Legal Consultative Committee for his excellent report and for his proposals, which were designed to intensify the relationship between the Commission and the Committee in the interests of the progressive development and codification of international law. He had no doubt that, primarily thanks to its new Secretary-General's personal qualities, AALCC would be joined by increasing numbers of French-speaking members from Africa and Asia.

20. Mr. ADDO said that he would like to know what was happening with the plan for the creation of a web site for AALCC, to which the former Secretary-General of the Committee had referred in the statement he had made at the Commission's preceding session.

21. Mr. KAMIL (Observer for the Asian-African Legal Consultative Committee) said that the web site had been created and that the address would be communicated to the members of the Commission shortly.

22. The CHAIRMAN thanked the Observer for the Asian-African Legal Consultative Committee for his very interesting statement on the activities of AALCC.

The meeting rose at 1 p.m.

2655th MEETING

Friday, 11 August 2000, at 10.05 a.m.

Chairman: Mr. Chusei YAMADA

Present: Mr. Addo, Mr. Al-Baharna, Mr. Baena Soares, Mr. Brownlie, Mr. Candiotti, Mr. Crawford, Mr. Dugard,

Mr. Economides, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Simma, Mr. Tomka.

Draft report of the Commission on the work of its fifty-second session

1. The CHAIRMAN invited members to consider the Commission's draft report.

CHAPTER I. *Organization of the session (A/CN.4/L.590)*

Paragraphs 1 to 10

Paragraphs 1 to 10 were adopted.

Paragraph 11

2. The CHAIRMAN said that, in paragraph 11, the words "opened the session and" had to be deleted as Mr. Corell, the Legal Counsel, had not, in fact, opened the session.

Paragraph 11, as amended, was adopted.

Paragraph 12

Paragraph 12 was adopted.

Chapter I, as amended, was adopted.

CHAPTER II. *Summary of the work of the Commission at its fifty-second session (A/CN.4/L.591)*

Paragraph 1

Paragraph 1 was adopted.

Paragraph 2

3. Further to a query by Mr. PELLET, Mr. DUGARD and Mr. GAJA confirmed that it was draft articles 1, 3 and 5 to 8 that had been referred to the Drafting Committee. Draft article 4 had not been referred.

Paragraph 2, as amended, was adopted.

Paragraphs 3 and 4

Paragraphs 3 and 4 were adopted.