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SIXTH COMMITTEE
10th meeting
held on
Friday, 3 October 1980
at 10.30 a.m.
New York

SUMMARY RECORD OF THE **10th** MEETING

Chairman: Mr. KOROMA (Sierra Leone)

CONTENTS

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The meeting was called to order at 11.15 a.m.

AGENDA ITEM 107: REPORT OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW ON THE WORK OF ITS THIRTEENTH SESSION (continued) (A/35/17; A/C.6/35/L.2 and L.3)

1. Mr. V. KOSTOV (Bulgaria) said that he welcomed the adoption of the United Nations Convention on Contracts for the International Sale of Goods and of the Protocol Amending the Convention on the Limitation Period in the International Sale of Goods, which represented a further step on the road towards the codification of international trade law.

2. The deliberations at the Commission's thirteenth session on the preliminary draft rules regulating liquidated damages and penalty clauses prepared by the Secretariat had revealed differences of opinion on some of the principles stated in the rules. The fact that agreement had nevertheless been reached, fully justified the continuation of the Working Group's efforts with a view to achieving a consensus on a set of rules regulating such matters in selected types of international trade contracts.

3. The Commission's efficiency had been demonstrated once again in connexion with the issue of international payments: the Working Group on International Negotiable Instruments had completed its consideration of the draft Convention on International Bills of Exchange and International Promissory Notes and had made considerable progress on the draft Uniform Rules on International Cheques.

4. In connexion with security interests in goods, an effort had been made to overcome the differences in approach of countries having different legal systems. The discussions and the materials prepared by the Secretariat had helped to clarify that question.

5. His delegation attached prime importance to conciliation procedures, which States could employ in order to settle disputes arising in the context of international trade relations. It noted with satisfaction that the UNCITRAL Conciliation Rules reflected the optional nature of such procedure. Those Rules, together with the UNCITRAL Arbitration Rules, would undoubtedly facilitate the search for solutions to such disputes and would contribute to the harmonization of international relations.

6. His delegation was also closely following the Commission's activities in connexion with the new international economic order. It agreed with the decision to give priority to the harmonization, unification and review of contractual provisions commonly occurring in international contracts in the field of industrial development, as a matter of importance and urgency, especially for the developing countries. However, it was important not to neglect other, equally essential questions, among them intergovernmental bilateral agreements on industrial co-operation. The Working Group on the New International Economic Order should not confine itself to considering only those aspects of commercial practices that were governed by private law; it should also take into account some aspects of public-law international trade, such as the role of the State in international trade.

7. In conclusion, he said that his delegation believed that the summary records of those meetings of the Commission that were devoted to the discussion of legal texts were essential for the work of all delegations concerned with international trade law.

AGENDA ITEM 102: DRAFT CODE OF OFFENCES AGAINST THE PEACE AND SECURITY OF MANKIND (A/35/210 and Add.1-2 and Add.2/Corr.1)

8. Mr. SUY (The Legal Counsel), introducing agenda item 102, said that the question under consideration was, of course, not new to the Committee: as early as 1947, the General Assembly, in resolution 177 (II), had directed the International Law Commission to formulate the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgement of the Tribunal and to prepare a draft code of offences against the peace and security of mankind. The Commission had begun work on the draft code at its 1949 session and had sent a questionnaire to Member States asking them which offences, apart from those recognized in the Charter and judgement of the Nürnberg Tribunal, should be included in the draft code. In 1950 the General Assembly, having considered the formulation of the Nürnberg principles, had in resolution 488 (V) requested the Commission, in preparing the draft code, to take account of the observations made on that formulation by delegations during the fifth session of the General Assembly and of any observations which might be made by Governments. However, even though the draft code had been completed by the Commission and submitted at the sixth session, the General Assembly had not considered it then or at its seventh session, when the item had been omitted from the agenda on the understanding that the matter would continue to be considered by the ILC. In 1954 the ILC had submitted a revised draft code to the Assembly at its ninth session, but the Assembly, considering that the draft code raised problems closely related to those associated with the definition of aggression, had postponed further consideration of the issue until the Special Committee on the question of defining aggression had submitted its report (resolution 897 (IX)). The same decision had been taken in 1957. As a result of the link thus established by the Assembly between the question of the draft code and that of the definition of aggression, it was not until 1974, when the Assembly had had before it a draft definition of aggression, that the Secretary-General had suggested to the General Committee that the time might have come for the Assembly to resume consideration of the question of the draft code of offences against the peace and security of mankind and the question of an international criminal jurisdiction. Once again, however, the Assembly had not made any decision on the subject in 1974. It should be noted that, in its report on the work of its twenty-ninth session in 1977, the Commission had suggested reviewing the 1954 draft code, taking duly into account the developments that had occurred in international law since that time. At the thirty-second session of the Assembly in 1977, seven delegations had requested the inclusion in the agenda of an item entitled "Draft Code of Offences against the Peace and Security of Mankind".

9. Legal instruments adopted since 1954 which might be considered to be relevant included the 1965 International Convention on the Elimination of All Forms of Racial Discrimination, the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid and the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, together with the Definition of Aggression, the Declaration on the Granting of Independence to Colonial Countries and Peoples and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

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(Mr. Suy)

10. It was clear therefore, that for 33 years the question of the draft code of offences against the peace and security of mankind had never ceased to arouse interest, even though there did not seem to be any unanimity of views on that matter. The range of opinions held in that respect was apparent from the replies received from countries and international organizations (A/35/210 and Add.1-3 and Add.2/Corr.1). Those replies focused the Committee's attention on specific problems related to the resumption of discussions on the draft code in the light of the developments that had occurred since 1954.

11. Mr. MALEK (Lebanon) observed that it had not been until after the judgement of the Nürnberg Tribunal had been rendered that the General Assembly had instructed the International Law Commission to formulate the principles on which that judgement and the Charter of the Tribunal had been based and to consider the preparation of a draft code of offences against the peace and security of mankind, the establishment of an international criminal jurisdiction and the definition of aggression. In 1954 the Commission had adopted a draft code of offences against the peace and security of mankind, consideration of which had been postponed by the Assembly, as had the establishment of an international criminal jurisdiction, until such time as a definition of aggression came to be adopted. That definition had been adopted in 1974, but only recently had the General Assembly decided to resume consideration of the draft code of offences. The draft code, which contained four articles, embodied the principles underlying the Charter of the Nürnberg Tribunal and that Tribunal's judgement, as formulated by the Commission. Article 1 laid down the principle of individual responsibility for crimes under international law. Article 2 listed acts deemed to be offences against the peace and security of mankind, reproducing the sixth principle as formulated by the Commission. Article 3 stated the principle of the criminal responsibility of heads of State and Government and corresponded to the third principle formulated by the Commission. Lastly, article 4 set forth the principle of responsibility in international law for acts committed pursuant to an order of a superior; it corresponded to the fourth principle formulated by the Commission.

12. While it might provide a useful basis for the drafting of a code of international offences, the draft code did not take account of developments that had occurred in international criminal law since 1954, the year when it had been drafted. It was to be noted, first of all, that the draft code was confined to offences having a political element and did not cover less serious international offences, such as the international traffic in narcotics, counterfeiting and other similar offences which were the subject of international conventions dating back quite a long time. It likewise did not cover international crimes punishable under more recent conventions, such as the aircraft hijacking or unlawful acts against the safety of civil aviation, crimes against internationally protected persons, offences committed in violation of human rights conventions, apartheid or racial discrimination. The draft code should therefore be revised to take into account the developments that had occurred in that sphere.

(Mr. Malek, Lebanon)

13. However, the Committee must first decide on the desirability of drafting a code of offences. If such a code was to be drafted, the method to be followed needed to be decided upon; the Committee could either refer the draft back to the International Law Commission for further consideration or establish an ad hoc committee. The Sixth Committee itself could hardly undertake the task, in view of its heavy work programme and the increasing number of items allocated to it every year.

14. Mrs. RYGH (Norway) said that her country, in accordance with General Assembly resolution 33/97, had already submitted its comments reproduced in document A/35/210/Add.1. The Norwegian Government had made a thorough study of the draft Code of Offences against the Peace and Security of Mankind and had come to the conclusion that it was necessary to undertake an extensive revision of the draft Code, as adopted at the sixth session of the International Law Commission in 1954, in view of the development of international law and the adoption of various instruments in that field, including the Definition of Aggression adopted by the General Assembly in its resolution 3314 (XXIX). The articles of the draft Code were somewhat imprecise and needed more stringent legal drafting. Her delegation did not wish to repeat the comments on the various articles which its Government had already presented, but would like to emphasize its view that the International Law Commission provided the best forum for substantive discussion on the subject. The General Assembly should therefore entrust the Commission with the task of reviewing the draft Code in order to achieve a more precise formulation which would enable it to function as a penal code. The Commission's work should in due course be the subject of a report to the General Assembly.

15. Mr. RAZAFINODRALAMBO (Madagascar) said that the draft Code of Offences against the Peace and Security of Mankind was one of the priorities to which the Sixth Committee should give particular attention. The problem had been of constant concern to peace-loving nations, although for too long only piecemeal or superficial solutions had emerged from the efforts which had been made. However, the crimes of colonialism had been swept under the carpet. It was not until the Nazi holocaust that the West had decided to take concrete measures and establish, under the 1945 London Agreement and the 1946 Tokyo Declaration, the special Nuremberg and Tokyo Military Tribunals. It was therefore not surprising that in 1946 the General Assembly had placed the question of the drafting of a code of offences against the peace and security of mankind on its agenda as a priority item and had entrusted that work to the International Law Commission.

16. Changes in the concept of international offences were inevitable with the passage of time. Thus, the work of the Commission, which had resulted in the draft before the Committee, showed some omissions more than 30 years later and seemed definitely out of date on some points. The format would be clearer if the sections, articles or paragraphs dealing with the various groups, categories and types of offence were given headings and subheadings. With regard to the substance, it should be noted that the authors had deliberately sidestepped the issue of State responsibility. It was true that it would be unrealistic to go against the traditional concept that only individuals could incur criminal responsibility. Yet it would have been possible at least to define the responsibility of bodies

(Mr. Razafinodralambo, Madagascar)

corporate as being close to that of offenders under domestic criminal law, and to lay down the civil responsibility of the State or a special responsibility based on the administrative responsibility provided for in codified legal systems. That aspect of the problem considerably complicated the task of the international legislator by raising questions of competence, since only an international jurisdiction could rule with complete independence on the international responsibility of a State. The definitions of offences in the 1954 draft should be reviewed in the light of the international instruments adopted since that date. For instance, the criteria applicable to the offences laid down in article 2, such as use of force or of armed bands, annexation and intervention, could not ignore the relevant resolutions and declarations of the General Assembly, in particular the Definition of Aggression, the Declaration on the Granting of Independence to Colonial Countries and Peoples and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. With regard to the crime of genocide, account should be taken in that same article of the Convention on the Prevention and Punishment of the Crime of Genocide and the International Convention on the Suppression and Punishment of the Crime of Apartheid. Finally, the definition of terrorism in article 2 could not ignore the provisions of the International Convention against the Taking of Hostages.

17. Although revision of the criteria adopted in the draft was essential if it was to be adopted, that in itself was not enough. A serious effort should be made to bring the draft up to date. The inclusion of crimes relating to slavery, racism and apartheid should not encounter overt opposition. The draft should also take account of new forms of colonialism, including the use of mercenaries, an offence which in 1977 had given rise to the adoption of a new article on mercenaries in Protocol I to the 1949 Geneva Conventions. A code which sidestepped apartheid and the use of mercenaries would lose all credibility in the eyes of the vast majority of the peoples of the third world. Furthermore, the project gave no precise definition of the traditional criminal-law concepts of complicity and extradition. A specific provision spelling out the constituent elements of complicity and covering a broad range of reprehensible acts was clearly desirable. With regard to extradition, the way in which bilateral conventions on the subject had been applied suggested that that point should not raise insurmountable difficulties. The code should be sufficiently comprehensive to gain universal endorsement. In order to achieve that, either the draft should be referred back to the International Law Commission or an ad hoc committee should be established to revise it; in the latter case, the ad hoc committee's role would be limited to putting the finishing touches to the text in the light of the comments of the Sixth Committee.

18. Mr. IMAM (Kuwait) said that the problem of a code of offences against the peace and security of mankind was one of the most complex encountered in the process of codification and progressive development of international law. The subject raised many questions. Did international law apply to individuals as well as to States? If so, for what acts might an individual be held criminally liable? Although the International Military Tribunal at Nuremberg had stated that individuals could be held responsible for war crimes, crimes against humanity and crimes against peace, that view was challenged by many jurists who contended that international law applied only to States while national law applied to individuals. A salient

(Mr. Imam, Kuwait)

example of the recent trend in international law towards the creation of a body of international criminal offences was the definition of genocide as an international crime in a Convention adopted in 1948. Under the Convention, repression was left to the courts of the State in which the genocide had been perpetrated but that solution was inadequate because genocide was normally committed in the name of the State by its officials, and punishment was not possible unless the existing Government was overthrown. It was therefore almost impossible, at the current stage of international law, to create judicial machinery to repress and punish that crime. Although no rule of international law said that a State could do no wrong, there were provisions in the constitutions of many States which stipulated that the head of State could do no wrong. It would thus seem that there was a conflict between the norms of domestic law and the future norms of international law which would stress the rights and duties of individuals. If the essence of law was its enforceability and binding character, then an international criminal jurisdiction should be created. A supranational criminal law presupposed the existence of an international criminal court. Blaise Pascal had put the matter neatly when he had said that justice without force was powerless, while force without justice was tyrannical, and that it was necessary to combine the two and thus make what was just strong, and what was strong just.

19. In order to achieve that noble ideal, some advocated more treaties to proscribe offences against the peace and security of mankind, because they saw in the accumulation of such instruments a means to educate Governments and peoples. Others claimed that constant reiteration of high principles with little impact could only undermine faith in those principles. The task of the International Law Commission would therefore be long and arduous before the draft Code of Offences was ready for consideration by the Sixth Committee. In its work, the Commission could benefit from the replies received from States on the subject and, as the Legal Counsel had pointed out, could draw upon the corpus of international law which was emerging. For the time being, he did not believe that the draft had reached a stage where it could profitably be considered by the Sixth Committee.

20. Mrs. OLIVEROS (Argentina) said that in her view, the debate on the item in the Sixth Committee at the thirty-third session had been very obscure and had done little credit to the Committee's tradition. It was to be hoped that the Committee had learnt from that experience and would be able, at the current session, to arrive at practical conclusions. Her delegation was ready to support any initiative leading to a scientific, but at the same time specific, study of the question.

21. The international community had for some years felt the need to define such offences as the taking of hostages, crimes against internationally protected persons, terrorism and aggression. The draft Code had been prepared at a time when few international instruments were in existence or were being drawn up. Her delegation saw little benefit in producing a list of crimes of the kind contained in the draft Code, which in any event largely constituted duplication of effort.

(Mrs. Oliveros, Argentina)

The value of a penal instrument which no court would apply was not apparent, and the proposed code would be incomplete unless it included procedural provisions especially concerning rules of evidence and a suitable evaluation system, and unless the competent court or tribunal was specified or the way in which it would be determined was spelt out. Moreover, in the view of her delegation, the subject under discussion was closely linked to the question of State responsibility in general, for both wrongful and lawful acts, and to criminal responsibility of States in particular. Her delegation was ready to support any practical and realistic solution and believed that the matter should be referred back to the International Law Commission, along with the comments of Governments and the relevant summary records.

22. Mr. MEISSNER (German Democratic Republic) said that he attached the greatest importance to the elaboration of a code of offences against the peace and security of mankind, which would constitute a weighty contribution not only to securing peace and observing international law but also to curbing activities by individuals, groups or organizations against peace and international law. The German Democratic Republic had already expressed its view on the matter, which was contained in document A/35/210/Add.1, and his delegation had spoken on the subject in the Sixth Committee on 5 December 1978.

23. Like other delegations, his delegation held the view that the revised draft Code submitted by the International Law Commission in 1954 constituted an acceptable basis for further discussions of the question. However, the draft should reflect more comprehensively the Nuremberg principles, particularly the principle that domestic law on statutory limitation should not apply to war crimes and crimes against humanity. The draft should also include the generally recognized principle under which the only options open to a State which had apprehended persons guilty of such crimes must be either to extradite them to a State requesting their extradition or to punish them itself with all due severity. Furthermore, the draft Code should take into consideration the progress made during the past 25 years in the codification of crimes against the peace and security of mankind, in particular, the Definition of Aggression and the Geneva Conventions of 12 August 1949 and Protocol I of 8 June 1977 amending the Conventions. The draft should also include provisions on the crime of racism - particularly the crime of apartheid - and the crime of terrorism.

24. A code containing the above-mentioned elements would be suitable for reaffirming, concretizing and enforcing existing contractual and customary-law obligations of States for the prosecution and punishment of grave international crimes. His delegation believed that the elaboration of the Code must no longer be delayed. It also considered the Sixth Committee the most suitable body for deciding how the work on the subject should be organized.

25. Mr. CALERO RODRIGUES (Brazil) pointed out that, at the thirty-third session of the General Assembly, only 18 delegations had spoken on the substance of the item under discussion. Furthermore, only 19 Governments had sent in comments on the subject. Comparing those figures with the number of Member States, one might come to the conclusion that in the international community as a whole there was no strong feeling in favour of reviving efforts towards the completion and adoption of a code of offences against the peace and security of mankind.

(Mr. Calero Rodrigues, Brazil)

26. Yet it must be supposed that all Governments - and that was the case of his Government - recognized that certain acts were so abhorrent that they should be considered crimes under international law and that those responsible for them should be punished. There were some difficulties, however, not only in listing the acts which constituted offences against the peace and security of mankind but, more especially, in incorporating in an international instrument some basic concepts that were necessarily related to the subject. Crime must be punished, but that meant determining penalties and indicating the authority competent to apply them. The International Law Commission had looked deeply into those problems but had been unable to give an answer and what it had presented as a draft Code after a great deal of work amounted to little more than a list of the acts which should be considered offences against the peace and security of mankind. The Commission had drawn up and then discarded three articles dealing with extradition, with its settlement of disputes relating to the interpretation and application of the Code and with the question of jurisdiction. On the question of punishment the Commission had not only made no progress in 1954 but had retreated by deleting article 5, approved in 1951, which had stated that the penalty for any offence defined in the Code would be determined by the tribunal exercising jurisdiction over the individuals accused.

27. If the aim really was to elaborate a meaningful code, its provisions must go beyond what was contained in the present draft. The problems involved were so vast, so delicate and so difficult that his delegation was not at all convinced that it would be possible, at the present stage in the process of codification of international law, to arrive at positive results. It believed that further attempts now to revise and complete the 1954 draft would lead nowhere. However, if an opposing view prevailed in the Committee - and his delegation hoped that it would not - he would suggest that the General Assembly should request the International Law Commission to reconsider the draft and give the Commission much more precise terms of reference than on the previous occasion. Laying down those terms of reference would not be an easy task, and he was not sure that the Sixth Committee could do so at the present time. In any case, his delegation believed that the following four points should be carefully considered: (1) general criteria for deciding whether an act was to be considered an offence against the peace and security of mankind; (2) attribution of responsibility for the offences; (3) determination of penalties; whether they were not to be set out in the Code; (4) implementation: should the Code be applied by an international tribunal or by the judicial organs of States?

The meeting rose at 12.35 p.m.