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Chairman: Mr. Francisco V. GARCIA AMADOR (Cuba).

AGENDA ITEM 51

Question of defining aggression: report of the Special Committee on the Question of Defining Aggression (A/C.6/L.337/Rev.1) *(continued)*[1]

1. Speaking on a point of order, Mr. TARAZI (Syria) proposed that the new Special Committee on the Question of Defining Aggression, the members of which were to be nominated by the Chairman, should include representatives of nineteen Member States.

2. Sir Gerald FITZMAURICE (United Kingdom) thought it would be preferable for reasons of convenience to limit the number of members of the Special Committee to fifteen.

3. Mr. PRATT DE MARIA (Uruguay) supported the Syrian representative. He felt that if the membership of the Committee were larger, the solution it would propose would be more generally acceptable.

4. Mr. SPIROPOULOS (Greece) proposed a Committee of seventeen members in order to ensure adequate representation for Europe and Asia.

5. After a short exchange of views, the CHAIRMAN put the Syrian proposal, the first one before the Committee, to the vote.

The proposal was adopted by 20 votes to 10, with 13 abstentions.

AGENDA ITEM 49

Report of the International Law Commission on the work of its sixth session (chapter III) (A/2693, A/C.6/L.338) *(continued)*

GENERAL DEBATE (*continued*)

6. Mr. ROLING (Netherlands) repudiated the Soviet Union representative's statement (422nd meeting) accusing him of having tried over the last five years to undermine the law of Nürnberg. He was surprised at the Soviet representative's long statement misrepresenting his intentions and statements and quoting certain passages out of context, particularly parts of an act of the Democratic Republic of Germany that he had originally mentioned in order to show that the national formulation of crimes against peace could readily be turned into an "instrument of combat". The Soviet representative had not quoted the preamble of that act and had thus distorted the Netherlands representative's statement. The Soviet representative had also quoted from a statement of the Netherlands representative to the Sixth Committee at the fourth session. That statement had been intended merely to show that a revolution, such as the Nürnberg revolution, could not easily change traditional ideas, and to emphasize the necessity of consolidating the principles of Nürnberg. The principles of a revolution could be betrayed. It was indeed the Soviet contention that the principles of liberty, equality and fraternity of the French Revolution had been betrayed by the bourgeoisie. One of the aims of the Netherlands delegation was to ensure that the United Nations would not one day be reproached with having betrayed the principles of the Nürnberg revolution.

7. With reference to the Chinese representative's statement (422nd meeting) that the Committee should not stop at codifying the law of Nürnberg and the rules applied in the post-war verdicts, he said that codification of the Nürnberg principles, which were in fact revolutionary, would not amount to "petrification" of law as the Chinese representative had said. He thought that the General Assembly would encounter difficult problems if it tried to break new ground. It had no legislative powers and, if it wished to formulate new law, would have to consider the possibility of a multilateral treaty. It was, however, competent to formulate and codify existing law by resolution. He thought the Committee should be realistic and concentrate on the latter task. That did not mean that the General Assembly was strictly bound by the law of the post-war judgments. Subsequent events might well have to be taken into account.

8. The object of one of his proposed amendments to the joint draft resolution (A/C.6/L.338) was to request Governments to submit their observations on the revised draft code. The proposal would give them an opportunity of proposing the inclusion in the code of certain rules that were not in the charters or judgments of the Nürnberg or Tokyo courts. His Government would carefully study those observations and would in certain circumstances be prepared to support the new provisions, but for the time being it was inclined to confine itself to codification of the laws recognized in the post-war judgments.

9. He thought that the General Assembly should endeavour to stimulate the advancement of international criminal law by the promotion of a detailed study of the post-war verdicts and particularly of the differences between them, since the Assembly would have to make

[1] Resumed from the 420th meeting.

a choice when it began to formulate crimes against peace. In making that choice, the Assembly would also have to know how various countries had applied the new principles of Nürnberg and to what extent they had corrected them. The Committee's task was therefore tremendous. It was undoubtedly easy to prohibit all kinds of international activity on paper. But before branding any act as an international crime it was necessary to assess the consequences of such a decision, particularly in the light of article 4 of the draft code, which enjoined disobedience to government orders where such orders constituted an international crime. In other words, every definition of an international crime was a potential incitement to disobedience of national authorities.

10. He had already emphasized the revolutionary character of the Nürnberg charter and judgments; he wished also to stress the revolutionary character of the recognition of international criminal law. He did not know whether countries would be ready to recognize that principle. It would mean a transfer of loyalty from the national State to the international community, a concept that was still imperfectly defined. In order to decide whether an act constituted an offence against the peace and security of mankind it would be necessary to inquire whether the act violated the laws of mankind to such an extent that the citizen should refuse to perform it. In his opinion, the citizen's duty to act thus had already been recognized in three cases: when his Government committed an act of aggression; when his Government, in time of war, disregarded the minimum of fairness and humanity as formulated in the laws of warfare; and finally, when his Government sought the mass destruction of a group of its population.

11. Most Member States would certainly be reluctant to widen that concept of loyalty to humanity. The existing text of the draft code appeared to extend unduly the scope of international criminal law.

12. The draft code raised other questions—for example, whether the crimes to be mentioned in the code should be limited to the three kinds mentioned in the charters of the Nürnberg and Tokyo Tribunals; if so, many paragraphs of the draft code would have to be dropped. Should the code restrict the crime against peace to the scope given to that crime in the charters or the judgments? What should be the relation between the crime against humanity and the crime of genocide? The responsibility of the professional soldier engaged in warfare must also be determined, and a decision on whether a group of individuals who made the policy of a State could be declared guilty of crimes against peace must be made.

13. It was certain that if the Committee could eliminate the superfluous and restrict itself to the codification of existing law, the code might become a very simple instrument with few provisions and clear-cut rules.

14. He felt that the joint draft resolution (A/C.6/L.338) must be amended and extended to make it more constructive, and he therefore proposed certain amendments that he would submit formally if the members of the Committee appeared to favour them. His proposed text requested Governments to submit their observations on the revised draft code, requested the Secretary-General to make a survey of the solutions found by national and international courts to the difficulties that had arisen from the interpretation of the Nürnberg and Tokyo charters, and decided to include in the provisional agenda of the eleventh session the revised draft code of offences against the peace and security of mankind.

15. Mr. ROBINSON (Israel) considered that the structure of the draft code was not satisfactory. Since article 2 (13), article 3 and article 4 merely extended or restricted the principle of individual responsibility proclaimed in article 1, it would be logical to divide the draft code into two sections: the first, dealing with the principle of responsibility, would include articles 1, 2 (13), 3 and 4 of the existing draft; the second would include the list of acts constituting crimes against the peace and security of humanity that appeared in paragraphs 1 to 12 inclusive of the present article 2.

16. Turning next to the relationship between the draft code and the Nürnberg principles, he wished to reply to the French representative, who at the 422nd meeting had regretted the omission from the International Law Commission's draft code of any reference to the right to a fair trial, which had been included in the charter of the Nürnberg Tribunal. He felt that that criticism of the International Law Commission was unjustified. The period 1945-1946 had been one of syncretism, and the legal instruments of the time had included not only a list of punishable crimes, but also provisions regarding the organization of the tribunals and their procedure. Syncretism had now given way to differentiation, which explained why the International Law Commission, while recognizing the importance of the right to a fair trial, had not mentioned it when formulating the list of crimes against the peace and security of humanity.

17. The Nürnberg principles would remain for years the main source of international criminal law and, even after the adoption of the code, would continue to have considerable legal authority, at least in so far as non-parties to the code were concerned. The Nürnberg principles should therefore be preserved; their full significance should be objectively recognized and should not be unduly broadened or narrowed down.

18. The principles had not always been properly understood because of the attempt to transfer the concepts of national criminal law to the field of international law. It must not be forgotten that, unlike national criminal law, international criminal law applied to only a very small number of persons, that the number of crimes under international criminal law was very limited, and that it operated only in times when conditions were abnormal.

19. The Nürnberg principles must be defended against unduly sweeping interpretations that might distort them. He accordingly protested against the Netherlands representative's statement (421st meeting) that the essence of the Nürnberg and Tokyo trials had been the "recognition of individual criminal responsibility for the foreign and domestic policy of a State". That was an over-generalization and an over-simplification. Numerous aspects of German foreign policy had not even been considered by the Nürnberg Tribunal; it was only when that policy had become a threat to the peace that it had been the subject of condemnation.

20. There was still less justification for the statement that, in the crime against humanity, individuals had been tried "for their share in the domestic policy of their country". Revolting as the domestic policy of the Nazi régime had been, especially with regard to

the Jews, acts committed in implementation of that policy had been considered by the International Military Tribunal only when connected with other war crimes; nobody had been condemned for participation in the drafting and implementation of the Nürnberg laws of 1935 or for having ordered the pogroms of 1938.

21. Only the acts committed in Germany after the start of aggression had been recognized as crimes against humanity. In that connexion, he cited the case of Streicher and von Schirach, who had been convicted only for acts perpetrated after the outbreak of hostilities.

22. The Nürnberg principles could be described as "revolutionary", the term that the Netherlands representative applied to them, only if they were isolated from the tremendous material and psychological revolution generated by Nazi aggression. They were revolutionary only if no account was taken of the development of the *jus ad bellum*, and the series of legal instruments that had modified traditional concepts since the League of Nations Covenant. While it was true that some of the Nürnberg principles were principles proclaimed for the first time, they were none the less the logical culmination of a rational evolutionary process.

23. In addition to the sixty Member States of the United Nations—which had all endorsed the Nürnberg principles, subject to divergencies of interpretation—the signatories of the peace treaties with the European Nazi satellites had recognized the principles, and so did—at least by implication—Western Germany and Austria as parties to the Geneva Convention relating to the Status of Refugees. Thus at least 67 States had accepted the principles. The degree of acceptance had therefore been underestimated.

24. Moreover, it would be wrong not to recognize that the principle of "human duties", embodied in the London Agreement of 1945, was on a less solid legal basis than the universal recognition of human rights. The 1948 Universal Declaration of Human Rights was the expression of an ideal, while the principle of human duties was embedded in positive common law. Moreover, human rights were intended to cover the entire population of the world, while international human duties, overriding the citizen's duties towards his Government, would never apply to more than a relatively few policy-making individuals.

25. The Netherlands representative had said (421st meeting) that the authority of the Nürnberg Tribunal had been challenged on the grounds that it had been established for the occasion and consisted of judges from the victorious Powers. That contention had been answered by one of the leading philosophers of modern times, Karl Jaspers, a German; the courts set up by the victor or victors legitimately had jurisdiction; the neutrals, having taken no part in the war, had no right to sit in such courts, and the inclusion of German judges would have made no change because they would have sat only by the grace of the victors.

26. Some of the expressions used by the Netherlands representative suggested that he regarded certain features of Nazi policy and of the Nürnberg judgments as equally shocking, and that in his view certain aspects of those judgments could be justified only if they were really a milestone in the development of international criminal law. He warmly protested against any such comparison or judgment.

27. The view had been expressed that the definition of aggression and the draft code were Siamese twins whose development was interdependent. That was the idea underlying the proposal to postpone discussion. It was fallacious for many reasons. In the first place, the definitions of aggression in existence in international instruments differed according to the areas in which they applied. A similar differentiation could be expected depending on the purposes of various treaties. It must therefore be accepted that there would be several definitions. In the second place, a definition of aggression was essential in a code under which aggression was a crime, but the absence of any such definition as a guiding principle had not hampered the work of the existing organs of the United Nations. Thirdly, aggression under the code would be an offence for which individuals would be responsible, while, for the purpose of the definition, the responsible entity would be a State. Moreover, the enumeration of acts constituting aggression in the draft code was closely connected with the Nürnberg principles. That connexion did not exist in the case of a definition of aggression. Finally, while the term "aggression" as used in the United Nations Charter was a catch-all word that had to be defined, the same was not true of the code, from which it could be completely eliminated without detracting from the value of the text. The "Siamese twins" theory was therefore unfounded.

28. Analysing the differences in wording between article 2 (10) of the draft code, dealing with the crime of genocide, and the Convention on the Prevention and Punishment of the Crime of Genocide, he said that if there was any point in including a reference to genocide in the code—which was questionable—the relevant provision should reproduce literally the terms of the Convention.

29. Turning to the question of crimes against humanity, he reviewed the development of the concept from the time when faulty punctuation in the London Agreement of 1945 had created a distinction between the various acts and had made a crime of political, racial or religious persecution only when it was committed in execution of or in connexion with another crime. The first attack on that idea had been made by Law No. 10 promulgated by the Control Council for Germany in November 1945. The process had culminated in the text drafted by the International Law Commission, which wholly eliminated that arbitrary distinction and was entirely satisfactory to the Israel delegation from that point of view.

30. Turning to the question of what the Sixth Committee should do at that stage of the discussion, he said that it must be considered whether the work of the International Law Commission on the matter could be regarded as completed. In any event, the draft code would have to be embodied in an international treaty. Much remained to be done to put it into that form. Moreover, the question of implementation had been left open, and was closely connected with the problem of international criminal jurisdiction. Finally, a complete commentary on the draft code was required because in a work like the code comments were at least as important as the legal provisions themselves. The commentary should give a full account of the *"travaux préparatoires"*. On behalf of his delegation, he suggested that the work should be undertaken by Mr.

Spiropoulos, whose experience and competence would ensure its success.

31. He concluded by expressing the hope that his suggestion would be embodied in a draft resolution and that the Sixth Committee would have the commentary before it at an early session of the General Assembly.

The meeting rose at 1.10 p.m.

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