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**SIXTH COMMITTEE**  
36th meeting  
held on  
Tuesday, 12 November 1985  
at 8.30 p.m.  
New York

**SUMMARY RECORD OF THE 36th MEETING**

Chairman: Mr. AL-QAYSI (Iraq)

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The meeting was called to order at 8.40 p.m.

AGENDA ITEM 138: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS THIRTY-SEVENTH SESSION (continued) (A/40/10; A/40/447)

AGENDA ITEM 133: DRAFT CODE OF OFFENCES AGAINST THE PEACE AND SECURITY OF MANKIND: REPORT OF THE SECRETARY-GENERAL (continued) (A/40/451 and Add.1-3, A/40/331-S/17209 and A/40/756-S/17584)

1. Mr. ENKHTSAIKHAN (Mongolia) said that Mongolia had from the outset supported the elaboration and adoption of a Code of Offences against the Peace and Security of Mankind. In order to ensure the peace and security of mankind, however, in addition to legal preventive and remedial measures the question must be addressed in its entirety, including the problem of the reduction and elimination of the material base of wars and aggression. The draft prepared by the International Law Commission in 1954 was a good basis on which to elaborate the Code. The four articles contained in it should be retained, with some drafting changes. The gap created by a further 30 years of development of international law should be filled, and the many international legal instruments adopted in that time should be duly reflected in the Code.
2. His delegation agreed with the Special Rapporteur on the advisability of limiting the Code for the time being to offences committed by individuals and to the most serious offences having widespread impact. With respect to the proposed draft article 1, his delegation was inclined to view the terms "peace" and "security of mankind" as being organically linked. Nevertheless, in certain cases, the security of peoples and of mankind as a whole could be threatened without peace being jeopardized stricto sensu. In the case of large-scale contamination of the environment by toxic chemicals or nuclear waste, although peace might not be jeopardized, the consequences could be catastrophic.
3. Regarding draft article 2, his delegation, like the International Law Commission in general, tended to favour the first alternative as being broader in scope and covering all individuals. It looked forward to the results of the Drafting Committee's consideration of the question of the definition of an offence.
4. It was inconceivable that a code of offences against the peace and security of mankind should remain silent on the problem of the use of nuclear weapons. He would like, therefore, to reiterate his delegation's belief that the Code should begin the list of offences with the use or threat of use of nuclear weapons. It should stipulate that such use or threat of use constituted the gravest crime against the peace and security of mankind and was prohibited at all times and in all circumstances. The use of other weapons of mass destruction should also be outlawed. The fact that there was no conventional norm banning the use of nuclear weapons, or the argument that formally prohibiting the use of nuclear weapons would deprive them of their political effect as a deterrent, could not justify leaving a gap in the Code that would render it inoperative in the event of a nuclear war. Nuclear war had been defined as the gravest of all crimes in many international legal instruments, including the Declaration on the Prevention of Nuclear

(Mr. Enkhsaikhan, Mongolia)

Catastrophe in General Assembly resolution 36/100. Explicit prohibition in the Code of the use of nuclear weapons would be a significant step towards erecting a legal barrier to the unleashing of nuclear war.

5. His delegation looked forward to the next stage of the Commission's work on the topic and hoped that in the year ahead, which had been proclaimed the International Year of Peace, tangible progress would be made.

6. Mr. AL-KHASAWNEH (Jordan) said that the report before the Sixth Committee reflected in large measure the recent changes in the membership of the International Law Commission. The Commission had made discernible progress in its work on the diplomatic courier, the draft Code of Offences, jurisdictional immunities and, to a lesser extent, State responsibility. No substantive work had been undertaken, however, on the two important and closely linked topics of the law of the non-navigational uses of international watercourses and international liability for injurious consequences arising out of acts not prohibited by international law. Although it recognized that the work on those two topics had been interrupted for reasons beyond the Commission's control, his delegation stressed the importance of its early resumption and welcomed the appointment of Special Rapporteurs for those topics.

7. With regard to the offences to be covered by the draft Code of Offences against the Peace and Security of Mankind an enumerative approach that was as exhaustive as possible should be combined with an approach based on very strict criteria for possible future additions. With that consideration in mind, his delegation was in favour of the first alternative proposed by the Special Rapporteur for draft article 3, although it hoped that he would be able to arrive at even stricter criteria. A more rigorous examination of some of the acts proposed for inclusion as offences against the peace and security of mankind might show them to be general headings that needed to be broken down into specific acts. For example, terrorism might prove to be an elusive concept and such manifestations of it as the taking of hostages or attacks on internationally protected persons might be more amenable to penal codification. Similarly, economic aggression might prove to be part of another heading proposed by the Special Rapporteur, namely, intervention in the internal or external affairs of another State.

8. His delegation had noted the Commission's decision that the assumption that the Code would be applicable to individuals was without prejudice to its possible applicability to States. The notion of the criminal responsibility of States had gained acceptance in international law and was supported by the writings of jurists and the opinions expressed by many Governments. Nevertheless, it must be recognized that the applicability of the Code to States would become increasingly difficult for the Commission to consider as its work progressed. Alternatively, the notion of the criminal responsibility of States could be reflected in the draft articles on State responsibility. His delegation had no strong views on the matter, but urged that a decision should be taken as soon as possible as to the topic in which the notion would be included.

(Mr. Al-Khasawneh, Jordan)

9. His delegation would prefer the first alternative proposed by the Special Rapporteur for article 2, since the term "individuals" covered "State authorities". Furthermore, it was possible that individuals or groups of individuals who were not State authorities might perpetrate crimes, such as genocide, against the peace and security of mankind.

10. Regarding the definition of aggression, his delegation considered it essential that the content of General Assembly resolution 3314 (XXIX) should be included in the Code. Since reference in a footnote was to be avoided if possible, his delegation favoured the first alternative proposed by the Special Rapporteur for draft article 4, section A. It hoped that the Commission would be able to find the formulation needed to reflect the resolution without destroying its underlying balance.

11. In conclusion, he wished to place on record his delegation's appreciation of the efforts of Mr. Doudou Thiam, the Special Rapporteur for the topic.

12. Mr. MUDHO (Kenya) congratulated the International Law Commission on its recent very productive session and on performing a vital task in codifying the existing law and progressively developing new norms of conduct. The main problem facing the international community, however, was not the lack of widely accepted or recognized international norms but the failure or unwillingness of States to comply with them. That malaise could be eradicated only through universal recognition and observance of international law. Kenya's uncompromising commitment to the rule of law was expressed in its foreign policy by faithful observance of all international agreements to which it was a party.

13. He noted with satisfaction that the draft Code of Offences against the Peace and Security of Mankind took due account of the 1954 draft. Kenya approved the outline proposed by the Special Rapporteur for Parts One and Two of the Code as well as his intention to limit the scope of the Code at the current stage to offences by individuals, without prejudice to subsequent consideration of the international criminal liability of States. No distinction should be made depending on the capacity in which individuals acted, and his delegation accordingly welcomed the Commission's decision to adopt the broader of the two alternatives presented by the Special Rapporteur.

14. His delegation, while appreciating the difficulties inherent in defining an offence under the draft Code, had serious doubts as to the wisdom of the Commission's interim decision to refer the matter to its Drafting Committee. Questions of principle were necessarily matters of substance which the Commission should either seek to resolve in plenary or refer to the General Assembly for guidance. The Commission's task would be greatly facilitated by the elaboration of general principles regarding the offences to be covered. The principles would include those listed in paragraph 45 of the report.

15. With regard to the topic of State responsibility, Kenya supported the inclusion of proposals that would form Part Three of the draft articles, dealing with implementation and the settlement of disputes. Although the outline was

(Mr. Mudho, Kenya)

modeled on parts of the 1969 Vienna Convention on the Law of Treaties, care should be exercised in making the analogy because the element of consensuality essential to the operation of the régime of treaties was not present in the régime of State responsibility.

16. Consequently, while his delegation approved of the overall structure, it did not share the concern that the relationship between the topic and the draft Code of Offences against the Peace and Security of Mankind should be a bar to treating the subject of State responsibility exhaustively. It endorsed the comprehensive approach reflected in draft article 5 dealing with the definition of an injured State. It noted, however, that there was a new element in the definition which linked the content with Part One.

17. On the topic of the status of the diplomatic courier, his delegation continued to hold the view that the facilities and concessions extended to the diplomatic courier should be limited to the requirements of his functions. It therefore noted with satisfaction that the Commission had restricted the immunity of the diplomatic courier from the criminal jurisdiction of the receiving or transit State to acts performed in the exercise of his functions. It urged the Commission to reconsider at its next session the question of the inviolability of the diplomatic bag. The adoption of a provision based on article 298 of the United Nations Convention on the Law of the Sea would not enhance the prospects for consolidating and unifying that aspect of the law. The option referred to in paragraph 182 of the report merited further scrutiny.

18. Few topics were of greater interest to the developing countries than the jurisdictional immunities of States and their property. The duties and obligations of States towards their citizens currently went far beyond the traditional concept of the maintenance of law and order within the State's borders and defence of its people and territory from external threats. Even in the most liberal free-market economies, the State intervened in numerous spheres of human activity previously regarded as being in the private domain, not least among them the economic or commercial field. While Governments, especially those of developing countries, often created entities that engaged in commercial activities and were designed to operate on a commercial basis, the overriding purpose in most cases was to provide a service to the public as a whole or to generate public revenue for the general good. Unless such activities - for example, transportation or large public works - were undertaken by the State, the public in developing countries would be denied the benefits or facilities accruing from them. His delegation therefore could not accept the distinction whereby activities characterized as commercial would be denied immunity and those classified as governmental would enjoy immunity. In that connection, it believed that the phrase "inter alia" in paragraph 3 of draft article 19 should be deleted. It also stressed the importance of paragraph 7 of that article concerning the sufficiency of the certificate provided by the diplomatic representative or other competent authority of the State concerned as evidence of the character of a ship or cargo which was the subject of litigation. It welcomed the attempt to clarify the concept of State property reflected in paragraphs 231 and 232 of the report. Regarding attachment and execution, his delegation considered that immunity should apply fully unless it was specifically and expressly waived.

(Mr. Mudho, Kenya)

19. His delegation welcomed the appointment of the Special Rapporteurs on the topics of the law of the non-navigational uses of international watercourses and of international liability for injurious consequences arising out of acts not prohibited by international law. It would reserve its comments on the two paragraphs proposed on the topic of relations between States and international organizations.

20. In conclusion, his delegation approved the priorities set by the Commission in its programme of work for 1986. The co-operation between the Commission and regional legal bodies should be maintained. His delegation also wished to record its appreciation to the Government of Brazil for making possible the 7th Gilberto Amado Memorial Lecture. Lastly, it thanked those Governments that had supported the International Law Seminars and hoped that those States in a position to do so would contribute to the continuation of the programme at the same level of participation in 1986.

21. Mr. CAVE (Barbados) endorsed the view that terrorism and mercenarism should be included in the draft Code of Offences against the Peace and Security of Mankind. Both terrorism and mercenarism reflected contempt for the individual and for the fundamental norms of society, and sought to glorify barbaric acts of the type committed by some belligerents during the Second World War. In 1976, Barbados had been the scene of a brutal act of terrorism motivated by issues having nothing to do with the country, although the implications had threatened the safety of the air travel vital to such island States. No amount of frustration and grievance, even subjection to oppression, could justify terrorism; nor should the cause of national liberation be confused with or judged by the deeds of armed zealots, whose appeal to misguided idealism was a cause for concern, especially during International Youth Year.

22. Threats and acts of terrorism also forced many developing countries to divert meagre resources for safeguards or to compromise their sovereignty through security agreements with stronger States. Terrorism and mercenarism threatened not only small States, whose protection was surely one of the Organization's basic purposes, but virtually every part of the world. The task of combating them was relevant to the preparation of the draft Code of Offences against the Peace and Security of Mankind. The more instruments against international terrorism and mercenarism the better.

23. Mr. LOULICHKI (Morocco) said that the report of the International Law Commission on the work of its thirty-seventh session (A/40/10) showed that the Commission was able to adapt its working methods while maintaining its high standards in the codification and progressive development of international law.

24. With regard to State responsibility, draft article 5 defined the expression "injured State" in terms of the origin or nature of the obligation breached. The divergence of views within the Commission reflected the draft's complexity; it might have been simpler to have a concise definition based on the criterion of the right infringed - which in any case would have to appear in the definitions normally given in the introduction to draft articles.

(Mr. Loulichki, Morocco)

25. Draft article 6 dealt with the consequences of a wrongful act, from the injured State's viewpoint, including application by the author of such remedies as were provided for in its internal law, and full restitution. The traditional notion of restitution in integrum seemed to be losing ground. In addition, it seemed inappropriate to specify that the injured State might require the State which had committed a wrongful act to apply remedies under its internal law. Rather than deleting the article, it would be preferable for it to start with the words "Commission of an internationally wrongful act by a State shall impose on it the obligation to:".

26. Articles 7, 8 and 9 taken together, even as moderated by draft article 10, seemed liable to set in motion an escalation between the author State and the injured State, with the risk of nullifying the existing primary legal relationships between those States. Paragraph 2 of draft article 9 could give rise to difficulties, because of the divergences of opinion that might arise in practice. Draft article 14 failed to clarify the issue of conflict between its provisions and a rule of jus cogens.

27. The drafting of Part Three would represent a delicate task, which must be undertaken with due caution.

28. The topic on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier had progressed commendably, and it should be possible to submit a complete set of draft articles in 1986. The new article 21 made a distinction which was justified when the courier ad hoc belonged to a diplomatic or consular mission in the receiving State; however, if the courier was accredited to a third State, the privileges and immunities should in principle be accorded to him for the period up to his departure. With regard to the revised text of article 36, his delegation believed that the diplomatic bag could not be dissociated from its contents and should be exempt from any electronic scanning which might affect its confidentiality.

29. Welcome progress had been made in regard to jurisdictional immunities of States and their property. His delegation was satisfied with the Special Rapporteur's proposed new wording for article 24. However, the Commission might well consider the suitability of retaining that article having regard to article 22, which set forth the category of property not enjoying immunity.

30. With regard to the second part of the topic of relations between States and international organizations, his delegation appreciated the Special Rapporteur's pragmatic approach.

31. His delegation welcomed the appointment of the Special Rapporteurs on the law of the non-navigational uses of international watercourses and international liability for injurious consequences arising out of acts not prohibited by international law.



32. Mr. VAN LANSCHOT (Netherlands) said that the Commission had worked commendably during its thirty-seventh session, and the progress reflected in paragraphs 297 to 299 of its report was welcome. His delegation did not, however, endorse the priority accorded by some delegations to the question of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier.

33. The delay in producing the Yearbook of the International Law Commission was a matter for concern; he hoped that the Secretariat would take all necessary steps for its speedy publication. His delegation agreed that the publication The Work of the International Law Commission was a valuable reference work, which should be updated and reissued. It also appreciated the help that the Commission gave to young lawyers at the international level.

34. Mr. JAGOTA (President of the International Law Commission) said that he appreciated the quality of the Sixth Committee's debate on the Commission's report. He would report to the Commission, at its next session, the comments, criticisms and suggestions made; the Commission would also have before it the relevant summary records of the Committee's discussions as well as the Secretariat's summary and the texts of any relevant Assembly resolutions.

35. He hoped that Governments would remain convinced of the usefulness of the annual International Law Seminar, particularly for participants from developing countries, and would make the requisite financial contributions.

36. The CHAIRMAN thanked the Chairman of the Commission on behalf of the Committee. One significant aspect of the valuable dialogue between the two bodies related to the structure of the Commission's reports. He himself thought that there was scope for improvement but that the traditional approach should not be eschewed entirely. There was no denying the growing difficulty of following all the Commission's debates in depth and better procedures must be sought.

The meeting rose at 9.55 p.m.