



SUMMARY RECORD OF THE 40th **MEETING**

Chairman: Mr. **DENG** (Sudan)

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The meeting was called to order at 6.10 p.m.

AGENDA ITEM 1341 REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTIETH SESSION (**continued**) (A/43/10, A/43/539)

AGENDA ITEM 130: DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND (**continued**) 0/43/525 and Add.1, A/43/621-S/20195, A/43/666-6/20211, A/43/709, A/43/716-6/20231, A/43/744-S/20238)

1. **Mr. ROUCOUNAS** (Greece), referring to article 12 of the draft Code of Crimes against the Peace and Security of Mankind, said that the International Law Commission, while including in its definition of aggression most of the elements of General Assembly resolution 3314 (XXIX), had still not delineated clearly the respective roles of the judge and of the Security Council in the attribution of responsibility for the crime. Moreover, the formula in article 12, paragraph 1, concerning any individual to whom responsibility for acts constituting aggression was attributed under the Code, called for further clarification. With regard to other aspects of aggression, his delegation believed that the Commission should include the actual threat of aggression, for the reasons set forth in paragraph 219 of the report (A/43/10). Furthermore, annexation should not be grouped together with the use of force, but should be included as a separate crime,

2. As the question of intervention had been the subject of lengthy discussion, the Commission must determine to what extent the draft Code should contain a precise provision on that subject; in any event, the crime of international terrorism should be dealt with separately. On the other hand, his delegation shared the view, expressed by other delegations and summarised in paragraph 259 of the report, that questions relating to breaches of treaty obligations should not be included in the draft Code. Lastly, it also endorsed the view, set forth in paragraph 275 of the report, that the draft Code should include provisions reflecting the current status of international law with regard to crimes clearly identified as such by the international instruments in force,

3. With regard to the elaboration of general principles for the draft Code as a whole, the draft articles proposed by the Commission were somewhat dispersed; it was to be hoped that, a logical continuity would be maintained in that part of the draft. Draft article 4, for instance, concerning the obligation to try or extradite, was at best a framework provision; none the less, it was necessary to examine thoroughly at some point the complex problems of international competence and international judicial assistance which were becoming more and more pressing in the International fight against crime,

4. Draft article 7, concerning the non bis in idem rule, attempted to summarize the current situation. Draft article 8 on non-retroactivity, however, which should have been a natural outgrowth of other existing norms, had been of serious concern to the Commission in the context of its uncertainty as to the appropriate judicial mechanism.

(Mr. Roucoux, Greece)

5. Draft article 10 on the responsibility of the superior had met with his delegation's approval since it reflected article 86, paragraph 2, of Additional Protocol I to the 1949 Geneva Conventions. Draft article 11 on the relationship between official position and criminal responsibility should be regarded from the standpoint of the attribution to individuals of crimes against the peace and security of mankind.

6. As the Commission pursued its efforts to elaborate the draft Code, the dilemma of jurisdiction was increasingly coming to the fore. His delegation had always been receptive to the idea of establishing an international criminal jurisdiction. The text of the draft articles adopted thus far, as well as the report and commentaries, expressly drew attention to that possibility. Indeed, if existing treaties, international custom and internal legislation determined which judge was competent to try a given crime, a code which encompassed a more comprehensive sphere of offence could not fail to have specific provisions on that question.

7. His delegation expressed its appreciation to the Special Rapporteur on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier for his follow-up to the replies received from Governments on the draft articles adopted by the Commission on first reading.

8. Mr. DIAZ-GONZALEZ (Chairman of the International Law Commission) said that he welcomed the general tone of the discussion, which had reflected the Committee's appreciation of the serious and creative work done by the Commission. The members of the Commission had great respect for the mandate conferred upon them by the General Assembly, and therefore paid great attention to the opinions expressed in the Committee and in the written comments of Governments. It was the Commission's task to reconcile, as effectively as possible, the various points of view voiced by the international community, with regard to the topics on its agenda, a task which was unavoidably time-consuming. The Commission had to strike a balance between a hasty and mechanical elaboration of norms which would fail to be ratified by Member States, and excessive delay in examining items which urgently required international regulation.

9. He drew attention to paragraphs 597 to 599 of the report, concerning the financial and language constraints which the International Law Seminar had encountered in 1988. In view of the importance which the Commission and the Committee had traditionally attached to the training of young lawyers and government officials, particularly those from developing countries, it was to be hoped that the draft resolution to be adopted would include formulations which would provide the necessary basis for the optimal functioning of the Seminar in 1989.

10. Mr. TUERK (Austria), speaking as Chairman of the Ad Hoc Working Group, said that the Working Group, pursuant to its mandate, had considered ways of improving the manner in which the report of the Commission was considered in the Committee. Following a general exchange of views, on the basis of which he had prepared a list of questions, the Working Group had concluded that the current arrangements should be maintained and strengthened. To that end, delegations wishing to comment on the

(Mr. Tuerk, Austria)

whole of the report in a single statement should, **as a rule, be given the** floor after the list of speakers on the topics scheduled for any given meeting had been exhausted¹ delegations wishing to make topic-by-topic statements should endeavour to abide by the agreed schedule and to exercise restraint regarding the length of their statements. Furthermore, the agreed schedule should **be** circulated to the members of the Committee well ahead of the start of consideration of the items concerned.

11. The Working Group had expressed concern that **Governments** had too little time to study the report of the **Commission**. The **Commission** shared that concern, **as** reflected in paragraph 581 of its latest report, and had suggested that the relevant items on the agenda of the General Assembly should be taken up at a later stage of the Assembly's session. However, in accordance with **established** practice, the items in question did not come under **discussion** in the Committee until the very end of **October**; deferring them to an even later stage would create less than optimum conditions for the holding of a serious debate.

12. The task of Governments would be facilitated if the report of the Commission could, without prejudice to its clarity and comprehensiveness, be reduced to more manageable proportions. Accordingly, it was suggested that the Commission might consider the possibility of shortening or **omitting the background information** currently appearing at the beginning of **most chapters**; shortening the **summary** of the debate or focusing it on points on which the Commission felt a particular need to **seek** the comments of the **General Assembly**; and giving succinct treatment to individual draft articles which were to be read in conjunction with other still uncompleted draft articles and therefore did not lend **themselves** to meaningful discussion.

13. It was easier to comment on individual articles if the intended structure of the corresponding draft was known in advance. No definitive conclusion could be arrived at until the work had reached a fairly advanced **stage**; however, the practice of Special Rapporteurs providing early indications of their intentions, and of the Commission working out tentative **outlines** on the basis of these Indications, should be encouraged,

14. With regard to the possibility of **arranging**, on a systematic basis, informal exchanges of views between delegations in the Committee on matters concerning the **Commission**, it was necessary to stress that the Committee and the **General Assembly** were alone empowered to provide the Commission with political or legal orientations in relation to its **programme** of work. Any common stand which might be arrived at as a result of informal consultations could be considered as **emanating** from the Committee **only** with its formal endorsement. On the other hand, **informal** exchanges of views on matters concerning, or dealt with by, the Commission, particularly if they involved the legal advisers of **Governments** gathered in New York, should be encouraged and facilitated. Such consultations should not lead to the issuance of a written report or formal recommendations. The Working Group wished to stress that recent experience showed that the follow-up action on the **Commission's** final drafts could be discussed with particular felicitous results in informal consultations, and that method might therefore be followed in the future,

(Mr. Tuerk, Austria)

15. With regard to the suggestion contained in paragraph 582 of the report that Special Rapporteurs should be enabled to attend the debates held on their respective topics in the Committee, there did not seem to have been any previous leak of understanding on the part of Special Rapporteurs as to existing trends in the Committee. Furthermore, Special Rapporteurs were responsible to the Commission and care should be taken not to jeopardise that relationship. He also drew attention to the financial implication⁶ involved.

16. Concerning the possibility of establishing priorities among the topics on the Commission's agenda, it should be noted that the programme worked out by the Commission at the beginning of each five-year term period was submitted to the General Assembly for approval. In implementing the approved programme, the Commission required sufficient freedom of action. On the other hand, it was a function of the Committee to alert the Commission to the needs of the international community in the area of the progressive development and codification of international law. It was not clear whether the General Assembly could go far beyond the general directive which it had, for a number of years, given the Commission in the relevant resolutions. It might, however, be possible to express, in the draft resolution dealing with the report of the Commission, the desire of the General Assembly that those draft articles which were at the stage of second reading in the Commission should be submitted as soon as possible to the Assembly.

17. Whereas the Commission, in paragraph 561 of its report, had pointed out that its task would be facilitated if the Assembly found it possible in certain cases to decide at an early stage on the form which the end product of the Commission's work should take, the Working Group believed that, as a general rule, a definite decision could only be taken once a specific draft had been completed; such a decision was necessarily conditional upon the acceptability of the draft.

18. With regard to the Commission's future programme of work the Working Group recognised that Governments had an important role to play in that area, and assumed that, in accordance with past practice, the proposals of the Commission would be discussed in due course within the framework of the Committee.

19. Mr. KOROMA (Sierra Leone) said that he hoped that the Committee would retain flexibility in implementing the recommendations contained in the report,

The meeting rose at 7.05 p.m.