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Summary record of the 2409th meeting

Topic:
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Extract from the Yearbook of the International Law Commission:-
1995, vol. I

2409th MEETING

Monday, 3 July 1995, at 3.15 p.m.

Chairman: Mr. Pemmaraju Sreenivasa RAO
later: Mr. Guillaume PAMBOU-TCHIVOUNDA

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. de Saram, Mr. Eiriksson, Mr. Elaraby, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mahiou, Mr. Mikulka, Mr. Razafindralambo, Mr. Rosenstock, Mr. Thiam, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

Statement by the Secretary-General

1. The CHAIRMAN said he wished to extend a warm welcome to the Secretary-General of the United Nations. As the Secretary-General was well aware, the Commission was composed of his former colleagues, friends, associates and admirers. On the occasion of the current celebrations of the fiftieth anniversary of the United Nations, his visit to the Commission was a timely and significant symbol of the close and deep bonds that existed between the objectives and purposes of that unique world organization, the United Nations, and the work of the Commission. With his present visit, the Secretary-General was not only honouring a Commission to which he had belonged with great distinction for so many years but also highlighting the value of its work for the concerns of the United Nations and the problems of the international community. The Secretary-General had referred to those concerns and problems and to the aspirations of the international community in his Agenda for Peace proposals[1] and in his address of 17 March 1995 to the United Nations Congress on Public International Law, held in New York from 13 to 17 March 1995, at which some members of the Commission had been privileged to be present. He wished to assure the Secretary-General that it was the earnest endeavour and hope of members of the Commission that the principles and concepts they codified and progressively developed would transcend technical parameters and address the broader concerns, problems and aspirations of the United Nations, the Organization which represented the peoples of the world. Their effort was thus to contribute to the continuous dialogue between law and politics and between law and diplomacy.

2. In conclusion, he paid tribute to the Secretary-General's outstanding contribution as a teacher, scholar, statesman, practitioner, policy-maker and first citizen of the world, all through the medium of international law, which—to borrow his own words—was truly the language of "international communication". He wished the Secretary-General all success in his pursuit of peace.

3. The SECRETARY-GENERAL said that he was greatly moved to find himself among his former colleagues, the members of the Commission. In his days as a young student of international law, he had had two ambitions: to lecture at the Academy of International Law at The Hague and, one day, to become a member of the International Law Commission. The first of those ambitions had been fulfilled as far back as 1960, but by the time the second had been realized, he had already become Minister of State for Foreign Affairs and had therefore been unable to participate fully in the Commission's work. One of his great frustrations had been the fact that his dream of attending the Commission meetings for an entire session had never been achieved. Professional honesty ought, perhaps, to have led him to resign his membership for that reason, but every year he had been convinced that he would be able to find time to attend for more than a very short period. Alas, political events had always prevented him from doing so. He wished to assure the Commission that he followed its work with the closest interest; and within the limits of his possibilities—which were not so great as they might outwardly seem—sought to assist that work in every respect. As the Chairman had said, he took advantage of every opportunity to mention that work in his speeches and writings; and the documents he presented had always emphasized the importance of international law as one of the veritable foundations of United Nations action. In that connection, the United Nations Congress on Public International Law, held earlier in the year, had brought together hundreds of jurists from all parts of the world for several days to discuss various problems. The Congress had represented a "first" in the history of the United Nations.

4. He wished to thank the Commission for the important contribution it had made and was making, in particular, in connection with the establishment of an international criminal court and the elaboration of international criminal law. The subject was to be discussed by the General Assembly at its forthcoming session. He believed that the time had come when international public opinion and Member States might be more prepared to accept the new institution than had been the case during the past few decades. He was not saying, of course, that the task would prove easy. Lengthy negotiations might be needed, and that brought him to the point with which he wished to conclude his brief remarks. If the elaboration of international law and international politics had one thing in common, it was the length of time they took. Both called for many years of patient labour, perseverance and continuity. There, however, the resemblance ended, for while international public opinion accepted the fact that the codification of international law took a long time, it refused to accept any such fact in the case of diplomacy, insisting upon immediate results in resolving international problems and achieving the peaceful settlement of international conflicts. Yet those tasks were quite as difficult and laborious as the codification of international law, and those engaged in international diplomacy found themselves quite often obliged to return to the point of departure. Both activities invited comparison with the myth of Sisyphus.

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[1] B. Boutros-Ghali, *An Agenda for Peace, 1995*, second edition (United Nations publication, Sales No. E.95.1.15).

5. In conclusion, he again thanked the members of the Commission for their signal contribution to solving problems of peace and development and expressed his pleasure in joining them again in a different capacity.

Draft Code of Crimes against the Peace and Security of Mankind (*continued*) (A/CN.4/464 and Add.1, sect. B, A/CN.4/466,[2] A/CN.4/L.505, A/CN.4/L.506 and Corr.1, A/CN.4/L.509)

[Agenda item 4]

Draft articles proposed by the Drafting Committee on second reading[3] (*continued*)

6. Mr. FOMBA said that a proposal had been made to add to article 1 (Scope and application of the present Code), a third paragraph providing that States parties to the future convention must incorporate the substantive and procedural provisions of the Code of Crimes against the Peace and Security of Mankind in their internal law. That raised the question of the relationship between international law and domestic law, which had three major aspects to it. First, a State could not invoke the provisions of its internal law to justify its failure to apply international law, for international law only considered it as a mere fact, as could be seen from articles 27 and 46 of the Vienna Convention on the Law of Treaties (hereinafter referred to as the "1969 Vienna Convention"). Secondly, the incorporation of international law in internal law was governed by the provisions of part II of the 1969 Vienna Convention, concerning the conclusion and entry into force of treaties and also by the final provisions of specific treaties. Any future convention containing the Code must also be governed by those same rules. Thirdly, the legal weight of a treaty in relation to internal law was determined by theory—dualist or monist—of each State regarding the relationship between international and internal law and the provisions of the country's constitution. For instance, in French-speaking African countries, a duly ratified treaty was considered to prevail over internal law.

7. Accordingly, the Special Rapporteur was correct in saying that States could not be obliged to incorporate the Code in their domestic law. That was contrary to the principles of State sovereignty and freedom to decide. At the same time, treaty practice was also relevant in that regard. For instance, the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents expressly stipulated in article 2, paragraph 1, that the intentional commission of, threat to commit, or attempt to commit certain acts or to participate in them as an accomplice "shall be made by each State party a crime under its internal Law". Under paragraph 2 of the same article, each State party was bound to make those crimes punishable by appropriate penalties which took into account their grave nature.

8. A number of questions could be raised about the definition of aggression contained in article 15 of the draft Code. Was that definition adequate for the basic requirements of criminal law? Should the definition expressly state the constituent elements of a crime, in particular intent and gravity? The solution should be sought in both legal theory and practice. From the viewpoint of theory, two choices had to be made: first, between a strict or relative analogy between national and international criminal law and secondly, between an explicit or implicit definition of "crime". From the viewpoint of practice, existing agreements should be evaluated with regard to the place and role accorded to the element of intent, and the necessary conclusions should be drawn. As to the draft Code itself, the Commission must decide how to deal with the question of intention in the Code and whether intent should be stressed only in the case of some or of all crimes.

9. He did not, for the moment, have definitive answers to all those questions. He agreed with the Special Rapporteur that, with regard to odious and serious crimes, there could be no crime without intent. That remained true whether or not intent was expressly stated in the definition of the crime.

10. Lastly, he agreed with the other members who had called for clarification of the fate of the articles which did not currently appear in the draft Code.

Mr. Pambou-Tchivounda took the Chair.

11. In reply to comments by Mr. ROSENSTOCK and Mr. THIAM (Special Rapporteur), Mr. YANKOV (Chairman of the Drafting Committee) confirmed that the Drafting Committee had decided to delete the words "or by treaty" from paragraph 1 (*a*) of article 8. The words "by law" in themselves covered all legal means, including international treaties.

12. Mr. VILLAGRÁN KRAMER said that, during the discussion on the issue, reference had been made to human rights instruments under which tribunals had been set up. However, since not all States were parties to those particular treaties, the Drafting Committee had considered it preferable to limit article 8 to the notion of tribunals duly established by law.

13. Mr. RAZAFINDRALAMBO asked whether, in formulating article 19, the Drafting Committee had indeed borne in mind and, at its discretion, dealt with all or part of the elements of articles 17 and 18. The fact that the Commission was invited to take note of the report of the Drafting Committee rather than to approve the draft articles adopted by it on second reading seemed to suggest that the Committee intended to revert to those and, possibly, other issues, but the Commission had received no indication to that effect.

14. Mr. YANKOV (Chairman of the Drafting Committee) said that, in reply to the very important question raised by Mr. Razafindralambo and other members, he wished to stress that the Drafting Committee had considered draft articles 15, 19, 21 and 22 in compliance with the decision taken by the Commission at its 2387th meeting to refer those articles to the Drafting Committee on the understanding that, in formulating them, the Com-

[2] Reproduced in *Yearbook ... 1995*, vol. II (Part One).

[3] For the text of the draft articles provisionally adopted by the Commission on first reading, see *Yearbook ... 1991*, vol. II (Part Two), pp. 94-97.

mittee would bear in mind and, at its discretion, deal with all or part of the elements of draft articles 17, 18, 20, 23 and 24 as adopted on first reading. In presenting the report of the Drafting Committee (A/CN.4/L.506 and Corr.1) to the Commission (2408th meeting), he had explained that, as a result of various factors, the Drafting Committee had been faced with a burdensome task which could not be completed at the present session. Even those articles which the Committee had adopted and for which it was presenting a text to the plenary might have to be reviewed once the second reading of part two had been completed. Having said that, he wished to reiterate his understanding that the referral to the Drafting Committee of articles 15, 19, 21 and 22 did not in itself rule out the possibility of the Committee's considering, when formulating those four draft articles, any of the other articles he had listed. Reference had been made to the words "at its discretion", which appeared in the report of the Drafting Committee. It had always been a fact that the Drafting Committee was a responsible body which, while remaining a subsidiary body of the Commission, was required to act in full independence when considering the draft articles before it. Accordingly, the Committee would take into consideration the discussion which had taken place at the present session, the discussion within the Drafting Committee itself and the discussion that would take place in the Sixth Committee at the next session of the General Assembly. Nothing would be lost or neglected, but consideration would have to be given to the issue of whether, in view of present-day realities, all the remaining articles deserved to be included as separate articles in the draft Code or whether some of them, such as the article on apartheid, could perhaps be included under crimes against humanity or some other heading. He hoped that his explanation would clarify the matter sufficiently to obviate further debate on that point, and he appealed to members of the Commission not to single out that point when commenting on the Drafting Committee's proposals. The Committee still had a great deal of work before it, and the time to finalize that work would come at the next session.

The meeting rose at 4.20 p.m.

2410th MEETING

Tuesday, 4 July 1995, at 10.15 a.m.

Chairman: Mr. Pemmaraju Sreenivasa RAO

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. de Saram, Mr. Eiriksson, Mr. Elaraby, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

Draft Code of Crimes against the Peace and Security of Mankind (*concluded*) (A/CN.4/464 and Add.1, sect. B, A/CN.4/466,[1] A/CN.4/L.505, A/CN.4/L.506 and Corr.1, A/CN.4/L.509)

[Agenda item 4]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE ON SECOND READING[2] (*concluded*)

1. Mr. YAMADA said he wished to make several preliminary comments which he hoped the Drafting Committee would take into account when it resumed its consideration of the draft articles at the next session. He suggested that article 6 should begin with the words "The State party" rather than simply "The State". In article 6 *bis*, paragraphs 2 and 3 ended with a clause which made extradition subject to "the conditions provided in the law of the requested State", but, in his view, the wording of article 8 of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, was better because it made extradition subject to "the procedural provisions and the other conditions of the law of the requested State" and the present case involved procedural rules on extradition. With regard to article 8, the expression "In the determination of any charge against him", as contained in paragraph 1 (*a*) and in article 14 of the International Covenant on Civil and Political Rights and in article 41, paragraph 1, of the draft statute for an international criminal court,[3] also applied to paragraphs 1 (*b*) and 1 (*g*) and therefore belonged in the introductory part of that paragraph. In article 9, the idea covered in paragraph 3 (*a*) could be expressed in a less complicated way. Paragraph 3 (*b*), which was taken word for word from the statute of the International Tribunal for the Former Yugoslavia,[4] referred to three cases, the first two of which were grammatically related to the same subject and the third of which had a different subject. The comma following the word "independent" should therefore be replaced by the word "or".

2. It had been suggested that a third paragraph should be added to article 1 stipulating that States parties must adopt legislation making crimes against the peace and security of mankind punishable under national law, but article 5 *bis* seemed to serve the same purpose by requiring each State party to establish its jurisdiction over such crimes. Depending on their constitutional requirements, States parties could therefore amend their criminal law or apply the provisions of the Code directly. In general, the Drafting Committee had made great progress in preparing the draft Code, but some basic provisions had still not been formulated and the harmonization of the various systems of criminal justice in the world would not be easy. It was to be hoped that, at its next session, the Commission would set aside enough meetings of the

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[1] Reproduced in *Yearbook... 1995*, vol. II (Part One).

[2] For the text of the draft articles provisionally adopted by the Commission on first reading, see *Yearbook... 1991*, vol. II (Part Two), pp. 94-97.

[3] *Yearbook... 1994*, vol. II (Part Two), para. 91. See 2379th meeting, footnote 10.

[4] Ibid., footnote 5.