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Summary record of the 1870th meeting

Topic:
Other topics

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58. The CHAIRMAN noted that the term used in the French version was *atteintes*.

Paragraph 21, as amended, was adopted.

Paragraph 22

Paragraph 22 was adopted.

Paragraphs 23 to 55 (A/CN.4/L.371/Add.1)

Paragraph 23

59. Sir Ian SINCLAIR proposed that, in the third sentence, the fourth word, "does", should be replaced by "did". At the end of the fifth sentence, the words "the State's international responsibility" should be replaced by the wording of the title of the topic: "State responsibility". Lastly, in the concluding sentence, the words "of the problem" should be deleted.

It was so agreed.

60. Mr. LACLETA MUÑOZ said that, in the Spanish text, in two places in paragraph 23 and in several other places throughout the chapter, the words *responsabilidad penal* should be replaced by *responsabilidad criminal*.

It was so agreed.

Paragraph 23, as amended, was adopted.

Paragraph 24

61. Mr. FRANCIS said that subsection II, on the content *ratione materiae* of the draft code and the first stage of the Commission's work on the draft (paras. 24-31), did not reflect the understanding reached with the Special Rapporteur by Mr. Jagota, some African members of the Commission and himself. As recalled in the first sentence of paragraph 24, the General Assembly, by its resolution 38/132, had given the Commission a twofold mandate: first, to elaborate an introduction and, secondly, to draw up a list of offences. He could not accept the suggestion, in paragraph 24 and the following paragraphs, that the Commission should disregard the first part of its mandate. The report should indicate that at least one member considered that the Commission should have placed before the General Assembly an introduction summarizing the general principles of international criminal law.

62. The CHAIRMAN drew attention to item 2 of paragraph 55, in subsection IV (Conclusions). Presumably Mr. Francis was proposing that the report should record his view that the Commission should have dealt with that introduction at the current session.

63. Mr. THIAM (Special Rapporteur) said that, at the initiative of Mr. Francis, a meeting between African and Asian members had in fact been held, but that no agreement of any kind had been reached. Even had there been agreement among the members in question, he wondered what weight it would have carried with the Commission as a whole. Moreover, a special rapporteur was required to report to the Commission, not to regional groupings.

64. Sir Ian SINCLAIR suggested that the difficulty could be overcome by deleting from paragraph 24 the concluding words of the second sentence, "and that a question of method obliges it, at the present stage, to begin by preparing a list of international crimes and to take up the drafting of the introduction as a second step". The sentence would thus end with the words "for their elaboration", and a further sentence would be inserted on the following lines: "Some members expressed the view that the preparation of an introduction should proceed in parallel with the elaboration of the list of offences".

65. Mr. FRANCIS thanked Sir Ian Sinclair for a constructive proposal that satisfied him in part. He none the less considered that his views should be reflected in the report.

66. The CHAIRMAN suggested that Mr. Francis should submit in writing the form of words he wished to include in the report.

The meeting rose at 6 p.m.

1870th MEETING

Tuesday, 24 July 1984, at 10 a.m.

Chairman: Mr. Alexander YANKOV

Present: Chief Akinjide, Mr. Balanda, Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov.

Draft report of the Commission on the work of its thirty-sixth session (*continued*)

CHAPTER II. *Draft Code of Offences against the Peace and Security of Mankind (continued)* (A/CN.4/L.371 and Add.1)

B. *Consideration of the topic at the present session (continued)* (A/CN.4/L.371 and Add.1)

Paragraphs 23 to 55 (*continued*) (A/CN.4/L.371/Add.1)

Paragraph 24 (*continued*) and paragraph 25

1. The CHAIRMAN invited the Commission to consider the following text proposed by Mr. Francis:

"[Some members however were of the view] that even a preliminary outline of the introduction was essential at the present stage of the Commission's work. It would at least comply, in spirit, with the mandate laid down by General Assembly resolution 38/132. Besides, it would elicit from the Sixth Committee comments of the representatives of Governments, which would assist the Commission in its future work on the topic.

“The outline should include, *inter alia*, a concise definition of crimes against the peace and security of mankind (and examples of such definition had been suggested by some speakers) and a statement of principles, in regard to the content of which the following were among observations also made by some speakers: the notion of individual criminal responsibility should be one of the basic principles of the code; offences against the peace and security of mankind constituted international crimes whose prosecution was a universal duty; the non-applicability of statutory limitation in respect of crimes committed by individuals; criminal responsibility might be attributed to States, although they could not as such be subject to any international criminal jurisdiction; the need to draw further upon the Nürnberg Principles in the preparation of the introduction.

“The above-mentioned approach would be consistent with the Commission’s decision ‘that the deductive method should be closely combined with the inductive method’, a decision that had been overwhelmingly endorsed by representatives in the Sixth Committee during the thirty-eighth session of the General Assembly.”

2. As far as paragraph 24 was concerned, the Commission still had before it Sir Ian Sinclair’s proposal (1869th meeting) that the latter part of the second sentence be deleted and that a new sentence be added, reading: “None the less, some members of the Commission expressed the view that the preparation of an introduction should proceed in parallel with the elaboration of the list of offences.”

3. Sir Ian SINCLAIR said that his own proposal was strictly confined to paragraph 24. The one submitted by Mr. Francis was much broader and involved the redrafting of paragraph 25 as well. In the circumstances, it would be desirable to discuss paragraph 25 first.

4. Mr. FRANCIS pointed out that his proposed text was based on the views expressed in the Commission not only by himself but also by other members. The opening words had been placed between square brackets because, for his part, he had no objection to the proposal by Sir Ian Sinclair, which would improve paragraph 24.

5. Sir Ian SINCLAIR said that, in principle, he could accept the text proposed by Mr. Francis to replace paragraph 25, the wording of which was not altogether satisfactory, particularly with regard to the references to the deductive method and the inductive method. However, in the opening phrase of the second paragraph of the proposal by Mr. Francis, the words “a concise definition of crimes against the peace and security of mankind” should be replaced by: “more precise criteria for identifying or defining crimes against the peace and security of mankind”. Also, the words in parentheses in the same paragraph, namely “and examples of such definition”, should be replaced by “and examples of such criteria”.

6. Lastly, in the first sentence of the first paragraph, the words “the introduction was essential” should be replaced by “the introduction was desirable”, a change

that would avoid placing undue emphasis on the division of opinion in the Commission.

7. Mr. USHAKOV said he wished to make it clear that he was not among the members who had proposed objective criteria, since he believed that no criteria of that kind existed for identifying crimes against the peace and security of mankind. Crimes against the peace and security of mankind could only be those recognized as such by the international community.

8. The CHAIRMAN proposed that a small group, consisting of the Special Rapporteur, Mr. Francis, Mr. Reuter and Sir Ian Sinclair, should be set up to prepare an agreed text, either to be inserted between paragraphs 24 and 25, or to replace paragraph 25.

9. Mr. THIAM (Special Rapporteur) said that the criteria proposed by the members of the Commission were set forth in paragraph 25. The text now proposed was not confined to an expression of the views of Mr. Francis; it also sought to reflect the views of other members, a task that fell to the Special Rapporteur. Paragraph 25 in its existing form in fact conveyed the numerous ideas expressed in the course of the debate and it showed that the majority of the Commission was in favour of the inductive method.

10. Mr. FRANCIS said that he would adopt a flexible approach to the question of the wording of his proposal. He could not, however, accept the statement by the Special Rapporteur. He was fully entitled to refer to the views expressed in the Commission not only by himself but also by other members. In actual fact, the text he had submitted was based on a paper by Mr. Jagota and it reflected the understanding reached with the Special Rapporteur at the time.

11. Mr. McCAFFREY said he supported the procedure proposed by the Chairman.

12. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to adopt his proposal to set up an informal group and defer consideration of paragraphs 24 and 25 until the group had reported back to the Commission.

It was so agreed.

Paragraph 26

13. Mr. LACLETA MUÑOZ noted that the term “crimes” had been rendered in the Spanish version of paragraphs 25 and 26 and subsequent paragraphs by its normal Spanish equivalent, *delitos*, but that the term *crímenes* had been used in paragraph 24. In view of the difficulty of arriving at complete uniformity, he suggested that, in the Spanish version, a footnote should be appended to paragraph 24 drawing attention to that problem of translation.

Paragraph 26 was adopted on that understanding.

Paragraph 27

14. Mr. NI proposed that the words “whereas every violation of a human right is not an offence”, in the second sentence, should be amended to read: “whereas not every violation of a human right is an offence”.

15. The CHAIRMAN noted that Mr. Ni's proposal was fully satisfactory in English, but might cause difficulties in the other language versions. However, that point could be dealt with by the translation services.

It was so agreed.

Paragraph 27, as amended, was adopted.

Paragraph 28

16. Mr. McCaffrey pointed out that the opening words, "The Commission took the view", might give a false impression of unanimity. Some form of language should be used to indicate that that had not been the case.

17. Sir Ian Sinclair suggested that the phrase should be altered to read: "Most members of the Commission took the view". A reference to the minority view was contained in paragraph 25, which the Commission had not yet adopted.

18. Mr. Ushakov pointed out that, in the past, the Commission had always avoided the use of terms such as "majority" and "minority". In the absence of a vote, and since not all members were present at every one of the Commission's meetings, those terms were inappropriate.

19. The CHAIRMAN said that the words in question could perhaps be altered to read: "The view was expressed that".

20. Chief Akinjide said that the Commission should take care not to set what might prove to be a dangerous precedent. The Commission took its decisions by consensus, and a consensus decision was not simply a decision by a majority. Where a consensus emerged, it became the view of the Commission as a whole.

21. The CHAIRMAN said that, if the words "most members of the Commission" were used, it would also be necessary to present the views of the minority.

22. Mr. Mahiou proposed that the words "no general rules", in the first sentence, should be changed to "not all general rules". The Commission's view had been that it was not possible to deduce all the general rules common to the different offences, but some members had considered that some such rules could be deduced at the current stage.

23. Mr. McCaffrey supported the proposal made by Mr. Mahiou.

24. Mr. Malek proposed that the words "as formulated by the Commission" should be inserted in the penultimate sentence, after the words "principle IV of the Judgment of the Nürnberg International Military Tribunal", in order to avoid giving the impression that the principle had been numbered by the Tribunal itself.

Paragraph 28 was adopted with the amendments proposed by Sir Ian Sinclair, Mr. Mahiou and Mr. Malek.

Paragraph 29

Paragraph 29 was adopted.

Paragraph 30

25. Mr. NI pointed out that the list given in parentheses in the first sentence, after the words "international instruments", namely "(conventions, resolutions, declarations)", was not exhaustive, since there were other types of international instruments, such as charters, covenants and protocols. He proposed the insertion of a comma followed by "etc." after the word "declarations".

It was so agreed.

26. Mr. Malek proposed the deletion of the word "international", before the word "crimes", in the first sentence. Serious breaches of international law were not defined as "international crimes" in the relevant international instruments; they were simply defined as "crimes", and were international because they were covered by international instruments.

27. Mr. OGISO suggested that the words "which define these acts as international crimes", in the first sentence, should be replaced by "the violation of which would constitute international crimes".

28. Mr. Mahiou said that, in all logic, it would be difficult to delete the word "international" before "crimes" in the first sentence. The problem raised by Mr. Malek lay chiefly in the fact that the international instruments in question did not really "define" the relevant crimes as "international". He suggested that the word "define" should be replaced by "regard".

29. Mr. THIAM (Special Rapporteur) accepted Mr. Mahiou's suggestion.

Paragraph 30, as amended, was adopted.

Paragraph 31

30. Mr. Malek proposed that the words "offences recognized since 1954" should be replaced by "offences not covered by the 1954 draft code". The wording as it stood could give the impression that the offences in question had not existed in 1954, which was not the case. For example, the taking of hostages had already been an offence in 1954, but an express decision had been taken not to include it in the draft code.

It was so agreed.

Paragraph 31, as amended, was adopted.

Paragraph 32

31. Mr. NI pointed out an inconsistency between paragraph 32 and the paragraphs that followed. Paragraph 32 listed three categories of crimes, but those categories were not treated in the proper order in the subsequent paragraphs.

32. Mr. Evensen proposed that paragraph 32 should be amended so as to reverse the order of the second and third categories.

It was so agreed.

Paragraph 32, as amended, was adopted.

Paragraph 33

Paragraph 33 was adopted.

Paragraph 34

33. Mr. OGISO proposed the insertion, after the second sentence, of a new sentence reading: 'It was also observed that paragraph (8), on annexation of foreign territory, should be reworded along the lines of paragraph (a) of article 3 of the same Definition.'

It was so agreed.

34. Mr. OGISO further proposed the insertion, before the last sentence of the paragraph, of a new sentence reading: 'In relation to paragraph (7), it was pointed out that, since disarmament agreements were often concluded by a limited number of participants, the question might arise whether acts contrary to such agreements committed by non-participants would also be regarded as offences.'

It was so agreed.

35. Mr. McCAFFREY, referring to the last sentence of the paragraph, proposed that the words *inter alia* should be inserted between 'left much to be desired,' and 'because'.

It was so agreed.

Paragraph 34, as amended, was adopted.

Paragraphs 35 to 37.

Paragraphs 35 to 37 were adopted.

Paragraph 38

36. Mr. THIAM (Special Rapporteur) submitted the following text to replace the first three sentences of paragraph 38, the final sentence remaining unchanged: 'Lastly, paragraph (13) of article 2 covers *conspiracy, direct incitement to commit any of the offences defined in the code, complicity and attempts*. These offences will be examined by the Commission in due course. For the reasons given earlier, it is difficult to discuss offences which are often related to main offences without having previously studied the offences to which they are related.'

Paragraph 38, as amended, was adopted.

Paragraph 39

37. Mr. OGISO said that the last part of the first sentence, reading 'that the offences it proposed should be retained', was too categorical. A more flexible formulation would be preferable, such as 'should be retained, subject to review, taking account of the views expressed by the members of the Commission as well as of the Sixth Committee'. He would like to know the Special Rapporteur's attitude to that suggestion.

38. Mr. THIAM (Special Rapporteur) said it must be clearly understood that the Commission had decided to retain the offences included in the 1954 draft code. If Mr. Ogiso's proposal amounted to a statement that some of those offences had not been retained, it would constitute a departure from what had been agreed upon. Too flexible a formula would reopen the whole question.

39. Mr. OGISO said that he did not wish to press his point.

Paragraph 39 was adopted.

Title of part two of the list of offences

40. Mr. THIAM (Special Rapporteur) said that the title of part two of the list of offences should be amended to read: 'Part Two. Offences covered since the 1954 draft code and the relevant instruments'.

The title of part two of the list, as amended, was adopted.

Paragraph 40

41. Mr. NI proposed the addition of a comma and the abbreviation 'etc.' after the word 'declarations', appearing in parentheses in the first sentence of the introduction to paragraph 40.

It was so agreed.

42. Mr. KOROMA proposed that the order of the words 'resolutions, declarations', appearing in parentheses in the same sentence, should be reversed. The same change would apply to the first sentence of paragraph 30. Moreover, the instruments set forth in paragraph 40 should be listed in chronological order.

It was so agreed.

43. Following a comment by Mr. OGISO, the CHAIRMAN suggested the insertion, in the second sentence of the introduction to paragraph 40, of the words 'listed by the Special Rapporteur' after the word 'instruments'.

It was so agreed.

Paragraph 40, as amended, was adopted.

Paragraph 41

44. Sir Ian SINCLAIR suggested that the second sentence should be altered to read: 'In the light of these instruments, it would seem possible to draw up a list of offences not covered by the 1954 draft code. It will, however, be necessary to make a choice between a *minimum content* and a *maximum content* of the code to be drafted.'

It was so agreed.

Paragraph 41, as amended, was adopted.

Paragraph 42

45. Sir Ian SINCLAIR, referring to the first sentence, pointed out that it was incorrect to say that General Assembly resolution 1514 (XV) of 14 December 1960 had been 'adopted unanimously'. The United Kingdom, for example, had abstained in the vote on the resolution. The sentence should be amended to read: 'The condemnation of colonialism derives initially from the General Assembly resolution of 14 December 1960.'

46. In the third sentence, the words 'it would be better to use the wording of article 19' should be replaced by 'it would be better to use wording possibly modelled on article 19'; and at the end of the sentence, the words 'or the expression 'denial of the right of self-determination' ' should be deleted.

47. Mr. THIAM (Special Rapporteur) said that the

amendment proposed by Sir Ian Sinclair to the first sentence was acceptable. As for the third sentence, the phrase beginning "it would be better" was couched in the conditional mood and was hence sufficiently dubitative. Moreover, he believed it desirable to retain the words "denial of the right of self-determination".

48. Sir Ian SINCLAIR said that he would not insist on the deletion of the words "denial of the right of self-determination", or on the retention of the word "possibly", in the amendment he had proposed for the third sentence of the paragraph.

49. Mr. KOROMA said that the words "condemnation of colonialism", at the beginning of the paragraph, had a political connotation. It would therefore be preferable to speak of the "illegality of colonialism", which would also better reflect the intended meaning. However, he supported Sir Ian Sinclair's revised amendment to the third sentence, namely "wording modelled on article 19".

50. Mr. THIAM (Special Rapporteur) said he accepted the amendment proposed by Sir Ian Sinclair to the second part of the third sentence, as revised by Sir Ian Sinclair.

51. Mr. DÍAZ GONZÁLEZ pointed out that colonialism was unlawful not because General Assembly resolution 1514 (XV) had declared it to be so, but because it was unlawful *ab initio*. The General Assembly resolution merely acknowledged its unlawful character. Hence it was difficult to say that the unlawfulness of colonialism "derives" from the General Assembly resolution.

52. Sir Ian SINCLAIR said that General Assembly resolution 1514 (XV) in fact amounted to a general condemnation of colonialism in all its forms. Possibly, therefore, the words "in all its forms" could be inserted after "condemnation of colonialism", in the first sentence.

53. Mr. KOROMA proposed that the first sentence of the paragraph should be amended to read: "Colonialism was declared illegal by resolution 1514, adopted by the General Assembly on 14 December 1960."

54. Mr. BALANDA said that it would be better to speak of "condemnation" of colonialism, a term more in keeping with General Assembly resolution 1514 (XV).

55. Chief AKINJIDE said that Mr. Koroma's point regarding the illegality of colonialism was well taken. He would suggest, however, that the word "again" should be inserted at an appropriate point in the first sentence of the paragraph.

56. Mr. DÍAZ GONZÁLEZ said he would have no objection to leaving paragraph 42 unchanged. If, however, the word "initially" were to be introduced in the first sentence, as proposed by Sir Ian Sinclair, it might suggest that colonialism had not been unlawful before the adoption of the relevant resolution—an absurdity which he for one could not accept.

57. Mr. KOROMA said that the statement that the condemnation of colonialism derived from General Assembly resolution 1514 (XV) was not factually correct.

He therefore maintained his proposal, either as originally worded or as amended by Chief Akinjide.

58. Sir Ian SINCLAIR said he was fully prepared to withdraw his proposal that the word "initially" be inserted in the first sentence of the paragraph, if it created a problem. He would none the less suggest that the first sentence be redrafted, as a simple statement of fact, to read: "General Assembly resolution 1514 (XV) of 14 December 1960 condemned colonialism in all its forms and manifestations."

It was so agreed.

Paragraph 42, as amended, was adopted.

The meeting rose at 1.05 p.m.

1871st MEETING

Wednesday, 25 July 1984, at 10 a.m.

Chairman: Mr. Alexander YANKOV

Present: Chief Akinjide, Mr. Balanda, Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Jacovides, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov.

Draft report of the Commission on the work of its thirty-sixth session (*continued*)

CHAPTER II. *Draft Code of Offences against the Peace and Security of Mankind (concluded)* (A/CN.4/L.371 and Add.1)

B. *Consideration of the topic at the present session (concluded)* (A/CN.4/L.371 and Add.1)

Paragraphs 23 to 55 (*concluded*) (A/CN.4/L.371/Add.1)

Paragraph 43

1. Mr. McCaffrey proposed the insertion, in the sixth sentence, of the words "many members believed that" between the words "Nevertheless" and "*apartheid*". Moreover, in the penultimate sentence, the words "as *jus cogens*" should be deleted.

2. Sir Ian SINCLAIR said that another solution to the problem posed by the penultimate sentence of the paragraph would be to replace the words "does not deprive" by "did not, in their view, deprive".

3. Mr. MAHIOU, supported by Chief AKINJIDE, welcomed Mr. McCaffrey's suggestion concerning the sixth sentence, but thought it would be preferable to say "most members believed that". Sir Ian Sinclair's suggestion was also acceptable and the penultimate sentence could be reworded: "From their point of view, the fact that some States had not acceded to the Convention on *Apartheid* did not deprive it of its force as *jus cogens*".