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Summary record of the 1988th meeting

Topic:
Other topics

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59. Mr. USHAKOV proposed that the words "on first reading" should be inserted after the word "adopted".

It was so agreed.

New paragraph 8 bis, as amended, was adopted.

New paragraph 8 *ter*

60. Mr. OGISO (Rapporteur) proposed the addition of the following new paragraph 8 *ter*:

"At the same meeting, the Commission decided, in accordance with articles 16 and 21 of its statute, to transmit the draft articles set out in section D.1 of the present chapter, through the Secretary-General, to the Governments of Member States for comments and observations, with the request that such comments and observations be submitted to the Secretary-General not later than 1 January 1988."

A similar paragraph was contained in chapter II of the report, dealing with jurisdictional immunities of States and their property.

New paragraph 8 ter was adopted.

Section B, as amended, was adopted.

The meeting rose at 1.10 p.m.

1988th MEETING

Thursday, 10 July 1986, at 3.15 p.m.

Chairman: Mr. Doudou THIAM

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Illueca, Mr. Jacovides, Mr. Koroma, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov.

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

CHAPTER III. Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (concluded) (A/CN.4/L.404 and Add.1)

C. Tribute to the Special Rapporteur, Mr. Alexander Yankov (A/CN.4/L.404/Add.1)

Paragraph 9

Paragraph 9 was adopted.

Section C was adopted.

D. Draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (A/CN.4/L.404/Add.1)

SUBSECTION 1 (Texts of the draft articles provisionally adopted by the Commission on first reading)

Section D.1 was adopted.

SUBSECTION 2 (Texts of draft articles 28 to 33, with commentaries thereto, provisionally adopted by the Commission at its thirty-eighth session)

Commentary to article 28 (Protection of the diplomatic bag)

Paragraph (1)

1. Mr. USHAKOV proposed that, since the Commission's discussions could not be described as a process of negotiation, the phrase "to submit to the General Assembly ... made in the Assembly", in the second sentence, should be replaced by "to adopt article 28 in its present form, as the observations and suggestions to be made by Governments".

2. Mr. McCaffrey and Mr. LACLETA MUÑOZ endorsed that proposal.

3. Sir Ian SINCLAIR also supported Mr. Ushakov's proposal. In addition, he proposed that, in the first sentence, the words "much discussion" should be replaced by "lengthy discussion".

4. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to approve paragraph (1) with the amendments proposed by Mr. Ushakov and Sir Ian Sinclair.

It was so agreed.

Paragraph (1), as amended, was approved.

Paragraph (2)

Paragraph (2) was approved with minor drafting changes.

Paragraphs (3) and (4)

Paragraphs (3) and (4) were approved.

Paragraphs (5) and (6)

Paragraphs (5) and (6) were approved with some drafting changes.

Paragraph (7)

5. Mr. CALERO RODRIGUES proposed that, in the second sentence, the words "means of violating" should be amended to read: "means of examination which might result in the violation of".

It was so agreed.

6. Mr. McCaffrey proposed that the word "sentence", in the first, second and last sentences, should be replaced by "phrase". He also proposed that, in the third sentence, the words "in exceptional cases" should be added after the word "possibility".

It was so agreed.

7. Mr. OGISO said that the words "the characteristics of today's international relations", in the third sentence, might give the impression that abuses of the diplomatic bag were a constant feature of modern-day international relations.

8. Mr. KOROMA, supporting the view expressed by Mr. Ogiso, proposed that the words “the characteristics” should be replaced by “certain characteristics”.

It was so agreed.

9. Mr. MAHIOU pointed out that the English and Spanish texts consisted of four sentences, whereas the French text contained only three, and that the last part of the third sentence of the French text began with the words *d'après eux*, which did not appear in the English and Spanish texts. It was not at all clear whether those words referred to the view of the “Other members of the Commission” mentioned at the beginning of the third sentence or to the view of all members.

10. Sir Ian SINCLAIR, supported by Mr. LACLETA MUÑOZ, proposed that the English and Spanish texts should be brought into line with the French text by adding the words “In the view of those members” at the beginning of the fourth sentence.

It was so agreed.

11. Mr. McCAFFREY proposed that, in the third sentence, the words “subjecting the bag to electronic scanning or other technical devices” should be replaced by “subjecting the bag to security checks by means of scanning with electronic or other technical devices”.

It was so agreed.

12. Chief AKINJIDE said that, during the discussion, he and several other members had drawn attention to the fact that many airlines would not accept luggage which had not been scanned. He therefore proposed that the following sentence should be added at the end of paragraph (7): “The point was also made that bags and other luggage which had not been scanned would not be accepted by many airlines.”

It was so agreed.

Paragraph (7), as amended, was approved.

Paragraph (8)

13. Chief AKINJIDE said that, since there had been cases in which the diplomatic bag had been used to carry unwilling passengers, the third sentence should include a reference to the “transport of human beings”.

14. Mr. LACLETA MUÑOZ, supporting the view expressed by Chief Akinjide, proposed that the words “and even for the transport of human beings” should be added after the words “or other items” in the third sentence.

15. Mr. MAHIOU said that the purpose of the third sentence was to deal with the problem of the smuggling of foreign currency, narcotic drugs and arms. Kidnaping was an entirely different problem.

16. Sir Ian SINCLAIR said that the commentary had to draw attention to contemporary international practice and therefore had to take account of the problem raised by Chief Akinjide. In 1964, a diplomatic bag had been opened at Rome Airport and a human being had been found inside. In London, in 1983, there had been an attempt to pass off as a diplomatic bag a crate con-

taining two people. In order to cover the case of attempt, he proposed that the words “or attempted to be used” should be added after the words “the diplomatic bag being used” in the third sentence.

17. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to approve paragraph (8) with the amendments proposed by Mr. Lacleta Muñoz and Sir Ian Sinclair.

It was so agreed.

Paragraph (8), as amended, was approved.

Paragraph (9)

Paragraph (9) was approved.

Paragraph (10)

Paragraph (10) was approved with minor drafting changes.

Paragraph (11)

Paragraph (11) was approved.

Paragraph (12)

18. Sir Ian SINCLAIR suggested that the last part of the last sentence, beginning with the words “as the satisfaction of the receiving State”, should be replaced by the following text: “since, on the one hand, the receiving State could always request more stringent protection measures, namely the opening of the bag, and since, on the other hand, it was left to the subjective appreciation of the competent authorities of the receiving State to determine whether the examination of the bag through electronic or other technical devices satisfied them”. Such wording would more objectively reflect the objections that had been raised to the proposal referred to in the paragraph.

19. Mr. MAHIOU said that he was one of the members whose view was reflected in the last sentence. He proposed that that sentence should be amended to read: “Some members found this proposal illogical, contrary to existing law and questionable in so far as it would involve a multiplicity of controls and make satisfaction of the receiving State dependent on subjective criteria, and would, moreover, not require automatic release of the bag for lack of evidence.”

20. Mr. USHAKOV proposed that the following sentence should be added at the end of paragraph (12) to reflect his own views: “One member was of the opinion that this provision was illogical and absurd, as it in fact provided not for an option for the receiving State, but rather for the exercise by that State of two measures of control, one after the other.”

21. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to approve paragraph (12) with the amendments proposed by Mr. Mahiou and Mr. Ushakov.

It was so agreed.

Paragraph (12), as amended, was approved.

The commentary to article 28, as amended, was approved.

Commentary to article 29 (Exemption from customs duties, dues and taxes)

Paragraph (1)

Paragraph (1) was approved with a minor drafting change.

Paragraph (2)

Paragraph (2) was approved.

Paragraph (3)

Paragraph (3) was approved with minor drafting changes.

The commentary to article 29, as amended, was approved.

Commentary to article 30 (Protective measures in case of *force majeure* or other circumstances)

Paragraph (1)

Paragraph (1) was approved with minor drafting changes.

Paragraph (2)

22. Sir Ian SINCLAIR proposed that, in the first sentence, the words "such as death or an accident" should be amended to read "such as death, serious illness or an accident".

It was so agreed.

Paragraph (2), as amended, was approved.

Paragraphs (3) and (4)

Paragraphs (3) and (4) were approved.

Paragraph (5)

Paragraph (5) was approved with a minor drafting change.

Paragraph (6)

23. Sir Ian SINCLAIR proposed that, in the third sentence, the words "adverse weather conditions" should be inserted between the words "such as" and "the forced landing".

It was so agreed.

24. Mr. McCAFFREY proposed that, in the fourth sentence, the words "the transit State in the case of *force majeure*" should be replaced by "a State through which a bag transits due to *force majeure*".

It was so agreed.

Paragraph (6), as amended, was approved subject to a correction in the Spanish text.

Paragraph (7)

Paragraph (7) was approved with minor drafting changes.

Paragraph (8)

25. Mr. CALERO RODRIGUES proposed that the last sentence should be deleted because the example to

which it referred was not consistent with what was stated in the five preceding sentences.

It was so agreed.

Paragraph (8), as amended, was approved.

The commentary to article 30, as amended, was approved.

Commentary to article 31 (Non-recognition of States or Governments or absence of diplomatic or consular relations)

Paragraph (1)

Paragraph (1) was approved with a minor drafting change.

Paragraph (2)

Paragraph (2) was approved subject to a minor correction in the French text.

Paragraph (3)

26. Mr. McCAFFREY proposed that paragraph (3) should be divided into two paragraphs, to be numbered (3) and (3 *bis*). The new paragraph (3) would consist of the first four sentences, and paragraph (3 *bis*) of the five remaining sentences, of the present paragraph (3). The explanation of draft article 31 would thus be dealt with separately, in the new paragraph (3 *bis*).

It was so agreed.

New paragraph (3) was approved with minor drafting changes.

New paragraph (3 *bis*)

27. Mr. McCAFFREY proposed that, since the view expressed in the penultimate sentence had not been that of the majority, the words "Most members" should be replaced by "Several members".

It was so agreed.

28. Sir Ian SINCLAIR proposed that, in the second sentence of the new paragraph (3 *bis*), the words "It thus purports to cover the legal protection" should be amended to read "It is thus designed to provide for the legal protection".

It was so agreed.

*New paragraph (3 *bis*), as amended, was approved with minor drafting changes.*

Paragraph (4)

29. Sir Ian SINCLAIR proposed that, in the first sentence, the word "strongly" should be added after the word "felt".

It was so agreed.

30. He further proposed that, in the same sentence, the words "as some expression of bilateral relations" should be replaced by "in the context of their bilateral relations".

It was so agreed.

Paragraph (4), as amended, was approved.

Paragraph (5)

31. Sir Ian SINCLAIR proposed that, in the first sentence, the words "While opting for the deletion ... a consensus to the effect that the granting" should be replaced by "The Commission was unanimously of the view that the granting".

It was so agreed.

Paragraph (5), as amended, was approved.

The commentary to article 31, as amended, was approved.

Commentary to article 32 (Relationship between the present articles and existing bilateral and regional agreements)

Paragraph (1)

Paragraph (1) was approved with a minor drafting change.

Paragraph (2)

Paragraph (2) was approved.

Paragraph (3)

Paragraph (3) was approved with minor drafting changes.

Paragraph (4)

Paragraph (4) was approved.

Paragraph (5)

Paragraph (5) was approved subject to a correction.

The commentary to article 32, as amended, was approved.

Commentary to article 33 (Optional declaration)

Paragraph (1)

32. Sir Ian SINCLAIR proposed that, in the third sentence, the words "to all categories of couriers" should be amended to read "to those categories of couriers".

It was so agreed.

33. Mr. USHAKOV, noting that draft article 33, paragraph 1, referred to a declaration specifying any category of diplomatic courier and diplomatic bag to which the present articles would not apply, said that paragraph (1) of the commentary had obviously been written before the draft article itself had been amended. He therefore proposed that, at the end of the first sentence of paragraph (1) of the commentary, the words "to which they intend the articles to apply" should be replaced by "to which they did not intend to apply the articles".

It was so agreed.

Paragraph (1), as amended, was approved with minor drafting changes.

Paragraph (2)

34. Sir Ian SINCLAIR proposed that the words "or States wishing to become parties" should be added after the words "States parties".

It was so agreed.

35. Mr. KOROMA proposed that the following sentence should be added at the end of paragraph (2): "One member raised the question whether such a provision detracted from the effort to harmonize the law in this area."

It was so agreed.

36. Mr. YANKOV (Special Rapporteur), replying to a question raised by Mr. Riphagen, said that draft article 33 did not provide for any kind of reservation; it was an agreed option placed at the disposal of States parties or States wishing to become parties to the future convention.

37. Sir Ian SINCLAIR proposed that the words "with respect to the various provisions" should be added after the words "agreed option" in what was now the first sentence.

It was so agreed.

38. Mr. REUTER proposed that the words "but an agreed option", in the first sentence, should be amended to read "but was the implementation of an agreed option".

It was so agreed.

39. Mr. USHAKOV proposed that, since a reservation was always unilateral, the words "of a unilateral character", in the first sentence, should be deleted.

It was so agreed.

Paragraph (2), as amended, was approved.

New paragraph (2 bis)

40. Mr. FLITAN proposed that the following new paragraph (2 bis) should be added after paragraph (2):

"One member of the Commission considered that the inclusion of article 33 could make it possible for States unilaterally to modify the legal régimes established by the four codification conventions to which they were parties."

It was so agreed.

New paragraph (2 bis) was approved.

Paragraph (3)

41. Sir Ian SINCLAIR proposed that, in the first sentence, the words "the opportunity at which" should be amended to read "the time at which", and that, in the second sentence, the words "As to the opportunity" should be replaced by "As to the timing".

It was so agreed.

42. He further proposed that, in the fourth sentence, the words "The opportunity" should be replaced by "The further option".

It was so agreed.

Paragraph (3), as amended, was approved with minor drafting changes.

Paragraph (4)

Paragraph (4) was approved with minor drafting changes.

Paragraph (5)

43. Mr. CALERO RODRIGUES proposed that the words "(signatory States not yet having ratified and States having consented to be bound by the treaty when the latter has not yet entered into force)", at the end of the third sentence, should be deleted. If the future convention was to be open to all States, it would be necessary for all States, not just the two categories referred to in the phrase in brackets, to be notified.

44. Mr. YANKOV (Special Rapporteur) said that there could be States other than those in the two categories in question, but since the words in brackets might be somewhat misleading, he could agree to their deletion.

45. Sir Ian SINCLAIR said that he fully supported the proposal made by Mr. Calero Rodrigues. The question of the States that would be entitled to become parties to the future convention would be decided by a conference of plenipotentiaries. The practice nowadays was to entitle all States to become parties to a convention of that kind. The formula "States entitled to become Parties to the present articles" should therefore not be limited in any way.

46. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to approve paragraph (5) with the amendment proposed by Mr. Calero Rodrigues and some minor drafting changes.

It was so agreed.

Paragraph (5), as amended, was approved.

Paragraphs (6) to (8)

Paragraphs (6) to (8) were approved with minor drafting changes.

The commentary to article 33, as amended, was approved.

Section D.2, as amended, was adopted.

Chapter III of the draft report, as amended, was adopted.

The meeting rose at 4.40 p.m.

1989th MEETING

Friday, 11 July 1986, at 10 a.m.

Chairman: Mr. Doudou THIAM

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Illueca, Mr. Jacovides, Mr. Koroma, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso,

Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov.

Draft report of the Commission on the work of its thirty-eighth session (concluded)

CHAPTER V. Draft Code of Offences against the Peace and Security of Mankind (concluded)* (A/CN.4/L.406 and Add.1)

B. Consideration of the topic at the present session (concluded) (A/CN.4/L.406 and Add.1)

Paragraph 65 (concluded) (A/CN.4/L.406/Add.1)

1. Sir Ian SINCLAIR recalled that, at the 1987th meeting, Mr. Francis had raised a number of questions regarding the relationship between paragraphs 65 and 80 of chapter V of the Commission's draft report. Following informal consultations between the Special Rapporteur, Mr. Francis and himself, it had been agreed that the following footnote to paragraph 65 would adequately reflect all the points of view expressed:

"Although the question of exculpatory pleas and extenuating circumstances, which is inextricably linked to the determination and extent of responsibility and at the same time to exceptions to criminal responsibility, was referred to under this heading by the Special Rapporteur in his fourth report (A/CN.4/398, paras. 177-184), it was not discussed in detail in the Commission. The observations made by members of the Commission on this question are summarized in paragraph 115 of the present report. The Special Rapporteur and the Commission will revert to the question of exculpatory pleas and extenuating circumstances at a later stage in their work on this topic."

2. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt the text proposed by Sir Ian Sinclair.

It was so agreed.

Paragraph 65, as amended, was adopted.

Section B, as amended, was adopted.

Chapter V of the draft report, as amended, was adopted.

The draft report of the Commission on the work of its thirty-eighth session as a whole, as amended, was adopted.

Closure of the session

3. The CHAIRMAN thanked the members of the Commission for their co-operation, which had made it possible to achieve effective results. The end of the current session also corresponded, in some measure, to the completion of the mandate of the present members, since new elections would be held before the thirty-ninth

* Resumed from the 1987th meeting.