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Summary record of the 1804th meeting

Topic:
Other topics

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(d) the text of paragraph 31 should be replaced by the following:

“Some members, on the other hand, are opposed to the concept that international criminal responsibility can be attributed to States within the framework of the draft code. They point to the incongruity and impracticality of instituting criminal proceedings against States. On any view of the matter, the immunity of States would prevent the courts of another State from exercising jurisdiction in such circumstances. Nor could it be realistically anticipated that States would accept that an international criminal court could exercise jurisdiction over States alleged to have committed international crimes. In their view, article 19 of part 1 of the draft articles on State responsibility, while no doubt relevant to a study of the topic, was concerned essentially with establishing that, for certain internationally wrongful acts designated as international crimes, there was an aggravated degree of State responsibility which could involve, as a consequence, the taking of measures in the form of sanctions against the offending State as a guarantee against repetition of the offence. The question of the responsibility of States for internationally wrongful acts designated as international crimes should, in their view, be dealt with exclusively within the framework of the draft on State responsibility.”

(e) paragraph 32 should be deleted; (f) paragraph 33 should be amended to read:

“Another problem that has been raised is that of the régime applicable to offences against the peace and security of mankind. Is there a special régime for such offences?”

(g) the first two sentences of paragraph 34 should be replaced by the following text:

“There was a broad measure of agreement that such a special régime does in fact exist, at least if the scope of the draft is restricted to offences committed by individuals.”

The meeting rose at 1 p.m.

1804th MEETING

Thursday, 14 July 1983, at 3.35 p.m.

Chairman: Mr. Laurel B. FRANCIS

Present: Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Jacovides, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Njenga, 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-fifth session (continued)

CHAPTER II. Draft Code of Offences against the Peace and Security of Mankind (continued) (A/CN.4/L.355)

1. The CHAIRMAN drew attention to the informal document containing the amendments proposed by Sir Ian Sinclair to paragraphs 29 to 34 of chapter II of the draft report (A/CN.4/L.355).

2. It was proposed that paragraph 29 should be deleted and that the first sentence of paragraph 30 should be replaced by the following text:

“It was unanimously accepted that international penal responsibility could be attributed to individuals and that the draft code should therefore cover the most serious international crimes committed by individuals.”

3. Paragraph 31 would be replaced by the following new text:

“Some members, on the other hand, are opposed to the concept that international criminal responsibility can be attributed to States within the framework of the draft code. They point to the incongruity and impracticality of instituting criminal proceedings against States. On any view of the matter, the immunity of States would prevent the courts of another State from exercising jurisdiction in such circumstances. Nor could it be realistically anticipated that States would accept that an international criminal court could exercise jurisdiction over States alleged to have committed international crimes. In their view, article 19 of part 1 of the draft articles on State responsibility, while no doubt relevant to a study of the topic, was concerned essentially with establishing that, for certain internationally wrongful acts designated as international crimes, there was an aggravated degree of State responsibility which could involve, as a consequence, the taking of measures in the form of sanctions against the offending State as a guarantee against repetition of the offence. The question of the responsibility of States for internationally wrongful acts designated as international crimes should, in their view, be dealt with exclusively within the framework of the draft on State responsibility.”

4. Paragraph 32 would be deleted and paragraph 33 should be amended to read:

“Another problem that has been raised is that of the régime applicable to offences against the peace and security of mankind. Is there a special régime for such offences?”

5. The first two sentences of paragraph 34 would be replaced by the following text:

“There was a broad measure of agreement that such a special régime does in fact exist, at least if the scope of the draft is restricted to offences committed by individuals.”

6. Mr. BARBOZA said that, without the Spanish text, he was not prepared to accept all the proposed amendments, which seemed to reopen the debate. He needed to

examine the proposals before he could give an opinion on them.

7. Mr. FLITAN said that the best course was not to change anything in a text which had been discussed at length. The proposals made by Sir Ian Sinclair were biased and expressed a minority view; the opinion of the majority must also be taken into account. It would be for the Special Rapporteur to find a proper balance between the various positions taken.

8. Sir Ian SINCLAIR said that his basic concern in submitting his proposals had been to ensure that the views of those members of the Commission whose position was similar to his own were accurately reflected in the report. While he acknowledged that adoption of his proposal for paragraph 31 might unbalance the text of the report to some extent, he had no objection to those members who held the opposite view endeavouring to restore the balance. His proposed text was designed to reflect the view that, while article 19 of part 1 of the draft articles on State responsibility was relevant to the draft code, the question of State responsibility in respect of international crimes should nevertheless be dealt with in the draft articles on State responsibility, rather than in the draft code of offences, which was to be a criminal code, applicable by some organ of justice.

9. His proposal regarding the first sentence of paragraph 30 of the report reflected what he believed to be unanimous agreement in the Commission that international penal responsibility could be attributed to individuals. Where members differed was on the feasibility of including offences committed by States within the scope of the draft. His proposal should not be interpreted as excluding the possibility of instituting criminal proceedings against individuals who, in their capacity as State officials, could be held criminally responsible for acts by the State. It was intended simply to reflect his own view that the institution of criminal proceedings against a State by the United Nations was beyond the bounds of possibility.

10. Mr. USHAKOV said that if the members who were in the majority considered that their point of view had been correctly summarized in the draft report, there was no problem. Sir Ian Sinclair was certainly entitled to state in the report that some members had been opposed to the idea that international criminal responsibility could be attributed to States.

11. If the question was how to express the unanimous opinion of the Commission, all members could take part in the discussion, but if it was a matter of recording the view of one or two members only, it was for those members—not others—to state their view on the proposed text.

12. If the Commission decided to retain the mention of unanimity in paragraph 30, he would propose some drafting amendments.

13. Mr. FLITAN said he agreed with Mr. Ushakov as to procedure. The Special Rapporteur had reproduced in the report the views expressed by various members, without repeating their arguments. He should draw on

the summary records to reflect the arguments on all sides, maintaining a fair balance between the opposing views.

14. Mr. McCAFFREY said that the problem was, first, not whether, but how the Commission was divided on the question of whether States should be made subjects of the draft code; and secondly, what the positions of the two sides really were. Some members, including himself, doubted whether a majority of the Commission was in favour of making States subjects of the draft code. In any event, the position of the minority should also be accurately reflected in the Commission's report. Sir Ian Sinclair's proposal, which he supported, was intended to give the Sixth Committee of the General Assembly a clear idea of what had taken place in the Commission's debate on the topic.

15. Mr. NJENGA said that the Commission should not attempt to rewrite chapter II of the draft report; that would mean reopening the debate on the topic. Any members who considered that their views were not properly represented should simply state their positions and leave it to the Special Rapporteur to amend the draft accordingly.

16. Mr. NI said it was his understanding that, at the present stage, it was not the Commission's intention to discuss the draft chapter paragraph by paragraph. In order to expedite the proceedings, it might be preferable to consider the conclusions proposed by the Special Rapporteur,¹ which covered all the important points raised. If the Commission could reach general agreement on them, it would probably have very little difficulty when the time came to consider amendments to its report.

17. Mr. BARBOZA said it was clear that Sir Ian Sinclair had made his suggestions for the Special Rapporteur, so they need not be examined, adopted or rejected at the present stage. The Commission had embarked on a discussion of a rather special kind, which concerned the conception of the report and was intended to answer the questions put by the General Assembly about the scope and structure of the draft code. He therefore proposed that the discussion should continue as though Sir Ian Sinclair had not made any proposal. The Special Rapporteur would take the discussion into account and amend his report or not amend it, as appropriate. Mr. Flitan had been right in suggesting that the Special Rapporteur should propose a new text taking into consideration all the points raised during the discussion. When the Commission had before it a more balanced text, it could examine the draft chapter in greater detail.

18. Mr. THIAM (Special Rapporteur) endorsed the remarks made by Mr. Ushakov and supported by Mr. Flitan and other members of the Commission, which he found very reasonable. There was certainly a majority in favour of the attribution of criminal responsibility to States and the view of the majority had to be expressed in

¹ An informal working paper incorporated, after amendment, as paragraph 40 of draft chapter II (revised), subsequently issued as document A/CN.4/L.366.

the report; but that did not mean that the minority view should be omitted. He would take the amendments proposed by Sir Ian Sinclair into consideration to the fullest possible extent.

19. He was surprised that the deletion of certain paragraphs had been proposed although they had not even been examined. Sir Ian Sinclair had proposed a new opening sentence for paragraph 30 in which the Commission would say that it was unanimous with regard to the penal responsibility of individuals. But had he considered paragraph 27? Perhaps it would suffice to add an endorsement by the Commission to that paragraph. Sir Ian had also proposed the deletion of paragraph 29, which referred to article 19 of part 1 of the draft articles on State responsibility. As Special Rapporteur, however, he believed that that reference should be retained, if only because the article was not sufficiently known. As to paragraph 31, which was said to be insufficiently explicit, he failed to see what could be clearer than saying that some members "are opposed to any criminal responsibility of States". The other proposals could be taken into consideration if their purpose was to stress one aspect more than another, but it was still necessary to examine the draft report more thoroughly.

20. Lastly, he pointed out that he had not officially submitted the conclusions to which Mr. Ni had referred. After consultations with several members of the Commission, he had thought it might perhaps be useful to circulate, as conclusions, a summary of the different views expressed on his draft chapter II. It was perhaps not appropriate to examine it at the present stage, since the summary of conclusions could not be adopted before the draft report itself.

21. Mr. USHAKOV said that the Commission's task was not to examine the Special Rapporteur's draft code, but to consider how the views expressed on it were reflected in the draft report. Any member who thought that his opinion was not correctly represented in the draft report could propose a clearer text. It was not for the Special Rapporteur alone to present the views of members of the Commission; that would leave the door open to a dictatorship of the Special Rapporteurs. He was perhaps not qualified to speak on how the Special Rapporteur had presented the majority view in the draft report but, as to the minority view, he supported the proposals by Sir Ian Sinclair, which were preferable to the Special Rapporteur's text.

22. Mr. BALANDA said it was obvious that the Commission's report should accurately reflect its discussions. The Special Rapporteur had to present the majority and minority views with equal objectivity, so that the General Assembly could take unbiased decisions. If every member of the Commission insisted on his views being recorded in detail, the best course would be to send the General Assembly the summary records. But since that would clearly not be acceptable, it was incumbent on the Special Rapporteur to act as spokesman, with the greatest possible objectivity and accuracy.

23. The document submitted by Sir Ian Sinclair should simply be referred to the Special Rapporteur, who would

see how far he could meet the legitimate concern of Sir Ian and other members of the Commission. The Commission should not discuss that document; it should confine itself to considering whether the contents of the draft report took account of what had actually been said, and to making any necessary drafting amendments.

24. Sir Ian SINCLAIR, referring to the comments made by the Special Rapporteur, said that he had proposed the deletion of paragraph 32 because he thought the content of that paragraph would be adequately covered by the text he had proposed for paragraph 31. With regard to the deletion of paragraph 29, he had no objection to the text of article 19 of part 1 of the draft articles on State responsibility being reproduced in full at some other point in the report. But if the Commission wished to retain paragraph 29 as it stood, he would not object.

25. While he fully agreed with what was said in paragraph 27, it was important to show, at the outset, that the Commission as a whole had agreed that the code should apply to individuals, but had subsequently been divided on whether it should also apply to the States.

26. Mr. MAHIOU observed that procedural difficulties arose with every delicate and controversial subject and that the Commission had made the mistake of combining its usual method of work, which was to examine the text paragraph by paragraph, with a general discussion on each chapter or on the draft report as a whole. The position had become clearer when Mr. Barboza had urged the Commission to examine the draft report and make its views known to the Special Rapporteur, who would take them into account in the revised text of chapter II. Sir Ian Sinclair, who regarded his proposals merely as suggestions, had accepted that procedure. The Commission's present business was therefore to exchange views on the draft report, whether paragraph by paragraph or chapter by chapter; it was only at a later stage that members would be able to submit formal amendments to the text.

27. The procedural discussion had, however, brought out the division of opinion on substance, concerning the criminal responsibility of States. The two opposing views—the majority view and the minority view—were recorded in paragraphs 30 and 31 of the draft report. It should be left to the Special Rapporteur to present those two views accurately, but Mr. Flitan's comment was justified: the paragraphs must be well balanced. Clearly, the majority view could not be recorded in two or three lines and the view of the minority in a passage two or three times as long.

28. Mr. STAVROPOULOS, referring to Sir Ian Sinclair's proposal to delete paragraph 29, said that while he thought the paragraph should be retained, it might perhaps be placed in the introduction to chapter II.

29. Mr. LACLETA MUÑOZ said he belonged to the majority of members who favoured the idea of the criminal responsibility of States, referred to in paragraph 30 of the draft report, and he stressed the need to use the term *criminal* in the Spanish text. Like many other members of the Commission, he considered it essential to develop that doctrine because of the adoption of article 19

of part 1 of the draft articles on State responsibility. It was also important to keep the text of article 19 in the report, because that article, which was little known outside the Commission, explained the position of many of its members. He saw no difficulty in adding a sentence on the question as suggested by Sir Ian Sinclair, but thought it should be in paragraph 27 rather than in paragraph 30.

30. Although he did not believe it possible for the report to record the views of every member of the Commission, he thought it should mention the need—which had been repeatedly stressed by the majority favouring the doctrine of the criminal responsibility of States—to provide for means of settlement of disputes relating to the existence of an act constituting an international crime, or to the characterization of an act as an international crime.

31. Mr. BARBOZA pointed out that several members of the Commission were confusing questions of substance with questions of procedure and suggested that the procedural problem might be settled by inviting the Special Rapporteur to take the present discussion into account in preparing a new text to be submitted at the next meeting. A decision to retain paragraph 29 would be tantamount to a decision on substance. The Commission should decide on the procedure to be followed before pronouncing on the substance.

32. On the proposal of Sir Ian Sinclair, the CHAIRMAN invited members of the Commission to state their views on the substance of paragraphs 26 to 34, before proceeding to consider the remainder of the report.

33. Mr. McCAFFREY supported the views expressed by Mr. Barboza.

34. Referring to paragraph 29, he said that, while he agreed that article 19 of part 1 of the draft articles on State responsibility should be referred to in the report to help members of the Sixth Committee of the General Assembly, he doubted whether it was appropriate to make the reference in connection with the “content of the draft *ratione personae*”. He supported the suggestion made by Mr. Stavropoulos that the reference to article 19 of part 1 of the draft articles on State responsibility be placed in the introduction to chapter II. Given the existence of article 19, he agreed with Sir Ian Sinclair that, in order to avoid confusion, States should not be made subjects of the draft code.

35. Referring to paragraph 30, he agreed that the report should record the fact that the Commission was unanimous in agreeing that individuals should be subjects of the draft code; that idea was already reflected to some extent in paragraph 27. It had not been his impression, however, that the majority of members had favoured the inclusion of States within the scope of the draft code. It might therefore be preferable to state that many members, or the majority of members who had spoken, had taken that view.

36. The second sentence of paragraph 31 was particularly unclear. The proposal by Sir Ian Sinclair appeared to be a more accurate reflection of his own views and those of other members on the question. In par-

ticular, the first and the last two sentences of that proposal were virtually essential if the report was to reflect the view of the minority.

37. With regard to the second sentence of paragraph 33, while he believed that there was a special régime of responsibility applying to individuals for offences against the peace and security of mankind, he doubted the existence of an acknowledged special régime applying to States. On that point, he would support a text along the lines proposed by Sir Ian Sinclair.

38. Mr. NJENGA, referring to the amendments proposed by Sir Ian Sinclair, said that he could not agree that paragraph 29 should be deleted or even placed in the introduction to chapter II, since article 19 of part 1 of the draft articles on State responsibility was intrinsically and crucially linked with the topic under consideration.

39. Furthermore, the text proposed for paragraph 30 gave a distorted picture of the Commission's debate. To reflect that debate more accurately, the text should make it clear that, while the Commission unanimously accepted the international penal responsibility of individuals, the majority of members held the view that there was also an international penal responsibility of States.

40. He could not agree to the proposed deletion of paragraph 32, since it must be retained if paragraph 29 was to remain unchanged.

41. Finally, he could not accept the proposed amendment to paragraph 34, which again tended to suggest that there was no international penal responsibility of States.

42. Mr. MAHIOU said that the Special Rapporteur should have rather more precise views on the crucial question of the responsibility of individuals and of States. He was not in favour of deleting paragraph 29 or the reference to article 19 of part 1 of the draft articles on State responsibility. It would be illogical to speak of international crimes by States without recognizing the principle of criminal responsibility; the Commission must infer from article 19 the necessary consequences concerning offences against the peace and security of mankind. The reference to article 19 should lead the Sixth Committee to a clear understanding of the difficulties of the subject and persuade it to give the Commission guidance on the principle of the criminal responsibility of States.

43. He was prepared to accept the replacement sentence proposed by Sir Ian Sinclair for paragraph 30, in which the Special Rapporteur in any case had also had to introduce a certain number of elements in support of the view of those advocating the principle of criminal responsibility of States, just as he would have to state the case for the opposite view in paragraph 31. He was in favour of retaining paragraph 32, which could only be deleted if paragraph 29 was also deleted. In paragraphs 33 and 34, it would of course be necessary to take account of the views expressed in paragraphs 30 and 31 and to distinguish between the criminal responsibility of individuals and that of States.

44. Mr. BARBOZA urged that paragraph 29 should be retained unchanged in its present position. To move it into the historical introduction would be to minimize its importance, whereas it was precisely from the text of article 19 of part 1 of the draft articles on State responsibility, reproduced in that paragraph, that the rest of the draft followed. Sir Ian Sinclair's proposal for paragraph 30 should rather be considered for incorporation in paragraph 27. Paragraph 32 should not be deleted. Paragraphs 27 to 32 were all interconnected and followed a logical sequence; it would be for the Special Rapporteur to see how he could reword his draft report in the light of Sir Ian Sinclair's proposals.
45. There was no need to overburden the text with a recital of arguments for particular views, since the interested reader could refer to the summary records for the positions of individual members.
46. Mr. FLITAN said that he could not support Sir Ian Sinclair's proposal for the first sentence of paragraph 30, because it might lead to misunderstanding in the Sixth Committee. All that was needed in paragraph 30 was to present the arguments advanced during the general discussion; to indicate that certain international crimes, such as aggression and *apartheid*, could only be committed by States; and to specify that the purpose of the code, which was to contribute to the achievement of international peace, would not be fulfilled if States could not be held responsible for any international crimes they might commit.
47. He could not approve of the deletion of paragraph 32 or the proposed amendment to paragraph 34. In general, the task of the Special Rapporteur was to state the various views clearly, so that the General Assembly could give the Commission precise guidance for its future work.
48. Mr. CALERO RODRIGUES said that paragraphs 26 to 34 followed a very logical sequence and covered all the essential points.
49. He did not support the proposal to delete paragraph 29 or to place it in the introduction to chapter II, where it would be less likely to be read. While he understood the difficulty of some members in accepting a text which, in their view, suggested that article 19 of part 1 of the draft articles on State responsibility clearly implied the existence of international criminal responsibility of States, it should be noted that that concept was not presented as being accepted by the Commission. At the same time, it was difficult to see how a text could refer to State responsibility in the case of crimes, without such responsibility being considered criminal. Consequently, paragraph 29 should remain unchanged and be left where it was.
50. The proposed amendments to paragraphs 30 and 31 were not unreasonable, provided the balance between the majority and minority views in the Commission was restored. As they stood, the proposed amendments devoted more space to the minority than to the majority view.
51. Paragraph 32 was quite acceptable. If it was deleted, however, as had been proposed, the reference it contained to article 19 might be inserted in the first sentence of paragraph 29.
52. He had no difficulty with paragraphs 33 and 34. The amendment to the first part of paragraph 34 proposed by Sir Ian Sinclair, on the other hand, seemed to be too restrictive and gave the impression that the Commission was inclined to limit the scope of the draft code to offences committed by individuals. He could accept the proposed amendment, however, if all reference to the scope of the draft code, which was a separate question, was deleted.
53. Mr. MALEK said he was opposed to the deletion of paragraphs 29 and 32. On the proposal relating to paragraph 30, he could give no opinion until he knew the position of the Special Rapporteur, and he would have to examine the proposed amendments to paragraphs 33 and 34 more thoroughly before pronouncing on them.
54. Mr. USHAKOV said that what raised problems for him in paragraph 29 was not the inclusion of the text of article 19 of part 1 of the draft articles on State responsibility, but the suggested interpretation of it in the phrase: "Article 19 . . . provides that crimes and delicts may be attributed to a State." He urged the Special Rapporteur to be cautious and give a balanced account of the various views expressed.
55. Sir Ian SINCLAIR said that he attached some importance to the inclusion in the report of a reference to the unanimous agreement of the Commission that international penal responsibility could be attributed to individuals. It would be inappropriate to include such a reference in paragraph 27, which was merely part of the introduction to the results of the Commission's debate on the topic.
56. While his proposed amendment to paragraph 30 of the report was intended to reflect the outcome of the Commission's debate, the same result could be achieved by a new paragraph 30 stating that the Commission's debate had been resumed and describing the Commission's unanimous acceptance of the principle of the international penal responsibility of individuals. The following paragraph could then describe the division of opinion in the Commission on the question of the criminal responsibility of States within the framework of the draft code. It should, indeed, be made quite clear that the division of opinion concerned the criminal responsibility of States within the framework of the code, as opposed to such responsibility within the framework of the draft articles on State responsibility.
57. He had proposed the deletion of paragraph 32 simply because his amendment to paragraph 31 already included a reference to the relevance of article 19 to the study of the topic under consideration.

The meeting rose at 6.20 p.m.
