Document:-
A/CN.4/SR.1869

Summary record of the 1869th meeting

Topic:
<multiple topics>

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vergence of views both on the substance of article 16 and on the procedure to be adopted in its respect. He was reluctant to put the matter to the vote, and suggested that it should be left open until the next meeting.

74. Mr. REUTER proposed that, since the Commission was divided, the matter should be put to a vote in order to save time. The differences of view could then be reflected in the report.

75. The CHAIRMAN said that a vote could not be taken because the Commission lacked a quorum.

76. Mr. KOROMA said that, his very great admiration and respect for Mr. Reuter notwithstanding, he deprecated the practice of asking for a vote. He did not believe that a vote in the existing context would advance the work of the Commission, and was in favour of endeavouring to find a compromise solution.

77. The CHAIRMAN suggested that consideration of the text proposed by the Drafting Committee for article 16 should be continued at the next meeting.

It was so agreed.

The meeting rose at 6.05 p.m.

1869th MEETING

Monday, 23 July 1984, at 3.05 p.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.

Jurisdictional immunities of States and their property (*concluded*) (A/CN.4/L.379, A/CN.4/L.381)

[Agenda item 3]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (*concluded*)

ARTICLES 16 (*concluded*), 17 and 18

ARTICLE 16 (Patents, trade marks and intellectual or industrial property) (*concluded*)

1. The CHAIRMAN recalled that, at the 1868th meeting, some members of the Commission had suggested that the adoption of article 16 proposed by the Drafting Committee (A/CN.4/L.379) should be deferred pending a decision on paragraph 2 of draft article 11. It would appear that those members were now prepared to agree to the provisional adoption of article 16, on the understanding that the text of paragraph 2 of article 11 as proposed by the Special Rapporteur (A/CN.4/L.381) would be referred to the Drafting Committee for consideration.

2. Mr. USHAKOV said that, although he was opposed to subparagraph (*b*), he had not asked for a vote on the draft article or for a final decision in the matter, since the article was being discussed on first reading and the text would necessarily have to be put to the vote on second reading. He asked that his views be reflected in the commentary, so that the Commission could be apprised of them at the outset of the thirty-seventh session, as the summary records of the meetings were due to be published in official form only in two years' time. Subparagraph (*b*) should have been placed between square brackets, a practice already followed by the Commission, even on first reading, for a particular draft article or a part of one. Lastly, it was regrettable that some draft articles, such as article 14, had been provisionally adopted. In his view, article 14 was totally unacceptable, both from the legal standpoint and from that of the prestige of the Commission, and would have been better deleted.

3. Mr. KOROMA said that he had serious reservations about draft article 16, but would not oppose its provisional adoption, on the understanding that reservations and comments would be taken into account when the article came to be re-examined. In his view, article 16 transcended the issue of nationalization, and article 11 provided only a partial response to the queries raised.

4. The CHAIRMAN said he would take it that the Commission agreed to the provisional adoption of draft article 16, on the understanding that all the reservations and comments made during the discussion would be duly reflected in the summary records of the meetings, in the report of the Commission and, so far as possible, in the commentary. In addition, paragraph 2 of draft article 11 as proposed by the Special Rapporteur (A/CN.4/L.381) would be referred to the Drafting Committee, with a view to meeting the concern of some members regarding the extraterritorial effects of nationalization.

It was so agreed.

Article 16 was adopted.

ARTICLE 17 (Fiscal matters)

5. Mr. MAHIOU (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 17:

Article 17. Fiscal matters

Unless otherwise agreed between the States concerned, the immunity of a State cannot be invoked before a court of another State in a proceeding relating to the fiscal obligations for which it may be liable under the law of the State of the forum, such as duties, taxes or other similar charges.

As had been suggested during the discussion in plenary, the text of article 17 had been considerably simplified compared with the text originally submitted by the Special Rapporteur in his sixth report (A/CN.4/376 and Add.1 and 2). [1]

[1] For the text submitted by the Special Rapporteur and the discussion thereon in the Commission at the current session, see 1833rd to 1837th meetings and 1838th meeting, paras. 1-24.

6. The Drafting Committee had decided that it was better not to list the various types of duties, taxes or other similar charges in the body of the article. In its view, it was impossible to draw up an exhaustive list, and even a non-exhaustive list would mean entering into detail in a branch of internal law that was complex and liable to change. The matter would be dealt with in the commentary. Accordingly, the general form of wording, "fiscal obligations... such as duties, taxes or other similar charges", had been used. Furthermore, since the rule involved the application of internal law, and particularly fiscal regulations that might or might not impose various fiscal obligations on a foreign State, it had been thought appropriate to refer to "fiscal obligations for which it may be liable under the law of the State of the forum". The members of the Committee all recognized that the question of "fiscal immunity" was quite distinct from that of "jurisdictional immunities".

7. Lastly, the Committee had decided not to retain paragraph 2 of article 17 as originally submitted by the Special Rapporteur. Although it recognized the importance of the subject-matter, it had taken the view that all matters pertaining to questions such as seizure, attachment or measures of execution could more appropriately be dealt with in the next part of the draft articles, which would deal specifically with those questions and which the Special Rapporteur would introduce at a later session of the Commission. In line with the new wording of the article, the title had been amended to read "Fiscal matters".

8. One member of the Committee had expressed reservations about article 17, judging it to be unnecessary, since it was designed to cater for situations or problems that would not arise in practice and were a pure figment of the imagination. In any case, States were subject to the fiscal obligations for which they might be liable under the law of the State of the forum. In the event of a dispute, the plaintiff in the proceedings would invariably be the foreign State and hence, under other articles of the draft, would not be exempt from the jurisdiction. Moreover, the whole question was one of comity and reciprocity as between the States concerned, and any request for privileges should be viewed in that context. Disputes about the existence of such privileges would be settled at the international level between the States concerned and had nothing to do with jurisdictional immunities.

9. Mr. USHAKOV said that he was utterly opposed to article 17, which was pointless. Its only justification was that it would apparently enable the revenue authorities of the State of the forum to institute legal proceedings for payment of a particular duty, tax or charge. The law of a State should of course apply to everybody, including foreign States, but it seemed in the case in point that the true purpose of the article was to undermine at all costs the jurisdictional immunity of States, to the benefit of transnational corporations, and hence to the detriment of young States. The jurisdictional immunity of States was the counterpart to their sovereignty and sovereign equality. To undermine the jurisdictional immunity of States was at one and the same time to undermine their independence and sovereign equality.

10. Mr. NI said that, as he had already had occasion to point out (1835th meeting), he could not agree to the draft articles now before the Commission, because they were contrary to the principle of the sovereign equality of States. Article 17, however, raised a particular point in that it referred to "obligations for which [the State] may be liable". His question was: liable to whom? In the case envisaged, the plaintiff was the forum State and the defendant was another State, but he was firmly of the opinion that a State could not be made subject to the jurisdiction of the municipal courts of the forum State. He had no intention of speaking again on points that he had already raised both in the Commission and in the Drafting Committee.

11. Mr. KOROMA said that his position was similar to that of Mr. Ushakov and Mr. Ni. He was opposed to article 17 but would not object to its adoption on a provisional basis.

12. Chief AKINJIDE, expressing agreement with Mr. Koroma and Mr. Ni, said that article 17 was totally unacceptable. Indeed, the draft article should have been couched in exactly opposite terms, so as to establish the basic premise that a State enjoyed immunity unless otherwise agreed between the two countries concerned. It might well prove difficult to win acceptance for a convention which, figuratively speaking, was gradually stripping the roof from the house of State immunity; in that sense, the Commission's work could perhaps be characterized as one of demolition rather than construction.

13. Mr. DÍAZ GONZÁLEZ said that, as he had been absent from the 1868th meeting and therefore unable to comment on article 16, he wished to endorse the reservations voiced by Mr. Koroma in regard to that article. As to article 17, he fully supported the remarks made by the four preceding speakers and therefore wished to enter an express reservation in its regard.

14. The CHAIRMAN, speaking as a member of the Commission, said that, whenever any aspect of the jurisdictional immunities of States was considered, new restrictions were introduced. As a result, the principle of State immunity was gradually being whittled away and thus deprived of its force.

15. Speaking as Chairman, he said he would take it that, due account being taken of the reservations expressed, the Commission wished to adopt draft article 17 provisionally.

It was so agreed.

Article 17 was adopted.

ARTICLE 18 (Participation in companies or other collective bodies)

16. Mr. MAHIOU (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 18:

Article 18. Participation in companies or other collective bodies

1. Unless otherwise agreed between the States concerned, a State cannot invoke immunity from the jurisdiction of a court of another State in a proceeding relating to its participation in a company or other collective body, whether incorporated or unincorporated, being a proceeding concerning the relationship between the State and the body or the other participants therein, provided that the body:

(*a*) has participants other than States or international organizations; and

(*b*) is incorporated or constituted under the law of the State of the forum or is controlled from or has its principal place of business in that State.

2. Paragraph 1 does not apply if provision to the contrary has been made by an agreement in writing between the parties to the dispute or by the constitution or other instrument establishing or regulating the body in question.

The Drafting Committee had endeavoured to formulate article 18, submitted by the Special Rapporteur in his sixth report (A/CN.4/376 and Add.1 and 2),[2] in more general terms, so as to take account of the various kinds of legal persons and forms of association under different legal systems.

17. In paragraph 1, the expression "shareholdings" had been deleted, for it was implicit in the case of an incorporated body, and would not apply in the case of other collective bodies. The Committee had also decided that there was no need to refer to "the determination of its rights and obligations" and that a general reference to "a proceeding relating to its participation"would suffice.

18. During the debate in the Drafting Committee, it had become clear that the nature of the collective bodies covered by the article varied considerably from one legal system to another. For instance, the legal entity termed an "unincorporated body" in English had no equivalent in French. In order to overcome the virtually insurmountable difficulties of transposing terms and concepts specific to a particular language and legal system, the Committee had sought to arrive at a more general form of wording and to find an expression that would command sufficiently broad acceptance to cover the various types of legal persons and forms of association under the various legal systems. The phrase that had been used in French was *dans une société ou un groupement ayant ou non la personnalité juridique,* which corresponded in the English text to the phrase "in a company or other collective body, whether incorporated or unincorporated". The possibility had been raised of substituting the expression *entité commerciale* for *groupement* in the French text.

19. Similar difficulties had arisen with regard to the designation of the parties to a legal proceeding, which again inevitably involved the different kinds of collective bodies. That was why the Committee had formulated the opening part of paragraph 1 in more concise terms, providing in English: "a proceeding concerning the relationship between the State and the body or the other participants therein", and in French: *une procédure ... concernant les rapports sociétaires.*

20. It was immediately apparent that the two language versions did not correspond literally. However, the Drafting Committee believed that, in legal and conceptual terms, they corresponded in substance. In an area of such complexity, where legal systems differed in terminology and in the kinds of legal persons to be taken into consideration, the aim should be to ensure that the language versions corresponded in meaning and intent rather than to seek a word-for-word or strictly literal rendering. However, the Committee was conscious of the pitfalls involved in reflecting certain legal concepts that varied or differed from one language and one legal system to another. Its attention had often been drawn to the difficulties to which that gave rise in Russian, Spanish, Chinese or Arabic, difficulties which, in the case of draft article 18, were particularly evident.

21. The Drafting Committee trusted that, on second reading, the differences in terminology would be re-examined in order to achieve greater harmony between the various language versions in both terminology and concepts, with due regard to the need to render the requisite meaning faithfully in each of the languages. However, one member of the Drafting Committee had not approved of the approach adopted and had taken the view that the various language versions should be much closer to one another and that significant differences in interpretation would undoubtedly arise if the language versions differed to the extent envisaged, which would remove any likelihood of a uniform or effective application of the article.

22. The wording of paragraph 1 (*a*) had been brought into line with the new terminology, the word "participants" being substituted for "members". Also, in accordance with a suggestion made at the 1838th meeting (para. 20), the words "or international organizations" had been added. The English text of paragraph 1 (*b*) was identical to that submitted by the Special Rapporteur, but in the French and Spanish texts the words *soit contrôlée à partir de cet Etat* and *sea controlada desde ese Estado* had been replaced by *ait le siège de sa direction... dans cet Etat* and *tenga la sede de su dirección ... en ese Estado*, respectively. That amendment had been introduced to reflect the desired meaning more accurately in those languages.

23. Paragraph 2 was the same in substance as the text originally proposed, with only one slight change at the end of the paragraph to take account of the new terminology used in paragraph 1. The commentary would indicate that the agreement in writing between the parties provided for in paragraph 2 could not run counter to the wishes of the States concerned in the event of an agreement between them, as provided for in the opening clause of paragraph 1. In that case, too, consideration would have to be given to the form and placement of the standard clause safeguarding the freedom of States to contract, which read: "Unless otherwise agreed between the States concerned". The title had been amended to take account of the rewording of the article.

24. Lastly, one member of the Drafting Committee had voiced opposition to the adoption of the draft article in its new version. In his view, apart from the dangers posed

[2] See footnote 1 above.

by the marked discrepancy between the various language versions, the new formulation referred to concepts that were specific to certain legal systems and were incomprehensible when removed from the context of those systems; as now set forth, the article did not provide for an effective rule of general application.

25. Mr. USHAKOV said that he was opposed to draft article 18 because of differences in substance, not terminology, between the English and French versions. In addition, the article contained several enigmas. For instance, to whom was it supposed to apply? It referred to participation "in a company or other collective body", but what was meant by "collective body"? Did it mean an international organization? The French version was even more complicated. The word *groupement* had a political connotation, but what it did it mean in law? Another enigma lay in the words *ayant ou non la personnalité juridique*. Under Soviet law, civil proceedings could be brought against an entity only if it had legal personality.

26. In reference to paragraph 1 (*a*), he would cite the case of UPU, whose members were States and Non-Self-Governing Territories. Accordingly, under the terms of article 18, UPU could be the subject of a civil action in any State whatsoever. But the question was, how could the article be applied?

27. The term *rapports sociétaires*, in paragraph 1, was a further source of complication, particularly since it was rendered in English by an expression far removed from it ("relationship between the State and the body or the other participants therein"). Furthermore, the first part of paragraph 1, when read in conjunction with subparagraph (*b*), was contrary to internal law and private international law, since the question of place of control or principal place of business depended on the activities of the company, and not on the *rapports sociétaires*.

28. In his view, such difficulties stemmed from the fact that, in its haste to adopt any text that would undermine the principle of the sovereign immunity of States, the Drafting Committee had spent only a few hours on those draft articles, whereas it had devoted several meetings to article 23 of the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier.

29. Sir Ian Sinclair said that, in substance, he endorsed draft article 18. He did not altogether concede Mr. Ushakov's point that it contained a series of enigmas. Admittedly, a problem arose as to how to express in general terms a concept that might not be found in all legal systems. The reason why the Drafting Committee had adopted the terms "collective body", in English, and *groupement*, in French, was that there simply was no other legal equivalent. Admittedly, the terminology was not ideal and the article would require close examination on second reading. In substance, however, it met a felt need to provide for a rule of immunity. Mr. Ushakov had also said that the article could cover bodies such as UPU. Surely, however, Mr. Ushakov was overlooking the phrase "Unless otherwise agreed between the States concerned"? If an agreement conferred immunity upon members of UPU, that agreement would apply to the exclusion of article 18. As to Mr. Ushakov's point regarding the distinction between "relationship" and *rapports sociétaires*, in his own view the two terms corresponded in substance.

30. Mr. BALANDA said that the word *groupement* ("collective body") was a sociological and political term rather than a legal one. He proposed that it should be replaced, in the title, by the expression *entité commerciale* ("commercial entity") and, in the body of the draft article, by *entité* ("entity"). However, he had no objection to the substance of the article.

31. Chief AKINJIDE said that, while he was not opposed to article 18 in principle, it posed a virtually insoluble problem. The problem stemmed from the fact that there were three sets of competing interests to be reconciled: those of States where the economy was privately controlled; those of States where it was State controlled; and those of developing countries where, in many respects, the economy was not controlled by the State. One problem, for instance, was that, under article 18, central banks would not enjoy immunity; it was those banks, however, rather than private banks, which, in developing and certain other countries, opened letters of credit. It was important for the Commission to be clear about what it was accepting—which, as far as commercial transactions were concerned, was in effect what was embodied in the relevant legislation of the United States of America and the United Kingdom of 1976 and 1978, respectively.

32. Mr. MAHIOU (Chairman of the Drafting Committee), speaking as a member of the Commission, said that he had no objection to the substance of article 18. In so far as a State engaged in commercial operations, it could expect to be sued or to have to sue in order to protect its interests. However, while the first criterion set forth in paragraph 1 (*b*) (incorporation of the company under the law of the State of the forum) was clear, the second (establishment of the place of control or of the principal place of business in that State) was much less so and might well give rise to difficulty. On that point, therefore, he reserved his position.

33. Since legal systems varied from country to country, the Drafting Committee had naturally had difficulty in finding equivalent terms. However, he supported Mr. Balanda's proposal that the word *groupement* should be replaced by *entité commerciale*, which had the merit of already having been used in other draft articles and of introducing an additional concept, at least in French.

34. Mr. LACLETA MUÑOZ said that he had some doubts about the terminology, but appreciated that the Commission would have an opportunity to reconsider the matter. However, the application of article 18 should not be confined solely to commercial entities: for instance, non-commercial entities that owned movable and immovable property should not be excluded from the draft articles.

35. The CHAIRMAN suggested that the Commission should adopt draft article 18 provisionally, on the under-

standing that the comments made regarding terminology would be referred to the Drafting Committee.

It was so agreed.

Article 18 was adopted.

36. Mr. FRANCIS said that he would like it to be reflected in the summary record of the meeting that, although he had not entered any reservation in regard to the provisional adoption of the draft articles on jurisdictional immunities of States and their property, he reserved the right to comment on them at an appropriate point in the future.

37. Mr. MAHIOU (Chairman of the Drafting Committee) expressed appreciation of the co-operation he had received from members of the Drafting Committee, even when additional meetings had proved necessary. He also thanked the members of the Secretariat who had assisted the Drafting Committee in its work.

38. The CHAIRMAN thanked the Chairman of the Drafting Committee for his report and all members of the Committee for their co-operation.

Co-operation with other bodies (*concluded*) *

[Agenda item 10]

Statement by the Observer for the Asian-African Legal Consultative Committee

39. The CHAIRMAN invited Mr. Nemoto, Observer for the Asian-African Legal Consultative Committee, to address the Commission.

40. Mr. NEMOTO (Observer for the Asian-African Legal Consultative Committee) said that the official relations between the Commission and the Asian-African Legal Consultative Committee had grown and strengthened over the period of more than two decades since they had first been established. It was gratifying to note the enormous progress the Commission had made in regard to certain items on its agenda, and in particular on two topics of special interest to the Asian-African region: jurisdictional immunities of States and their property and the law of the non-navigational uses of international watercourses.

41. With regard to State immunity, many Governments in the Asian-African region were deeply concerned about the recent legislation enacted in the United States of America and some other countries. At a meeting of legal advisers held at United Nations Headquarters in November 1983, the view had been expressed that the aim of the Commission should be to settle the law on the subject authoritatively, with a view to achieving a uniform approach in the application of State immunity. One of the recommendations made was that reciprocity should be the guiding principle and that the Commission might perhaps be requested to consider including a provision to that effect in the draft articles on jurisdictional immunities of States and their property.

42. The work of the Asian-African Legal Consultative Committee on the non-navigational uses of international watercourses had been suspended in 1973 following the Commission's decision to take up the subject. However, at its most recent session, in Tokyo, the Committee had decided to resume consideration of the topic in the light of the Commission's work. It was therefore gratified to note that the Special Rapporteur for the topic, Mr. Evensen, had submitted his second report (A/CN.4/381), containing a complete set of draft articles.

43. The meeting of legal advisers in November 1983 had also considered the Commission's report on its thirty-fifth session, submitted to the General Assembly. In their own report, the legal advisers had concluded that, rather than debate each and every topic dealt with in the Commission's report, it would be desirable for the Sixth Committee to concentrate on those issues on which a debate would provide the Commission with guidance regarding the approach to be adopted or would promote detailed consideration at the final stage of the Commission's work on a particular topic. They had also thought that it would be useful if the Commission, in its report, could give some indication of the topics that required discussion in the Sixth Committee.

44. Referring to the current programme of work of the Asian-African Legal Consultative Committee, he said that the law of the sea, and in particular the provisions of the 1982 United Nations Convention on the Law of the Sea, [3] remained a priority. The Committee was participating in the Preparatory Commission for the International Sea-Bed Authority and for the International Tribunal for the Law of the Sea, and had presented a paper at the second session of the Preparatory Commission, held in Kingston, Jamaica, in March 1983, on preparations for the exploration and exploitation of the reserved areas. It was also studying the question of delimitation of maritime zones under the United Nations Convention on the Law of the Sea, the legal framework for optimum utilization of the resources of the exclusive economic zone, and the rights and interests of land-locked States. It was likewise pursuing its consultations with various United Nations agencies concerning economic, scientific and technical co-operation in the use of the Indian Ocean.

45. The Committee's work on promotion and protection of investments was virtually finalized. It had taken up that topic, along with a number of other matters connected with economic co-operation, following a suggestion made at the Ministerial Meeting on Regional Co-operation in Industry held in Kuala Lumpur, Malaysia, in 1980. The Committee had also been closely involved in aspects of the legal work of UNCTAD and had been actively participating in UNCITRAL. In particular, it had jointly sponsored with UNCITRAL a seminar on commercial arbitration in March 1984 and was planning another joint seminar in November 1984 to consider, *inter alia*, a suitable framework for trading in South-East Asia and the Pacific. Two other seminars on international economic co-operation were planned.

* Resumed from the 1849th meeting.

[3] See *Official Records of the Third United Nations Conference on the Law of the Sea*, vol. XVII (United Nations publication, Sales No. E.84.V.3), document A/CONF.62/122.

46. The Committee's studies were continuing on such matters as the status and treatment of refugees, mutual co-operation in judicial assistance and the role of the ICJ in settling disputes. Another topic of considerable interest that would probably be taken up at the Committee's next session related to the concept of a peace zone in international law and to the framework of that zone.

47. In conclusion, he trusted that the Commission would participate at the Committee's next session, to be held in Kathmandu, Nepal, in February 1985.

48. The CHAIRMAN thanked the Observer for the Asian-African Legal Consultative Committee for his statement, and expressed the Commission's appreciation of the very fruitful relations which the two bodies had enjoyed for more than two decades. He asked the Observer to convey to the members of the Committee the Commission's earnest hope that those relations would be maintained.

Statement by the Observer for the Arab Commission for International Law

49. The CHAIRMAN welcomed Mr. Ennaifer, Observer for the Arab Commission for International Law, and invited him to address the Commission.

50. Mr. ENNAIFER (Observer for the Arab Commission for International Law), referring to the mutual co-operation and support existing between the Commission he represented and the International Law Commission, said that the co-operation between the two bodies was reflected in the annual participation by an observer for the Arab Commission for International Law in part of the work of the International Law Commission. In an effort to render such co-operation more effective and dynamic, the Council of Ministers of the League of Arab States, at its session in 1984, had once again invited the organs of the general secretariat of the League, as well as of the Arab Commission for International Law, to co-operate closely with the International Law Commission. The mutual support of the two bodies was evident from the fact that the Arab Commission was pursuing objectives similar to those of the International Law Commission, although at the regional level in the Arab world. He wished the International Law Commission every success in the performance of its tasks.

51. The CHAIRMAN thanked the Observer for the Arab Commission for International Law for his statement and expressed his best wishes for the success of that Commission in its endeavours to promote international law and the rule of law in international relations. It could rest assured of the readiness of the International Law Commission to continue the whole-hearted co-operation that had been established between the two bodies.

Draft report of the Commission on the work of its thirty-sixth session

52. The CHAIRMAN invited the Commission to consider its draft report, chapter by chapter, starting with chapter I.

CHAPTER I. ***Organization of the session*** (A/CN.4/L.370)

Chapter I of the draft report was adopted.

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

A. Introduction (A/CN.4/L.371)

Paragraphs 1 to 13

Paragraphs 1 to 13 were adopted.

Paragraph 14

53. Sir Ian SINCLAIR proposed that, in the second sentence of paragraph 14, the words "during the present, thirty-fifth, session" should be amended to read: "during its thirty-fifth session".

It was so agreed.

Paragraph 14, as amended, was adopted.

Paragraphs 15 and 16.

Paragraphs 15 and 16 were adopted.

Paragraph 17

54. Sir Ian SINCLAIR pointed out that a correction should be made to the English and French versions of the first sentence of paragraph 17. The reference in parentheses at the end of the sentence should read: "(see paragraph 15 above)", as correctly indicated in the Spanish version.

It was so agreed.

Paragraph 17, as amended, was adopted.

Paragraph 18

55. Sir Ian SINCLAIR pointed out that, in the first sentence, the words "at its thirty-fifth session" should be replaced by "on its thirty-fifth session". In the third sentence, the words "can be attributed" should be replaced by "could be attributed".

It was so agreed.

Paragraph 18, as amended, was adopted.

Paragraph 19

Paragraph 19 was adopted.

Section A, as amended, was adopted.

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

Paragraphs 20 to 22 (A/CN.4/L.371)

Paragraph 20

Paragraph 20 was adopted.

Paragraph 21

56. Mr. McCAFFREY suggested that, at the end of the penultimate sentence, the words "serious damages" should be amended to read "serious damage", the reference being to serious damage to the environment.

It was so agreed.

57. Mr. LACLETA MUÑOZ, referring to the remark made by Mr. McCaffrey, pointed out that the term used in the Spanish version was not *daños* but *atentados*, which was preferable.

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.