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Summary record of the 1933rd meeting

Topic:
Other topics

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number of applications received from that region. There was no link between that sentence and paragraph 30.

46. Mr. SUCHARITKUL said that the retention of paragraph 29 as it stood might encourage certain Asian countries to respond more favourably to the appeal made in paragraph 30.

47. Sir Ian SINCLAIR withdrew his suggestion.

Paragraph 29 was adopted.

Paragraph 30

48. The CHAIRMAN said that, in his statement to the Commission at its 1928th meeting, Mr. Gibrain, the Director of the International Law Seminar, had supplied figures to show that, unless there was an increase in voluntary contributions, the Seminar might not have sufficient funds for its 1986 session. Mr. Gibrain would be writing to Governments on that subject and he himself proposed to refer to it in his statement to the General Assembly.

49. Sir Ian SINCLAIR proposed the deletion, in the second sentence, of the words "at the very least in a symbolical manner".

It was so agreed.

Paragraph 30, as amended, was adopted.

Section G, as amended, was adopted.

The meeting rose at 1.20 p.m.

1933rd MEETING

Tuesday, 23 July 1985, at 10.05 a.m.

Chairman: Mr. Satya Pal JAGOTA

Present: Mr. Arangio-Ruiz, Mr. Balanda, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Illueca, Mr. Koroma, Mr. Malek, Mr. McCaffrey, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Thiam, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov

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

1. The CHAIRMAN stated that the adoption of a paragraph of the report would be taken to include that of any footnotes attached to it.

CHAPTER VIII [former chapter IX]. Other decisions and conclusions of the Commission (concluded) (A/CN.4/L.394 and Add.1-3)

B [former A]. Programme and methods of work of the Commission (concluded) (A/CN.4/L.394 and Add.2)

Paragraphs 1 to 4 (A/CN.4/L.394)

Paragraphs 1 to 4 were adopted.

Paragraphs 5 to 13 (A/CN.4/L.394/Add.2)

Paragraphs 5 to 13 were adopted.

Section B was adopted.

C [former B]. Co-operation with other bodies (concluded) (A/CN.4/L.394 and Add.3)

C.1. Arab Commission for International Law (A/CN.4/L.394/Add.3)

Paragraphs 1 and 2

Paragraphs 1 and 2 were adopted.

Section C was adopted.

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

CHAPTER II. Draft Code of Offences against the Peace and Security of Mankind (A/CN.4/L.387 and Add.1)

A. Introduction (A/CN.4/L.387)

Paragraphs 1 to 9

Paragraphs 1 to 9 were adopted.

Paragraph 10

2. Mr. FLITAN (Rapporteur of the Commission) explained that paragraphs 1 to 19 of chapter II of the draft report were almost identical with paragraphs 10 to 28 of the Commission's report on its thirty-sixth session.¹ The same was true of the footnotes, except that, in footnote 17 to paragraph 10 of chapter II of the draft report under consideration, "July 1984" should be replaced by "July 1985".

3. Mr. THIAM (Special Rapporteur) said that the French text of footnote 17 should be brought into line with the English by replacing the words *n'avait pas repris* by *n'a pas repris*.

Paragraph 10, as amended, was adopted.

Paragraphs 11 to 17

Paragraphs 11 to 17 were adopted.

Paragraph 18

4. Sir Ian SINCLAIR proposed that the word "international" should be inserted before the words "criminal jurisdiction" in the first part of the penultimate sentence.

5. Mr. THIAM (Special Rapporteur) explained that the adjective "international" had been omitted because the competent court would not necessarily be international in character. It was therefore desirable not to confine the reference to an international court. He urged that the text should be retained as it stood.

6. Mr. RIPHAGEN pointed out that the penultimate sentence reflected the views of a number of members who had stressed the need for an international criminal jurisdiction.

7. The CHAIRMAN recalled that paragraph 18 described a discussion that had taken place at the thirty-fifth session, in 1983, and reproduced the language used in that regard in paragraph 27 of the

¹ Yearbook ... 1984, vol. II (Part Two), pp. 7 et seq.

Commission's report on its thirty-sixth session.² It was therefore inadvisable to depart from that language.

8. Mr. CALERO RODRIGUES said that he was one of the members referred to in the penultimate sentence. The position in 1983, as he recalled it, had been that the members in question formed two groups, the first believing that a code unaccompanied by penalties and an international criminal jurisdiction would be ineffective, and the second considering that, while a competent jurisdiction was necessary for that purpose, it need not be international in character. In the view of the latter group, it was enough that the code should indicate the competent national jurisdiction. He accordingly agreed with the Special Rapporteur that the sentence should be kept as it stood, so as to convey the views of both groups.

Paragraph 18 was adopted.

Paragraph 19

Paragraph 19 was adopted.

Paragraph 20

9. Mr. MALEK proposed the deletion, in the second sentence, of the words "in plenary".

It was so agreed.

Paragraph 20, as amended, was adopted.

Paragraphs 21 to 23

Paragraphs 21 to 23 were adopted.

Section A, as amended, was adopted.

B. Consideration of the topic at the present session (A/CN.4/L.387 and Add.1)

Paragraphs 24 to 32 (A/CN.4/L.387)

Paragraphs 24 to 31

Paragraphs 24 to 31 were adopted.

Paragraph 32

10. Mr. TOMUSCHAT proposed the deletion of paragraph 32, which was misleading. The paragraphs that followed contained the views of the Special Rapporteur, as well as the conclusions reached by the Commission itself, and not merely the latter as paragraph 32 suggested.

11. After an exchange of views in which Mr. THIAM, Mr. CALERO RODRIGUES, the CHAIRMAN (speaking as a member of the Commission), Mr. ARANGIO-RUIZ, Mr. McCAFFREY and Mr. FRANCIS took part, Mr. YANKOV proposed that the text of paragraph 32 should be amended to read:

"32. The following paragraphs reflect in a more detailed manner aspects of the work on the topic by the Commission at its present session."

It was so agreed.

Paragraph 32, as amended, was adopted.

Paragraphs 33 to 43 (A/CN.4/L.387/Add.1)

Paragraph 33

12. Mr. DÍAZ GONZÁLEZ recalled that, during the Commission's consideration of the draft articles on State responsibility and the draft Code of Offences against the Peace and Security of Mankind, the Spanish-speaking members of the Commission had emphasized the need to make a distinction, in the Spanish texts, between the words *delito* (offence) and *crimen* (crime). Every *crimen* was a *delito*, but not every *delito* was a *crimen*. The members in question had stated repeatedly, particularly in regard to article 19 of part I of the draft articles on State responsibility,³ that an offence was deemed to be an international crime if it was sufficiently serious to be classified as such. It was imperative to make that distinction, as the Rapporteur himself had done, in the Spanish text.

13. The CHAIRMAN suggested that the Commission should adopt paragraph 33 on the understanding that the Secretariat would ensure that due account was taken in all the language versions of the report of the distinction between an "offence" and a "crime".

Paragraph 33 was adopted on that understanding.

Paragraph 34

Paragraph 34 was adopted.

Paragraph 35

14. Mr. MALEK pointed out that the "general principles" formulated by the Commission at its second session, in 1950, were in fact the "principles of international law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal".⁴ He proposed that that fact should be made clear by the inclusion of a footnote in paragraph 35 referring to the Commission's report on its second session.

It was so agreed.

15. Sir Ian SINCLAIR proposed the insertion of the words "in the context of its work on the Nürnberg Principles" after the words "general principles formulated by the Commission at its second session, in 1950".

It was so agreed.

Paragraph 35, as amended, was adopted.

Paragraph 36

16. Sir Ian SINCLAIR proposed that paragraph 36 should be reworded to read:

"Following the Commission's further discussion of that question, in which a number of members stressed the importance of formulating general principles in parallel with the list of offences, the Special Rapporteur once again pointed out that the principles which had already been formulated by the Commission would be supplemented, as appropriate, in the light of developments in international law."

³ *Yearbook ... 1980*, vol. II (Part Two), p. 32.

⁴ *Yearbook ... 1950*, vol. II, pp. 374-378, document A/1316, paras. 95-127.

² *Ibid.*, p. 10.

Paragraphs 37 to 41

17. Mr. CALERO RODRIGUES, referring to paragraph 37, noted that the penultimate sentence, and in particular the phrase "a non-temporal element that has not been formulated", was not clear, although there was no difficulty with the French text.

18. Mr. USHAKOV said that, in the penultimate sentence of paragraph 37, the words "*jus cogens* also brings in a non-temporal element that has not been formulated" meant that the preemptory rules of law were retroactive. He could accept that as the Special Rapporteur's personal opinion, but not as the view of the Commission.

19. Sir Ian SINCLAIR, supported by Mr. McCAF-FREY, proposed that the words "In his view" should be inserted at the beginning of the first sentence of paragraph 37, to make it clear that the views expressed did not reflect those of the whole Commission.

20. He fully agreed with Mr. Calero Rodrigues regarding the penultimate sentence of the paragraph.

21. Mr. THIAM (Special Rapporteur) said that he would gladly agree to Sir Ian Sinclair's suggestion that the words "In his view" should be inserted, since the opinions expressed were his own, although they had sometimes been shared by other members of the Commission.

22. By the expression "element that has not been formulated", he meant an element that was not expressed in any explicit manner.

23. Sir Ian SINCLAIR proposed that the penultimate sentence of paragraph 37 should be amended to read: "All that can be said is that there is no *lex* in international law to which the principle *nullum crimen sine lege* might be applicable, and that *jus cogens* also brings in a non-temporal and uncodified element."

24. Mr. TOMUSCHAT, supported by Mr. McCAFFREY, proposed that, to make it quite clear that the views stated in paragraphs 37 to 40 were those of the Special Rapporteur, the past tense should be used instead of the present.

25. Mr. MALEK said that, if he had understood the Special Rapporteur correctly, the second sentence of paragraph 37 was concerned not only with the principle *nullum crimen sine lege*, but also with the principle *nulla poena sine lege*, in other words with the two aspects of the principle of the non-retroactivity of criminal law in general. He therefore proposed that the sentence should be reworded to read: "Consideration also had to be given to the scope of the principle of the non-retroactivity of criminal law in its dual aspect, *nullum crimen sine lege*, *nulla poena sine lege*."

26. Mr. ILLUECA, supporting Sir Ian Sinclair's proposal, said that it should be made clear, where appropriate, that the opinions expressed were those of the Special Rapporteur.

27. Mr. USHAKOV said that he could not agree with the way in which the Special Rapporteur had

presented his conclusions and opinions as emanating from the Commission, not only in paragraph 37, but also in paragraphs 38, 39, 40 *et seq.* The paragraphs in question should be amended to make it quite clear by whom the conclusions had been reached.

28. Mr. THIAM (Special Rapporteur) said that he accepted full responsibility for the opinions he had expressed, which were his own. In cases where the opinions expressed were not those of the Commission, the Secretariat could easily add the words "in the view of the Special Rapporteur".

29. Mr. DÍAZ GONZÁLEZ said that, if the words "in the view of the Special Rapporteur" were added as and where appropriate, the situation would be quite clear.

30. Provided that paragraph 37 was retained as drafted, he could agree with Mr. Malek that, if the Commission had to discuss the non-applicability of statutory limitations to offences against the peace and security of mankind, it should start by considering the principles *nullum crimen sine lege* and *nulla poena sine lege*.

31. Moreover, he found the statement in the first part of the second sentence of paragraph 37 somewhat strange. The principle *nullum crimen sine lege*, *nulla poena sine lege* was accepted by virtually all States and formed the basis of the criminal codes of many countries, including his own. The fact that the victorious Allied Powers had disregarded it at the Nürnberg trial did not mean that the remaining States by which it had been applied had abandoned it. As the Special Rapporteur had said, a far more detailed discussion by the Commission would be required to ascertain whether it should follow the decision of the Allied Powers or whether it should continue to uphold that principle.

32. Sir Ian SINCLAIR said that he could not accept the second sentence of paragraph 40, which, as drafted, purported to state a conclusion by the Commission. He therefore proposed that the words "in the view of the Special Rapporteur" should be added in the first sentence, between the words "show that" and "criminal acts", and that the second sentence should be deleted.

33. Mr. YANKOV said that, while he had no objection to the reflection of the views of the Special Rapporteur, he considered that it was necessary also to reflect members' views if an objective picture of the debate in the Commission was to be given.

34. The CHAIRMAN said that the report should not reflect only the views of the Special Rapporteur, particularly since a broad understanding on the matter had been reached in the Commission.

35. Mr. THIAM (Special Rapporteur) said that he had no objection to the insertion of such words as "in the view of the Special Rapporteur" whenever the Commission deemed it necessary in order to make it clear that the view expressed was that of the Special Rapporteur and not that of the Commission.

36. With regard to Mr. Yankov's observation, he said that he could not repeat the views voiced by members of the Commission each year. In that connection, he would refer the Commission to para-

graph 35 of chapter II of the draft report, which stated clearly that the Special Rapporteur had referred to the conclusions of the Commission as reflected in paragraph 33 of its report on its thirty-sixth session.⁵ However, if the Commission so wished, he was prepared to add a paragraph stating, once again, that some members of the Commission had been in favour of the immediate consideration of general principles, whereas others had been opposed thereto.

37. The CHAIRMAN suggested that a decision on paragraphs 37 to 41 should be deferred pending the redrafting of the text, which could be referred back to the Commission for adoption.

It was so agreed.

Paragraph 42

Paragraph 42 was adopted.

Paragraph 43

38. Mr. BALANDA, referring to the first sentence, proposed the deletion of the word "possibility", which would prejudice the issue. It was now recognized that the Commission had confined itself to considering the criminal responsibility of individuals without prejudice to the subsequent consideration of the criminal responsibility of States, which it could not avoid.

39. Mr. THIAM (Special Rapporteur) said that, while he was not opposed to that proposed amendment, he would point out that the word "possible" appeared in the conclusions adopted by the Commission on the draft Code of Offences against the Peace and Security of Mankind at its thirty-sixth session.⁶

40. Sir Ian SINCLAIR agreed with the view expressed by the Special Rapporteur. It was his understanding that the Commission wished to leave the matter open for the time being.

41. Mr. BALANDA said that he would not insist on the deletion of the word "possibility", although he did not agree with it.

Paragraph 43 was adopted.

42. Mr. ARANGIO-RUIZ, referring to a statement he had made at the 1887th meeting regarding the régime in his country at a certain point in its history, proposed that a new paragraph should be added to chapter II of the draft report, reading:

"One member of the Commission said that it was necessary to introduce into the code the express and specific condemnation, as a crime against humanity, of any act aimed—with or without external support—at subjecting a people to a régime not in conformity with the principle of self-determination and depriving that people of human rights and fundamental freedoms."

The meeting rose at 1.10 p.m.

⁵ Yearbook ... 1984, vol. II (Part Two), p. 11.

⁶ Ibid., p. 17, para. 65 (a).

1934th MEETING

Wednesday, 24 July 1985, at 10.05 a.m.

Chairman: Mr. Satya Pal JAGOTA

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

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

CHAPTER II. *Draft Code of Offences against the Peace and Security of Mankind* (continued) (A/CN.4/L.387 and Add.1)

B. *Consideration of the topic at the present session* (continued) (A/CN.4/L.387 and Add.1)

Paragraphs 43 *bis* to 88 (A/CN.4/L.387/Add.1)

Paragraph 43 *bis*

1. Sir Ian SINCLAIR proposed that, to bring the English text into line with the French, the words "could be achieved only" should be replaced by "could not be achieved".

It was so agreed.

2. Mr. McCAFFREY proposed that the word "liability" should be replaced by "responsibility", and that the same change should be made throughout the text wherever the reference was in effect to criminal responsibility.

It was so agreed.

Paragraph 43 bis, as amended, was adopted.

Paragraph 44

3. Mr. USHAKOV, referring to the second sentence, remarked that individuals could in themselves sometimes constitute organs, but certainly not authorities. He therefore proposed that the words "authorities of a State" should be replaced by "agents of a State".

4. Mr. BALANDA said that, while he understood Mr. Ushakov's concern, the latter's proposal would narrow the text considerably, in French at any rate. A prime minister or head of State, for example, was not an agent of the State but one of the authorities of the State, and the term "agents of the State" referred more to government officials. If, however, Mr. Ushakov's proposal were accepted, he would like it to be made clear in the commentary that "agents of a State" should be taken to mean the authorities of the State as well.

5. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt Mr. Ushakov's proposed amendment to the second sentence of paragraph 44.