

Document:-
A/CN.4/SR.1934

Summary record of the 1934th meeting

Topic:
Other topics

Extract from the Yearbook of the International Law Commission:-
1985, vol. I

*Downloaded from the web site of the International Law Commission
(<http://www.un.org/law/ilc/index.htm>)*

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.

It was so agreed.

Paragraph 44, as amended, was adopted.

Paragraph 45

Paragraph 45 was adopted.

Paragraph 46

6. Mr. TOMUSCHAT proposed that the words "writers and" should be deleted from the second and third sentences and that, as a consequential amendment, the footnote reference thereto should also be deleted. He also proposed that the paragraph should be couched in the past tense.

It was so agreed.

Paragraph 46, as amended, was adopted.

Paragraph 47

7. Mr. McCAFFREY proposed the addition, after the word "genocide", in the second sentence, of the words "and terrorist acts, for example".

It was so agreed.

8. Sir Ian SINCLAIR proposed that the words "some private multinational corporations", in the last sentence, should be replaced by "some private criminal organizations operating transnationally", to cover organizations such as the Mafia.

9. Chief AKINJIDE said that, while he had no objection to Sir Ian Sinclair's proposal, he would prefer to retain the original text, which accurately reflected what had transpired during the debate in the Commission.

10. Following an exchange of views in which Mr. ARANGIO-RUIZ, Mr. BALANDA, Mr. CALERO RODRIGUES, Mr. DÍAZ GONZÁLEZ, Sir Ian SINCLAIR, Mr. THIAM (Special Rapporteur) and Mr. TOMUSCHAT took part, the CHAIRMAN suggested that the last sentence should be reworded to read: "It was also stated that some private multinational corporations and criminal organizations had sufficient means to endanger the stability not only of small States, but of the great Powers as well."

It was so agreed.

Paragraph 47, as amended, was adopted.

Paragraphs 48 to 51

Paragraphs 48 to 51 were adopted.

Paragraph 52

11. Mr. CALERO RODRIGUES proposed that, to bring the English text into line with the French, the words "The majority of", at the beginning of the first sentence, should be replaced by "A large majority of".

It was so agreed.

12. Mr. YANKOV said that the second sentence, as it stood, could give the erroneous impression that the crimes and offences referred to were exhaustive.

13. Following a brief exchange of views in which Sir Ian SINCLAIR, Mr. SUCHARITKUL and Mr. THIAM (Special Rapporteur) took part, the CHAIRMAN suggested that the second sentence of paragraph 52 should be reworded to read:

"Just as the word 'crime' in internal law referred to such different acts as arson, armed robbery, murder, assassination, etc., the term 'offence against the peace and security of mankind' referred, despite its unity, to such different acts as aggression, terrorism, genocide, etc."

It was so agreed.

Paragraph 52, as amended, was adopted.

Paragraph 53

Paragraph 53 was adopted.

Paragraph 54

14. Sir Ian SINCLAIR proposed that the words "as opposed to lesser offences" should be added at the end of the second sentence.

It was so agreed.

Paragraph 54, as amended, was adopted.

Paragraph 55

Paragraph 55 was adopted.

Paragraph 56

15. Sir Ian SINCLAIR proposed that the words "which is a breach of an obligation", in the penultimate sentence, should be replaced by "which is the obligation breached".

It was so agreed.

Paragraph 56, as amended, was adopted.

Paragraph 57

16. Mr. McCAFFREY proposed that the words "Such interests are", at the beginning of the second sentence, should be replaced by "Such interests were", to indicate that the view expressed was that of the Special Rapporteur.

It was so agreed.

Paragraph 57, as amended, was adopted.

Paragraphs 58 to 63

Paragraphs 58 to 63 were adopted.

Paragraph 64

17. Mr. DÍAZ GONZÁLEZ, referring to the Spanish text, said that the last sentence was meaningless since no distinction was made between *delito* and *crimen*, as in article 19 of part 1 of the draft articles on State responsibility.¹

Paragraph 64 was adopted.

Paragraph 65

18. Mr. ARANGIO-RUIZ proposed that the first part of the second sentence should be amended to read: "These are acts seriously affecting the relations between States ...".

It was so agreed.

¹ See 1933rd meeting, footnote 3.

19. Mr. REUTER proposed that, to avoid undue repetition, the end of the same sentence after the word “stability”, should be reworded to read: “which thereby constitute an offence against international peace and security”.

It was so agreed.

Paragraph 65, as amended, was adopted.

Paragraph 66

20. Mr. CALERO RODRIGUES said that he was not certain about the third sentence, since, in international law, humanitarian law had a very special meaning.

21. Following an exchange of views in which Chief AKINJIDE, Mr. ARANGIO-RUIZ, Mr. KOROMA, Mr. REUTER, Sir Ian SINCLAIR and Mr. THIAM (Special Rapporteur) took part, the CHAIRMAN suggested that it should be left to the translation services to arrive at a form of wording that would avoid any connotation of humanitarian law but would reflect the idea of humanism or of an international law that was increasingly humane.

Paragraph 66 was adopted on that understanding.

New paragraph 66 bis

22. Mr. ARANGIO-RUIZ recalled that, at the 1933rd meeting, he had proposed the addition of a new paragraph in chapter II of the draft report. That paragraph, which Sir Ian Sinclair had suggested should become paragraph 66 bis, read:

“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 at depriving that people of human rights and fundamental freedoms.”

23. Mr. KOROMA, supported by Chief AKINJIDE and Mr. FRANCIS, proposed that the opening words of the text proposed by Mr. Arangio-Ruiz should be replaced by: “The view was expressed that it was necessary ...”.

It was so agreed.

24. Mr. RAZAFINDRALAMBO said that the draft report was supposed to reflect views expressed in the Commission and that the position of Mr. Arangio-Ruiz had apparently not had the support of several members.

25. Mr. THIAM (Special Rapporteur) said that Mr. Arangio-Ruiz had indeed raised the matter (1887th meeting), and had referred to events that had occurred, mainly in Italy, during the Second World War. Since there had been no discussion, it would be more accurate to say “One member of the Commission ...”. While the matter would undoubtedly be raised in the course of the Commission’s consideration of the topic, it was as yet too soon to take a position on the substantive issue whether human rights violations inside a country amounted to offences against the peace and security of mankind.

26. Mr. ARANGIO-RUIZ said that the events to which he had referred had affected not only Italy and the Italian people, but all mankind. The Second World War would probably have taken a different turn and would probably have been shorter had certain people not seized power in Italy by force and against the will of the Italian people. An important issue was involved, not just an internal matter.

New paragraph 66 bis, as amended, was adopted

Paragraphs 67 to 73

Paragraphs 67 to 73 were adopted.

Paragraph 74

27. Mr. TOMUSCHAT proposed that the fourth sentence, which was in the present tense, be reformulated in the past tense.

It was so agreed.

Paragraph 74, as amended, was adopted.

Paragraphs 75 to 77

28. Mr. CALERO RODRIGUES, supported by Sir Ian SINCLAIR, proposed that the term “interference”, in the title of the section and throughout the text of paragraphs 75 to 77, be amended to read “intervention”, in conformity with the terminology used in the 1954 draft code itself.²

It was so agreed.

29. Mr. CALERO RODRIGUES noted that, while paragraph 77 attempted to summarize the views of some members on the subject of intervention, his own view was not adequately reflected. Accordingly, he proposed the insertion of an additional passage as follows:

“It was also said that intervention in the affairs of another State was necessarily translated objectively into certain specific acts, such as fomenting internal troubles or exerting political or economic pressure. It would be wise for the Commission not to inscribe ‘intervention’ as such as an offence in the code, but to break down the concept and list instead, as offences, specific acts which constituted intervention.”

That wording had been taken from the relevant passages of the summary record of the 1880th meeting (paras. 37-38).

30. Mr. TOMUSCHAT proposed the insertion of a suitable passage to reflect his own views on the same issue.

31. After an exchange of views in which Mr. THIAM (Special Rapporteur), Mr. TOMUSCHAT and Mr. McCAFFREY took part, Mr. YANKOV proposed that two amendments be made to paragraph 77. First, the passage proposed by Mr. Calero Rodrigues should be inserted and, secondly, in order to take account of Mr. Tomuschat’s point, the following sentence should be added:

² Reproduced in *Yearbook ... 1984*, vol. II (Part Two), p. 8, para. 17.

"In addition, it was pointed out that acts of intervention did not have the character of seriousness which was the distinctive feature of offences against the peace and security of mankind."

It was so agreed.

Paragraphs 75 to 77, as amended, were adopted.

Paragraphs 78 and 79

Paragraphs 78 and 79 were adopted.

Paragraph 80

32. Mr. OGISO said that the second sentence of paragraph 80 appeared to reflect his views. He accordingly proposed that the word "solely", after the words "should relate", be replaced by "rather".

It was so agreed.

33. Sir Ian SINCLAIR proposed the addition of a third sentence, as follows: "Other members again expressed doubts about the relevance in present-day circumstances of the provision of the 1954 draft code."

It was so agreed.

Paragraph 80, as amended, was adopted.

Paragraph 81

Paragraph 81 was adopted.

Paragraph 82

34. Mr. THIAM (Special Rapporteur) said that the words "for all practical purposes was a matter of history", at the end of the second sentence, should be replaced by "which was now only of historical interest".

Paragraph 82, as amended, was adopted.

Paragraph 83

35. Mr. DÍAZ GONZÁLEZ, referring to the first sentence, said that the case of Namibia was not the only one that had been mentioned. He therefore proposed that the sentence should be reworded to read: "Other members, however, expressed the view that the case of Namibia and the various cases of colonialism persisting in all continents were sufficient proof that the question was a topical one."

It was so agreed.

36. Sir Ian SINCLAIR proposed that, in the second sentence, the word "absolutely" be replaced by "very", to conform with the French text.

It was so agreed.

37. Mr. TOMUSCHAT said that the language of paragraph 83 was too narrow. It was essential to cover not only colonialism, but also the forcible denial or deprivation of the right to self-determination. He accordingly proposed that the semi-colon appearing after the word "broadly", in the second sentence, should be replaced by a full stop, and should be followed by a third sentence beginning: "The view was also expressed that it was appropriate ...".

38. Mr. DÍAZ GONZÁLEZ said that that formulation would give the impression that colonialism was only a question of the self-determination of peoples. Some instances of colonialism had come about because States had been severed from territories annexed by other States as colonial territories. Colonial peoples acquired independence through the process of self-determination, but for colonial territories to do so they had to be returned to the States from which they had been severed.

39. The CHAIRMAN said that it would be taken that the notion of colonial domination was to be construed broadly. If there were no objections, he would take it that the Commission agreed to adopt the proposal made by Mr. Tomuschat.

It was so agreed.

Paragraph 83, as amended, was adopted.

Paragraph 84

40. Mr. CALERO RODRIGUES said that the last part of the second sentence of paragraph 84 gave the impression that the Commission had taken a decision on the question of including a provision on mercenarism in the draft code, whereas in fact the Commission had not considered the question. The report should reflect that situation accurately.

41. After an exchange of views in which Sir Ian SINCLAIR, Mr. McCAFFREY, Mr. BALANDA, Mr. OGISO and Mr. USHAKOV took part, Mr. THIAM (Special Rapporteur) said that the words "the Commission" should be replaced by "several members".

Paragraph 84, as amended, was adopted.

Paragraph 85

42. Mr. DÍAZ GONZÁLEZ said that paragraph 85 failed to reflect the point of view of those members who did not agree that measures of an economic nature taken by a State could be forcible ones, in which case they became part of aggression as defined by the General Assembly in 1974.³ He therefore suggested that reference should be made to the fact that it had also been stated that economic measures, in addition to having a psychological impact, could constitute actual aggression which could threaten the stability of a Government and the lives and well-being of the people of a country.

43. Mr. McCAFFREY said that the Special Rapporteur had endeavoured, in paragraph 85, to give a concise account of the different views expressed during the discussion. Any member could, of course, ask for his views to be reflected in the report, although at the risk of its assuming voluminous proportions. However, the last sentence of the paragraph apparently met the concern of Mr. Díaz González, since it followed that the acts to which he had referred were identifiable with the offences covered by the code and, in particular, with intervention and aggression.

³ General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

44. Mr. DÍAZ GONZÁLEZ said that paragraph 85 as worded reflected the views both of members who considered that there was no point in including economic aggression in the draft code, since it came under aggression as defined by the General Assembly, and of members who considered that economic aggression was covered by the various offences provided for under the code. His own view was that economic aggression should figure in the code as an offence against the peace and security of mankind—a view shared by other members of the Commission.

45. Mr. McCAFFREY suggested that a decision on paragraph 85 should be deferred to enable him to give some thought to whether it was necessary to have his views reflected.

It was so agreed.

Paragraphs 86 and 87

Paragraphs 86 and 87 were adopted.

Paragraph 88

46. Sir Ian SINCLAIR said that the wording of paragraph 88 depended on the final content of paragraphs 37 to 41, which had not yet been adopted. Consideration of paragraph 88 should therefore be postponed.

It was so agreed.

47. Mr. LACLETA MUÑOZ said that, having been unable to attend the discussion on the draft report until the present stage, he wished to voice serious doubts regarding the use, in Spanish, of the word *delito* instead of *crimen* both in paragraph 88 and in the body of the report. For reasons both of logic and of consistency with other draft articles, offences against the peace and security of mankind should be classified as *crimenes*. It should be remembered that the wording in question had been agreed by the General Assembly at a time when the Commission had still not made any distinction in its work on State responsibility between crimes and offences, and that the grounds on which that wording had been based were no longer valid.

The meeting rose at 1.15 p.m.

1935th MEETING

Wednesday, 24 July 1985, at 3.05 p.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* (*concluded*) (A/CN.4/L.387 and Add.1)

1. The CHAIRMAN invited the Commission to consider the paragraphs of section B still outstanding.

Paragraphs 36 to 41, 85 and 88 (A/CN.4/L.387/Add.1).

Paragraph 36 (*concluded*)*

2. The CHAIRMAN invited the Commission to consider the revised text of paragraph 36, which read:

“36. 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. Mr. USHAKOV proposed the insertion of “in 1950” between the words “Commission” and “would be supplemented”, near the end of the paragraph.

It was so agreed.

Paragraph 36, as amended, was adopted.

Paragraphs 37 and 38 (*concluded*)*

4. The CHAIRMAN invited the Commission to consider the revised text of paragraph 37 and the text of paragraph 38, which read:

“37. The new rules that had emerged concerned, in the view of the Special Rapporteur, the non-applicability of statutory limitations to offences against the peace and security of mankind, the scope of the principles *nullum crimen sine lege* and non-retroactivity, and the applicability of *jus cogens* with its non-temporal element.

“38. Again, once a criminal act had been defined and characterized, the responsibility of its perpetrator and the extent of that responsibility brought into play a number of moral and subjective elements, such as intention, degree of awareness and motive, which did not necessarily form part of every offence, but only of some.”

Paragraph 37, as amended, and paragraph 38 were adopted.

Paragraph 39 (*concluded*)*

5. The CHAIRMAN invited the Commission to consider paragraph 39 in the following form:

“39. Concepts such as complicity, the involvement of all the participants and the types of participation that might be punishable also called for

* Resumed from the 1933rd meeting.