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**A/CN.4/SR.1986**

**Summary record of the 1986th meeting**

Topic:  
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the French text by stating: "Different views were expressed in the Commission on the inclusion ..."

*It was so agreed.*

*Paragraph 28, as amended, was adopted.*

Paragraph 29

*Paragraph 29 was adopted.*

Paragraph 30

68. Sir Ian SINCLAIR said that the initial phrase of the English text should read "The comments made in the Commission", in keeping with the original French text.

*It was so agreed.*

*Paragraph 30, as amended, was adopted.*

Paragraphs 31 to 33

*Paragraphs 31 to 33 were adopted.*

Paragraph 34

69. Mr. McCAFFREY said that it was incorrect to use the present tense in the last phrase, for it gave the mistaken impression that the passage in question expressed the views of the Commission itself. The past tense was required.

70. Mr. JACOVIDES proposed that the passage should be reworded as follows: "According to the latter members, drug trafficking was of course an international crime, but it was not, for all that, an offence against the peace and security of mankind."

71. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt paragraph 34 with the amendment proposed by Mr. Jacovides.

*It was so agreed.*

*Paragraph 34, as amended, was adopted.*

Paragraph 34 bis

72. Mr. ARANGIO-RUIZ drew attention to the opening words of paragraph 34 bis, "One member of the Commission indicated". He was the member in question, but for the purposes of the record he would point out that at least two other members had shared his view.

73. Mr. KOROMA proposed that the sentence should begin with the words "Some members of the Commission".

*It was so agreed.*

74. Mr. DÍAZ GONZÁLEZ said that, in the Spanish text, the expression *libre disposición* should be replaced by *libre determinación*.

*It was so agreed.*

*Paragraph 34 bis, as amended, was adopted.*

New paragraph 34 ter

75. Mr. BALANDA proposed the inclusion of a paragraph 34 ter stating: "Some members proposed the

inclusion in the draft code of trafficking in children and women, and slavery."

*New paragraph 34 ter was adopted.*

*The meeting rose at 1.05 p.m.*

## 1986th MEETING

*Wednesday, 9 July 1986, at 3.15 p.m.*

*Chairman: Mr. Alexander YANKOV*

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

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

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

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

Paragraphs 35 to 64 (A/CN.4/L.406)

Paragraph 35

*Paragraph 35 was adopted with minor drafting changes.*

Paragraph 36

1. Sir Ian SINCLAIR proposed that, in the second sentence, the words "war is no longer a right, but a wrongful act" should be replaced by the words "war is no longer lawful".

2. Mr. JACOVIDES supported that proposal.

3. Mr. RIPHAGEN also supported the proposal and himself proposed that, in the same sentence, the words "Except in very limited cases, such as self-defence or the maintenance of peace" should be deleted.

4. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt those amendments.

*It was so agreed.*

*Paragraph 36, as amended, was adopted with minor drafting changes.*

Paragraph 37

5. Mr. KOROMA proposed the insertion, before the last sentence, of a new sentence reading: "Furthermore,

they pointed out that not all the laws and customs of war had been codified.”

*It was so agreed.*

*Paragraph 37, as amended, was adopted.*

Paragraph 38

6. Mr. KOROMA pointed out that the words “and included collective action and peace-keeping operations” implied that such operations constituted cases of “armed conflict”, but that was a doubtful proposition.

7. Sir Ian SINCLAIR proposed that those words should be deleted; the examples given were not strictly necessary.

*It was so agreed.*

*Paragraph 38, as amended, was adopted.*

Paragraph 39

8. Mr. THIAM (Special Rapporteur) said that the second sentence should be deleted, since the draft code now included such a provision.

*Paragraph 39, as amended, was adopted.*

Paragraph 40

9. Mr. THIAM (Special Rapporteur) said that, in the last sentence, the words “concurrent offences were, moreover, not exclusive to the topic” should be replaced by “concurrent offences were, moreover, not a phenomenon characteristic only of the topic”.

*Paragraph 40, as amended, was adopted subject to a correction in the Spanish text.*

Paragraph 41

*Paragraph 41 was adopted.*

Paragraphs 42 to 44

*Paragraphs 42 to 44 were adopted with some drafting changes.*

Paragraphs 45

10. Mr. THIAM (Special Rapporteur) said that, in the penultimate sentence, the words “and the circumstances of each particular case” should be replaced by “and the question of the very existence of self-defence in the circumstances of each particular case”.

*It was so agreed.*

11. Mr. KOROMA proposed that, in the second sentence, the words “the use of nuclear weapons had to be condemned” should be replaced by “the use of nuclear weapons had to be outlawed”.

12. Mr. MAHIU said that he preferred the original wording, since a convention would be necessary to outlaw the use of such weapons.

13. Mr. McCAFFREY agreed with that view.

14. Mr. THIAM (Special Rapporteur) pointed out that, if the word “condemned” were replaced by “outlawed”, the whole sentence would probably have to be changed.

15. Mr. KOROMA said that many jurists and writers held that the outlawing of nuclear weapons stemmed from the provisions of the 1907 Hague Convention. No specific convention was needed for the purpose.

16. Mr. USHAKOV said that it would be more appropriate to refer to the prohibition of nuclear weapons. He proposed that the word “condemned” should be replaced by the word “banned”.

*It was so agreed.*

*Paragraph 45, as amended, was adopted.*

Paragraph 46

17. Mr. JACOVIDES proposed that the words “might prevent the draft from being adopted” should be replaced by “might be counter-productive in terms of the acceptability of the draft”.

*It was so agreed.*

*Paragraph 46, as amended, was adopted.*

Paragraphs 47 and 48

*Paragraphs 47 and 48 were adopted.*

Paragraphs 49 and 50

*Paragraphs 49 and 50 were adopted with minor drafting changes.*

Paragraph 51

18. Mr. MAHIU noted that the footnote relating to the *Hostage* case, cited in the last sentence, had been omitted. It should be restored.

*It was so agreed.*

*Paragraph 51, as amended, was adopted with minor drafting changes in the French and Spanish texts.*

Paragraph 52

19. Sir Ian SINCLAIR proposed that, at the end of the penultimate sentence, the words “holding a high political, civil or military position” should be amended to read “the fact of holding a high political, civil or military position”.

*It was so agreed.*

*Paragraph 52, as amended, was adopted with minor drafting changes.*

Paragraph 53

20. Mr. LACLETA MUÑOZ proposed that the words “Responsibility of the superior” should be amended to read “Complicity of the superior”.

21. Sir Ian SINCLAIR recalled that draft article 9 was entitled “Responsibility of the superior”. He could, however, accept Mr. Lacleta Muñoz’s proposal because draft article 9 dealt with complicity as a form of responsibility.

22. Mr. THIAM (Special Rapporteur) proposed that the word “complicity” should be used in all the

language versions, and that the quotation-marks should be deleted.

*It was so agreed.*

*Paragraph 53, as amended, was adopted.*

Paragraph 54

*Paragraph 54 was adopted with minor drafting changes.*

Paragraph 55

*Paragraph 55 was adopted.*

Paragraph 56

*Paragraph 56 was adopted subject to a correction in the French text.*

Paragraph 57

23. Sir Ian SINCLAIR noted that the words *un régime exorbitant du droit commun*, in the first sentence of the French text, had been translated into English as “a special ordinary law régime”. He proposed that the secretariat should be requested to find a more adequate translation.

24. Mr. LACLETA MUÑOZ proposed that, in the Spanish text, the words *este régimen exorbitante del derecho común* should be replaced by *un régimen especial derogatorio del derecho común*.

25. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt paragraph 57 subject to the proposed amendments to the English and Spanish texts.

*It was so agreed.*

*Paragraph 57 was adopted on that understanding.*

Paragraphs 58 to 61

*Paragraphs 58 to 61 were adopted.*

Paragraph 62

*Paragraph 62 was adopted with minor drafting changes.*

Paragraph 63

*Paragraph 63 was adopted.*

Paragraph 64

26. Mr. THIAM (Special Rapporteur) said that the words “other offences” should be replaced by “these concepts”, which should not be in quotation-marks.

*Paragraph 64, as amended, was adopted.*

Paragraphs 65 to 109 (A/CN.4/L.406/Add.1)

Paragraph 65

27. The CHAIRMAN said that, in the second sentence of the English text, the words “humanity has more difficulty in finding a justification than in finding a war crime” should be deleted.

*Paragraph 65 was adopted subject to that correction.*

Paragraph 66

*Paragraph 66 was adopted with minor drafting changes.*

Paragraphs 67 and 68

*Paragraphs 67 and 68 were adopted.*

Heading preceding paragraph 69

28. Mr. USHAKOV said that the heading “Principles relating to the offender” was totally inadequate. He suggested that it should be amended to read “Principles relating to the official position of the offender”.

*It was so agreed.*

*The heading preceding paragraph 69, as amended, was adopted.*

Paragraph 69

*Paragraph 69 was adopted with minor drafting changes.*

Paragraph 70

29. Sir Ian SINCLAIR proposed that the words “in greater detail” should be inserted at the end of the first sentence.

*It was so agreed.*

*Paragraph 70, as amended, was adopted.*

Paragraph 71

*Paragraph 71 was adopted with a minor drafting change.*

Paragraphs 72 and 73

*Paragraphs 72 and 73 were adopted.*

Paragraphs 74 and 75

*Paragraphs 74 and 75 were adopted with some drafting changes.*

Paragraph 76

*Paragraph 76 was adopted subject to a correction in the Spanish text.*

Paragraph 77

30. Sir Ian SINCLAIR proposed that, in order to strengthen the idea expressed in the second sentence, the words “after a certain number of years” should be amended to read “many years after an alleged offence had been committed”.

*It was so agreed.*

*Paragraph 77, as amended, was adopted.*

Paragraph 78

31. Sir Ian SINCLAIR proposed that, in the second part of the first sentence, the words “which gives preference to nationality rather than to the place of the crime” should be replaced by “which was based on nationality rather than on the place of the crime”.

*It was so agreed.*

*Paragraph 78, as amended, was adopted with some drafting changes.*

Paragraph 79

32. Mr. McCaffrey said that he was one of the members whose views were reflected in the fourth sentence. He nevertheless wished to make it clear that he was not, as that sentence suggested, opposed to the system of universal jurisdiction in general. He had expressed doubts only with regard to the applicability of that system in the instance under consideration. He therefore proposed that, at the beginning of the fourth sentence, the words "Among the members opposed to the universal system" should be amended to read "Among the members doubting the general applicability of universal jurisdiction". In the fifth sentence, the words "Other members opposed to that system" should be replaced by "Other members who expressed doubts concerning that system".

*It was so agreed.*

*Paragraph 79, as amended, was adopted.*

Paragraph 79 bis

*Paragraph 79 bis was adopted.*

Paragraph 80

33. Mr. THIAM (Special Rapporteur) said that the second sentence should be amended to read: "He pointed out that, although in principle every wrongful act engaged the criminal responsibility of its author, there could be exceptions to that rule."

34. Mr. USHAKOV said that the term "justifying facts", in the last sentence, was not clear. It would be difficult to translate into Russian. Reference was apparently being made more to "circumstances" than to "facts".

35. Mr. THIAM (Special Rapporteur) said that the term "justifying facts" was a well-established one. Unlike the term "extenuating circumstances", it did refer to facts.

36. Mr. REUTER noted that the last sentence referred to three sets of circumstances which eliminated or attenuated responsibility, namely justifying facts, exculpatory pleas and extenuating circumstances. That enumeration suggested that three subheadings would follow. In fact, however, there was only one subheading, "Justifying facts", preceding paragraph 81. He proposed that that subheading should be deleted.

*It was so agreed.*

37. Mr. McCaffrey drew attention to a discrepancy between paragraph 65, which contained a list of six categories of general principles, and the following paragraphs. Paragraphs 66 to 79 bis referred to the first four categories, but the heading of the fifth category, namely "The determination and extent of responsibility", had been omitted altogether and the heading which immediately preceded paragraph 80, "5. Exceptions to criminal responsibility", was in fact that of the sixth category referred to in paragraph 65. That discrepancy was bound to raise questions in the minds

of readers and, in particular, in the Sixth Committee of the General Assembly.

38. Mr. THIAM (Special Rapporteur) said that one way of solving that problem would be to draft a new paragraph indicating that the question of the determination and extent of responsibility would be dealt with in a future report.

39. The CHAIRMAN suggested that the Commission might add a new paragraph 79 *ter*, which would be preceded by the heading "5. The determination and extent of responsibility". The heading which now preceded paragraph 80 would be renumbered and would read "6. Exceptions to criminal responsibility".

40. Mr. REUTER said that that proposal would be at variance with the thinking of the Special Rapporteur, for whom exculpatory pleas and extenuating circumstances came within the category entitled "The determination and extent of responsibility".

41. As an alternative, he proposed that the numbers preceding the six categories of principles listed in paragraph 65 should be deleted.

*It was so agreed.*

42. In addition, he proposed that, for the fifth category listed in paragraph 65, namely "The determination and extent of responsibility", a footnote should be added which might read: "The question of exculpatory pleas and extenuating circumstances will be discussed in a future report."

43. Mr. FRANCIS said that it would be wrong to suggest that the Commission had not dealt at all with the principles relating to the determination and extent of responsibility. That category of principles was discussed in the Special Rapporteur's fourth report (A/CN.4/398, paras. 177-259).

44. He realized that the intention was to amend paragraph 80 so as to eliminate the references to exculpatory pleas and extenuating circumstances, leaving only the reference to "justifying facts", but in his view the draft report should be arranged so as to conform to the headings listed in paragraph 65.

45. The CHAIRMAN said that the problem had been solved by deleting the numbers of the six headings listed in paragraph 65 and that it had been proposed that an explanatory footnote should be attached to the fifth heading.

46. Sir Ian SINCLAIR proposed that, in order to meet the concern expressed by Mr. Francis, the footnote to be attached to the heading "The determination and extent of responsibility" in paragraph 65 should indicate clearly that "the question of exculpatory pleas and extenuating circumstances will be dealt with in a future report, since the Commission did not discuss it at the present session and considered only the question of 'justifying facts'".

47. Mr. THIAM (Special Rapporteur) proposed that the last two sentences of paragraph 80 should be replaced by the following sentence: "These are the justifying facts."

48. Mr. REUTER proposed that the new sentence should read: "These were circumstances which, in certain legal systems, were known as 'justifying facts'." It would thus be clear that the paragraphs which followed dealt with the problem of justifying facts.

49. M. KOROMA said that he objected to the use in the English text of the term "justifying facts", which should be replaced by the more appropriate term "plea of justification".

50. Chief AKINJIDE said that he fully agreed with that suggestion.

51. Mr. USHAKOV said that he approved of the new sentence proposed by Mr. Reuter to replace the last two sentences. The proposed wording made it clear that the term "justifying facts" was connected with "certain legal systems" and it accurately reflected the real position. The French legal concept of *faits justificatifs* did not exist in Soviet criminal law. The same might be true in other legal systems.

52. Sir Ian SINCLAIR said that he entirely agreed with Mr. Reuter and Mr. Ushakov. While the issue was a difficult one, Mr. Reuter's proposal was a perfectly good statement of fact. It reflected the position in French law and, possibly, in some other systems of law.

53. He was, however, opposed to Mr. Koroma's suggestion that, in the English text, the term "justifying facts" should be replaced by "plea of justification", which was not precisely equivalent to the French legal concept of *faits justificatifs*. In some circumstances, the term "plea of justification" related to civil rather than to criminal law.

54. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt the text proposed by Mr. Reuter to replace the last two sentences of paragraph 80.

*It was so agreed.*

*Paragraph 80, as amended, was adopted.*

Paragraph 81

*Paragraph 81 was adopted with minor drafting changes.*

Paragraph 82

55. Sir Ian SINCLAIR said that the first three sentences did not accurately describe the position in English law on exceptions to criminal responsibility. It was, for example, quite wrong to state, as did the third sentence, that an English judge "creates the law", although he could help to develop it on the basis of precedents. He therefore proposed that the third sentence should be deleted.

*It was so agreed.*

*Paragraph 82, as amended, was adopted with minor drafting changes.*

Paragraphs 83 to 85

*Paragraphs 83 to 85 were adopted with some drafting changes.*

Paragraph 86

*Paragraph 86 was adopted.*

Paragraph 87

*Paragraph 87 was adopted with minor drafting changes.*

Paragraphs 88 to 96

*Paragraphs 88 to 96 were adopted.*

Paragraph 97

*Paragraph 97 was adopted subject to a correction to the footnote relating to the Hostage case.*

Paragraphs 98 to 100

*Paragraphs 98 to 100 were adopted.*

Paragraph 101

*Paragraph 101 was adopted subject to a correction in the French text.*

Paragraph 102

*Paragraph 102 was adopted with minor drafting changes.*

Paragraph 103

56. Sir Ian SINCLAIR proposed that the words "in accordance with its rights", at the end of the paragraph, should be amended to read "in accordance with its right of self-defence".

*It was so agreed.*

*Paragraph 103, as amended, was adopted.*

Paragraph 104

*Paragraph 104 was adopted.*

Paragraphs 105 to 109

57. Mr. OGISO said that, although it was stated in paragraph 105 that the Special Rapporteur had "confined his examination of reprisals to armed reprisals", paragraphs 107 and 108 appeared to refer to belligerent reprisals. He requested the Special Rapporteur to clarify the position in that regard. If the intention was to deal not only with armed reprisals, but also with belligerent reprisals, that should be explained either in paragraph 105 or in one of the following paragraphs.

58. Mr. THIAM (Special Rapporteur) said that that was precisely his intention. Humanitarian law referred to reprisals and he therefore had to deal with them, at least in the case of war crimes.

59. Sir Ian SINCLAIR said Mr. Ogisso had rightly pointed out that paragraphs 106, 107 and 108 were not strictly confined to armed reprisals, but also encompassed reprisals which were carried out during an armed conflict but which might not be armed reprisals. He therefore suggested that paragraph 105 should be amended to state only that the Special Rapporteur had raised the question whether reprisals should constitute a "justifying fact".

60. Mr. OGISO said that he could agree with that suggestion.

61. Mr. McCAFFREY said that it would be rather strange to state that reprisals “constituted” a justifying fact. It would be preferable to say that the Special Rapporteur had raised the question whether “reprisals were legally justified”.

62. Mr. ARANGIO-RUIZ said that the real question was not whether reprisals constituted a “justifying fact”, but rather whether action or conduct carried out by way of reprisals constituted a “justifying fact”.

63. Mr. McCAFFREY suggested the following wording for the second sentence of paragraph 105: “He raised the question whether the defence of justification (‘justifying fact’) could apply to such reprisals.” In the legal system of the United States of America, there were three possible categories of defence for a criminal act: justification, excuse and mitigation.

64. Mr. LACLETA MUÑOZ said that paragraphs 105 to 109 went much too far. He could not agree, for example, with the sweeping statement in paragraph 109 that “reprisals merged sometimes with aggression, and sometimes with a war crime. In both instances, they constituted an offence and not a justifying fact.” There were cases in which reprisals were justified and that applied to some of the reprisals referred to in paragraph 109. When reprisals were justified, their author was also justified, except when the action taken was excessive.

65. Mr. THIAM (Special Rapporteur) said that, when the Commission had adopted part 1 of the draft articles on State responsibility, it had agreed that reprisals could in no case justify, or constitute a lawful response to, any act. That proposition would probably not be accepted by all States, but he had to work on the basis of a principle accepted by the Commission.

66. Mr. LACLETA MUÑOZ said that the proposition in question was true with regard to armed reprisals, but the scope of paragraph 105 was being extended to reprisals which took place during an armed conflict but which might not be armed reprisals. One example would be punishment lawfully imposed on a group of prisoners.

67. Mr. THIAM (Special Rapporteur) said that, under the 1949 Geneva Conventions and Additional Protocol I of 1977, reprisals were prohibited. Reprisals against a civil population constituted a war crime. The idea contained in paragraphs 105 to 109 therefore had to be retained, but it might be worded differently.

68. He proposed that paragraph 105 should state: “The Special Rapporteur raised the question whether reprisals could, as such, be justified (‘justifying facts’).”

69. Sir Ian SINCLAIR proposed that paragraph 105 should read: “The Special Rapporteur raised the question whether the exception of justification (‘justifying facts’) could apply to reprisals.”

70. Mr. LACLETA MUÑOZ supported that proposal.

71. Mr. KOROMA said it should be made clear that paragraph 105 dealt with armed reprisals.

72. Mr. LACLETA MUÑOZ supported that proposal. If paragraph 105 did not refer to armed reprisals, it would contradict paragraphs 108 and 109. Paragraph 108 stated that reprisals carried out in breach of existing conventions or the customs of war “could not constitute admissible exceptions”. It followed that reprisals carried out in accordance with the relevant conventions were justified; such reprisals were, of course, not armed reprisals.

73. After a brief discussion in which Mr. McCAFFREY and Sir Ian SINCLAIR took part, Mr. THIAM (Special Rapporteur) said that, in consultation with the members concerned, including Mr. Lacleta Muñoz and Mr. Koroma, he would prepare a redraft of paragraphs 105 to 109 for submission to the Commission at its next meeting.

*It was so agreed.*

*The meeting rose at 6.15 p.m.*

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## 1987th MEETING

*Thursday, 10 July 1986, at 10.20 a.m.*

*Chairman:* Mr. Alexander YANKOV

*later:* Mr. Doudou THIAM

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

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

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

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

Paragraphs 65 to 109 (*continued*) (A/CN.4/L.406/Add.1)

Paragraph 65 (*continued*) and paragraphs 80 and 81 (*concluded*)

1. Mr. FRANCIS, referring to paragraph 80 of chapter V of the Commission’s draft report, which reflected views expressed by the Special Rapporteur in his fourth report (A/CN.4/398), said that it was essential that that fourth report should be presented to the General Assembly in exactly the same manner as the Special Rapporteur had presented it to the Commission. Paragraph 80 was in fact a summary of certain