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Summary record of the 1987th meeting

Topic:
Other topics

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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.

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.

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

paragraphs of section E of part IV of the Special Rapporteur's fourth report (*ibid.*, paras. 177, 178 and 181).

2. Since paragraph 80 dealt with the principles relating to the determination and extent of criminal responsibility and paragraph 81 with exceptions to criminal responsibility, as referred to in the Special Rapporteur's fourth report under that precise heading (*ibid.*, paras. 185-254), it clearly followed that the heading which preceded paragraph 80 should be "5. The determination and extent of responsibility", and not "Exceptions to criminal responsibility", which should therefore be renumbered and placed between paragraph 80 and paragraph 81.

3. He also proposed that the following sentence should be added at the end of paragraph 80: "He further pointed out that, in the determination of individual criminal responsibility, such facts as would preclude that responsibility should be considered as constituting exceptions." That sentence, based on paragraph 184 of the Special Rapporteur's fourth report, would serve as a link between paragraph 80 and paragraph 81.

4. With regard to the footnote to paragraph 65 suggested by Mr. Reuter (1986th meeting, para. 42), for which Sir Ian Sinclair had proposed a text (*ibid.*, para. 46), he said that exculpatory pleas and extenuating circumstances had been discussed briefly at the present session. He wished to know whether Sir Ian Sinclair would be prepared to agree to the insertion, in the first phrase of his proposed text, of the word "further" between the words "will be dealt with" and "in a future report", and to the content of the footnote being incorporated in the text of paragraph 115 as an independent statement constituting the last sentence of part IV (General principles) of section B of chapter V of the draft report.

5. The CHAIRMAN said that, unless the Commission decided to reopen the discussion of paragraphs 65, 80 and 81, the only course open to Mr. Francis was to request that his views should be reflected in the summary record of the present meeting.

6. Speaking as a member of the Commission, he said that he would not be in favour of reopening the discussion and reconsidering paragraphs which the Commission had already adopted.

7. Mr. FRANCIS said that the point was not that his views should be placed on record, but that the Commission should avoid using wording in its report that might mislead the General Assembly by wrongly suggesting that certain questions had not been considered at the present session.

8. Mr. DÍAZ GONZÁLEZ said that, since paragraphs 80 and 81 reflected the views of the Special Rapporteur, it was for the Special Rapporteur to decide on the wording to be used.

9. Mr. CALERO RODRIGUES agreed that it would not be advisable to reopen the debate on paragraphs already adopted. Some of the suggestions made by Mr. Francis constituted improvements, but it was for the Special Rapporteur to decide whether to incorporate them.

10. Sir Ian SINCLAIR said that, although the draft report might well read better with some of the suggestions made by Mr. Francis, time constraints made it very difficult to reopen the discussion of paragraphs 65, 80 and 81.

11. Since no final decision had been taken on the text of the footnote to be added to paragraph 65, he proposed that informal consultations should be held by the Special Rapporteur, Mr. Francis and himself on the wording of that footnote, which would, of course, indicate that the question of exculpatory pleas and extenuating circumstances had been referred to in the Special Rapporteur's fourth report.

12. Mr. McCAFFREY said that, although the suggestions made by Mr. Francis would undoubtedly improve the report, their inclusion was not absolutely necessary.

13. Mr. KOROMA said that he saw considerable merit in the suggestions made by Mr. Francis. The consideration of chapter V of the draft report had been complicated by the fact that the Special Rapporteur's opinions had been intermingled with comments made by members. He hoped that the lessons to be learned from that problem would be borne in mind during the preparation of future reports of the Commission.

14. Mr. FRANCIS said he could not agree that it was impossible for the Commission to review paragraphs that had already been adopted. Paragraph 80 stood in need of correction so that the presentation of the Special Rapporteur's fourth report to the General Assembly would be identical with the manner in which the Special Rapporteur had presented it to the Commission. Enough flexibility ought to be exercised to permit such correction so long as the draft report as a whole had not been adopted.

15. The CHAIRMAN said that the discussion had been useful in clarifying the methodological problems involved in the preparation of the Commission's report. The practical problem at hand could, however, be solved if, in a spirit of compromise, the Commission agreed to adopt the proposal by Sir Ian Sinclair for informal consultations concerning paragraph 65.

Sir Ian Sinclair's proposal was adopted.

Paragraphs 105 to 109 (*concluded*)

16. The CHAIRMAN recalled that, at the previous meeting, a number of suggestions had been made with regard to the wording of paragraphs 105 to 109. The members concerned and the Special Rapporteur had redrafted those paragraphs, which he now invited the Special Rapporteur to introduce.

17. Mr. THIAM (Special Rapporteur) introduced the text of the new paragraphs 105 to 109, which read:

"Means of defence based on reprisals

"105. In the Special Rapporteur's opinion, reprisals could take place in peacetime or in wartime.

"106. In peacetime, defence based on armed reprisals was not admissible.

“107. In wartime, defence based on reprisals was not admissible if the reprisals were carried out in violation of the laws and customs of war.

“108. These cases of inadmissibility resulted from the fact that reprisals merged sometimes with aggression if they were carried out in peacetime, and sometimes with a war crime if they took place in the course of an armed conflict and were carried out in violation of the laws and customs of war.

“109. In short, the Special Rapporteur’s view was that the prohibition of reprisals, since it was not general in *jus in bello*, meant that reprisals could be justified in all instances in which they were not prohibited. Yet the prohibition of reprisals, in the framework of Additional Protocol I of 1977, was only sectoral in nature; it applied solely to reprisals directed against the sick and the wounded, civilian populations, prisoners of war, and civilian or cultural objects.”

18. That new text should dispel the misunderstandings caused by the original text, which had not been explicit enough.

19. The CHAIRMAN invited members to consider the new text paragraph by paragraph.

Paragraphs 105 and 106

Paragraphs 105 and 106 were adopted.

Paragraph 107

20. Sir Ian SINCLAIR, noting that paragraph 107 was not very clear, requested the Special Rapporteur to explain whether it referred only to belligerent reprisals.

21. Mr. THIAM (Special Rapporteur) said that paragraph 107 did in fact refer to “belligerent reprisals”, the term that was commonly used in English law. He pointed out that Additional Protocol I of 1977 made no distinction between armed and unarmed reprisals.

22. Mr. REUTER said that Additional Protocol I of 1977 contained specific provisions, but no general rule, relating to the question of reprisals. What it prohibited were “belligerent reprisals”, in the sense of reprisals which could be carried out only in wartime in the framework of the new régime applicable in wartime. The term “belligerent reprisals” and the term “armed reprisals” would have to be clearly defined.

23. Sir Ian SINCLAIR said he had always thought that the term “belligerent reprisals” meant reprisals carried out in wartime against persons protected by the 1949 Geneva Conventions and that it did not refer to armed reprisals. He was, however, prepared to join in any consensus the Commission might reach on the meaning of that term.

24. Mr. RIPHAGEN said that, in his view, reprisals were measures taken contrary to the laws and customs of war and that, in some cases, they might be admissible, while in others they would be prohibited.

25. Mr. CALERO RODRIGUES said that paragraph 107 went with paragraph 109. In his view, the Special

Rapporteur had used the term “means of defence” in a legal sense, thus implying that a State could not invoke reprisals to avoid being held responsible. The wording of the French text of paragraph 107 did not give rise to any problems, but the English text might be understood differently, in something other than a legal sense. In French, the term *moyen de défense* meant a justifying fact which could be invoked as a defence.

26. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt paragraph 107 in the light of the comments made.

Paragraph 107 was adopted.

27. Mr. CALERO RODRIGUES suggested that paragraphs 105, 106 and 107, which were very short, should be merged and that paragraphs 108 to 118 should be renumbered accordingly.

It was so agreed.

Paragraph 108

Paragraph 108 was adopted.

Paragraph 109

28. Mr. KOROMA urged the Special Rapporteur to reconsider the unnecessarily forthright statement that “reprisals could be justified in all instances in which they were not prohibited”.

29. Mr. THIAM (Special Rapporteur) said that the French text was very clear.

30. Mr. LACLETA MUÑOZ said that paragraph 109 merely described the true situation, which was that all reprisals were, fortunately, not systematically prohibited. The original text had appeared to rule out reprisals of any kind, although it was a well-known fact that reprisals could play a useful role by providing a response to a wrongful act.

31. Mr. KOROMA said that, since armed reprisals were prohibited under international law, he could not see any compelling reason for stating in paragraph 109 that other forms of reprisals were permitted.

32. The CHAIRMAN said that Mr. Koroma’s opinion on that point would be included in the summary record. As for paragraph 109, it expressed the views of the Special Rapporteur.

Paragraph 109 was adopted

Paragraph 110

Paragraph 110 was adopted with a minor drafting change in the French and Spanish texts.

Paragraph 111

33. Mr. THIAM (Special Rapporteur), replying to a question raised by Sir Ian Sinclair concerning the second sentence of subparagraph (2), said that the idea of proportionality could be explained by drawing a parallel between reprisals and self-defence, which required that the response should not be out of proportion to the attack that gave rise to it. In the case under consideration, the legal precedents to which he had referred in his

fourth report (A/CN.4/398, paras. 241-253) showed that a State could not invoke an exception if the reprisals it carried out to escape from a danger caused an even more serious danger.

34. Sir Ian SINCLAIR proposed that, in the second sentence of subparagraph (2), the words "the act which the perpetrator was seeking to elude" should be replaced by "the situation from which the perpetrator was seeking to escape".

It was so agreed.

35. Mr. LACLETA MUÑOZ proposed that, in subparagraph (3), the word "against" should be replaced by "with respect to".

It was so agreed.

Paragraph 111, as amended, was adopted.

Paragraph 112

36. Mr. THIAM (Special Rapporteur) said that, in the second sentence, the words "With regard to the exceptions as a whole" should be replaced by "With regard to the formulation of these exceptions in the draft code".

Paragraph 112, as amended, was adopted.

Paragraph 113

37. Mr. THIAM (Special Rapporteur) said that the word "superiors" should be replaced by "a superior".

Paragraph 113, as amended, was adopted.

Paragraph 114

Paragraph 114 was adopted.

Paragraph 115

Paragraph 115 was adopted with minor drafting changes.

Paragraph 116

Paragraph 116 was adopted.

Paragraph 117

38. Mr. THIAM (Special Rapporteur) said that, in the third sentence, the word "endorsed" should be replaced by "supported".

It was so agreed.

39. Mr. JACOVIDES proposed that, after the first sentence, the following new sentence should be added: "Certain specific suggestions regarding the draft articles were also provisionally made."

It was so agreed.

Paragraph 117, as amended, was adopted.

Paragraph 118

40. Mr. RAZAFINDRALAMBO proposed that, in the first sentence, the words "to other sessions" should be replaced by "to future sessions" and that, in the second sentence, the words "and also those expressed" should be replaced by "and the views that would be expressed".

It was so agreed.

41. Mr. McCAFFREY proposed that the penultimate sentence should be strengthened by replacing the words "will examine attentively any guidance that may be furnished" by "will examine attentively any guidance that the General Assembly may furnish". Instead of referring in the last sentence to a paragraph of the Commission's report on its thirty-fifth session (1983), he suggested that the content of that paragraph should be reproduced.

42. Sir Ian SINCLAIR proposed that the word "attentively", in the penultimate sentence, should be replaced by "carefully". As to the second suggestion made by Mr. McCaffrey, he proposed the insertion of a footnote reproducing the text of paragraph 69 (c) (i) of the Commission's report on its thirty-fifth session.

43. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt paragraph 118 with the amendments proposed by Mr. McCaffrey and Sir Ian Sinclair.

It was so agreed.

Paragraph 118, as amended, was adopted.

44. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to defer the completion of its consideration of chapter V of the draft report until Mr. Francis, Sir Ian Sinclair and the Special Rapporteur had submitted the text of the footnote to be added to paragraph 65.

It was so agreed.

Mr. Thiam took the Chair.

CHAPTER III. Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (A/CN.4/L.404 and Add.1)

A. Introduction (A/CN.4/L.404)

Paragraphs 1 to 4

Paragraphs 1 to 4 were adopted.

Paragraph 5

45. Mr. YANKOV (Special Rapporteur) said that the numbers of the draft articles referred to in subparagraph (b) should be amended to read "36 to 43".

Paragraph 5, as amended, was adopted.

Section A, as amended, was adopted.

B. Consideration of the topic at the present session (A/CN.4/L.404/Add.1)

Paragraph 6

46. Mr. OGISO (Rapporteur) proposed that the texts of draft articles 36, 37 and 41 to 43 as submitted by the Special Rapporteur in his seventh report (A/CN.4/400) should be deleted from footnote 4. Their inclusion in the Commission's report in addition to the texts of the draft articles adopted by the Commission on first reading might create confusion in the Sixth Committee of the General Assembly.

47. Mr. McCAFFREY said he agreed with the Rapporteur that the inclusion of the texts of the draft articles submitted by the Special Rapporteur would cause confusion in the Sixth Committee. Normally, the report

did not include the texts of draft articles submitted by the Special Rapporteur which had not yet been adopted by the Commission.

48. He pointed out that, in the second and last sentences of paragraph 6, the word “to” following the word “explanations” should be replaced by “concerning”.

It was so agreed.

49. Mr. CALERO RODRIGUES, supported by Mr. NJENGA, said that, even though articles had been adopted by the Commission on first reading, it would be helpful to representatives in the Sixth Committee if the texts of draft articles 36, 37 and 41 to 43 as submitted by the Special Rapporteur were reproduced in footnote 4.

50. Sir Ian SINCLAIR said that he was inclined to agree with the Rapporteur. The Commission should endeavour to maintain uniformity in the various chapters of its report. Since draft articles submitted by the Special Rapporteur for jurisdictional immunities of States and their property had not been included in chapter II of the draft report, it would be preferable not to include the draft articles in question in chapter III. Moreover, if those draft articles were reproduced in the footnote, representatives in the Sixth Committee might be led to make comparisons between them and the articles adopted by the Commission.

51. Chief AKINJIDE said he agreed that the inclusion of the draft articles in footnote 4 was bound to cause confusion in the Sixth Committee and suggest that the Sixth Committee was being asked to choose between the two sets of articles. Special rapporteurs were, after all, responsible to the Commission, not to the Sixth Committee, and once their proposals had been considered by the Commission, there was no need to submit them to the Sixth Committee. The draft articles should therefore be deleted from footnote 4.

52. Mr. McCAFFREY agreed with the view expressed by Chief Akirjide. There might be grounds for reproducing the draft articles in the report if the Commission had discussed them at length at the current session, but that had not been the case. Moreover, as Sir Ian Sinclair had pointed out, it was necessary to maintain some balance between the various chapters of the report. If the Commission decided to retain the draft articles in footnote 4, it would have to do the same in the chapter on jurisdictional immunities of States and their property. Otherwise, representatives in the Sixth Committee would inevitably wonder why the two topics had been treated differently.

53. Mr. REUTER said he also considered that the Special Rapporteur’s role was to report not to the Sixth Committee, but to the Commission, and that the Sixth Committee could not be regarded as a court of appeal. The first version of a text should be reproduced in the Commission’s report only when there was a commentary explaining how that version had served as a point of departure for the final text. In the case under consideration, however, the inclusion of the draft articles submitted by the Special Rapporteur might imply that there was some disagreement between the Commission and the Special Rapporteur. That was, in fact, not at all

true, since the Special Rapporteur’s proposals had been followed in almost every case and few changes had been made to the texts he had submitted.

54. Mr. ILLUECA said that he agreed with the view expressed by Mr. Calero Rodrigues. It had to be borne in mind that the Commission’s documents were intended not only for the Sixth Committee and the General Assembly, but also for world legal opinion. The Commission’s report should therefore describe all aspects of the work that had been done and reproduce all the texts the Commission had had before it. It would, moreover, be only common courtesy to defer to the Special Rapporteur’s wishes. Although the Commission had proceeded differently in other cases, each Special Rapporteur had his own working methods and should be able to express his views.

55. Mr. YANKOV (Special Rapporteur) said that, in reproducing the texts of the draft articles, he had simply intended to facilitate the consideration of the topic by the Sixth Committee. The draft articles had, after all, been discussed at the current session and representatives in the Sixth Committee were quite capable of distinguishing between them and the articles adopted by the Commission. However, in a spirit of compromise and to expedite the Commission’s work, he would not insist on the inclusion of the texts of the draft articles in footnote 4 to paragraph 6.

56. Mr. USHAKOV said that he shared the view of the Special Rapporteur, whose seventh report contained not only draft articles, but also commentaries reflecting legal developments. All, not part, of his report should therefore be reproduced. His own suggestion was that footnote 4 to paragraph 6 should simply indicate the symbol of the seventh report, “A/CN.4/400”, which contained the draft articles submitted by the Special Rapporteur.

It was so agreed.

Paragraph 6, as amended, was adopted.

Paragraph 7

Paragraph 7 was adopted with minor drafting changes.

Paragraph 8

57. Mr. OGISO (Rapporteur) proposed that the words “thus completing the adoption on first reading of the whole set of draft articles on the topic”, in the second sentence, should be deleted.

It was so agreed.

Paragraph 8, as amended, was adopted.

New paragraph 8 bis

58. Mr. OGISO (Rapporteur) proposed the addition of the following new paragraph 8 bis:

“Also at its 1980th meeting, on 2 July 1986, the Commission adopted the whole set of draft articles on the topic. The texts are reproduced in section D.1 of the present chapter.”

It was so agreed.

59. Mr. USHAKOV proposed that the words "on first reading" should be inserted after the word "adopted".

It was so agreed.

New paragraph 8 bis, as amended, was adopted.

New paragraph 8 *ter*

60. Mr. OGISO (Rapporteur) proposed the addition of the following new paragraph 8 *ter*:

"At the same meeting, the Commission decided, in accordance with articles 16 and 21 of its statute, to transmit the draft articles set out in section D.1 of the present chapter, through the Secretary-General, to the Governments of Member States for comments and observations, with the request that such comments and observations be submitted to the Secretary-General not later than 1 January 1988."

A similar paragraph was contained in chapter II of the report, dealing with jurisdictional immunities of States and their property.

New paragraph 8 ter was adopted.

Section B, as amended, was adopted.

The meeting rose at 1.10 p.m.

1988th MEETING

Thursday, 10 July 1986, at 3.15 p.m.

Chairman: Mr. Doudou THIAM

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. Tomuschat, Mr. Ushakov, Mr. Yankov.

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

CHAPTER III. *Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier* (concluded) (A/CN.4/L.404 and Add.1)

C. *Tribute to the Special Rapporteur, Mr. Alexander Yankov* (A/CN.4/L.404/Add.1)

Paragraph 9

Paragraph 9 was adopted.

Section C was adopted.

D. *Draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier* (A/CN.4/L.404/Add.1)

SUBSECTION 1 (Texts of the draft articles provisionally adopted by the Commission on first reading)

Section D.1 was adopted.

SUBSECTION 2 (Texts of draft articles 28 to 33, with commentaries thereto, provisionally adopted by the Commission at its thirty-eighth session)

Commentary to article 28 (Protection of the diplomatic bag)

Paragraph (1)

1. Mr. USHAKOV proposed that, since the Commission's discussions could not be described as a process of negotiation, the phrase "to submit to the General Assembly ... made in the Assembly", in the second sentence, should be replaced by "to adopt article 28 in its present form, as the observations and suggestions to be made by Governments".

2. Mr. McCAFFREY and Mr. LACLETA MUÑOZ endorsed that proposal.

3. Sir Ian SINCLAIR also supported Mr. Ushakov's proposal. In addition, he proposed that, in the first sentence, the words "much discussion" should be replaced by "lengthy discussion".

4. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to approve paragraph (1) with the amendments proposed by Mr. Ushakov and Sir Ian Sinclair.

It was so agreed.

Paragraph (1), as amended, was approved.

Paragraph (2)

Paragraph (2) was approved with minor drafting changes.

Paragraphs (3) and (4)

Paragraphs (3) and (4) were approved.

Paragraphs (5) and (6)

Paragraphs (5) and (6) were approved with some drafting changes.

Paragraph (7)

5. Mr. CALERO RODRIGUES proposed that, in the second sentence, the words "means of violating" should be amended to read: "means of examination which might result in the violation of".

It was so agreed.

6. Mr. McCAFFREY proposed that the word "sentence", in the first, second and last sentences, should be replaced by "phrase". He also proposed that, in the third sentence, the words "in exceptional cases" should be added after the word "possibility".

It was so agreed.

7. Mr. OGISO said that the words "the characteristics of today's international relations", in the third sentence, might give the impression that abuses of the diplomatic bag were a constant feature of modern-day international relations.