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Summary record of the 2038th meeting

Topic:
Other topics

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Paragraph 25

3. Mr. MAHIU said that he was normally inclined to favour concise reports. Paragraph 25, however, was perhaps a little too short. Certain aspects of the discussion should have been reported more fully, since the Commission had spent a fairly long time on the topic. Nevertheless, he would not insist on the paragraph being reworded.

4. The CHAIRMAN, speaking as a member of the Commission and referring to the second sentence, said he did not think that the Commission had taken a formal decision regarding the methodology to be followed. He therefore suggested that the first part of the sentence should be replaced by the following wording: "Regarding the methodology to be followed, the Special Rapporteur would be free to follow a combination of the approaches . . ."

5. Mr. GRAEFRATH asked whether paragraph 25 summarized the entire discussion on the topic, or whether the intention was to amplify it.

6. Mr. DÍAZ GONZÁLEZ (Special Rapporteur) said that the amendment suggested by Mr. McCaffrey was acceptable. Paragraph 25 reflected the whole of the discussion and he did not think anything needed to be added regarding the adoption of the plan of work.

Mr. McCaffrey's amendment was adopted.

Paragraph 25, as amended, was adopted.

Section B, as amended, was adopted.

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

7. Mr. RAZAFINDRALAMBO noted that, in the French text of certain parts of the draft report, the footnotes had been listed at the end of the document in question, which made it difficult to refer to them. Footnotes normally appeared at the bottom of the page to which they related, as was the case with other parts of the draft report. He therefore recommended that the format of the various chapters should be harmonized.

The meeting rose at 3.25 p.m.

2038th MEETING

Thursday, 16 July 1987, at 10.05 a.m.

Chairman: Mr. Stephen C. McCaffrey

Present: Prince Ajibola, Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

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

CHAPTER II. *Draft Code of Offences against the Peace and Security of Mankind* (continued)* (A/CN.4/L.414 and Add.1)

B. *Consideration of the topic at the present session (concluded)* (A/CN.4/L.414 and Add.1)

Paragraphs 52 to 55 (A/CN.4/L.414/Add.1)

Paragraphs 52 to 55 were adopted.

Section B, as amended, was adopted.

C. *Draft articles on the draft Code of Crimes against the Peace and Security of Mankind* (A/CN.4/L.414/Add.1)

Paragraph 56

Paragraph 56 was adopted.

Commentary to article 1 (Definition)

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

1. Mr. RAZAFINDRALAMBO proposed that the term "intention", in the fourth sentence, should be replaced by "motive".

2. Mr. BARSEGOV said that it seemed appropriate to retain the term "intention", for it was used specifically in the Convention on the Prevention and Punishment of the Crime of Genocide.

3. Mr. THIAM (Special Rapporteur) said that the amendment proposed by Mr. Razafindralambo was acceptable and could well be made.

It was so agreed.

4. The CHAIRMAN, speaking as a member of the Commission, proposed that, in the same sentence, "(genocide . . .)" should be replaced by "(for example, genocide)".

It was so agreed.

5. Mr. BARSEGOV criticized the use of the conjunction "or" in the same sentence to connect the three criteria mentioned with regard to the seriousness of the act, namely the nature of the act, the extent of its effects and the motive of the perpetrator. The conjunction "and" would be more appropriate.

6. Mr. THIAM (Special Rapporteur) suggested that the conjunction "or" should be retained, and that the words "or from several of these elements" should be added at the end of the sentence, so as to take account of Mr. Barsegov's point.

It was so agreed.

Paragraph (2), as amended, was approved.

Paragraph (3)

Paragraph (3) was approved.

Paragraph (4)

7. Mr. PAWLAK thanked the Special Rapporteur for his efforts to give an account of the various views expressed on the subject mentioned in paragraph (4). His

* Resumed from the 2034th meeting.

own view, however, was not fully reflected and he therefore proposed the addition at the end of the paragraph of a sentence along the following lines: "However, the Commission decided that it would revert at an appropriate stage to the question of the conceptual definition of crimes against the peace and security of mankind."

8. Mr. THIAM (Special Rapporteur) said that that proposal was acceptable, but the sentence should be placed at the end of paragraph (1) of the commentary.

It was so agreed.

9. Mr. SEPÚLVEDA GUTIÉRREZ pointed out that the penultimate sentence could be misleading. The reader might well infer that a list of crimes was included in the draft code.

10. Mr. THIAM (Special Rapporteur) said that the penultimate sentence had to be read in conjunction with the last sentence. Many members had stressed that no list of crimes would ever be final, since other crimes could be added later.

11. Mr. SOLARI TUDELA said that the problem might be solved by changing the tense of the verb in the penultimate sentence, so as to state that the enumeration of crimes in the draft code "will not be exhaustive".

12. Mr. REUTER suggested that the difficulty could be overcome by combining the last two sentences of the paragraph.

13. After a brief discussion in which Mr. FRANCIS, Mr. GRAEFRATH, Mr. BARSEGOV, Prince AJIBOLA, Mr. HAYES, Mr. AL-BAHARNA, Mr. PAWLAK and Mr. EIRIKSSON took part, Mr. THIAM (Special Rapporteur) proposed that the last two sentences should be combined so as to read: "The enumeration of crimes in the present draft code could be supplemented at any time by other legal instruments."

14. Mr. ARANGIO-RUIZ suggested that the words "other legal instruments" in the proposed new text should be replaced by "new instruments of the same legal nature".

It was so agreed.

The Special Rapporteur's amendment was adopted.

15. Mr. FRANCIS said that he could accept paragraph (4), but wished to place on record a reservation, namely that the provisional list of crimes against the peace and security of mankind must encompass aggression, as well as the right of the Security Council to define other forms of aggression. No new legal instrument was required for those crimes to be covered by the code.

Paragraph (4), as amended, was approved.

Paragraph (5)

16. Mr. CALERO RODRIGUES proposed that the word "nevertheless", in the seventh sentence, should be deleted, so as to convey more accurately the sense of the discussion.

17. Mr. MAHIOU said that he agreed with Mr. Calero Rodrigues's remarks, but the best course would be to delete the entire sentence.

It was so agreed.

18. Mr. BENNOUNA said that paragraph (5) of the commentary to article 1 was fundamental to the whole of the draft and should therefore reflect all the views expressed on the inclusion of a reference to international law. Some members maintained that such a reference was necessary because crimes against the peace and security of mankind were governed by the rules of general international law independently of any convention. They also thought it might be premature to take a decision on the inclusion of such a reference before a detailed list of the crimes to be covered by the code had been drawn up. At the 1993rd meeting, he had pointed out that a problem arose out of the relationship between the consensual nature of the future instrument and the universal character of the offence and had suggested that crimes against the peace and security of mankind could be regarded as a violation of a peremptory norm of international law. All such views should be reflected in the commentary in order to acquaint the General Assembly with the wide-ranging debate that had taken place. He therefore proposed that the last sentence of the paragraph should be replaced by wording along the following lines:

"It was also pointed out that the inclusion of such an expression raised the question whether crimes against the peace and security of mankind were governed by rules of general international law independently of the draft code. Another question was whether such rules were not in the nature of *ius cogens*. Lastly, it was held that the inclusion of such a reference was premature and that it was necessary to wait until the detailed list of the crimes concerned was known before a decision was reached on the matter."

19. Mr. MAHIOU said that he agreed with Mr. Bennouna's remarks, but considered that the proposed formulation should be reworded more concisely and be submitted in writing. The Commission could then revert to the matter at a later stage.

20. Mr. AL-BAHARNA proposed that, for the sake of consistency, the formula "the expression 'under international law'" should be used throughout the paragraph, instead of "the words 'under international law'".

It was so agreed.

21. Mr. TOMUSCHAT proposed that the words "under international law", in the last sentence, should be replaced by "under existing rules of international law", and that the words "or under a future convention binding States" should be deleted.

It was so agreed.

22. Prince AJIBOLA proposed that the word "conversion", in the penultimate sentence, should be replaced by "application".

23. After a brief discussion in which Mr. AL-BAHARNA, Mr. CALERO RODRIGUES and Mr. YANKOV took part, the CHAIRMAN proposed that

the words "conversion of international obligations into obligations under internal law", in the penultimate sentence, should be replaced by "incorporation of international obligations into the internal law of States".

It was so agreed.

24. Mr. BEESLEY said that paragraph (5) failed to reflect a view he had expressed formally (2031st meeting), namely that the words "under international law", in article 1, should be transferred to the latter part of the sentence, between the words "constitute crimes" and "against the peace and security of mankind".

25. Mr. THIAM (Special Rapporteur) said that a sentence could certainly be added to paragraph (5) in order to reflect Mr. Beesley's opinion.

It was so agreed.

26. The CHAIRMAN said that the Commission would revert to paragraph (5) when Mr. Bennouna's proposal (see para. 18 above) had been submitted in writing.

Commentary to article 2 (Characterization)

Paragraph (1)

27. Mr. ARANGIO-RUIZ said that he wished to enter a reservation. He was not opposed to approval of the commentary, or adoption of article 2 itself, but wished to reserve his position on both until such time as the question of the application of the code under the internal law of the States parties to the instrument that would embody the code was resolved to his satisfaction.

28. The Nürnberg trial, to which paragraph (1) of the commentary made reference, was extremely important for the development of the topic under consideration in that it constituted a leading historical and moral precedent in determining crimes against the peace and security of mankind. It was not, however, altogether a valid precedent for the determination of the respective roles of international law and internal law in the characterization of crimes against the peace and security of mankind and in the prosecution of those responsible for such crimes. In the case of the Nürnberg trial, the problem had been resolved by the special circumstances obtaining at that time, and in particular by the fact that the internal law of the State governing the persons on trial, as the nationals of that State, had been, as it were, *in manu* of the four occupying Powers. Thus there had been no independent and sovereign organization to exercise effective authority over the territory and raise objections under internal law to the application of the Four-Power London Agreement of 1945. Furthermore, that Agreement, which had always had his full support, had been binding only on the four Powers *inter se*.

29. Mr. BARSEGOV, speaking on a point of order, said that at the present stage it was not the task of members of the Commission to comment on the Nürnberg trial. Had it been, he too would have had something to say.

30. The CHAIRMAN said that Mr. Arangio-Ruiz was entitled to enter a reservation. He would, however, urge members to be as brief as possible so as to enable the Commission to complete its work on time.

31. Mr. ARANGIO-RUIZ, continuing his statement, said that the precedent set by the Nürnberg trial did not help the Commission to resolve the specific problem of determining the respective roles of international law and internal law in the arrest and, where applicable, extradition, prosecution and conviction of persons accused of crimes against the peace and security of mankind. If the code was to be an effective instrument for the prevention and prosecution of such crimes, adequate means for that purpose would have to be found: it was not enough simply to invoke the precedent of the Nürnberg trial.

32. Accordingly, each State party to the instrument that would embody the code should be required to incorporate the code into its internal law. Any State in breach of that obligation would then be responsible for having violated the code and any corresponding rules of general international law.

33. Mr. GRAEFRATH said that it was not necessary for everybody who disagreed with the reservation entered by Mr. Arangio-Ruiz to make that point. He asked for his remark to be reflected in the summary record.

34. Mr. PAWLAK said that he did not subscribe to Mr. Arangio-Ruiz's views regarding the Nürnberg trial and its importance for the Commission's work on the draft code. The precedent set by that trial might not be of assistance to Mr. Arangio-Ruiz, but it could be to other members.

35. Mr. ARANGIO-RUIZ said he had not maintained that the Nürnberg trial was of no help to the Commission. On the contrary, it was of great help; but it was one thing to say that it provided the historical and moral origins of the draft code and another to say that the legal framework within which the trial had been held could be used as a model for the framework upon which the code was to be built.

36. Mr. BARSEGOV said that, given the lack of time available to the Commission and the fact that the position of members, with the apparent exception of one, was well known, he would refrain from commenting on the true historical role of the Nürnberg trial.

37. Mr. YANKOV, speaking on a point of order, asked the Chairman to rule that any general statements reopening the discussion on points of substance were out of order. The Commission was operating under severe constraints and it would be appreciated if such statements could be avoided. The Commission should confine itself to the task in hand, which was the approval of the proposed commentary.

38. The CHAIRMAN said that, while members certainly had a right to enter reservations, he would appeal to them not to respond at the present stage to reservations entered by others.

39. Mr. REUTER said it was incorrect to say that all members but one were in agreement on the matter. Members should perhaps not voice their opinion at the present stage in the proceedings, but their silence should in no sense be interpreted as agreement. For his own part, he endorsed Mr. Arangio-Ruiz's views.

40. Mr. HAYES said he would not wish it to be assumed that he had any particular views on the Nürnberg trial until such time as it was appropriate for him to express an opinion in the matter.

Paragraph (1) was approved.

Paragraph (2)

Paragraph (2) was approved.

Paragraph (3)

41. Mr. TOMUSCHAT proposed that the penultimate sentence, which was closely linked to the *non bis in idem* principle, should be deleted. The Commission had yet to conclude its formulation of that principle and it would be inadvisable to prejudge the issue.

It was so agreed.

Paragraph (3), as amended, was approved.

The commentary to article 2, as amended, was approved.

Commentary to article 3 (Responsibility and punishment)

Paragraph (1)

42. Mr. THIAM (Special Rapporteur) pointed out that the word *celui-ci*, in the second sentence of the French text, should be replaced by *l'individu*.

Paragraph (1), as amended in the French text, was approved.

Paragraph (2)

43. Mr. GRAEFRATH said that there was some confusion in the first and second sentences of the second subparagraph between the notions of motive and intent. He proposed that, to avoid such confusion, the two sentences should be replaced by the following text:

“The motive answers the question what were the reasons animating a perpetrator. Motives generally characterizing a crime against humanity are based on racial or national hatred, religion or political opinion.”

It was so agreed.

44. Further to a comment by Mr. YANKOV, Mr. THIAM (Special Rapporteur) said that he would prefer not to delete the last sentence of the second subparagraph.

45. Mr. CALERO RODRIGUES said that Mr. Graefrath's amendment concerning the first two sentences of the second subparagraph had been very useful, for it was difficult to draw a distinction between the notions of motive and intent. In the last four sentences of the first subparagraph, another, even more subtle, distinction was drawn between notions that did not exist in all legal systems, namely the French terms *mobile* and *motif*, which were difficult to translate into English. Perhaps the best course would be simply to delete those four sentences.

46. Mr. BEESLEY said that the English text of the passage in question was not felicitous. Although the Special Rapporteur had dealt with the problem very skilfully and therefore wished to refer to it, the question

was somewhat delicate in English. There was no reason to give pride of place to one particular legal system and therefore it would be enough to say: “It should be noted that, in some systems of law, the motive is distinguished from the intention (*mens rea*).” He fully appreciated Mr. Calero Rodrigues's point, but wondered about the effects of deleting the four sentences. Perhaps it would be better to amend the text as he himself had suggested, since the original French posed no difficulties.

47. Mr. THIAM (Special Rapporteur) said that he had sought faithfully to summarize the debate, in which a distinction had been drawn between *mobile* (motive) and *motif* (incentive), but he could none the less agree to the deletion of the passage in question.

48. Mr. BEESLEY said that an individual could be motivated by all sorts of considerations, but the concern of the courts was whether he had intended to kill. Hence there was a major distinction between motive and intent, one which had been discussed in the Commission. It would be regrettable if the commentary were to remain silent on that point and become the subject of unwarranted criticism. Nevertheless, he would not press his proposal if it meant delaying the work in hand.

49. The CHAIRMAN said that the penultimate sentence of the second subparagraph might meet Mr. Beesley's concern.

50. Mr. BARSEGOV said he understood that the Special Rapporteur had wished to reflect in the commentary all the nuances of the debate, but it would be enough to indicate the distinction to be drawn between motive and intent and better to delete the last four sentences of the first subparagraph, since the second subparagraph was sufficiently detailed.

51. Mr. HAYES pointed out that, in paragraph (2) of the commentary to article 1, the Commission had replaced the term “intention” by “motive”, in connection with genocide. It now appeared to be using the term “motive” in an entirely different sense. Consequently, the word “purpose” could be used in paragraph (2) of the commentary to article 1, in order to avoid any confusion between that notion and the notion of motive developed in the present case.

52. Mr. THIAM (Special Rapporteur) said that paragraph (2) of the commentary to article 1 had already been approved, but he endorsed the idea of deleting the last four sentences of the first subparagraph of paragraph (2) of the commentary to article 3, concerning the distinction between motive and incentive.

It was so agreed.

53. Mr. EIRIKSSON said that the phrase “that are not covered by the definition of the offence”, in article 3, paragraph 1, was not properly explained in the commentary and it was not easy to grasp its purpose. However, he had already consulted the Special Rapporteur on the matter.

54. Mr. CALERO RODRIGUES proposed that, in the fourth sentence of the first subparagraph, the expression “justifying fact” should be replaced by “exception”.

55. The CHAIRMAN suggested that it would be better to use the word "defence".

It was so agreed.

Paragraph (2), as amended, was approved.

Paragraph (3)

Paragraph (3) was approved.

Paragraph (4)

56. Mr. THIAM (Special Rapporteur) said that the words "does not refer to the criminal responsibility of the State", in the first sentence, should be replaced by "refers to the criminal responsibility of the individual".

Paragraph (4), as amended, was approved.

Paragraph (5)

Paragraph (5) was approved.

The commentary to article 3, as amended, was approved.

Commentary to article 5 (Non-applicability of statutory limitations)

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

Paragraph (2) was approved with a drafting change.

Paragraph (3)

57. Mr. RAZAFINDRALAMBO proposed that the words "concern themselves with statutory limitation", in the first sentence, should be replaced by "concern themselves with the rule of statutory limitation".

It was so agreed.

58. Mr. BARSEGOV said that the second sentence should refer to "recognition of the rule", and not "introduction of the rule", which conveyed the impression that the rule of the non-applicability of statutory limitations had emerged from nowhere, which had not been the case. It had always existed, even though it had not been properly recognized.

It was so agreed.

Paragraph (3), as amended, was approved.

Paragraphs (4) and (5)

59. Mr. TOMUSCHAT said that paragraph (4) was of little value, for article 5 applied to all crimes against the peace and security of mankind, without distinction. Why then draw a distinction between war crimes and crimes against humanity?

60. Mr. THIAM (Special Rapporteur) said that paragraph (4) was purely explanatory and could be deleted, but the Commission would later revert to the rule of the non-applicability of statutory limitations. It was not entirely obvious that the rule applied to all crimes against the peace and security of mankind, particularly war crimes.

61. Mr. PAWLAK said that the question had been discussed in the Commission and should be reflected in the report.

62. Mr. TOMUSCHAT said that he, among others, had reservations about the rule set out in article 5 and would point out that it might well have to be reviewed in the light of the list of crimes. Paragraph (4) ought therefore to come after paragraph (5) and begin with the sentence: "In particular, as far as war crimes are concerned, there may be a need to recognize statutory limitations." In its present form, paragraph (4) was not readily understandable.

63. Prince AJIBOLA said that paragraph (4) could be retained, whether or not it was combined with paragraph (5).

64. Mr. THIAM (Special Rapporteur) said that he had no objection to the idea of reversing the order of paragraphs (4) and (5), or even combining them.

65. The CHAIRMAN suggested that the Special Rapporteur should make arrangements with the secretariat for the presentation of paragraphs (4) and (5).

It was so agreed.

Paragraphs (4) and (5) were approved on that understanding.

The commentary to article 5, as amended, was approved.

The meeting rose at 1.05 p.m.

2039th MEETING

Thursday, 16 July 1987, at 3 p.m.

Chairman: Mr. Stephen C. McCaffrey

Present: Prince Ajibola, Mr. Al-Khasawneh, Mr. Arango-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Diaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Mahiou, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

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

CHAPTER II. *Draft Code of Offences against the Peace and Security of Mankind* (continued) (A/CN.4/L.414 and Add.1)

C. *Draft articles on the draft Code of Crimes against the Peace and Security of Mankind* (concluded) (A/CN.4/L.414/Add.1)

Article 6 (Judicial guarantees)

1. Mr. MAHIOU, referring to the French text, said he noted that, although article 6 had been amended by the Commission, it now appeared in its original version.