

Document:-  
**A/CN.4/SR.2199**

**Summary record of the 2199th meeting**

Topic:  
**Other topics**

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## 2199th MEETING

Wednesday, 18 July 1990, at 10.05 a.m.

Chairman: Mr. Jiuyong SHI

*Present:* Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucounas, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

### Draft report of the Commission on the work of its forty-second session (continued)

#### CHAPTER I. Organization of the session (A/CN.4/L.446)

Paragraphs 1 to 10

*Paragraphs 1 to 10 were adopted.*

Paragraph 11

1. Mr. EIRIKSSON (Rapporteur) pointed out that a passage relating to draft article 17 would appear in another part of the report and proposed that an appropriate reference to it be added at the end of paragraph 11.

*It was so agreed.*

*Paragraph 11, as amended, was adopted.*

Paragraph 12

2. Mr. EIRIKSSON (Rapporteur) proposed that the reference to General Assembly resolution 44/39, at the end of the first sentence, be made more specific by adding the words "on the question of establishing an international criminal court or other international criminal trial mechanism".

*It was so agreed.*

*Paragraph 12, as amended, was adopted.*

Paragraphs 13 to 18

*Paragraphs 13 to 18 were adopted.*

*Chapter I of the draft report, as amended, was adopted.*

#### CHAPTER VI. Relations between States and international organizations (second part of the topic) (A/CN.4/L.451)

##### A. Introduction

Paragraphs 1 to 8

*Paragraphs 1 to 8 were adopted.*

*Section A was adopted.*

##### B. Consideration of the topic at the present session

Paragraphs 9 and 10

*Paragraphs 9 and 10 were adopted.*

Paragraph 11

3. Mr. MAHIOU expressed surprise at a formulation which he found rather unusual. It was usual to begin

with the views of the Special Rapporteur, but in the present case, on the contrary, it was stated that the Special Rapporteur's fourth report had been "welcomed with satisfaction"—a judgment that was generally dispensed with—and paragraph 11 went on immediately to describe the views of members of the Commission. Furthermore, it was stated in the second sentence that "the report finally charted the right course for the topic". That was a peremptory, even exaggerated, assertion which it would be advisable to moderate.

4. Mr. EIRIKSSON (Rapporteur), replying to Mr. Mahiou, proposed that the first sentence of paragraph 11 be deleted. He would also try to make it clear that the opinion reported in the paragraph was that of a few members of the Commission or a small group of members, and not that of the whole Commission; that was all the more necessary because the following paragraphs stated contrary views.

5. Mr. SOLARI TUDELA said that, if paragraph 11 were redrafted in the manner indicated by the Rapporteur, he would like the idea of "right course" to be retained. Since it was the first time that the Commission had decided to refer draft articles on the topic to the Drafting Committee, that fact should not be omitted.

6. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to revert to paragraph 11 when it had been redrafted.

*It was so agreed.*

Paragraphs 12 and 13

*Paragraphs 12 and 13 were adopted.*

Paragraph 14

7. Mr. MAHIOU pointed out that that long paragraph purported to describe, in succession, the opinion of "some members of the Commission and, in particular, the Special Rapporteur", then the views of the Commission itself and finally those of the General Assembly, with the result that one could not tell to whom the last four sentences should be attributed.

8. Mr. BENNOUNA said that he had the same doubts. As he saw it, paragraph 14 was intended to report the opinion of the Special Rapporteur. What troubled the reader was simply the reference in the first sentence to "some members of the Commission and, in particular, the Special Rapporteur".

9. Mr. BARBOZA said that he, too, had doubts about the content of paragraph 14, which was quite unusual.

10. Mr. EIRIKSSON (Rapporteur) said that all the arguments set out in paragraph 14 were homogeneous: they called for continued consideration of the topic. All the views mentioned had been put forward in the Commission's meetings and had contributed to the discussion. It would be inappropriate to say nothing of them. Perhaps the beginning of the paragraph could be reworded so as to introduce the text that followed.

11. The CHAIRMAN said that, if there were no objections, he would take it that the Commission

wished to take time for consideration and to revert to paragraph 14 when it had been redrafted.

*It was so agreed.*

Paragraphs 15 and 16

*Paragraphs 15 and 16 were adopted.*

Paragraph 17

12. After an exchange of views between Mr. EIRIKSSON (Rapporteur), Mr. BARBOZA and Mr. TOMUSCHAT on the use of the expression "with a universal vocation" to correspond to the French *à vocation universelle*, it was decided to ask the translation services to find a better formula.

*Paragraph 17 was adopted subject to that reservation.*

Paragraphs 18 to 23

*Paragraphs 18 to 23 were adopted.*

Paragraph 24

13. Mr. SOLARI TUDELA asked that the first sentence of the Spanish text be amended: the expression *miembro de frase* was not clear.

*Paragraph 24 was adopted subject to that reservation.*

Paragraphs 25 to 32

*Paragraphs 25 to 32 were adopted.*

Paragraph 33

14. Mr. TOMUSCHAT and Mr. GRAEFRATH pointed out that the second sentence ("In the report under consideration, he had submitted two separate articles . . .") was unclear and perhaps even incorrect, since it was not clear whether it referred to the Special Rapporteur's second or fourth report. That passage should be clarified.

*Paragraph 33 was adopted subject to that reservation.*

Paragraph 34

*Paragraph 34 was adopted.*

Paragraph 35

15. Mr. MAHIOU said that the fifth sentence, which stated that "immunity from jurisdiction in the case of international organizations was granted to protect the interests of all the member States", appeared to confuse the interests of States members of international organizations with those of the organizations themselves, thereby disregarding the legal personality of the organizations.

16. Mr. RAZAFINDRALAMBO said that he interpreted that sentence to mean that, when the interests of an international organization were protected, those of its member States must necessarily be protected at the same time. He thought that the confusion arose from the phrase which followed the words "member States".

17. Mr. EIRIKSSON (Rapporteur) said that the sentence in question reflected a stand taken against any restriction of the immunity of international organizations. The intention was to draw a distinction between the restricted immunity granted to States and the absolute immunity enjoyed by international organizations.

18. Mr. TOMUSCHAT confirmed that that view had been expressed. The only problem was to whom it should be attributed.

19. Mr. FRANCIS said that there might perhaps be a problem of attribution, but the idea was clear, namely that the immunity accorded to international organizations was intended to protect wider interests than those of the member States taken individually.

20. Mr. SOLARI TUDELA said that he was one of the members who had made the observation in question.

21. Mr. MAHIOU said that, if the intention was to defend the absolute immunity of international organizations, it seemed unwise to invoke the interests of the member States, which had only restricted immunity. The report should also indicate who had expressed the opinion recorded in the sixth sentence.

22. The CHAIRMAN said that the Rapporteur would amend the fifth and sixth sentences in consultation with the members concerned.

*Paragraph 35 was adopted on that understanding.*

Paragraphs 36 to 41

*Paragraphs 36 to 41 were adopted.*

Paragraph 42

23. Mr. MAHIOU, supported by Mr. TOMUSCHAT, said that the last words of paragraph 42, "and could on no account be expropriated", were unnecessary and seemed to reflect some confusion about the concept of expropriation: by definition, public property could not be expropriated. He proposed that those words be deleted.

*It was so agreed.*

*Paragraph 42, as amended, was adopted.*

Paragraphs 43 and 44

*Paragraphs 43 and 44 were adopted.*

Paragraph 45

24. Mr. BENNOUNA asked that an effort be made to improve the drafting of the last sentence of the French text, which contained the phrases *d'accorder refuge à des cas justifiés* and *l'asile servait de garantie à un droit de l'homme fondamental*.

25. Mr. TOMUSCHAT proposed that the word "perhaps", in the last sentence, be deleted: if the draft articles were adopted by States, article 9 could certainly be so invoked.

*It was so agreed.*

26. The CHAIRMAN said that the Rapporteur would see that Mr. Bennouna's request was complied with.

*Paragraph 45, as amended, was adopted on that understanding.*

Paragraphs 46 to 51

*Paragraphs 46 to 51 were adopted.*

27. The CHAIRMAN thanked the Arabic-speaking and Russian-speaking members of the Commission for consenting to the Commission's considering document A/CN.4/L.451 although the Arabic and Russian versions had not yet been distributed.

**CHAPTER II. Draft Code of Crimes against the Peace and Security of Mankind (A/CN.4/L.447 and Add.1 and 2 and Add.2/Corr.1 and Add.3)**

28. The CHAIRMAN said that chapter II of the draft report would consist of sections A, B, C and D. With regard to section B, he pointed out that the text of subsection 3 contained in document A/CN.4/L.447/Add.3 corresponded to the text already adopted by the Commission on the question of draft article 17 (see 2198th meeting, paras. 1-6 and 52-67). As for section C, he pointed out that the text contained in document A/CN.4/L.447/Add.1 corresponded to the report of the Working Group on the question of the establishment of an international criminal jurisdiction adopted earlier by the Commission (see 2189th and 2192nd to 2194th meetings, and 2196th meeting, paras. 1-42).

29. He therefore invited the Commission to consider section A, section B, subsections 1 and 2, and section D of chapter II.

**A. Introduction (A/CN.4/L.447)**

Paragraphs 1 to 7

*Paragraphs 1 to 7 were adopted.*

*Section A was adopted.*

**B. Consideration of the topic at the present session**

Paragraphs 8 to 70 (A/CN.4/L.447)

Paragraphs 8 to 15

*Paragraphs 8 to 15 were adopted.*

Paragraph 16

30. Mr. BARSEGOV proposed that, in the first sentence, the word "degrees" be replaced by "forms".

*It was so agreed.*

31. Mr. TOMUSCHAT said that the word "subsidiary", in the second sentence, was not an accurate translation of the French word *accessoire*. He proposed that it be replaced by the word "accessory".

*It was so agreed.*

*Paragraph 16, as amended, was adopted.*

Paragraph 17

32. Mr. McCAFFREY said that English legal usage required the deletion of the article "an" which appeared twice before the word "attempted" in the second sentence.

*It was so agreed.*

*Paragraph 17, as amended, was adopted.*

Paragraphs 18 to 22

*Paragraphs 18 to 22 were adopted.*

Paragraph 23

33. Mr. MAHIOU said that the beginning of the French text would be more correct if amended to read: *Se posait aussi, comme l'avait dit le Rapporteur spécial...*

*It was so agreed.*

*Paragraph 23, as amended in the French text, was adopted.*

Paragraph 24

*Paragraph 24 was adopted.*

Paragraph 25

34. Mr. TOMUSCHAT said he was not sure that the laws of the Federal Republic of Germany recognized, as was stated in the last sentence of paragraph 25, that giving assistance after the commission of an offence could, in certain circumstances, constitute complicity. He suggested that he verify that point and inform the Rapporteur, who could amend the sentence if necessary.

*Paragraph 25 was adopted subject to that reservation.*

Paragraph 26

35. Mr. McCAFFREY said that he found paragraph 26 too short, considering the arguments advanced during the discussion, especially as the answer given in the following paragraphs was much more extensive. When speaking of a material definition of the perpetrator, he had not been thinking of a general definition, but of a definition for each of the crimes considered.

36. Mr. BENNOUNA said that he had taken the same position during the debate, stressing that, in the article on aggression, the Commission had tried to define the perpetrator for each act of aggression.

37. Mr. GRAEFRATH said that he, too, recalled having raised the question; but he was not certain that the problem could be solved simply by adding the words "for each crime considered" at the end of the first sentence of paragraph 26, since the Drafting Committee had considered including a general provision defining the perpetrator of crimes against peace. He therefore proposed the addition, at the end of the first sentence, of the following phrase: "taking into consideration specific elements of particular crimes".

*It was so agreed.*

*Paragraph 26, as amended, was adopted.*

Paragraph 27

*Paragraph 27 was adopted.*

Paragraph 28

38. Mr. McCAFFREY stressed that the draft code dealt with three different categories of crimes—war crimes, crimes against peace and crimes against humanity—and suggested that the last part of the first sentence be amended accordingly.

39. After a discussion in which Mr. BENNOUNA, Mr. MAHIOU, Mr. RAZAFINDRALAMBO, Mr. THIAM (Special Rapporteur) and Mr. EIRIKSSON (Rapporteur) took part, the CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to amend the last part of the first sentence of paragraph 28 to read: "... were easier to apply to war crimes than to crimes against peace or crimes against humanity".

*It was so agreed.*

*Paragraph 28, as amended, was adopted.*

Paragraphs 29 and 30

*Paragraphs 29 and 30 were adopted.*

Paragraph 31

40. After an exchange of views in which Mr. EIRIKSSON (Rapporteur) and Mr. McCAFFREY

took part, the CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to amend the second sentence to read: "Other members expressed serious doubts on that point or requested clarification on particular points."

*It was so agreed.*

*Paragraph 31, as amended, was adopted.*

Paragraphs 32 to 34

*Paragraphs 32 to 34 were adopted.*

Paragraph 35

41. Mr. EIRIKSSON (Rapporteur) said that, at the end of the last sentence, the word "or" should be replaced by "and".

*Paragraph 35, as amended, was adopted.*

Paragraphs 36 to 39

*Paragraphs 36 to 39 were adopted.*

Paragraph 40

42. Mr. BEESLEY proposed the addition, at the end of the paragraph, of the following sentence, summarizing what he had said on the matter during the discussion:

"One member suggested that the creation or institution of the crime of conspiracy in national penal systems seemed to have evolved as a matter of public policy, due to the seriousness or frequency of the underlying crime or the difficulty of taking criminal proceedings against individual perpetrators, and the same process might be envisaged on the international plane."

*It was so agreed.*

*Paragraph 40, as amended, was adopted.*

Paragraphs 41 to 45

*Paragraphs 41 to 45 were adopted.*

Paragraph 46

43. Mr. EIRIKSSON (Rapporteur) said that the words "intentionally, knowingly or unthinkingly", in the first sentence, seemed ambiguous. He suggested that he ascertain exactly what had been said by the member of the Commission concerned.

*Paragraph 46 was adopted subject to that reservation.*

Paragraphs 47 to 54

*Paragraphs 47 to 54 were adopted.*

Paragraph 55

44. Mr. EIRIKSSON (Rapporteur) proposed that the word "even", in the first sentence, be deleted.

*It was so agreed.*

*Paragraph 55, as amended, was adopted.*

Paragraph 56

45. Mr. McCAFFREY said that he did not understand the meaning of the second sentence.

46. Mr. EIRIKSSON (Rapporteur) proposed that the sentence be amended to read: "But it would also be unwise to specify as a general rule that attempt would be punishable in respect of all crimes against the peace and security of mankind."

*It was so agreed.*

*Paragraph 56, as amended, was adopted.*

Paragraphs 57 to 59

*Paragraphs 57 to 59 were adopted.*

Paragraph 60

47. Mr. MAHIU proposed that the last part of paragraph 60 be amended to read: "... and which, in their view, should certainly be included in the code".

*It was so agreed.*

*Paragraph 60, as amended, was adopted.*

Paragraph 61

*Paragraph 61 was adopted.*

Paragraph 62

48. Mr. EIRIKSSON (Rapporteur) suggested that the word "State" be deleted from the second and fifth sentences.

*It was so agreed.*

*Paragraph 62, as amended, was adopted.*

Paragraph 63

49. Mr. GRAEFRATH, supported by Mr. PAWLAK, proposed that paragraph 63 be deleted.

*It was so agreed.*

Paragraph 64

50. Mr. KOROMA proposed that, in the first sentence, the words "from them" after the words "it was not clear" be deleted.

*It was so agreed.*

*Paragraph 64, as amended, was adopted.*

Paragraph 65

51. Mr. MAHIU suggested that the adjective "conceivable" be deleted.

*It was so agreed.*

*Paragraph 65, as amended, was adopted.*

Paragraph 66

52. Mr. KOROMA suggested that the word "highest", at the end of the second sentence, be deleted.

*It was so agreed.*

*Paragraph 66, as amended, was adopted.*

Paragraphs 67 to 70

*Paragraphs 67 to 70 were adopted.*

53. Mr. FRANCIS said that he wished to express strong reservations on the idea of treating traffic in narcotic drugs as a crime under the draft code only when it was organized on a large scale.

**CHAPTER IV. The law of the non-navigational uses of international watercourses** (continued) (A/CN.4/L.449 and Add.1 and 2)

**C. Draft articles on the law of the non-navigational uses of international watercourses** (A/CN.4/L.449/Add.1 and 2)

**SUBSECTION 1** (Texts of the draft articles provisionally adopted so far by the Commission) (A/CN.4/L.449/Add.1)

*Section C.1 was adopted.*

**SUBSECTION 2** (Texts of draft articles 22 to 27, with commentaries thereto, provisionally adopted by the Commission at its forty-second session) (A/CN.4/L.449/Add.1 and 2)

*Commentary to article 22 (Protection and preservation of ecosystems)*  
Paragraphs (1) and (2)

*Paragraphs (1) and (2) were approved.*

Paragraph (3)

54. Mr. McCAFFREY (Special Rapporteur) suggested that consideration of paragraph (3) be deferred until he was able to submit an amendment in response to an observation made to him by a member of the Commission.

*It was so agreed.*

Paragraph (4)

55. Mr. EIRIKSSON (Rapporteur) proposed that the words "of course", in the seventh sentence, be deleted.

*Paragraph (4) was approved.*

Paragraph (5)

56. Mr. BENNOUNA suggested that paragraphs (5) to (9), which only rehearsed State practice, should be deleted, especially as the sources cited there could be found in the relevant report of the Special Rapporteur.

57. Mr. MAHIOU, while recognizing the usefulness of the citations in question, doubted whether they should be retained.

58. Mr. McCAFFREY (Special Rapporteur) said that it was the Commission's tradition, going back to the early 1950s, to support its draft articles with authoritative sources; otherwise it would give the impression that it elaborated them starting from nothing. It was important that draft articles be firmly based on State practice. Moreover, he had only followed that practice in regard to article 22 and had drafted much less extensive commentaries to the other articles. He had also tried to condense, as much as possible, the citations reproduced in paragraphs (5) to (9), which in his report took up some 50 pages. In any case, it was a question of principle which involved the Commission's reputation.

59. The CHAIRMAN drew attention to article 20 of the Commission's statute, which provided that the commentaries to its articles must contain "adequate presentation of precedents and other relevant data, including treaties, judicial decisions and doctrine".

60. Mr. TOMUSCHAT said that he shared the views of the Special Rapporteur and the Chairman and believed that the commentaries to articles were not only useful, but indispensable for the agents of Governments and members of universities who had to consult them.

61. Mr. AL-QAYSI added that, if the citations in paragraphs (5) to (9) were deleted, the reader would have to await publication of the *Yearbook* containing the Special Rapporteur's report to find them again.

62. Mr. EIRIKSSON (Rapporteur) suggested that paragraphs (5) to (9) could be retained, but with some of the citations transferred to footnotes.

63. Mr. PAWLAK opposed the deletion of paragraphs (5) to (9), which would enable the Commission to convince the General Assembly that its work rested on solid foundations.

64. Mr. KOROMA said he, too, thought that the citations should be retained.

65. Mr. ROUCOUNAS observed that some reports were extremely rich, while others were rather meagre. Mr. McCaffrey's reports contained valuable elements, of which the Commission would be wrong to deprive itself, especially as, under Article 38 of the Statute of the ICJ, the Commission's work could serve as a subsidiary means for the determination of rules of law. The articles adopted by the Commission should therefore be accompanied by detailed commentaries.

66. Mr. JACOVIDES said that he was opposed to the deletion of paragraphs (5) to (9).

67. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to retain paragraphs (5) to (9) of the commentary to article 22.

*It was so agreed.*

*The meeting rose at 1.15 p.m.*

## 2200th MEETING

*Wednesday, 18 July 1990, at 3.05 p.m.*

*Chairman: Mr. Jiuyong SHI*

*Present: Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucounas, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.*

### Draft report of the Commission on the work of its forty-second session (*continued*)

CHAPTER IV. *The law of the non-navigational uses of international watercourses* (*continued*) (A/CN.4/L.449 and Add.1 and 2)

C. *Draft articles on the law of the non-navigational uses of international watercourses* (*continued*) (A/CN.4/L.449/Add.1 and 2)

SUBSECTION 2 (Texts of draft articles 22 to 27, with commentaries thereto, provisionally adopted by the Commission at its forty-second session (*continued*)) (A/CN.4/L.449/Add.1 and 2)

*Commentary to article 22 (Protection and preservation of ecosystems)* (*continued*)

Paragraph (3) (*concluded*)

1. Mr. McCAFFREY (Special Rapporteur) recalled that a point made by a member of the Commission concerning paragraph (3) had been left in abeyance. To meet that point, he suggested that the words "the threat of harm", in the third sentence, be amended to read: "a significant threat of harm".

*It was so agreed.*

*Paragraph (3), as amended, was approved.*