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Summary record of the 2208th meeting

Topic:
<multiple topics>

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by the procedures of ordinary law, but, in cases in which property was in the custody of the police or the court, the court must in practice see to its disposal. If such a possibility was to be envisaged in the draft Code, the Commission would have to prepare a separate, more complex provision. In any event, such property should be entrusted to a humanitarian organization only if it was impossible, for one reason or another, to return it to its rightful owner.

34. In conclusion, he was of the view that the draft Code should both provide for and specify applicable penalties; that the latter should be universally acceptable, even at the risk of having an imbalance in certain countries between penalties applicable to "ordinary" crimes and those applicable to the crimes covered in the Code; that the system of punishment should be based on imprisonment, with or without variations; and that the same type of penalty should be imposed for all very serious crimes, but with minimum and maximum limits, so that the court could take account of the degree of heinousness of the act in question. Lastly, he doubted that a provision on stolen or misappropriated property was desirable, but, if the Commission considered it necessary, it should be dealt with in a separate article.

The meeting rose at 11.35 a.m.

2208th MEETING

Wednesday, 15 May 1991, 10.10 a.m.

Chairman: Mr. Abdul G. KOROMA

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Illueca, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Draft Code of Crimes against the Peace and Security of Mankind[1] (*continued*) (A/CN.4/435 and Add.1,[2] A/CN.4/L.456, sect. B, A/CN.4/L.459 and Corr.1 and Add.1, ILC(XLIII)/Conf.Room Doc.3)

[Agenda item 4]

NINTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE Z *and*

JURISDICTION OF AN INTERNATIONAL CRIMINAL COURT[3] (*continued*)

1. Mr. THIAM (Special Rapporteur) said that, unfortunately, information on the situation with respect to the death penalty in Latin America had been omitted from the ninth report. A corrigendum containing a statement of the current situation would be issued.

2. Mr. SHI said the Special Rapporteur was right to affirm that the principle of *nulla poena sine lege* required that provision must be made for penalties in the draft Code. The Special Rapporteur's proposed single article on penalties, set out as article Z and covering all crimes listed in the Code, was an attempt to find a simplified solution to an extremely complicated issue. The Special Rapporteur argued that, since the crimes listed in the Code were the most serious international crimes, the heaviest penalties should be imposed and that, given the trend towards abolition of the death penalty, the heaviest penalty must be life imprisonment. It was further argued that, in view of the problem of the diversity of legal systems, the inclusion of penalties in the Code itself for adoption by States in an international convention would produce a degree of uniformity of punishment. The question was whether such a solution would be acceptable to States in general, for the "international-convention approach" would entail drastic changes in some national criminal codes with respect to penalties for crimes that were evidently less serious than the ones listed in the draft Code. For many States that would create both procedural and philosophical difficulties. The only alternative solution would be to establish an international criminal court with exclusive jurisdiction, but the problem of the acceptance of such a court by States would still arise. The issue of the provision of penalties in the Code was hard to resolve in practice.

3. Despite the difficulties, he was ready to accept the first two paragraphs of article Z. The third paragraph provided for confiscation of stolen or misappropriated property. In that regard he agreed with Mr. Hayes (2207th meeting) that the possibility of such confiscation need not be viewed with disfavour on the ground that it could punish the relatives of the convicted persons. Confiscated property should, in general, be restored to the rightful owner, and property forming part of a State's cultural or historical heritage should be restored to the State. If such restoration was not possible, the property might be entrusted to a United Nations body, UNICEF, for example, as suggested by the Special Rapporteur. Lastly, the third paragraph should, in his opinion, be presented as a separate article.

4. The approach taken by the Special Rapporteur in part two of his report, on the establishment of an international criminal jurisdiction, was certainly in conformity

[1] The draft code adopted by the Commission at its sixth session, in 1954 (*Yearbook... 1954*, vol. II, pp. 151-152, document A/2693, para. 54) is reproduced in *Yearbook... 1985*, vol. II (Part Two), p. 8, para. 18.

[2] Reproduced in *Yearbook... 1991*, vol. II (Part One).

[3] For texts of draft article Z and of possible draft provisions on jurisdiction of the court and criminal proceedings, see 2207th meeting, para. 3.

with paragraph 3 of General Assembly resolution 45/41, for it would help to determine the feasibility of setting up an international criminal court. The point of departure for considering the issue of the jurisdiction of an international criminal court was that States were very cautious when dealing with matters that touched on their sovereignty. Accordingly, acceptance of the statute of an international criminal court did not imply consent to the court's jurisdiction. A separate expression of consent was needed by means of a convention, special agreement or unilateral declaration, as provided for in article 26 of the 1953 draft statute for an international criminal court.[4] Safeguards were needed to allow a State to decide on national criminal jurisdiction despite its overall consent to confer jurisdiction on an international court. Nor should such consent affect the system of universal jurisdiction of national courts over certain crimes, pursuant to international conventions or agreements.

5. The Special Rapporteur was right to limit the court's jurisdiction *ratione personae* to natural persons, for at the present stage of the work on the draft Code criminal responsibility was limited to individuals. On the question of jurisdiction *ratione materiae*, the Special Rapporteur was more flexible in that he presented the alternative of having no limitation, so that the draft would gain greater acceptance by States. Under such an alternative, however, the question of the limitation of personal jurisdiction to individuals would arise, since the debate in the Sixth Committee had revealed that some States would like to extend personal jurisdiction to juridical persons, particularly for certain crimes.

6. As to the number of States required to confer jurisdiction, he agreed to the idea of combining the principles of territoriality, active and passive personality, and real protection, with priority on the principle of territoriality. Such a system had more merits than drawbacks, since it protected State sovereignty, and the principle of territoriality was the general rule in almost all States.

7. Paragraphs 3, 4 and 5 of the possible draft provision on the jurisdiction of the court were acceptable. More particularly, the idea of the competence of the court to interpret a provision of international criminal law was a good one. Concerning access to the court, he could support the ideas set out in the possible draft provision on criminal proceedings. The provision making criminal proceedings subject to prior determination by the Security Council of the existence of the crimes in question was consistent with the article on the crime of aggression provisionally adopted by the Commission.[5]

8. Mr. GRAEFRATH said that the Special Rapporteur's ninth report focused on issues that had to be settled if the draft Code was to become a useful tool in strengthening peace and international cooperation. While he agreed with the Special Rapporteur's general approach in seeking universally acceptable solutions to those issues he was unable to accept all of the conclusions.

9. With regard, first, to penalties for crimes against the peace and security of mankind, a provision on the question must indeed be included in the draft Code if the establishment of an international criminal court was being considered. Such a provision would not only satisfy the principle *nulla poena sine lege*: it would also give expression to the moral and legal values the Code sought to protect and, at the same time, serve to unify the system of punishment for the crimes enumerated in the Code. The problem was that most of the crimes in question were already offences punishable under the domestic law of many countries. Preference could, of course, be had to domestic law in order to determine the penalty for a given crime, and there were two sources of such law—the law of the country in which the crime had been committed and the law of the country of which the alleged offender was, or had been, a national at the time the crime had been committed. Yet that approach could give rise to difficulties in view of the diversity of legal systems and penalties concerned. He therefore agreed that the Commission should not take that tack. Instead, the Code itself should specify the penalties to be applied, or, rather, it should provide for a range of penalties within which the judge could exercise his discretion. One provision on penalties would therefore suffice.

10. Not only extenuating circumstances, but attempt as well should attract a lighter penalty, and that should be spelt out in the draft Code. He agreed that there should be no return to the death penalty and was also opposed to life imprisonment, which was inhuman and contrary to human rights. A 25-year term of imprisonment should be the most severe penalty. He did not favour the imposition of a minimum punishment in a code dealing with particularly serious crimes. In particular, a judge at an international criminal court should not be placed in a straitjacket but should be allowed the freedom to take account of the specific circumstances of the case and of the personality of the offender.

11. Provision should also be included in the draft Code for an additional penalty, confiscation of property, which could be particularly important in the case of crimes such as drug trafficking. The court should decide what was to become of confiscated property, but the property should in the first instance be used to compensate the victims of the crime, and provision to that effect should be included in the draft. The question of stolen or misappropriated property was a different matter and should be dealt with separately, if at all.

12. As to part two of the report, he was in general agreement with paragraphs 3, 4 and 5 of the Special Rapporteur's proposed article on the jurisdiction of the court. It would be noted in that connection that the Sixth Committee had not spoken in favour of any one specific model for an international criminal court, possibly because the consequences stemming from a decision on competence and jurisdiction might not have been sufficiently clear. The few representatives who had opposed the idea of an international criminal court had taken the view that it was premature or could jeopardize the existing system of universal jurisdiction. On the question of competence itself, opinions had been more or less equally divided, some representatives considering that the court should have competence to try all crimes cov-

[4] See 2207th meeting, footnote 7.

[5] For text and commentary, see *Yearbook... 1988*, vol. II (Part Two), pp. 71-73, article 12.

ered by the Code, while others preferred to leave it to States to decide over which crimes the court should have jurisdiction. The jurisdiction and competence of an international criminal court lay at the core of the political decision that would have to be taken by States if such a court was to become a reality, something that would necessarily have an effect on State sovereignty. Those in favour of an international criminal court with exclusive jurisdiction over certain crimes expected States to surrender their own right to punish those crimes. That would apply even in the case of crimes committed by or against nationals of the State concerned and of crimes committed against a State or on the State's territory. Hence, while exclusive jurisdiction could perhaps be envisaged for such crimes as aggression or genocide, it would not make for a very realistic approach. Experience showed that, by and large, States reserved for themselves the right to punish their own citizens, to engage in criminal proceedings for offences committed on their territory, and they were not prepared to extradite their own nationals. It was therefore somewhat surprising that so many States represented at the General Assembly had spoken in favour of an international criminal court with exclusive jurisdiction. States that supported such a maximalist approach often did so subject to a reservation that other States or all States should act in the same way. In practice, demand for the maximum could have the effect of thwarting achievement of the minimum.

13. The rule put forward by the Special Rapporteur envisaged concurrent, rather than exclusive, jurisdiction, though not in express terms. It was not clear from the Special Rapporteur's proposal, however, whether a State which conferred jurisdiction over certain crimes on the international criminal court would continue to have national jurisdiction or would waive it completely. Apparently, the principle underlying the proposed article was that the mere fact that jurisdiction had been conferred would not affect the law by which national criminal jurisdiction was determined, the result being that national criminal jurisdiction would remain intact. In that event, a State would not be bound to bring a specific case before the international criminal court but would have the right to choose whether to do so or to bring the case before its own courts.

14. The Special Rapporteur had said that he had taken account of the concern to ensure that the criminal jurisdiction of States was respected, and had also rightly noted that there would be no point in laying down a rule that would remain a dead letter because States were not prepared to surrender their national criminal jurisdiction. The agreement of at least three States might be required before the court could try an alleged offender—the State in which the crime had been committed, the State of which the offender was a national and the State of which the victim was a national. On the other hand, in the case of war crimes, for instance, the court would be powerless if, unlike the other States concerned, the State at whose command such crimes had been committed did not agree to confer jurisdiction on the court. The Special Rapporteur had in fact referred to those drawbacks in his report, concluding that the rule laid down in paragraphs 1 and 2 of the draft article would be only "a makeshift solution, a necessary concession to State sovereignty" and, it was hoped, "of an entirely temporary nature". He shared the Special Rapporteur's misgivings on that score and feared that such a rule would neither contribute to the establishment of a meaningful international jurisdiction nor provide for the effective implementation mechanism that the Code required.

15. One encouraging development was that several representatives in the Sixth Committee had supported the establishment of an international criminal court with a "review function", which was one way of establishing a court that could unify the punishment of international crimes, while avoiding the surrender of national criminal jurisdiction and ensuring impartiality and objectivity in the prosecution of international crimes. The advantage of an international criminal court as a review body to complement national jurisdiction was that it would be able to build on the international norms governing the prosecution of international offences. Even States which favoured exclusive jurisdiction for an international criminal court might be prepared to accept a review function in regard to certain crimes.

16. A court with a review function would also perform a preventive role inasmuch as it would act as an incentive to national courts to comply with international standards. Furthermore, it would promote international cooperation in the prosecution of international crimes by allowing for a combination of the universal criminal jurisdiction of States and an international jurisdiction. The court's action could be further enhanced if it was authorized to give advisory opinions when so requested by national courts. Many of the practical difficulties connected with an international criminal court which had exclusive or concurrent jurisdiction would likewise be avoided. Some States opposed to such a model found it impossible to accept international control over judgements handed down by their courts. All existing complaints procedures in the human rights field came into play only when domestic remedies had been exhausted, and human rights courts and committees dealt solely with those cases that had been the subject of a final decision by the national courts. In other words, they merely reviewed the State practice sanctioned by the highest courts of the country concerned. If that was feasible with respect to torture or inhuman and degrading treatment, why should it not be possible in the case of the prosecution of war crimes and crimes against humanity? The idea of an international criminal court which had a review function and advisory powers was therefore realistic and should be pursued. Conversely, regarding the broadening of the range of States whose conferment of jurisdiction would be required, he did not favour the path for discussion outlined in the report, for the reasons stated by the Special Rapporteur himself.

17. So far as the relationship with the Security Council was concerned, the rule accepted under article 12 might suffice, namely, that a court, including an international criminal court, was bound to respect a decision of the Security Council as to whether or not an act of aggression had actually occurred. A decision on individual responsibility for participation in the crime, however, must be left to the court and should not depend on any Security Council decision.

18. Lastly, with regard to measures of implementation, the Commission could draw on the human rights conventions for guidance, and particularly instruments which contained specific provisions on measures relating to the halting and prevention of crimes, mutual assistance in the detection and arrest of suspects, collection of evidence and exchange of information. There remained the difficult questions of asylum and extradition, and a rule might also be needed requiring States to adopt the necessary measures to incorporate the provisions of the Code into their national law.

The meeting was suspended at 11 a.m. and resumed at noon.

19. Mr. CALERO RODRIGUES congratulated the Special Rapporteur on a report which, although very succinct, dealt with characteristic clarity with some essential aspects of the questions of penalties and of the establishment of an international criminal jurisdiction.

20. With regard to penalties, dealt with in part one of the report, the Special Rapporteur raised the question whether a separate penalty should be provided for each crime in the Code or whether a single penalty, applicable to all the crimes, would suffice, and advocated the latter solution. That position was entirely justified. Certain crimes such as aggression or genocide could be considered more serious than others, but for the purposes of choosing a penalty it would be extremely difficult to differentiate between, say, terrorism and trafficking in narcotic drugs. However, he had doubts about the proposal to establish a standard penalty that could be reduced if there were extenuating circumstances. The court should be given leeway to take account not only of the presence or absence of extenuating circumstances but also of aggravating circumstances and, indeed, of all other relevant circumstances, including the perpetrator's personality, the occasion on which the act had been perpetrated, the seriousness of the effects, and so on. In the light of all those circumstances, the court could determine, within certain set limits, what the penalty should be, graduating it upwards or downwards as it saw fit.

21. As to the nature of those general limits, he wholly agreed with the Special Rapporteur's decision to rule out the death penalty, since it no longer existed in many national legislations and since there appeared to be a universal trend towards its abolition. However, the idea of a general basic penalty and the proposed nature of that penalty, namely, life imprisonment, was more questionable. Life imprisonment, too, had been eliminated from many legislations, including the laws of his country, Brazil, as being contrary to certain basic principles of human rights. He would therefore feel inclined to rule out life imprisonment as well and, instead, to set a lower limit of, say, 12 to 15 years, and an upper limit of, say, 30 to 35 years, on the possible term of imprisonment of a person convicted under the Code. Those figures were only tentative and further detailed discussion would certainly be necessary, but in view of the seriousness of the crime they seemed to be more or less appropriate. Furthermore, a statement should be included somewhere in the Code to the effect that the sentence was final and the prisoner should not be eligible for release under any circumstances before the full term of imprisonment had been served.

22. With regard to the passage in square brackets in the text proposed for draft article Z, he agreed with the distinction drawn by some members between confiscation of stolen or misappropriated property as a measure of simple restitution, on the one hand, and as a punitive measure, on the other. That point should be made clearer in the text; in particular, the expression "as appropriate" was somewhat misleading. It was right to say that confiscated property could be used for the purposes of making reparation to the victims of the crime.

23. He had no difficulty with paragraph 1 of the suggested draft provision on the jurisdiction of the court, which he took to mean that the court would have jurisdiction over crimes under the Code that were committed in the territory of a State party. Such a provision was necessary in order to make it clear that parties to the Code, unless the Code became a universal instrument, could not claim to exercise universal jurisdiction. He did, however, have serious doubts about the proposition contained in paragraph 2, which, by requiring conferment of jurisdiction by the State or States of which the perpetrator was a national, or by the victim State, or by the State whose nationals had been the victims of the crime, if such States also had jurisdiction under their domestic legislation over such individuals, appeared to call into question the territorial element established in paragraph 1. In his view, the court should be able to exercise jurisdiction under the Code over crimes committed in the territory of States parties independently of the position of other, what might be termed, "nationality" States. The reference to the possible existence of jurisdiction on the part of other States was particularly disturbing. States, whether or not they were parties to the Code, should not be entitled to invoke their own national jurisdictions in order to block the exercise of legally established international jurisdiction.

24. The ideas incorporated in paragraphs 3, 4 and 5 were acceptable, but they were out of place in an article on the jurisdiction of the court and should form separate articles elsewhere in the Code.

25. As to the possible draft provision on criminal proceedings, it must be made clear, in paragraph 1, that there was a difference between instituting proceedings and bringing a case to the attention of an international court. In most national legal systems, proceedings were instituted not by an individual but by the State against an individual. National legal systems had appropriate organs to take such action, and an international court must likewise be able to do so. The role of the State must be confined to calling the attention of such a court to the fact that proceedings might need to be instituted, but the State itself could not institute such proceedings. Perhaps the distinction he was making was simply a drafting matter.

26. Paragraph 2 was a special case that concerned the crime of aggression or the threat of aggression. Admittedly, the question had been dealt with, albeit insufficiently, in article 12, paragraph 5,[6] and it was rendered more complicated by the fact that aggression could only be committed by a State, not by an individual. An indi-

[6] Ibid.

vidual could be judged for committing aggression only if a State had been found to have committed that crime. Actually, the individual was participating in the crime of a State. Under the Charter of the United Nations, it fell to the Security Council to determine whether an act of aggression had taken place. He therefore believed that article 12, paragraph 5, should be improved: a special provision, as now being proposed, was not necessary.

27. The footnote to paragraph 1 of document A/CN.4/435, confirming the intention of the Special Rapporteur to abandon the tripartite division into "crimes against peace", "crimes against humanity" and "war crimes", was most welcome, but the Drafting Committee should be authorized to make that change in the structure of the articles at the present session, instead of waiting until the second reading.

28. In addition, the Drafting Committee should prepare an article introducing the part of the Code that enumerated the crimes against the peace and security of mankind. A complete list of such crimes should not be sent to the General Assembly until such an introductory article had been drafted.

29. Mr. TOMUSCHAT said it was important to define the penalties that would be imposed for the crimes covered by the Code. Then, it would no longer be necessary to refer to the general principles of law, as in article 15, paragraph 2, of the International Covenant on Civil and Political Rights, to justify instituting criminal proceedings against the author of a crime that affected the entire international community.

30. The Commission should not seek to resist the worldwide trend towards abolition of the death penalty, even for the most serious crimes, such as genocide. The move away from the death penalty had been evident in legal thinking since the Nürnberg and Tokyo Tribunals. On the other hand, it was only too obvious that a fine would not be in keeping with the seriousness of the crime, and deprivation of liberty was the only appropriate punishment, despite the practical problems it raised. It was probably necessary to create an international prison for that purpose.

31. He did not concur with the Special Rapporteur that the same penalty should be imposed for all crimes against the peace and security of mankind, since not all crimes were equally serious. For example, genocide was worse than other crimes covered by the Code. Hence it was imperative to consider each crime separately, so as to determine the proper punishment. The Commission should suggest a minimum and a maximum sentence for each crime, but should not be more specific. The matter should be left to States at a future conference on the draft Code.

32. Mr. Calero Rodrigues was right to point to the need for an article to introduce the list of crimes covered by the Code. It was also essential to link the crime committed by the State and the guilty person. The Code did not establish such a link, and perhaps the Special Rapporteur could draft a suitable article.

Organization of work of the session (*continued*)*

[Agenda item 1]

33. The CHAIRMAN said that, on the recommendation of the Enlarged Bureau, he was proposing a tentative schedule of plenary meetings for the Commission's approval, namely:

Draft Code of Crimes against the Peace and Security of Mankind [item 4]	14 to 22 May (6 meetings)
The law of the non-navigational uses of international watercourses [item 5]	23 to 31 May (6 meetings)
Report of the Drafting Committee on jurisdictional immunities of States and their property [item 3]	4 to 7 June (4 meetings)
International liability for injurious consequences arising out of acts not prohibited by international law [item 6]	11 to 20 June (7 meetings)
Report of the Drafting Committee on the law of the non-navigational uses of international watercourses [item 5]	21 to 26 June (3 meetings)
Relations between States and international organizations [item 7]	27 June to 4 July (5 meetings)
Reports of the Drafting Committee on the draft Code of Crimes against the Peace and Security of Mankind [item 4] and on State responsibility [item 2]	5 to 10 July (3 meetings)
Reports of the Planning Group and of the Working Group on the long-term programme of work [item 8]	11 July (1 meeting)
Adoption of the report of the Commission	12 to 19 July (11 meetings)

Any time saved in plenary meetings would be allocated to the Drafting Committee, the Planning Group, the Enlarged Bureau or other bodies, as required. The proposed schedule would be applied flexibly, subject to the progress made. In accordance with previous practice, representatives of organizations with which the Commission cooperated would be invited to make statements in the course of the session.

34. He confirmed that the discussion of the report of the Drafting Committee on jurisdictional immunities (4-7 June) would be confined to consideration of the articles and that the commentaries to the articles would be examined in connection with the adoption of the report on the work of the session.

35. Mr. CALERO RODRIGUES asked whether the Commission would, as on previous occasions, be allowed a day without work before the period of twice-daily meetings set aside for the adoption of the report.

36. The CHAIRMAN said he took note of that point.

* Resumed from the 2206th meeting.

37. Mr. NJENGA asked whether a similar schedule of meetings of the Drafting Committee might be drawn up for the benefit of those members of the Commission who were not members of the Drafting Committee. He also expressed the hope that the Drafting Committee would complete its work on jurisdictional immunities by 4 June and its report on international watercourses by 21 June.

38. Mr. PAWLAK (Chairman of the Drafting Committee) said that the idea of a schedule of meetings of the Drafting Committee was attractive, but it was difficult to prepare because the Committee would meet whenever time normally set aside for plenary meetings remained unused. As to the other points raised by Mr. Njenga, he agreed that the Drafting Committee should make every effort to complete its work on jurisdictional immunities and on international watercourses in time. Lastly, he invited those members of the Commission who were not members of the Drafting Committee, or who attended the Committee's meetings sporadically, to consult him on any drafting matters pending, so as to dispose of minor queries and confine the discussion in plenary to substantive issues.

39. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to the schedule proposed by the Enlarged Bureau.

It was so agreed.

40. Mr. CALERO RODRIGUES proposed that Mr. Hayes should succeed the late Mr. Paul Reuter as a member of the informal committee for arranging the Gilberto Amado Memorial Lecture.

It was so agreed.

41. Mr. McCAFFREY, speaking with reference to the topic on international watercourses, suggested that the Commission should not yet discuss in plenary the portion of his sixth report dealing with the settlement of disputes (A/CN.4/427/Add.1),[7] so as to expedite consideration of the concept of an international watercourse system, which was dealt with in the seventh report (A/CN.4/436).[8] Taking up the settlement of disputes would be time-consuming, and the subject would probably not be considered by the Drafting Committee in any event.

42. The CHAIRMAN thanked Mr. McCaffrey for his clarification and said it was understood that the Commission would focus on the seventh report.

The meeting rose at 1 p.m.

[7] Reproduced in *Yearbook ... 1990*, vol. II (Part One).

[8] Reproduced in *Yearbook ... 1991*, vol. II (Part One).

2209th MEETING

Thursday, 16 May 1991, at 10 a.m.

Chairman: Mr. Abdul G. KOROMA

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Graefrath, Mr. Hayes, Mr. Illueca, Mr. Jacovides, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Draft Code of Crimes against the Peace and Security of Mankind[1] (*continued*) (A/CN.4/435 and Add.1,[2] A/CN.4/L.456, sect. B, A/CN.4/L.459 and Corr.1 and Add.1, ILC(XLIII)/Conf.Room Doc.3)

[Agenda item 4]

NINTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE Z *and*
JURISDICTION OF AN INTERNATIONAL CRIMINAL COURT[3] (*continued*)

1. Mr. PELLET said that he did not think that the issues dealt with in the ninth report could be discussed until a clear-cut position had been adopted on the establishment of an international criminal court. There would be no point in working on provisions relating to the jurisdiction of the court and criminal proceedings if the court had not been established.

2. The same was true of applicable penalties and draft article Z. If the international criminal court was to be established, it would be necessary to raise the question of applicable penalties, although the answer was far from obvious: it might well be asked in that case whether it would be better to leave it to each State to determine the applicable penalties or merely to formulate some general principles or to provide for minimum penalties. None of those questions would arise, however, if the court was not to be set up.

3. He was not opposed to the establishment of such a court and was in fact inclined to favour it, but the matter was, in his view, too serious to be decided by lawyers. While the Commission had stated its views on the subject, as the General Assembly had requested it to do, by

[1] The draft code adopted by the Commission at its sixth session, in 1954 (*Yearbook ... 1954*, vol. II, pp. 151-152, document A/2693, para. 54) is reproduced in *Yearbook ... 1985*, vol. II (Part Two), p. 8, para. 18.

[2] Reproduced in *Yearbook ... 1991*, vol. II (Part One).

[3] For texts of draft article Z and of possible draft provisions on jurisdiction of the court and criminal proceedings, see 2207th meeting, para. 3.