Document:-

A/CN.4/SR.2209

Summary record of the 2209th meeting

Topic:

Draft code of crimes against the peace and security of mankind (Part II)- including the draft statute for an international criminal court

Extract from the Yearbook of the International Law Commission:-

1991, vol. I

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.

indicating in its last report[4] that examination of the question had reflected a broad agreement, in principle, on the desirability of the establishment of a permanent international criminal court to be brought into relationship with the United Nations system—which might, moreover, have been something of an overstatement—the same was not true of the General Assembly, which, after a confused debate in the Sixth Committee, had confined itself in paragraph 3 of resolution 45/41 to referring the question back to the Commission. The latter should therefore appeal to the General Assembly's and the Sixth Committee's sense of responsibility by clearly stating that to continue with the consideration of the question was both impossible and useless so long as those bodies had not adopted a firm position on the principle of the establishment of an international criminal court.

4. Until such a position had been adopted, he would be hesitant to enter into the debate sought by the Special Rapporteur and, rather than making an in-depth analysis, he would simply give his impressions.

5. The first paragraph of draft article Z was a good illustration of the problem he had just raised. If an international criminal court was established and if it had exclusive jurisdiction to implement the Code, the principle stated in the paragraph seemed to be a good one, since in that case the death penalty had to be ruled out for two reasons: first, because its abolition was a step forward in moral terms and, above all, because the States which had abolished it would be reluctant to accede to an instrument which re-established it, if only in exceptional cases, and might even be unable to do so, since the abolition of the death penalty had become a constitutional principle in some of those countries.

6. The problem that arose if the Code was to be implemented by national courts was very different. In such a case, it might be unacceptable to rule out the death penalty for individuals tried in States which had not abolished the death penalty for far less serious crimes. Such a reversal of values would be open to strong criticism and the best course in such a case would probably be to say that national courts should apply the penalty provided by internal law for the most serious crimes.

7. Once again, however, a definite position could not be adopted without knowing which bodies would be competent to impose penalties.

8. As a secondary point, he drew the Special Rapporteur's attention to a problem of terminology relating to the use of the term "life imprisonment" in the first paragraph of draft article Z. Since internal law often used more detailed terms (French criminal law, for example, distinguished detention and rigorous imprisonment from ordinary imprisonment), it might be advisable to use more neutral wording, such as "deprivation of liberty".

9. With regard to the second paragraph of draft article Z, he said that he agreed with the possibility of adjusting the penalty, but was not sure whether the adjustment should depend solely on the existence of extenuating circumstances, since other factors, such as the accused person's partial exemption from criminal responsibility, might also need to be taken into account. He was also not sure whether the court was being allowed enough choice. It was open to question whether life imprisonment was acceptable and he recalled that several members of the Commission had said that, in their view, a penalty of that kind was contrary to the principles of human rights and was prohibited in their countries.

10. As to the third paragraph of the draft article, which appeared in square brackets, the underlying idea was good, but the wording raised several problems. First, the term "misappropriated property" appeared to include "stolen property", making the second term redundant. Secondly, profits deriving from misappropriated property should also be confiscated. Thirdly, it was difficult to see why the confiscation of such property might be only partial. The argument put forward in that respect in the report was hardly convincing: neither the offender himself nor his spouse or his heirs should benefit from the misappropriated property. Fourthly, although the idea was indeed praiseworthy, it was difficult to see by what principle the court should entrust the property in question to a humanitarian organization. Stolen property must be restored to its rightful owner: that was a fundamental rule, as several members of the Commission had already stated. It was only in the very special case when the owner of the property had died without leaving any heirs that the problem of the disposition of the property would arise.

11. It might also happen that the legitimate property of the offender was totally or partially confiscated or—which amounted to virtually the same thing—that the offender was ordered to pay a fine. But, in any event, whether it was a question of misappropriated property whose rightful owner had disappeared or of confiscated property or even of the proceeds of a fine, he was not sure that it was a satisfactory solution to entrust the property to some unspecified humanitarian organization. Since a crime against the peace and security of mankind usually entailed victims, it would seem preferable, for reasons of natural justice, for the property to be used primarily for reparation—necessarily partial—of the harm suffered by the victims. That also seemed to be the basic idea of article 28 of the Charter of the Nürnberg Tribunal, which had provided for the delivery of confiscated property to the Control Council of Germany.[5]

12. The text of the possible draft provision on the jurisdiction of the court was based on the principle of the territoriality of criminal jurisdiction; however, while territoriality was indeed the basis for most national systems of criminal law, it was important to bear in mind another principle, namely, that the competence of criminal jurisdictions derived from the competence of criminal law itself: in other words, it was because criminal law was based on the principle of territoriality that the jurisdiction of national criminal courts was essentially territorial. But could that rule also be applied in the area of interest to the Commission? The question did arise, for, in that area, criminal law was "deterritorialized" and "internationalized". It consisted of international texts,

[4] *Yearbook . . . 1990*, vol. II (Part Two), para. 155.

[5] See 2207th meeting, footnote 5.

either the Code itself or ad hoc conventions. It did not therefore seem right to accord privileged status to the State in whose territory the crime had been committed. It was the entire international community which was affected and it seemed sufficient that the State in whose territory the alleged perpetrator was found should bring the case before the court.

13. That was, moreover, what the relevant conventions intended, for they all used the system known—no doubt wrongly—as *système de la répression universelle* (system of universal jurisdiction). If the Commission also used that system in the Code or in the statute of the court, or indeed in both instruments, it would not be taking too bold a decision, as the Special Rapporteur seemed to fear.

14. At the present stage, there did not seem to be any point in a detailed consideration of the text of the proposed draft provision, which appeared, moreover, to raise a number of problems. But it was useful to provide, as the Special Rapporteur did in paragraphs 4 and 5, that the court, if any, might play the role of a regulatory body in the event of a conflict of jurisdiction or might interpret the meaning of a provision of international criminal law if it was unclear.

15. According to paragraph 2 of the Special Rapporteur's proposed text on criminal proceedings, in the event of an act of aggression, the institution of proceedings would be subject to prior determination of the existence of the crime by the Security Council, in which that power was vested by Article 39 of the Charter of the United Nations. However, it must be remembered that the court would not be operating in the same area as the Council. First, the court would not be restoring peace and security, but trying offenders who had jeopardized peace and security, determining whether the aggression was attributable to a given individual, and proceeding accordingly. Secondly, the Security Council based its opinions on political criteria, but the court would rule exclusively on legal criteria. If the Security Council determined the existence of an act of aggression, no doubt the court would be bound by that determination. But the inverse proposition was not certain. It might well happen that the Security Council would not determine a given act to be an act of aggression even when the criteria for the crime of aggression were met. Such cases might even occur frequently, if only by reason of the right of veto. It would be shocking if, because a State had the right of veto, its leaders or those of a State which it protected were treated differently from the leaders of some other smaller or more isolated State. The practice of applying a double standard was certainly reprehensible in all cases, but it was understandable from the political standpoint; it was not understandable from a legal standpoint, and even less so from a judicial standpoint.

16. That was indeed the principle applied by ICJ in its 1986 decision in the case between Nicaragua and the United States of America.[6] The Court had certainly not refused to consider the question whether one of the States parties to the dispute had been guilty of an act of aggression which had not been determined by the Security Council.

17. Lastly, he wished to reiterate that he had agreed to engage in the present exercise in legal impressionism only in deference to the Special Rapporteur's wish for a debate. In his opinion, however, it would be preferable to leave it at that until the General Assembly had assumed its responsibilities, something which the Commission ought most firmly to invite it to do in its report.

18. Mr. BARBOZA said that, with regard to the question of penalties, just as the Code specified the crimes in question, it should also specify the penalties to be imposed on the perpetrators. Like the provisions on crimes, however, the provisions on penalties should reflect the feelings and values of the international community, which might differ from those of the various national communities.

19. There was also the question whether a separate penalty should be provided for each of the crimes in the Code, or a single penalty for all the crimes, or whether it should be expressly left to the court to determine the penalty. He rejected the latter solution, which had been used in the 1954 draft Code, for it was incompatible with the principle of *nullum crimen, nulla poena sine lege*, and he agreed with the Special Rapporteur that the best solution was to prescribe a single penalty: since all the crimes in question were extremely serious ones, they could not carry widely differing penalties. As in internal law, however, it should be left to the judge to adjust the penalty in the light of the facts of the case and the character of the offender.

20. As to the nature of the penalty, he was not in favour of life imprisonment. There were other possible solutions, especially since, with the passage of time and once the offender had ceased to constitute a danger, the public's desire for retribution ought to fade. Nor did he approve of the last paragraph of draft article Z, which appeared in square brackets. Property stolen or misappropriated by the offender, together with any profits which he or she might have made from it, must be restored in full to its rightful owners. There could be no question of confiscating such property. As Mr. Pellet had said, the offender's family had no right to such property either. On the other hand, if provision was made for a financial penalty, a kind of criminal fine, then it might be possible to envisage handing the money over to a humanitarian organization.

21. Turning to the question of the jurisdiction of the international criminal court, he said that paragraphs 1 and 2 of the possible draft provision were the most debatable. Paragraph 1 seemed to posit the general principle of the territoriality of criminal law and paragraph 2 the principle of active and passive personality and the so-called principle of real protection, somehow making the jurisdiction of the court subject to recognition by the laws of the State or States in question of the jurisdiction of their own courts to try the accused individuals. But what would happen if the laws of the State in which the crime had been committed were silent on the jurisdiction of its courts with regard to the act in question? Would the national courts be automatically deemed competent?

[6] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14.

If so, what was the difference between paragraphs 1 and 2, if not that paragraph 2 stated expressly that domestic legislation must confer jurisdiction on the courts of the States concerned and that paragraph 1 did not do so? It would be useful if the Special Rapporteur could offer some clarification on that point.

22. Furthermore, many States would be required to confer jurisdiction, and their tacit option of trying the accused themselves or referring him to an international criminal court provided such scope that, given the natural tendency of States not to relinquish their jurisdiction, the court's competence would be reduced considerably.

23. Thus, under the proposed text, the international criminal court was a simple addition to the jurisdiction of each State that was called upon to have cognizance of any disputes concerning judicial competence (para. 4) and to standardize decisions in cases of divergent sentences handed down in respect of the same crime. That comment also applied to the role that the court would play if requested to give an interpretation of a provision of international criminal law. The Special Rapporteur had noted that he had tried to take account of contemporary international realities, which would appear to prohibit giving wider jurisdiction to the international criminal court. He personally would prefer retaining the principle of the territoriality of criminal law or, as had been suggested, the jurisdiction of the court of the State in which the accused had been arrested. In any event, it was important not to increase the number of options for the conferment of jurisdiction and to have a single rule, which was the most logical solution and the one most likely to be applied.

24. Paragraph 5 was interesting in that it gave the court competence to interpret, apparently *in abstracto*, the rules of international criminal law. As Mr. Graefrath had suggested at the 2208th meeting, advisory competence might also be conferred on the court in specific cases: the court would then become an instrument of international pressure that would help guide and form international public opinion. It would be a good idea for the Special Rapporteur to explore that possibility.

25. With regard to criminal proceedings, the Special Rapporteur was proposing a text which, in paragraph 1, provided that such proceedings were to be instituted by States and, in paragraph 2, that, in the case of crimes of aggression or the threat of aggression, they were to be subject to prior determination by the Security Council of the existence of such crimes. He agreed with Mr. Pellet's comments on the subject and questioned the advisability of that reservation. Clearly, if the Security Council decided that a particular act committed by a State constituted aggression or a threat of aggression, the international criminal court could not reach a different determination without prejudicing the United Nations system. He also wondered what would happen if the Security Council refrained from characterizing the act in question and confined itself to imposing sanctions or formulating recommendations. In sum, the Security Council was only a political body whose permanent members had the right of veto. It was empowered not to characterize a given act as aggression or a threat of aggression, but to restore peace if it had been breached, to avert threats to the peace and to oppose acts of aggression.

26. It was unacceptable for the decision of a judicial body to be subject to a prior determination by the Security Council. On the other hand, if the Security Council had not ruled on an act of a State, the international criminal court would have full freedom to determine the existence of an act of aggression or a threat of aggression, where appropriate. Lastly, if for one reason or another, the Security Council was to make a determination on that act after the international criminal court had done so—a highly improbable case, since action by the Security Council would have had to become less urgent—it would not consider itself to be bound by the decision of the court. In any event, the point was that the action of the international criminal court and that of the Security Council took place at different levels: the court's role was to punish a criminal act, whereas the Security Council's was to take measures to solve problems and avert threats to peace and international security.

27. Mr. MAHIOU commended the Special Rapporteur on the clarity and conciseness of his reports and noted that the ninth report focused on four questions.

28. First, should the draft Code provide for penalties? The answer to that question was definitely affirmative and derived primarily from the principle of *nulla poena sine lege*, the validity and scope of which had been demonstrated by the Special Rapporteur and other members of the Commission. Other solutions had been envisaged in the past, particularly that adopted by the Commission in 1951,[7] to leave it to the court to decide on the applicable penalty. That solution might be chosen, provided that the court adopted a scale of penalties before exercising its jurisdiction, but it did not appear to be desirable for at least two reasons: it was important to ensure that the wording chosen by the Commission did not give rise to doubts and discussions which would only weaken the Code, and, above all, the Code would be incomplete if it merely made certain acts a crime without stating what the consequences would be for the guilty parties.

29. The second question was what type of penalties there should be: a penalty for each crime or one single penalty applicable in all cases? In theory, the ideal solution would be to have a penalty for each crime because, although all the crimes under the Code were characterized by their extreme gravity, their degree of gravity could vary. Justice and fairness required that the crime should be punished according to its degree of gravity and the degree of responsibility of its author. In the case under consideration, however, that ideal solution was probably impossible to apply and it would also entail endless debates to determine each of the crimes, their gravity and the corresponding applicable penalty. Thus, in practice and to be realistic, the Commission would appear to have no other choice than to establish the principle of a single penalty for all crimes. It might therefore follow the course the Special Rapporteur had taken in draft article Z, but only in part. Providing only for life imprisonment, even if mitigated by extenuating circumstances, would be too rigorously binding for the

[7] See 2207th meeting, footnote 4.

judge, who must be allowed more freedom to decide than he would have by taking extenuating circumstances into account. To that end, there might be a minimum term of imprisonment—10 years—and a maximum term—life imprisonment—which would replace capital punishment, a penalty that it would be difficult for the Commission to adopt, in view of its abolition in certain countries and the growing abolitionist movement, and also in view of the Commission's moral authority and the influence it could and should bring to bear in making the rules of law more humane, even in the case of punishments. It should also be noted that most of the countries that had abolished capital punishment allowed life imprisonment as a replacement penalty. Setting such a penalty would avoid provoking strong objections on the part of States that were still in favour of capital punishment and might even encourage them gradually to abolish it in their national legislation. It should also be stressed that the application of the penalty would be left to the appreciation of the court and that, with regard to the enforcement of the sentence, no matter how harsh, the conduct of the convicted person should be taken into account so that he might benefit from a reduced sentence if he mended his ways.

30. Concerning the proposed confiscation measure, he noted that the Special Rapporteur had proceeded cautiously: not only had he placed the provision in square brackets, but he would also leave it to the judge to decide so that the provision would be applied only as appropriate. Confiscation was thus a complementary, and not an accessory, penalty. In some countries, such as his own, Algeria, a distinction was made between the two, the idea being that a complementary penalty was provided for by the law and the judge might or might not impose it, whereas an accessory penalty was automatically added to the main penalty; the judge did not have to impose it and he could not even rule it out. In his own view, the penalty of confiscation could involve both those aspects. Cases were conceivable in which the penalty would be imposed automatically: for example, confiscation of objects used to commit the crime, the means of producing and transporting narcotic drugs, the products of a criminal activity and the property and profits illegally acquired through that criminal activity; in other cases, confiscation would be optional and would take the form of a financial penalty intended to compensate the victims. The fate of the confiscated property would also depend on its nature: stolen property should be returned to its rightful owners or their heirs or, in their absence, should be entrusted to humanitarian organizations. In any event, whether accessory or complementary, the penalty of confiscation would have to be provided for in the Code; otherwise, any decision taken by the judge would be criticized as being inconsistent with the principle of *nulla poena sine lege*.

31. With regard to the international criminal jurisdiction, the Commission had to improve on the work it had begun at its preceding session and establish the rules and principles governing action by the international criminal court and its relations with national courts—or in other words, specifically determine the scope of the principle of universal jurisdiction.

32. The simplest solution would, of course, be for the international criminal court to have exclusive jurisdiction. That would then eliminate, or at least solve, the many complex problems that would lead to conflicts of jurisdiction between the court, on the one hand, and national courts, on the other, or even as between national courts. It remained to be seen whether the solution was acceptable to States at the current stage. The General Assembly had not wanted to take a decision in that connection and States seemed to be fairly divided on the matter. None the less, the solution should not be ruled out; it would even be a good idea to stress its advantages with a view to encouraging the General Assembly to take a position in the matter.

33. A second solution, mentioned by Mr. Graefrath (2208th meeting), would in effect be for the jurisdiction of national courts and that of the court to exist side by side, by conferring jurisdiction on the court to hear appeals from national courts. It was doubtful, however, whether States would accept that solution, particularly if it meant that appeals could be lodged against decisions handed down by higher courts such as a supreme court. Moreover, there were countries where the law provided, in criminal cases, for appeal not on a point of fact, but on a point of law. It was therefore important to determine whether the international criminal court would be seized by way of appeal on a point of fact, in other words, whether it could reconsider the facts and try the case again on the merits, or by way of appeal on a point of law, in other words, whether it could take a decision not on the facts, but on compliance with the rules of law and with the procedural rules. That question called for further reflection.

34. A third solution would be for national courts and the international criminal court to have concurrent jurisdiction. It was a compromise solution and would probably be more acceptable in the eyes of States, as it would allow them to exercise their sovereignty in judicial matters, but it was more complex and delicate. That was because it would involve a careful examination of ways of combining the jurisidiction of national courts and of the international court and, in particular, of avoiding the conflicts of jurisdiction that might, depending on the course of events, lead to paralysis and injustice.

35. The Special Rapporteur, for his part, proposed a solution that was based on the principle of the territoriality of criminal law, combined with other rules such as that of the nationality of the perpetrator or of the victim, to complement or supplement territorial jurisdiction. Paragraph 2 of the proposed provision was, however, either over-ambitious or inadequate, and the accompanying commentaries were not very clear. The argument put forward by the Special Rapporteur in his report to demonstrate, on the basis of the precedents set by the Nürnberg and Tokyo Tribunals, that there was a trend towards having crimes tried in the place where they were committed was ambiguous: was it the place where the court had its seat or its nationality that determined territoriality? Without wishing to reopen the debate on the legal nature and character of the Nürnberg and Tokyo Tribunals, he considered that, had the principle of territoriality been strictly applied, the German or Japanese courts should have tried the war criminals in that case. They

had indeed been tried in Germany and Japan, but by courts of another nationality. It could, of course, be argued, as certain writers had submitted, that the courts in question had been set up by the victors to exercise the jurisdiction of the courts of the vanquished. But the precedent cited by the Special Rapporteur in that connection was neither satisfactory nor convincing, particularly since it was not certain that the jurisdiction of the Nürnberg and Tokyo Tribunals had been limited to crimes committed in Germany and Japan: they might have had to try crimes committed outside the borders of those countries. The Special Rapporteur had demonstrated very clearly the drawback to his proposed solution, which was based on the difficult, if not impossible, reconciliation of the principle of territoriality, the system of active and passive personality and the system of real protection—so much so that one might even wonder whether he really believed in it. At any rate, his analysis justified the conclusion that the solution was impracticable and that, even if it were adopted, other problems would arise that would in turn have to be solved. Paragraph 2 of the draft provision submitted to the Commission was no more than a starting point or outline. In other words, the Special Rapporteur and the Commission still had much to do, unless they managed to win the support of States for the principle of the exclusive jurisdiction of the international criminal court.

36. Fourthly and lastly, with regard to criminal proceedings and in particular to the respective roles of the Security Council and the international criminal court in the case of the crime of aggression, he recalled that the problem had already arisen in connection with draft article 12 and had yet to be solved. The clause in that article relating to relations between the Security Council and national courts—namely to the question whether it was for the Security Council or for national tribunals to determine that a crime of aggression existed—had thus far remained in square brackets. In his view, the international criminal court and the Security Council were two organs that operated on different levels. The Security Council was an organ vested under the Charter of the United Nations with special political powers and prerogatives which could not be usurped by any other organ. The court, for its part, would be a judicial organ on which the Code conferred judicial powers. The proceedings of the international court should on no account depend on other organs, particularly where some of their members had a right of veto under their statute. In that connection, he endorsed what Mr. Pellet had said when he had recalled that the problem had arisen at ICJ in the case between Nicaragua and the United States of America.[8] It was that independence of the law which would ensure that criminals received due punishment.

The meeting rose at 11.10 a.m.

[8] See footnote 6 above.

2210th MEETING

Friday, 17 May 1991, at 10.05 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. 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. JACOVIDES said that the topic under consideration had acquired added importance in the light of recent developments on the world scene. He was firmly convinced that a code of crimes against the peace and security of mankind had a rightful place in the corpus of international law. As a complete legal instrument encompassing the three essential elements of crimes, penalties and jurisdiction, it could and should serve the important purpose of deterrence and punishment. It was gratifying that recent events had moved some of those who had viewed the draft Code with scepticism to join in the support for the proposed establishment of an international criminal jurisdiction. The overall impact of the Gulf crisis and its aftermath, by highlighting the need to observe the relevant rules of international law and to implement United Nations resolutions, was conducive to promoting the international legal order that his country had advocated long before the crisis had begun.

2. As to part one of the Special Rapporteur's report, concerning the issue of penalties, it was clear that the principle of *nulla poena sine lege* called for a relevant provision in the Code. Since only the most serious

[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.