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Summary record of the 2213th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
1991, vol. I

the punishment to be applied were questions to be determined by the court.

48. A finding of aggression was not simply a political act, but was founded on international law. Denial of the legal character of a determination of aggression by the Security Council on the grounds that the Council was a political organ would also lead to denial of the legal nature of many General Assembly resolutions setting forth principles and rules of international law. Furthermore, it should not be forgotten that acts such as genocide, apartheid or aggression were not only crimes but also political acts. He shared the fear expressed by some members that conferment of the function of determining an act of aggression upon a criminal court, albeit an international court, might ultimately lead to the destruction of the existing system of international law and order. For States Members of the United Nations, the Charter represented the supreme source of contemporary international law, and any decision in the matter by a criminal court would be without force if it ran counter to a decision by the Security Council. At the same time, he understood the concern of those members of the Commission who did not want acts of aggression to remain unpunished in cases where the Security Council, for political reasons, failed to reach a decision. The problem was, of course, a difficult one, but in seeking a solution it was more advisable to adjust to new realities in international relations than to ignore or destroy the existing legal order.

49. He agreed with the view expressed in the commentary to the draft provision on criminal proceedings, but expressed doubts as to paragraph 1 of the provision, according to which criminal proceedings in respect of crimes against the peace and security of mankind should be instituted only by States. Since crimes of that nature could not be committed by individuals except as part of actions by States, and since States could not be prosecuted under the draft Code, it would seem appropriate to allow criminal proceedings for crimes against the peace and security of mankind to be instituted not only by States but also by the General Assembly, the Security Council—without the power of veto—and by national liberation movements recognized by the United Nations.

50. With reference to the question of penalties, for all its importance, it was subordinate to the decision reached on the establishment of a permanent international criminal court. The question of penalties was difficult not only because of the multiplicity of crimes but also, as the Special Rapporteur himself recognized in the report, because of the diversity of concepts and philosophies involved. He could not agree with the Special Rapporteur's choice of a single penalty applicable to all the crimes as against a separate penalty for each crime in the Code. Uniformity in sentencing was, of course, desirable, but it could be achieved only by linking specific penalties to specific crimes. The task would undoubtedly be difficult, yet an attempt based on a close study of existing national and international practice and of the experience of specialized organizations would be worth making.

51. On the question of the maximum penalty, referred to in the first paragraph of the text proposed by the Special Rapporteur, he pointed out that the existing diversity of penalties was due not so much to different philosophical or conceptual approaches as to different situations as regards crime in different countries. In assessing the seriousness of a specific crime, international justice also had to take into account universal criteria for determining the seriousness of the various types of crimes. So long as the international community remained divided on the subject of the death penalty, the argument that certain countries would not extradite an offender if he risked capital punishment could be countered by the argument that other countries might not want to extradite an individual guilty of, say, the crime of genocide, to a court which would perhaps sentence him to only 10 years' imprisonment. Attempting to settle the difficult question of capital punishment by accepting one of the solutions to be found in national penal systems might be detrimental to acceptance of the Code and to the idea of an international criminal court. For those reasons, he would recommend a more flexible approach, with a maximum and a minimum penalty indicated on the basis of existing practice in different countries. Such an approach would be conducive to greater harmony between national and international justice and would thus enhance the effectiveness of the struggle against international crimes.

The meeting rose at 1.05 p.m.

2213th MEETING

Thursday, 23 May 1991, at 10.05 a.m.

Chairman: Mr. Abdul G. KOROMA

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, 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. Sreenivasa Rao, 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]

[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).

NINTH REPORT OF THE SPECIAL RAPPORTEUR
(continued)

ARTICLE Z *and*

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

1. Mr. Sreenivasa RAO said that the imposition of penalties for crimes committed, a necessary part of criminal justice, was a difficult problem and to tackle it before a consensus had been reached on the crimes to be covered by the Code was perhaps premature. True, only the most heinous crimes, namely, aggression, genocide and serious war crimes, were to be included in the Code and they deserved nothing less than the most exemplary punishment, usually either the death penalty or, in countries where capital punishment had been abolished, life imprisonment. However, the judge should always be given the necessary discretion to take account of any exceptional or attenuating circumstances. If the Code was to be implemented through national courts, the national system of punishment would logically be applicable. The problem of differences between penalties which might be imposed in different countries for the same crime and upon the same offender would be mitigated, in his opinion, by the avoidance of double jeopardy, reluctance to conduct trials *in absentia* and bilateral or multilateral agreements enabling a State to yield its jurisdiction to another or several other States. If, on the other hand, all or some of the crimes in the Code were to be dealt with exclusively by the proposed international criminal court, it would appear more acceptable to prescribe only one penalty, that of life imprisonment, with or without the possibility of parole after a certain number of years. From that point of view, draft article Z proposed by the Special Rapporteur seemed reasonable, although it remained linked to the question of the jurisdiction to be assigned to the court and could be treated only as tentative.

2. The text in square brackets required revision because properties in the possession of a convicted offender could be of different types. Property belonging to persons having valid title to it had to be returned to those persons or to the State of their nationality. In the absence of a rightful owner in a position to claim it, the property could be entrusted to a trust, given to the State trying the offender or to the State asked to implement the sentence of the court or simply held in the custody of the international criminal court itself. If the property belonged to the convict, it should be returned to his heirs or the State of his nationality after any valid claims of third parties had been suitably disposed of.

3. With regard to the jurisdiction of the international criminal court, there were several possible solutions: jurisdiction in the first instance on issues of law and conflicting claims only; review in the second instance of sentences rendered by national courts; exclusive jurisdiction for certain crimes and a review competence for others; concurrent jurisdiction of the court and national courts; residual jurisdiction where none of the States concerned elected to exercise its jurisdiction, and so forth. Whatever the solution adopted, it appeared reasonable to proceed from the principle that the jurisdiction of the court should be based upon the consent of the States parties to its statute directly concerned by the crime being tried. Although the crimes in the Code were, by definition, committed against the peace and security of mankind, not all States appeared to be equally qualified to institute proceedings on their own behalf or on behalf of the international community. As recent events had shown, situations of armed conflict and acts of aggression and genocide called for careful, deliberate and mature reactions in the interests of due process of law, the rights of the accused and human rights and fundamental freedoms. It was observed that the State of which the perpetrator of the crime of aggression or genocide or certain other crimes was a national or the State whose nationals had been the victims of the crime might not always act with the necessary impartiality and objectivity. It therefore seemed preferable to have those crimes tried by the international criminal court rather than by national courts. In addition to such exclusive jurisdiction for certain crimes, the court could be given jurisdiction for other crimes which States might decide to refer to it, as well as jurisdiction to review decisions of national courts and to issue advisory opinions at the request of States, the highest national courts or international or intergovernmental organizations.

4. With regard to the conferment of jurisdiction, it seemed essential to give a central place to the consent of the State having custody of the accused. The concept of custody could no doubt be extended to include extradition, so that the custody of the accused could be transferred to the State in whose territory the offence had been committed. However, bearing in mind the length and complexity of the extradition process, he had no firm opinion as to the need to establish a link between those two concepts. In any event, the States referred to in paragraph 2 of the draft article were entitled to seek the extradition of the accused. The Special Rapporteur had certainly captured the most modern aspects of the concept of jurisdiction by invoking the passive personality or real-protection systems. In that connection, the point needed to be made that the right to bring cases before the court was confined to States and did not extend to non-governmental organizations or to ICRC, which could do more useful work through the service they rendered and as watchdogs than as complainants; and helping to gather and assess evidence.

5. Paragraph 3 of the proposed text, which was based upon a well-known principle, was acceptable, as was paragraph 5. He could also accept paragraph 4, provided that the consensual basis for jurisdiction was assured. The fact remained, however, that the only way to enhance the future international criminal court was to establish simultaneously an international prosecutor's office equipped with all necessary means of gathering evidence and deciding whether the case should be tried by the court.

6. With regard to criminal proceedings and the question whether, in the case of the crimes of aggression or the threat of aggression, such proceedings should be subject to prior determination by the Security Council, he said that a problem would arise if the Security Council were deadlocked so that the existence of the crime could

[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.

not be determined. In the interest of not upsetting the fragile balance of international peace and security, it seemed advisable not to provide for any possibility of the complaint being brought before the court by indirect means. If a complaint were lodged, the public prosecutor's office attached to the court could and should serve as a safeguard, but, once the case had been brought before the court, nothing should prevent it from coming to its own conclusions about the matters involved. The court could be given the option of requesting the Security Council's advice, which would be recommendatory in nature. Conversely, the Council could seek advisory opinions from the court, just as the Charter of the United Nations authorized it to do from ICJ. Thus, the respective roles of the Security Council and the court should be seen as mutually complementary rather than competing or conflicting. The role of the Security Council in determining aggression or the threat of aggression was well recognized, but the authority of its decisions would be further strengthened if the rules it laid down were applied uniformly and without discrimination. As to the international criminal court, while there now seemed to be greater support for the idea among the members of the Commission and while the international climate seemed generally more favourable to it, great circumspection was still called for in advancing towards a universal consensus.

7. Mr. ILLUECA said that the draft provision on jurisdiction would obviously involve a system of concurrent jurisdictions and, in that case, the text would be acceptable subject to a few reservations, particularly as the court was also to have cognizance of disputes concerning judicial competence, applications for review of sentences passed in violation of the *non bis in idem* principle and requests for interpretation of provisions of international criminal law. In that connection, it might be possible to go so far as to empower the court to issue advisory opinions on any legal question within its competence.

8. In his view, the ideal solution would be an international criminal court with exclusive jurisdiction for certain crimes or, in other words, as Mr. Ogiso had said (2210th meeting), a court exercising jurisdiction over the nationals of all States parties to its statute, unlike ICJ, whose jurisdiction was still subject to the consent of States. Unfortunately, that ideal solution did not seem feasible at the present stage and the Special Rapporteur had probably been guided by the need to take account of the "realism of States" in supplementing the principle of territoriality by the active and passive personality system and the real-protection system to the extent that the domestic legislation of the States concerned required their application in a specific case. No objection could be made to those principles, which seemed to be firmly established on the international scene, as the International Convention against the Recruitment, Use, Financing and Training of Mercenaries showed.

9. The Special Rapporteur's conclusion that the principle of conferment of jurisdiction was "a make-shift solution, a necessary concession to State sovereignty", thus implied that the solution lay in establishing an international criminal court having concurrent jurisdiction with national courts—a system whereby States could opt to institute proceedings before either a national court or before the international criminal court. The fact was that universal criminal jurisdiction and the establishment of an international criminal court were not mutually exclusive, as had been convincingly argued by Mr. Graefrath, whose recent article in the *European Journal of International Law* shed useful light on the question.

10. The possible draft provision on criminal proceedings restricted the institution of criminal proceedings to States without requiring them to meet any conditions. With regard to the question of the Security Council, the Special Rapporteur, while indicating in his report that the Council could not institute criminal proceedings itself, assigned to it in the draft a dominant function which would hamper the international criminal court in the event of the crime of aggression or threat of aggression. Like other members of the Commission, he personally did not share the view that criminal proceedings had to be subject to the prior consent of the Security Council. Such a restrictive procedure had no foundation in the Charter of the United Nations. Recalling in that connection how the great Powers at the San Francisco Conference had opposed the idea of ICJ having compulsory jurisdiction, he said that the time had come for those countries to abandon a policy that had been overtaken by events, in the interest of democratization of international relations and of the United Nations system and, ultimately, in the interest of international peace and security. He noted that Article 36, paragraph 3, of the Charter embodied the compromise formula agreed on at the time in order to establish a balance between the political bodies and ICJ, while Article 95 confirmed the view that the legal order was not subject to the Security Council's decisions.

11. Without underestimating the difficulties arising from the diversity of legal systems and from methodological problems, he was in favour of the inclusion in the Code of a provision on applicable penalties, taking into account the *nullum crimen sine poena* principle. To that end, there should be a single penalty which would have an upper and a lower limit and would be determined by the court in the light of extenuating or aggravating circumstances.

12. In that connection, he said that he shared the sense of revulsion which the death penalty provoked among most members of the Commission. Latin America had recently revealed its sentiments on the matter when the General Assembly of the Organization of American States had approved a protocol to the American Convention on Human Rights on the abolition of the death penalty. He could not, however, object as vigorously to the penalty of life imprisonment. The international community should take pains to emphasize the exemplary nature of the penalty applicable to persons who committed barbarous crimes in order to prevent such acts from being committed again and to protect human rights and fundamental freedoms. Such criteria formed the basis for the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, the Declaration on Territorial Asylum,[4] article 1, paragraph 2 of which provided that:

> The right to seek and to enjoy asylum may not be invoked by any person with respect to whom there are serious reasons for considering

[4] General Assembly resolution 2312 (XXII) of 14 December 1967.

that he has committed a crime against peace, a war crime or a crime against humanity ...

and General Assembly resolution 3074 (XXVIII) of 3 December 1973 on principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity. With the help of the suggestions submitted by the Special Rapporteur, the Commission should be able to reach agreement on the applicable penalty.

13. Several States parties to the 1948 Convention on the Prevention and Punishment of Genocide imposed penalties for genocide. For example, in Spain, persons who committed that crime were liable under the Criminal Code to a prison term of 12 to 30 years; in the United States of America, the 1987 Proxmire Act provided for a maximum fine of $US 1 million, together, where appropriate, with a term of imprisonment that could extend to life; in Panama, the Criminal Code provided for a penalty of 15 to 20 years' imprisonment, in other words, for the maximum authorized under Panamanian law; and, in the United Kingdom of Great Britain and Northern Ireland, the 1969 Genocide Act provided for the same penalty as that imposed on persons who committed grave offences under the 1949 Geneva Conventions, namely, imprisonment from 14 years' to life.

14. With regard to the actual wording of draft article Z, crimes against the peace and security of mankind called above all for the adoption of exemplary penalties which reflected the feeling of condemnation that such acts aroused in the international community and which also had a deterrent effect. Justice should therefore not be merely the expression of feelings of compassion and solidarity towards the victims; it should also aim at remedying the causes of the suffering endured by the victims, at righting the wrongs done and at preventing the number of torturers from increasing. Society would not forget crimes against peace and security; that was why measures had already been taken to ensure that such crimes were not subject to any statutory limitation, to provide for the extradition of persons who committed them and, in particular, to refuse them the right of asylum. Any potential criminal should realize that, while he might not actually have to suffer the death penalty, he would none the less be outlawed from society.

15. He agreed with the first paragraph of draft article Z, but considered that a provision could perhaps be included to provide, in addition to life imprisonment, for the accessory penalties of total legal incapacity and deprivation of civil rights.

16. The second paragraph of the Spanish text should be brought into line with the English and French texts and worded to read: *Si hubiere circunstancias atenuantes*. Moreover, however different the crimes covered by the Code might be, they all bore the distinguishing feature of extreme gravity, which justified a heavier penalty than a prison term of 10 to 20 years. The paragraph would therefore be more acceptable if it read: "If there are extenuating circumstances, the defendant shall be sentenced to imprisonment for a term of 14 to 30 years."

17. The third paragraph gave rise to some problems. Confiscation or seizure of stolen property was not a supplementary or optional penalty: it was an inescapable accessory penalty, as was apparent from the work of the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Havana, in 1990, which served as the basis for General Assembly resolutions 45/116 and 45/117, to which were annexed respectively, a Model Treaty on Extradition and a Model Treaty on Mutual Assistance in Criminal Matters with an Optional Protocol concerning the proceeds of crime. In that connection, he noted that the Protocol in its paragraph 1 defined the proceeds of crime as:

> ... any property suspected, or found by a court, to be property directly or indirectly derived or realized as a result of the commission of an offence or to represent the value of property and other benefits derived from the commission of an offence.

He further noted that paragraph 5 of the Protocol laid down the procedure for the enforcement of a final order forfeiting or confiscating the proceeds of crime made by a court of the requesting State. The Model Treaty on Extradition also included an article on surrender of property (article 13), paragraph 1 of which read:

> To the extent permitted under the law of the requested State and subject to the rights of third parties, which shall be duly respected, all property found in the requested State that has been acquired as a result of the offence or that may be required as evidence shall, if the requesting State so requests, be surrendered if extradition is granted.

18. Accordingly, the third paragraph of article Z could be worded to read:

> "The penalty of life imprisonment and the penalty of imprisonment for a fixed term shall be accompanied by deprivation of civil rights and total legal incapacity of the accused for the duration of the penalty to which he has been sentenced as well as by confiscation of property and of other proceeds of the crime. The value of the confiscated property shall be used in the first instance to compensate the victims of the crime, as provided for under the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by the United Nations General Assembly in resolution 40/34 of 29 November 1985, and the balance shall be entrusted to the World Food Programme."

19. Mr. EIRIKSSON said that he had already expressed his reservations with regard to the articles being drafted by the Commission. Only when it came to their adoption could the Commission really know the nature of the provisions they contained and decide what should be done with them. Unfortunately, it probably would not have time to complete the first reading of the articles at the current session and, although a full set of articles was now before the Commission, it was not yet clear what the final product would look like.

20. The Commission had proceeded with its work without having decided on the final form of the draft articles or how they would be adopted. Yet the subject in general, and the question of the international criminal court in particular, were of such a nature that the Commission could not expect clear-cut guidance from the Sixth Committee. He for his part proceeded from the assumption that the articles to be adopted would eventually take the form of a draft international convention, part of which would be the draft statute of an international criminal court. States would then have an opportunity of

choosing the provisions that were acceptable to them and even of deciding whether they wished to proceed at all.

21. At the current stage, the Commission should deal without further delay with outstanding problems concerning the international criminal court. To that end, a working group should, in his view, be convened to develop further some of the points raised at the preceding session and to choose from among the options presented. Such a group could work informally so as not to take up time allocated to other agenda items.

22. With regard to penalties, he considered, first, that the Code should include a provision in that connection and that the question should not be left to the court. Secondly, as the Commission had to deal only with a dozen or so crimes, it should not be an insurmountable task to set out penalties for each. Of course, since all the crimes in question were extremely serious, there should in principle be no great difference between them—and he said "in principle" because some articles adopted provisionally concerned crimes that would perhaps not warrant final inclusion in the Code.

23. Thirdly, for reasons of principle, the Commission should exclude the death penalty. Life imprisonment should perhaps also be excluded, though he had no strong views on the matter. The solution might be to provide for a term of imprisonment, laying down a minimum and maximum for each crime. A system for reviewing the sentence after a given period could also be introduced.

24. Fourthly, the determination of the penalty should be left to the Conference of States convened to adopt the Code. Finally, he had been convinced by a number of comments made during the discussion that consideration of the question of the return of stolen property or property unlawfully appropriated by the accused should be postponed until later, since it might delay the Commission's work. The same applied to the question whether community service should be included among the penalties.

25. In summary, the Commission should provide only for a framework of penalties to be built into the Code when it was adopted.

26. Turning to the question of jurisdiction, he said that, in the first place, a jurisdiction *ratione materiae* based on the Code should be envisaged. The Commission could reassess that aspect of the matter in the light of the progress of its work.

27. Secondly, only States parties to the statute of the court should be able to institute proceedings. If paragraph 2 of the draft provision on the jurisdiction of the court was interpreted as requiring the consent of other States, it would suffice for the court to have jurisdiction, if one of the four categories of States referred to in paragraph 135 (*c*) of the Commission's report on the work of its forty-second session (A/45/10),[5] gave consent. In practice, the State in whose territory the accused was found would also have to give its consent because, in his view, there could be no trial *in absentia*.

28. Thirdly, he could not for the time being accept paragraph 4 of the draft provision on the jurisdiction of the court, but would welcome further development of paragraph 5 on the interpretation of the provisions of international criminal law.

29. Lastly, he continued to have reservations concerning the structure of article 12 (Aggression),[6] which had been provisionally adopted by the Commission at its fortieth session, particularly with regard to the role of the Security Council in the determination of the crime. Paragraph 2 of the draft provision on criminal proceedings which did not really concern proceedings, should be considered in the context of article 12, but an explanation should be included in the commentary to make it clear that a separate decision by the Security Council would be required on the institution of proceedings. However, in the light of his reservations on the article concerning aggression, he would not take a position on that possibility at the current stage.

30. Mr. THIAM (Special Rapporteur), summing up the debate on agenda item 4, noted that the consideration of his report had given rise to a lively and highly informative debate. Before analysing the remarks made on specific points raised in the report, he would comment on the observations made with regard to certain general matters.

31. Opinions were divided as to how the Commission should react to General Assembly resolution 45/41. Some took the view that the Commission should deliver an ultimatum to the General Assembly and let it be known that, in the absence of a clearer mandate, it would be impossible for it to make headway. Others felt that the Commission should set about drawing up a draft statute for the international criminal court forthwith and should not wait for more specific guidance from the General Assembly. Yet others recommended an intermediate solution, which had his support, namely, to request the General Assembly to express its wishes more clearly, but not to suspend the Commission's work on the matter.

32. The inclusion in the Code of provisions on penalties also did not meet with general agreement. In the opinion of some members, the determination of the applicable penalties was a matter for the political bodies and should not be dealt with by the Commission. He did not, of course, share that view. In his opinion, the Commission could certainly make proposals on the application of penalties and even suggest specific penalties without encroaching on the prerogatives of the political bodies and, more specifically, of States with which the decision would, in the final analysis, rest. If the Commission disregarded that aspect of the matter, it would also run the risk of attracting the same criticism as the authors of the 1954 Code, who had been reproached for drafting provisions on crimes without providing for penalties, in total disregard of the *nulla poena sine lege* rule.

[5] *Yearbook ... 1990*, vol. II (Part Two).

[6] See 2208th meeting, footnote 5.

33. As to the reactions to the first part of his report and to the draft article on applicable penalties in particular, once again the positions were fairly clear-cut. Some members of the Commission considered that, given the trends in international law, the death penalty was obsolete and could not be included. They had argued that, even in countries where it had not yet been abolished, it was very rarely carried out in practice. Some would even go so far as to exclude life imprisonment. In his view, however, that would be going too far. It should not be forgotten that the crimes covered by the Code were of exceptional gravity and required an exceptional regime. That had, moreover, been recognized by the Commission when it had decided, contrary to all the principles of criminal law, that no statutory limitation should apply to those crimes and to exclude all defences, such as, for instance, duress. If the death penalty were not to be included in square brackets in the draft article, then life imprisonment should at least be retained.

34. As to aggravating circumstances, which, as one member of the Commission had pointed out, were provided for in the criminal law of all countries, he had decided, after due consideration, not to include that concept, for the simple reason that, in view of the gravity of the crimes in question, it was difficult to see how there could be any such circumstances.

35. He had proposed a provision of a general nature on penalties that was applicable to all the crimes covered by the Code because, as he saw it, all those crimes were extremely serious and could therefore be placed on the same footing. That provision was, however, not as rigid as it might seem because, since account was being taken of extenuating circumstances, it would always be possible for the judge to adjust the penalty. In view of the comments made during the discussion, he had nevertheless prepared two new versions of draft article Z which were more flexible and which read:

ALTERNATIVE A

Any person convicted of any of the crimes covered by this Code shall be sentenced to [life imprisonment] imprisonment for a term of 15 to 35 years which cannot be commuted, without prejudice to the following other sentences, if deemed necessary by the court:

1. **Community work;**
2. **Total or partial confiscation of property;**
3. **Deprivation of some or all civil and political rights.**

ALTERNATIVE B

1. **The court may impose one of the following penalties:**
   [(*a*) Life imprisonment;]
   (*b*) Imprisonment for a term of 10 to 35 years which cannot be commuted.
2. **In addition, the court may order:**
   (*a*) Community work;
   (*b*) Total or partial confiscation of property;
   (*c*) Deprivation of some or all civil and political rights.

36. With regard to the confiscation of property, he admitted that the wording proposed in the text of draft article Z was not altogether satisfactory. It might be better to provide for the total confiscation of property and not to regard confiscation as a form of compensation, in which case it would be for the injured party, where appropriate, to institute civil proceedings to obtain compensation.

37. The question of the establishment of an international criminal court had given rise to a particularly lively debate. The proposed provisions on that subject had proved to be very controversial, but they had enabled the Commission to consider the question thoroughly, as the General Assembly had requested it to do.

38. He had attended the meetings of the General Assembly and had seen that the adoption of resolution 45/41 had been preceded by tough negotiations and that the text submitted by a number of third world countries had had to be considerably reworded before it could be accepted. Those who believed that the General Assembly could already entrust the Commission with the task of preparing a draft statute of an international criminal court were mistaken because several countries were strongly opposed to the establishment of such a court.

39. In order to take account of that situation, he had proposed provisions which were intended merely to give the Commission food for thought and he had taken care not to focus on his personal opinion or to try to impose his views. In the draft provision relating to criminal proceedings, he had even played the role of devil's advocate. His position on the competence of the Security Council in that regard was, of course, known to all.

40. The debate on the jurisdiction of the international criminal court had revealed two major trends. Some members considered that the international court should have concurrent jurisdiction with national courts. Others advocated a more delicately toned solution, a kind of power sharing: the international court would have exclusive jurisdiction for extremely grave crimes and concurrent jurisdiction with national courts for the other crimes covered by the Code. His own feeling was that the second solution was the best one. He believed that States could agree to recognize the exclusive jurisdiction of the court for genocide, which was the extremely serious crime under international law *par excellence*, as well as for other crimes such as apartheid and perhaps also the illicit drug traffic. No one had been in favour of conferring exclusive jurisdiction on the international criminal court for all the crimes covered by the Code, a solution which would, in any case, be quite unrealistic because States were clearly not ready to accept such a transfer of jurisdiction.

41. One member of the Commission had strongly objected to the idea of the conferment of jurisdiction, stating that, since the crimes in question were crimes defined under international law, the right of the international criminal court to try those crimes could not be disputed and, more importantly, no State whatever could be regarded as having the power to confer jurisdiction on the international criminal court for those crimes: the conferment of jurisdiction on the international criminal court should be automatic for all crimes which were defined under international law. That reasoning appeared to be based on a misunderstanding. The definition of a crime was one thing and jurisdiction was another. The fact that a crime was defined in international law did not mean that States were automatically divested of the right to deal with it. There was nothing to prevent a State from recognizing a crime defined in international law, incorporating it into its internal law and prosecuting the per-

petrators of such an act in conformity with its rules of procedure.

42. When a crime against the peace and security of mankind was committed, there were always States that were directly concerned, whether it be the State in whose territory the crime had been committed, the State against which the crime had been directed or whose nationals had been the victims, or the State of which the perpetrator of the crime was a national. It would certainly be going too far to assert that those States had no right to deal with the crime in question because it was a crime under international law.

43. In paragraph 1 of his possible draft provision on the jurisdiction of the court, he had laid down the principle of the jurisdiction of the State in whose territory the crime had been committed. His proposal had not been well received and Mr. Pellet (2209th meeting), in particular, had opposed it on the grounds that the rule in international criminal law was not the principle of territoriality, but the principle of universal jurisdiction. He himself had serious doubts about the accuracy of that assertion. However attractive it might seem, the principle of universal jurisdiction, which was preferred by most writers on law, but which, since Grotius, had not really prevailed in practice, gave rise to all kinds of material and practical problems, for the gathering of evidence, for example, which meant that, in the present instance, it could not be taken as the rule or as a fundamental principle.

44. The fact was that most of the relevant international conventions dealing, for example, with the suppression of illicit acts directed against the safety of civil aviation, of the illicit seizure of aircraft and of terrorism, placed the State in whose territory the crime had been committed first on the list of States which had jurisdiction to try the crime in question. Cherif Bassiouni, the author of a draft international criminal code, had gone further than the Commission itself had wanted to do by trying to establish an order of priority for the jurisdiction of the States concerned and his article entitled "Jurisdiction" read:

Section 1. *Jurisdictional bases*

1.1 Jurisdiction for the prosecution and punishment of any international crime as defined in this Code [Special Part] shall vest in the following order:

(*a*) the Contracting Party in whose territory the crime occurred in whole or in part;

(*b*) any Contracting Party of which the accused is a national;

(*c*) any Contracting Party of which the victim is a national;

(*d*) any other Contracting Party within whose territory the accused may be found.

In his commentary, the author stated:

The approach followed is that of ranking the priority of jurisdictional theories based on recognition of international law and practice. The primary jurisdictional theory in Paragraph 1 (*a*) is that of territorial jurisdiction. Sound policy reasons as well as international practice favor this theory, and that state's judicial forum will probably be the most convenient.... Ranking thereafter in order of their international acceptance are the theories of nationality, passive personality and universality.[7]

45. He himself had not included the State in whose territory an individual alleged to have committed the crime was present among the States on which jurisdiction should be conferred because, according to article 4 (Obligation to try or extradite) provisionally adopted by the Commission,[8] that State had the obligation to try or to extradite.

46. He nevertheless believed it would be useful to establish some order of priority for the other States concerned. That would, moreover, help to advance international criminal law as a branch of learning. The fact remained, however, that, for the international court to be able to try a case, it was absolutely necessary for jurisdiction to be conferred on it by the territorial State, which was recognized as the competent State by international practice.

47. Turning to the question of criminal proceedings, he repeated that the draft provision he had proposed was only a working hypothesis. He construed the term "criminal proceedings", which could be taken to mean both the right to lodge a complaint and the right to try for the competent authorities of a State, only as the right to take action as a party before the international criminal court or to file a complaint before it. He therefore drew a distinction between it and *actio popularis*. Like other members of the Commission, he believed that the right to institute proceedings in the international criminal court should belong not only to States (to the exclusion of individuals), but also to international organizations. That idea was, moreover, not a new one.

48. He fully understood the strong reactions to which the key question of the role of the Security Council had given rise, in particular on the part of Mr. Illueca, whose point of view he shared to some extent. The fact remained that there was nothing absurd in suggesting the intervention of a political organ; that suggestion was to be found in a number of drafts submitted in the past. Before the Second World War, for example, Vespasien V. Pella had put forward a draft statute for the establishment of a criminal chamber within PCIJ. The draft statute had been accepted by the International Association of Penal Law and specified that international criminal proceedings would be instituted by the "Council of the League of Nations", a term later altered to "Security Council". It was true that past actions by the Security Council justified some doubts about it, but, as Mr. Pawlak had pointed out (2212th meeting), the Security Council had changed and the stalemate that had affected it for so long had been the result not of an inherent defect, but of the Cold War that had been going on at the time.

49. The question of the role of the Security Council had already been considered by the Commission a few years earlier and a number of possible situations had been discussed.[9] First, there was that in which the Council unequivocally found, for example, that a crime of aggression had been committed, in which case it would be

[7] C. Bassiouni, *International Criminal Law—A Draft International Criminal Code* (Alphen aan den Rijn/Germantown, Sijthoff & Noordhoff, 1980), p. 112.

[8] For text and commentary, see *Yearbook... 1988*, vol. II (Part Two), p. 67.

[9] See *Yearbook... 1988*, vol. I, 2053rd to 2061st and 2085th meetings.

difficult for an international criminal court to say the contrary, not because it was apparently subordinated to the Security Council, but simply in order to avoid conflicts between the complainant State and the State against which the complaint was directed. There was also the possibility of the exercise of the right of veto, but he pointed out that such a veto would not make it impossible for a State to take action before an international criminal court. A veto was not a decision: it was, as it were, a refusal to deal with a problem. It would therefore not prevent the filing of a complaint before the international criminal court and would not be an obstacle to its jurisdiction. Lastly, there was the possibility of the Security Council taking no action because it was ultimately a negotiating body. The Council's silence would, similarly, not prevent the international criminal court from dealing with the case.

50. It followed that the role of the Security Council in the context of criminal proceedings could give rise to problems only in the first of those hypothetical cases. He was convinced, however, that the Commission would be able to find wise and carefully reasoned solutions to those problems which would take account of the new political climate.

51. Mr. BARSEGOV said that some clarifications were called for with regard to the Special Rapporteur's comments on what he took to be his remarks. In his view, crimes under international law fell into a particular category and should not all automatically come within the jurisdiction of the international criminal court.

52. He was prepared to accept the exclusive jurisdiction of the international criminal court for some of those crimes, for example, those covered by international conventions that provided for the perpetrators to be judged by an international court, such as the crime of genocide. For other crimes, it would be desirable to confer jurisdiction on the international criminal court only in those cases where national courts had stated that they lacked jurisdiction.

53. In other words, he had objected to the Special Rapporteur's draft because it appeared to assume that a national court which stated that it lacked jurisdiction could not refer the case to the international criminal court.

54. Mr. NJENGA said he did not believe that the new text of the Special Rapporteur's proposed draft article Z, which contained original ideas, could be referred to the Drafting Committee without having been discussed in plenary.

55. Mr. AL-KHASAWNEH said that it would be premature for the Commission, which was called upon to legislate for a world that did not agree on the question of the death penalty, to adopt a clear-cut opinion on the question instead of giving the States concerned discretionary power. After all, the death penalty was provided for in the case of certain crimes: for example, Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty[10] stipulated in article 2 that "A State might make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war". Leaving such discretion to States would in no way be contrary to the principle of *nulla poena sine lege*: it would be sufficient to indicate the gravity of the crimes in question in the Code and to include a general provision stating that those crimes would be punished by a penalty that was in keeping with their degree of gravity.

56. Mr. PAWLAK said he continued to believe that the Commission should abandon the idea of including a general provision on penalties in the Code and, instead, set a penalty for each crime.

57. Mr. DÍAZ GONZÁLEZ said that he had two questions to ask following the Special Rapporteur's somewhat contradictory summary and explanation of the role of the Security Council. First, assuming that the Security Council had determined that a crime of aggression had taken place but that the international criminal court ruled that there had not been a crime of aggression, what purpose would have been served by consulting the Security Council, if its determination was not going to be followed? Secondly, what would happen in the opposite case, where the Security Council determined that there had not been a crime of aggression but the international criminal court found that there had been? How would the international criminal court and the international community react? In that connection, he referred to Mr Pellet's remarks (2209th meeting) with regard to the judgment of ICJ in the *Nicaragua* v. *United States of America* case.

58. In his view, it would be for an international criminal court to decide whether an act was a crime and to rule on the merits of the case, regardless of the opinion of any other United Nations body. The administration of justice must in no way be subordinated to another body that had nothing to do with the judicial power. The independence and freedom of the courts guaranteed justice and their impartiality.

59. Mr. THIAM (Special Rapporteur), apologizing for not being able to refer to all the statements that had been made, noted that Mr. Al-Khasawneh had taken exception to the absence of the death penalty in the draft article on penalties. The Commission's report to the General Assembly would state that two or three of its members had expressed reservations in that regard.

60. With regard to the role of the Security Council, a difficult problem that the Commission would have to solve, he again pointed out that he did not have an opinion *a priori* and rather than proposing any solution, had simply sought to initiate a debate.

61. Concerning the objection raised by Mr. Njenga about referring the new text of draft article Z to the Drafting Committee before its consideration in plenary, he was prepared to agree to such consideration if the Commission so decided.

62. Mr. FRANCIS said that, in view of the list of crimes against the peace and security of mankind that had been drawn up so far, if a case involving one of those crimes was before a court, it did not need to ask

[10] See 2211th meeting, footnote 9.

the Security Council for a prior determination, even in the event of an act of aggression. Otherwise, the list would not serve any purpose.

63. Mr. AL-BAHARNA, acknowledging that the Special Rapporteur had had little time to prepare the summary of the debate, said that he, too, had expressed reservations about the question of the death penalty, although he had no definite opinion on the subject. With regard to the referral of cases to the court, he had suggested that that possibility should be open not only to States, but also to intergovernmental organizations and individuals. As to the Security Council, he was firmly opposed to giving it any role whatsoever in the administration of justice. The international criminal court, as a judicial body, must be independent and have control over its own decisions, no matter what position the Security Council might adopt, for example, on the question of aggression or the threat of aggression. Lastly, although several members of the Commission had supported set penalties for each crime, the majority had spoken in favour of a general provision setting a maximum and a minimum penalty.

The meeting was suspended at 11.40 a.m. and resumed at 12.10 p.m.

The law of the non-navigational uses of international watercourses (A/CN.4/436,[11] A/CN.4/L.456, sect. D, A/CN.4/L.458 and Corr.1 and Add.1, ILC(XLIII)/Conf.Room Doc.2)

[Agenda item 5]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR

PART I OF THE DRAFT ARTICLES

ARTICLE [1] [2] (Use of terms)

64. The CHAIRMAN invited the Special Rapporteur to introduce his seventh report (A/CN.4/436) on the law of the non-navigational uses of international watercourses.

65. Mr. McCAFFREY (Special Rapporteur) said that his report dealt primarily with the use of terms and, in particular, with the question of the definition of the term "international watercourse" and the "system" concept. In order to enable the Commission to make the best use of its time, he proposed not to take up the question of the settlement of disputes, which had been pending since the preceding session, but to focus the debate on the "system" concept. He was convinced that the only possible basis for the draft articles was that of hydrologic reality, namely, that a watercourse was a system of interrelated hydrographic components and that an international watercourse was a watercourse, parts of which were situated in two or more States.

66. His report contained a proposal for the structure of Part I of the draft articles as well as two alternative texts for the article on use of terms, which would be numbered either "1" or "2" depending on the Commission's decision on the matter of structure addressed in his report. The texts he was proposing read:

Article [1] [2]. Use of terms

ALTERNATIVE A

For the purposes of the present articles:

(*a*) A watercourse system is a system of waters composed of hydrographic components, including rivers, lakes, groundwater and canals, constituting by virtue of their physical relationship a unitary whole.

(*b*) An international watercourse system is a watercourse system, parts of which are situated in different States.

(*c*) A [watercourse] [system] State is a State in whose territory part of an international watercourse system is situated.

ALTERNATIVE B

For the purposes of the present articles:

(*a*) A watercourse is a system of waters composed of hydrographic components, including rivers, lakes, groundwater and canals, constituting by virtue of their physical relationship a unitary whole.

(*b*) An international watercourse is a watercourse, parts of which are situated in different States.

(*c*) A [watercourse] [system] State is a State in whose territory part of an international watercourse is situated.

67. Mr. CALERO RODRIGUES said that, like its predecessors, the seventh report was supported by sound documentation, even if the information it contained, while very instructive from the strict point of view of hydrology, was not always directly related to the topic under consideration.

68. With regard to the definition of the term "international watercourse", the Special Rapporteur recommended using the definition that the Commission had adopted as a working hypothesis,[12] except for the last paragraph, which read:

> To the extent that parts of the waters in one State are not affected by or do not affect uses of waters in another State, they shall not be treated as being included in the international watercourse system. Thus, to the extent that the uses of the waters of the system have an effect on one another, to that extent the system is international, but only to that extent; accordingly, there is not an absolute, but a relative, international character of the watercourse.

He had no objection to abandoning the concept of the "relative international character" of watercourses, which was, in fact, rather curious. Nevertheless, the articles drafted on the basis of that working hypothesis would apply to international watercourses only in certain cases: when waters in one State were affected by or affected uses of waters in another State.

69. Concerning the concept of the watercourse system, the Special Rapporteur made a distinction of doubtful legal interest between the permanent components of the system—rivers, their tributaries and groundwater—and possible components—lakes, reservoirs, canals and glaciers. With regard to groundwater, to which a large part of the report was devoted, the Special Rapporteur also differentiated between free groundwater, which was nor-

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

[12] Adopted by the Commission at its thirty-second session in 1980. See *Yearbook ... 1980*, vol. II (Part Two), p. 108, para. 90.

mally associated with surface water, and confined groundwater, which was not related to surface water, and gave examples of instruments that dealt with the two categories. After commenting on the rules governing international groundwater adopted by ILA at its Seoul Conference in 1986, he concluded that the views of ILA would support the inclusion of groundwater in the Commission's draft articles, whether or not it was related to surface water. He himself did not see how the scope of the draft articles could be extended to include confined groundwater (aquifers). First, it was difficult to understand how the term "watercourse" could encompass the category of groundwater. Secondly, and above all, the provisions of the draft articles, as they now stood, did not take into consideration problems specific to confined groundwater and would therefore not be applicable to such water. Consequently, the Commission must restrict the scope of the draft articles to free groundwater that was associated with surface water and merely draw the attention of the international community to the need for an instrument on confined groundwater.

70. He agreed with the Special Rapporteur that it was necessary, in order to avoid all problems of application, to define not only the term "international watercourse", but also the term "watercourse".

71. The "system" concept defended by the Special Rapporteur was acceptable, provided that it was clearly defined. However, instead of speaking of "watercourse system", as was the case in alternative A of the draft article, it would be preferable to say, as in alternative B that "a watercourse is a system". Such wording would allow the system concept to be included in the draft articles without changing the general title.

72. On the other hand, he was opposed to the reference in both alternatives of the draft article to "hydrographic components, including rivers, lakes, groundwater and canals, constituting by virtue of their physical relationship a unitary whole". In a sense, that was inconsistent with the principle of the unity of the system, which was essential and must be stressed. Moreover, the existence of a physical relationship between the hydrographic components, to use the Special Rapporteur's wording, was not sufficient to form a unitary whole. The flow of some of the waters of the Danube into the drainage basin of the Rhine, which was at the origin of the famous *Donauversinkung* case,[13] was an example of a physical relationship between two rivers, but that did not mean that the Rhine and the Danube were a single watercourse. That was an important point to which it would be necessary to return.

The meeting rose at 1.20 p.m.

[13] *Streitsache des Landes Württemberg und des Landes Preussen gegen das Land Baden, betreffend die Donauversinkung*, German *Staatsgerichtshof*, 18 June 1927, *Entscheidungen des Reichsgerichts in Zivilsachen* (Berlin), vol. 116, appendix, pp. 18 *et seq.*

2214th MEETING

Friday, 24 May 1991, at 10.05 a.m.

Chairman: Mr. Abdul G. KOROMA

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Barboza, Mr. Barsegov, Mr. Beesley, 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. Sreenivasa Rao, 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 (*concluded*)

ARTICLE Z *and*

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

1. Mr. THIAM (Special Rapporteur) said that, before the Commission proceeded to take a decision on draft article Z, he wished to round off the statement he had made at the previous meeting with a few additional remarks. In particular, he wished to reassure those members who had expressed reservations about the abolition of the death penalty, as well as those who favoured specific penalties for each crime, or a more flexible system of punishment that established a maximum and a minimum penalty, that their comments had been duly noted.

2. As to the court's competence to hear appeals, he was firmly opposed to any form of hierarchical scale on which the court would occupy a higher position than national jurisdictions. The only hypothetical cases in which the international court might act as a court of appeal would be those where a crime under the Code had been defined as an ordinary crime instead of as a crime against the peace and security of mankind and, possibly, where the victim State or the State of which the victim was a national had obvious reason to think that the penalty was disproportionate to the heinous nature of the offence. Provision for such hypothetical cases might rea-

[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.