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Summary record of the 2207th meeting

Topic:
<multiple topics>

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

larly important task at the present session, had made some progress thanks to the dedication and sense of responsibility of all of its members as well as of other members of the Commission. The Committee had continued the second reading of articles presented by the Special Rapporteur on the topic of jurisdictional immunities of States and their property (agenda item 3), and had provisionally adopted articles 17 and 18, subject to certain additions to article 18 that would be examined at a later stage. The Committee had now embarked on the consideration of one of the most difficult problems presented by the draft articles, namely, State enterprises, and had already made substantial headway. It had adopted part of article 2, having drafted a new paragraph 1 (*b*) (iii), and had started on a compromise formula for article 11 *bis*, which would probably become part of article 10. The Committee intended to pursue its work on the topic, with a brief interruption to consider articles outstanding from the draft Code of Crimes against the Peace and Security of Mankind (agenda item 4), and hoped to complete the work by the end of the following week. Finally, he proposed that Mr. Solari Tudela should be appointed to serve on the Drafting Committee.

It was so agreed.

3. The CHAIRMAN thanked the Chairman of the Drafting Committee for his report and congratulated him and all those who had participated in the Committee's work on the progress accomplished so far.

Organization of work of the session (*continued*)

[Agenda item 1]

4. The CHAIRMAN said that, since several of the Special Rapporteurs were absent, the Enlarged Bureau did not deem it appropriate at that stage to recommend a complete calendar for the present session, but merely to recommend that, when the two-week period of concentrated work in the Drafting Committee ended, the Commission should revert to its normal pattern of meetings. Accordingly, the first substantive meeting should be held on Tuesday, 14 May, and the first topic to be taken up should be the draft Code of Crimes against the Peace and Security of Mankind (agenda item 4).

It was so agreed.

5. The CHAIRMAN said he had received a letter from the Chairman of the Committee on Conferences reminding the Commission of the contents of General Assembly resolution 45/238 A, of 21 December 1990. The letter suggested various means whereby United Nations organs might make optimum use of the conference-servicing resources provided to them without detriment to the success of their work, and requested him to note the suggestions made and to inform the Commission of the contents of the letter as well as of the relevant portions of resolution 45/238 A. With the Commission's permission, he intended to reply that the International Law Commission, which had an excellent record of utilizing conference resources, had taken due note of the suggestions and would continue to do its best to maintain its exceptionally high rate of utilization of conference resources.

It was so agreed.

6. Mr. KOTLIAR (Secretary to the Commission), replying to inquiries by Mr. BEESLEY and Mr. CALERO RODRIGUES, confirmed that 9 and 20 May 1991 were official holidays at the United Nations Office at Geneva and that no meetings would be held on those dates.

7. Mr. PELLET expressed his protest that 1 May, which was a holiday in most parts of the world, was not observed at the United Nations Office at Geneva, whereas it closed for holidays less universal in character.

8. The CHAIRMAN said that Mr. Pellet's comment would be conveyed to the appropriate officials.

The meeting rose at 10.45 a.m.

2207th MEETING

Tuesday, 14 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. Graefrath, Mr. Hayes, Mr. Illueca, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Progress report by the Chairman of the Drafting Committee (*concluded*)

1. Mr. PAWLAK (Chairman of the Drafting Committee) said that the Committee had used the time allotted to it to good advantage. Following two weeks of hard work, it had virtually completed its consideration on second reading of the draft articles on jurisdictional immunities of States and their property; only two points remained to be settled. The text to be submitted for consideration by the Commission contained two fewer articles than the original text, as two draft articles had been merged into one and another had been deleted. He thanked all the members of the Committee, the other members of the Commission, and the Special Rapporteur for their cooperation.

2. The CHAIRMAN thanked the Chairman of the Drafting Committee and all who had taken part in the

Committee's work. He wished the Committee every success in its further work.

Draft Code of Crimes against the Peace and Security of Mankind[1] (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

ARTICLE Z *and*

JURISDICTION OF AN INTERNATIONAL CRIMINAL COURT

3. The CHAIRMAN invited the Special Rapporteur to introduce his ninth report on the item (A/CN.4/435 and Add.1) containing draft article Z, which read:

Any defendant found guilty of any of the crimes defined in this Code shall be sentenced to life imprisonment.

If there are extenuating circumstances, the defendant shall be sentenced to imprisonment for a term of 10 to 20 years.

[In addition, the defendant may, as appropriate, be sentenced to total or partial confiscation of stolen or misappropriated property. The Tribunal shall decide whether to entrust such property to a humanitarian organization.]

and a possible draft provision on the jurisdiction of an international criminal court which read:

1. The Court shall try individuals accused of the crimes defined in the code of crimes against the peace and security of mankind [accused of crimes defined in the annex to the present statute] in respect of which the State or States in which the crime is alleged to have been committed has or have conferred jurisdiction upon it.

2. Conferment of jurisdiction by the State or States of which the perpetrator is a national, or by the victim State or the State against which the crime was directed, or by the State whose nationals have been the victims of the crime shall be required only if such States also have jurisdiction, under their domestic legislation, over such individuals.

3. The Court shall have cognizance of any challenge to its own jurisdiction.

4. Provided that jurisdiction is conferred upon it by the States concerned, the Court shall also have cognizance of any disputes concerning judicial competence that may arise between such States, as well as of applications for review of sentences handed down in respect of the same crime by the courts of different States.

5. The Court may be seized by one or several States with the interpretation of a provision of international criminal law.

together with a possible draft provision on criminal proceedings, which read:

1. Criminal proceedings in respect of crimes against the peace and security of mankind shall be instituted by States.

2. However, in the case of crimes of aggression or the threat of aggression, criminal proceedings shall be subject to prior determination by the Security Council of the existence of such crimes.

4. Mr. THIAM (Special Rapporteur), introducing the ninth report on the item, said that it consisted of two parts which dealt respectively with applicable penalties (A/CN.4/435) and with the question of the establishment of an international criminal jurisdiction (A/CN.4/435/Add.1).

5. He had discussed the question of penalties in his eighth report, which had been introduced at the Commission's preceding session (A/CN.4/430 and Add.1)[3] when he had proposed a draft provision for inclusion in the statute of an international criminal court. Some members had, however, pointed out that the penalties should appear in the Code itself and not in the statute of the proposed court. Accordingly, he was now proposing a draft article Z, which would be included in the Code.

6. The applicable penalties raised delicate problems, as evidenced by the fact that, when confronted with the criticisms of Governments, the Commission had withdrawn the 1954 text of draft article 5 dealing with the question. The problems were of two kinds and stemmed principally from the diversity of legal systems. The establishment of a scale of penalties called for a uniform moral and philosophical approach that existed in domestic, but not in international, law. Penalties varied from country to country, according to the offences to be punished. In addition, there were penalties such as the death penalty and other afflictive punishments (for instance, physical mutilation) about which there was much controversy and which were not universally applied. He had therefore endeavoured to avoid extremes and to find a middle way that might be acceptable to all States. His proposal was that life imprisonment should be the punishment imposed for the crimes defined under the Code. Reservations about that kind of punishment had been expressed at the Commission's preceding session by those who considered that it precluded all possibility of the improvement and rehabilitation of the convicted person, but it seemed to be the solution that met with widest agreement. If extenuating circumstances were allowed, a penalty of 10 to 20 years' imprisonment would be possible. He called upon all members to let him know their views on the matter.

7. The second group of problems concerned the method to be adopted. Should the relevant penalty for each crime be indicated or, since all such crimes were characterized by their extreme gravity, should the same penalty be laid down, under a general formula, for all cases, with a minimum and a maximum according to whether or not there were extenuating circumstances? He had decided to opt for the latter solution, since, in his view, it would be impossible to establish a scale of penalties for each crime taken separately.

8. Members would recall that the Commission had deliberately refrained from including penalties in the 1954 draft Code. Admittedly, at its third session in 1951, it had adopted a draft article 5, which read:

The penalty for any offence defined in this Code shall be determined by the tribunal exercising jurisdiction over the individual accused, taking into account the gravity of the offence.[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).

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

[4] *Yearbook ... 1951*, vol. II, pp. 134 *et seq.*, document A/1858, para. 59.

The drawback of that provision had been, however, that it would be left to the judge to establish the penalty to be imposed and, in the light of the strong reservations of the Governments which had communicated their observations to the Commission at that time, it had finally decided that it would be advisable to withdraw the provision.

9. The provision now being proposed was a step forward compared with the earlier provision in the sense that the applicable penalty would not be determined by the competent judge, but would be prescribed for all crimes covered by the Code. That penalty could be supplemented by an optional one which had been placed in square brackets in the report, namely, total or partial confiscation of property which the convicted person might have stolen or misappropriated. That penalty, already provided for in the Charter of the Nürnberg Tribunal,[5] would be particularly applicable in the case of war crimes, which often involved theft or appropriation by force of property belonging to private individuals, especially in occupied territories. To whom would the confiscated property be awarded? At the national level, confiscated property went to the State; at the international level, it would be difficult to award it to one State rather than another. He was therefore proposing that it should be left to the competent court to entrust such property to a humanitarian organization such as UNICEF, ICRC or an international body set up to combat illegal drug trafficking.

10. The question of the establishment of an international criminal jurisdiction was beginning to receive the attention of the international community and of many political bodies and some recent initiatives by the Congress of the United States of America and the European Community, not to mention other isolated initiatives, had been taken along those lines.

11. At its last session, the General Assembly had unfortunately not reacted as the Commission had wished to the questionnaire-report on that subject which he had submitted to the Commission in his eighth report:[6] refusing to decide on the proposed choices and solutions or to rule any of them out. In paragraph 3 of resolution 45/41, the Assembly had merely invited the Commission to continue its work on the question without offering any other guidelines. He had therefore continued to consider the problems on whose solution the establishment of an international criminal jurisdiction depended and had focused on two of those problems in particular: the jurisdiction of the court and the institution of international criminal proceedings.

12. With regard to jurisdiction, he had endeavoured to suggest solutions which reflected the present realities of international criminal law. The draft provision submitted for the Commission's consideration was, moreover, not intended for referral to the Drafting Committee; its purpose was to serve as a basis for a discussion from which he might draw conclusions concerning the statute of the possible future international criminal court, which could not be drafted until the jurisdiction of the court had been defined.

13. The question of jurisdiction had been considered on several occasions in the United Nations and, in particular, by the 1953 Committee on International Criminal Jurisdiction, which had produced a revised draft statute for an international criminal court.[7] He had used article 27 of that text, with a number of changes and additions, as the basis for his proposal.

14. Paragraph 1 of the draft provision he was proposing provided that the court was competent to try individuals or, in other words, natural persons, rather than States, and formulate a rule relating to jurisdiction *ratione materiae*. That jurisdiction might be defined in one of two ways: the court tried crimes defined in the Code or it tried crimes defined in an annex to its statute; such crimes would, of course, be far fewer in number than those listed in the Code. His own view was that it would be a mistake to be over-ambitious as far as the court's jurisdiction *ratione materiae* was concerned; all the discussions had shown that there was some hesitation in that regard. It would be better to proceed cautiously and flexibly, starting, for example, by restricting the court's jurisdiction to crimes which were dealt with in international conventions, on which general agreement therefore existed, such as genocide, apartheid, certain war crimes, certain acts of terrorism, such as attacks on persons and property enjoying diplomatic protection, and drug trafficking, and which would be listed in an annex to the statute of the court.

15. With regard to jurisdiction *ratione personae*, he said that, although he was opposed in principle to the rule of conferment of jurisdiction by States, international realities made it difficult to dispense with that rule. In the case under consideration, the rule could involve four States: the State in whose territory the crime had been committed, the victim State (or the State whose nationals had been the victims of the crime), the State of which the perpetrator of the crime was a national and the State in the territory of which the perpetrator had been found. For the latter State, the decision whether or not to extradite was, in fact, tantamount to recognition or non-recognition of the court's jurisdiction. The problem therefore arose only in connection with the other three States. The 1953 draft statute had required conferment of jurisdiction by two States, the State where the crime had been committed and the State of which the victim was a national. The draft provision now being submitted to the Commission was less rigid. Paragraph 1 unreservedly reaffirmed the principle of territoriality in the sense of requiring conferment of jurisdiction by the State in which the crime had been committed. Having established that principle, he had also wished to introduce the principle of active or passive personality, which was beginning to be widely applied. Many States conferred jurisdiction on their courts in respect of certain crimes committed abroad. To cover such cases, it was only realistic to include a provision to the effect that, over and above the

[5] Charter annexed to the London Agreement of 8 August 1945 for the prosecution and punishment of the major war criminals of the European Axis (United Nations, *Treaty Series*, vol. 82, p. 279).

[6] See footnote 3 above.

[7] Report of the 1953 Committee on International Criminal Jurisdiction, *Official Records of the General Assembly, Ninth Session, Supplement No. 12* (A/2645), annex.

conferment of jurisdiction required under the principle of territoriality, those States would also have to confer jurisdiction on the court. Paragraph 2 therefore provided that conferment of jurisdiction by the State of which the perpetrator was a national or by the State whose nationals had been the victims of the crime would be required only if their domestic legislation so required in the particular case under consideration. The fact that so many States were required to confer jurisdiction also added to the number of obstacles, but rules relating to jurisdiction were determined by States. Setting those rules aside completely might be an attractive idea in theory, but it was not feasible in practice.

16. The proposed text also provided that the court should have cognizance of any challenge to its own jurisdiction (para. 3), that it should have cognizance of any disputes concerning judicial competence as well as of applications for review of sentences handed down in respect of the same crime (para. 4) and that it might be seized with the interpretation of a provision of international criminal law (para. 5). In the last-mentioned case, the court's intervention would help to remove some uncertainties regarding terminology and to explain the meaning and content of the many principles which international criminal law, a new field, borrowed from internal criminal law.

17. The second major issue to be settled was criminal proceedings. In his view, the Security Council, although the guardian of international peace and security, was primarily a political organ with no judicial functions at all. However, Article 39 of the Charter of the United Nations conferred on the Council the power to determine the existence of an act of aggression or any threat to the peace. The text he was proposing therefore provided that criminal proceedings should be instituted by States (para. 1), but that, in the case of the crimes of aggression or the threat of aggression, criminal proceedings should be subject to prior determination of those crimes by the Security Council (para. 2). Some members of the Commission would have preferred total independence from the political organs, but the Charter was a reality which must be respected as it stood, whatever might be thought of the actions of the Security Council, which did, moreover, seem more concerned to comply with the spirit of international law.

18. If the discussion in the Commission produced a clearer picture of the areas over which the court would have jurisdiction and who would be able to institute criminal proceedings, he might perhaps put forward the statute of an international criminal jurisdiction in 1992.

19. Mr. AL-BAHARNA said that, despite the differences of opinion on the issues relating to the penalties to be applied, the idea of including a provision on penalties in the Code had unanimous support. The difficulty lay in the very different approaches which States took to penalties and in the problems of their execution. To a large extent, the present controversy merely reflected long-standing questions as to the utility and extent of the punishment of offenders: hence the lack of agreement in the Commission on the penalties themselves, their scope and their formulation.

20. With regard to the procedural difficulties referred to in the ninth report, it would be better, in order to make the draft Code somewhat flexible, to envisage a general formula or a set of provisions dealing with all cases rather than to specify the corresponding penalty for each crime.

21. The Special Rapporteur invited the Commission to choose between the two possible solutions to another problem: should the provisions on penalties be incorporated into domestic law or should they be included in the Code, which might be adopted by means of an international convention? He was to be congratulated for opting for the second solution, which had the merit of promoting uniformity. Furthermore, all of the crimes in question would fall within the scope of an international convention, whereas internal law, reflecting political and social realities, might be selective.

22. What still had to be determined was the precise content of the provisions. Draft article Z was not entirely satisfactory, since, while it was true that the crimes covered by the Code were by reason of their extreme gravity, foremost in the hierarchy of international crimes, as the Special Rapporteur had said, it was equally true that the degree of individual responsibility depended on the factors at work. To ignore those factors when sentencing the perpetrator of a crime against the peace and security of mankind, to reduce all the possible penalties to a single form of punishment and to make all the crimes subject to the maximum penalty of life imprisonment, subject only to any extenuating circumstances, would amount to a failure to take into account the actual circumstances of each case.

23. Why not have a set of provisions for the three basic modes of punishment: financial penalties, imprisonment and capital punishment, with community service as a supplementary penalty? First, financial penalties, although seemingly inappropriate, might have their uses in certain cases, especially in conjunction with terms of imprisonment. Failure to pay the fine might also entail an extension of the term of imprisonment or an obligation to perform community service under the supervision of the group of persons victims of the crimes committed by the guilty person.

24. Secondly, as far as capital punishment was concerned, the perpetrators of the most serious crimes should certainly not escape extreme punishment and the States which still had the death penalty in their criminal codes far outnumbered those which had abolished it. In order to safeguard the sensibilities of the latter group of States, the death penalty provision might be accompanied by a reservation entitling any State which instituted proceedings to request the court not to impose the death penalty in the event of conviction. Life imprisonment offered many advantages over the death penalty, if only because it was reversible and had the support of all countries. Perhaps the Commission would therefore have to adopt life imprisonment for its Code rather than the death penalty.

25. Thirdly, a set of provisions providing for financial penalties, imprisonment and community service would leave the court sufficient latitude.

26. Fourthly, such a diversity of types of punishment would take account of the basic philosophies underlying the various penalties: for example, the idea of retribution was present both in community service and in financial penalties.

27. Lastly, the total or partial confiscation of stolen property could not be regarded as a penalty. Such property ought to be restored to its true owner or to persons claiming it on his behalf or, in the absence of evidence, to a relevant international body as custodian.

28. In conclusion, he recalled the practice of leaving it to the States parties to a convention to prescribe penalties and he cited in that connection article V of the Con vention on the Prevention and Punishment of the Crime of Genocide, article IV of the International Convention on the Suppression and Punishment of the Crime of Apartheid and article 5 of the draft code produced by the Commission in 1951. On the other hand, article 27 of the Charter of the Nürnberg Tribunal stated that: "The Tribunal shall have the right to impose upon a Defendant, on conviction, death or such other punishment as shall be determined by it to be just".[8] Thus, the historical antecedents did not establish conclusively a single principle governing penalties for international crimes. The Commission was therefore free to adopt a rule acceptable to and applicable by the international community.

29. Mr. HAYES said that, if an international jurisdiction was to be established, the need for a provision on penalties had to be acknowledged in order to avoid prejudicing the principle of *nulla poena sine lege*. If there was to be only a system of national jurisdiction, national legislation could give effect to that principle, but then disparities would inevitably appear in the penalties imposed for a similar offence. He was therefore of the opinion that the draft Code should provide for a uniform system of punishment, whether the jurisdiction was international or national. As the Special Rapporteur pointed out, that was made difficult by ethical and philosophical diversity among States; criminal penalties ranged from fines to capital punishment and included deprivation of liberty in every form, forced labour, various degrees of corporal punishment, and so forth. A uniform system of punishment was possible only with universally acceptable penalties, even if the penalties applicable to the very serious crimes under consideration proved to be less severe than those applicable in certain countries to less serious crimes. An example of such difficulties was the European Convention on Extradition, which had been in force for nearly 30 years. Despite the relative cohesiveness of the States then members of the Council of Europe, the diversity of penalties in those States at the time of the drafting of that instrument had posed problems and several States that had abolished capital punishment had, upon ratification, formulated a reservation in which they had reserved the right not to extradite an individual to a State in which the crime of which he had been accused made him liable to be sentenced to death.

30. In the case of the Code, if the system of punishment included penalties—not only the death penalty—that were not universally acceptable, the difficulties would be even greater, not only for the purposes of extradition, which would be a key element of its implementation, but also for the very acceptance of the Code. The expression "cruel, inhuman or degrading treatment or punishment" in the Universal Declaration of Human Rights and its later use in a number of human rights instruments was not interpreted uniformly, even for capital punishment. It followed from all those considerations that imprisonment was the most fitting penalty because it was widely accepted and because it punished the crimes being dealt with better than fines would. The Commission might wish to consider whether certain obligations that were sometimes added to the penalty of imprisonment, such as the concomitant obligation to perform a certain type of work, were widely accepted: if so, that would make it possible to graduate the types of penalties and help make them fit the crime.

31. In the relevant draft provision presented in 1954 (article 5), the Commission had proposed to leave it entirely to the competent court to determine what penalty to impose. That text had been criticized by States for not respecting the principle of *nulla poena sine lege*, for leaving too much to the court and for dealing with a question that should be dealt with in national legislation, a criticism assuming, of course, that there would be a national jurisdiction rather than an international court. In his own view, that provision complied with the letter of the principle *nulla poena sine lege*, but more specificity was required to ensure at least a minimum degree of uniformity, regardless of the jurisdiction. It would be best to establish an adequate penalty together with a minimum and a maximum length, without trying to define the penalty that corresponded to each crime, since all crimes that came under the Code were very serious. Guided by those minimum and maximum limits, the court would have discretionary power to set the applicable penalty in each case and to take into consideration not only any extenuating circumstances, but also all other circumstances.

32. That line of reasoning led him to conclude that the system of punishment should be based on terms of imprisonment and, unlike the Special Rapporteur, he believed that a definite period of time would be preferable to life imprisonment. In reality, the duration of "life" imprisonment varied from country to country. As the modern trend was to impose long prison sentences of 30 or even 40 years, the maximum penalty should be of a similar length, but the Commission needed additional information before proceeding with that question.

33. Referring to the text of article Z as proposed by the Special Rapporteur, he questioned whether it was appropriate to introduce a provision such as the one in square brackets on stolen or misappropriated property, and, if so, whether it should be included in the draft article on penalties. He did not share the Special Rapporteur's concern for the relatives of the convicted person. Depriving a criminal or his relatives of stolen property was neither an injustice nor a punishment. The Commission's main consideration should be to ensure that such property was restored to its rightful owner. Perhaps that could be done

[8] See footnote 5 above.

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

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

The meeting rose at 11.35 a.m.

2208th MEETING

Wednesday, 15 May 1991, 10.10 a.m.

Chairman: Mr. Abdul G. KOROMA

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

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

[Agenda item 4]

NINTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE Z *and*

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

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

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

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

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

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

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

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