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Summary record of the 2151st meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
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izers. At the international level, it was impossible to be concerned with smaller-scale crime, although the point must be reflected in the text itself.

47. In part III of his report, concerning the statute of an international criminal court, the Special Rapporteur proposed three alternative texts on penalties (A/CN.4/430 and Add.1, para. 101). A provision of such a kind should form part of the substantive rules, since it was not part of procedural law. Therefore, either the provision must be placed in the general part of chapter I of the draft code or the appropriate penalties must be indicated for each individual crime. He also disagreed with the Special Rapporteur on the content of the three versions: it was a recognized principle of international law on the protection of human rights that the penalties must be set in the rule characterizing an act as a crime. The Commission would therefore have to agree on the appropriate penalty for each crime listed. However, that task might be left to the future plenipotentiary conference, since the members of the Commission were not experts in criminal law.

Drafting Committee

48. Mr. MAHIOU (Chairman of the Drafting Committee) said that, following consultations, he proposed the following membership for the Drafting Committee: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Barsegov, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Hayes, Mr. Koroma, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Sepúlveda Gutiérrez, Mr. Shi and Mr. Solari Tudela. Mr. Eiriksson would be an *ex officio* member in his capacity as Rapporteur of the Commission.

It was so agreed.

The meeting rose at 1 p.m.

2151st MEETING

Thursday, 3 May 1990, at 10 a.m.

Chairman: Mr. Jiuyong SHI

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

Organization of work of the session (*continued*)

[Agenda item 1]

1. The CHAIRMAN said that, as a result of discussions held in the Enlarged Bureau and informal consultations, a timetable for the work of the session had been arrived at on the assumption that the Commission would hold four plenary meetings a week during the first 10 weeks and 10 meetings a week during the last two weeks. The proposed timetable was as follows:

1.	Draft Code of Crimes against the Peace and Security of Mankind (item 5)	2-15 May	8 meetings
2.	Jurisdictional immunities of States and their property (item 4)	16-22 May	4 meetings
3.	The law of the non-navigational uses of international watercourses (item 6)	23-31 May	5 meetings
4.	State responsibility (item 3)	5-12 June	5 meetings
5.	Relations between States and international organizations (second part of the topic) (item 8)	13-19 June	4 meetings
6.	International liability for injurious consequences arising out of acts not prohibited by international law (item 7)	20-29 June	7 meetings
7.	Reports of the Drafting Committee	3-9 July	6 meetings
8.	Adoption of the report of the Commission	12-20 July	14 meetings

2. The meeting on 1 June could be used by the Drafting Committee or the proposed working group on the question of establishing an international criminal court. The four meetings on 10 and 11 July would be kept in reserve. It was understood that any time saved in the consideration of a topic in the plenary Commission should be allocated to the Drafting Committee, the Planning Group or other organs. In accordance with previous practice, the representatives of the legal bodies with which the Commission maintained a working relationship would make their statements on dates to be decided in the course of the session.

3. Mr. ARANGIO-RUIZ expressed surprise that only five meetings had been allocated to agenda item 3, "State responsibility". There was a disproportion that could be remedied by allotting some of the meetings held in reserve to that topic.

4. Mr. JACOVIDES, agreeing with that suggestion, said that he was concerned at the Commission's slow progress on the topic of State responsibility. It would be advisable for it to produce some tangible results for the next session of the General Assembly.

5. Mr. BENNOUNA said he, too, considered that more time should be allowed for the consideration of State responsibility. The topic occupied a very important place in the Commission's mandate as it was the last major area of general international law still to be codified. The Commission must speed up its work on the topic, the completion of which would only enhance its prestige.

6. Mr. BARBOZA said that, while he believed State responsibility was, as just stated, a topic of great importance, agenda item 7, "International liability for injurious consequences arising out of acts not prohibited by international law", was certainly more urgent.

Many United Nations organs had been working on the matter at various technical levels and were starting to prepare draft rules. Principle 22 of the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration),[1] which provided that "States shall co-operate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage . . .", was in the throes of implementation. One only had to remember the field of dangerous goods, for instance. The Commission should therefore identify general principles and submit a body of systematic ideas to the General Assembly. The seven meetings envisaged for that purpose were the minimum to be contemplated.

7. The CHAIRMAN said that the proposed timetable was not to be seen as a strait-jacket. On the contrary, it would be applied with the utmost flexibility and the Commission would allot additional meetings to particular agenda items as necessary. On that understanding, if there were no objections, he would take it that the Commission agreed to adopt the proposed timetable.

It was so agreed.

Draft Code of Crimes against the Peace and Security of Mankind[2] (*continued*) (A/CN.4/419 and Add.1,[3] A/CN.4/429 and Add.1-4,[4] A/CN.4/430 and Add.1,[5] A/CN.4/L.443, sect. B)

[Agenda item 5]

EIGHTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

ARTICLES 15, 16, 17, X AND Y[6] *and*

PROVISIONS ON THE STATUTE OF AN INTERNATIONAL CRIMINAL COURT (*continued*)

8. Mr. JACOVIDES said that he had taken due note of the Special Rapporteur's analyses in part I of his eighth report (A/CN.4/430 and Add.1), entitled "Complicity, conspiracy (*complot*) and attempt", and of the divergent views expressed by Mr. Tomuschat at the previous meeting. He had had occasion in the past to indicate his own views on the matter and would therefore not repeat them.

9. With regard to part II of the report (International illicit traffic in narcotic drugs), he recalled that he had been among those who had suggested several years previously that the inclusion of that subject in the draft code should be envisaged. He was therefore glad that the General Assembly had specifically entrusted consideration of the matter to the Commission. There was little doubt that trafficking in narcotic drugs was currently one of the major scourges of mankind and that it merited inclusion in the code, after it had been appropriately defined.

10. Part III of the report dealt with the statute of an international criminal court. To be a complete legal instrument, the code had to include three elements: the crime, the penalty and jurisdiction. He therefore welcomed the General Assembly's initiative and the Special Rapporteur's response. The General Assembly expected a legal opinion on the question of the statute of the court, and a working group would be an appropriate body to articulate the Commission's position, taking as its starting-point the views of the Special Rapporteur.

11. For the time being, he would confine himself to a few main points, but might revert later to other aspects of the matter. First, on the issue of jurisdiction, the international criminal court should have jurisdiction over those accused of crimes included in the code. Other offences, defined as crimes under other international instruments, could come under the jurisdiction of the court on an optional basis. Secondly, on the issue of the procedure for appointing judges, it would be preferable if they were appointed by the General Assembly, the costs being met by a fund set up by the Assembly.

12. An important consideration concerned the necessity or non-necessity of the agreement of other States for the submission of cases to, or withdrawal of complaints from, the court. In his view, the question did not arise inasmuch as the crimes covered by the code were of concern to the international community as a whole and transcended the subjective interests of the parties.

13. Mr. GRAEFRATH thanked the Special Rapporteur for his eighth report (A/CN.4/430 and Add.1), which recommended simplified solutions to extremely difficult problems and provided the Commission with a questionnaire on problems connected with the establishment of an international criminal court which might serve to streamline a preliminary discussion on the subject and at the same time facilitate the task allotted to the Commission by the General Assembly in its resolution 44/39 of 4 December 1989.

14. For the time being, he would confine himself to some remarks on parts I and II of the report, reserving his right to speak again later on the questionnaire set forth in part III.

15. The comments on draft article 15 in the report started with remarks on methodology and he would therefore follow that approach. Attempt, participation and conspiracy were not, in his opinion, separate crimes, but forms of commission of offences. He would therefore not speak of a crime of complicity, or of a crime of attempt, which, as seemed to be understood in draft article 17, was merely the commencement of the execution of a crime as defined in the list of crimes. In his view, the place for general provisions defining forms of commission of crimes was in the part of the draft code dealing with general principles. On the other hand, when defining the elements of specific crimes, the Commission had to determine which potential forms of

[1] *Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972* (United Nations publication, Sales No. E.73.II.A.14 and corrigendum), part one, chap. I.

[2] 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.

[3] Reproduced in *Yearbook . . . 1989*, vol. II (Part One).

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

[5] *Ibid.*

[6] For the texts, see 2150th meeting, para. 14.

commission it wished to cover and how to punish the perpetrators. That was clearly connected with the difficult question of determining who was responsible for a certain crime.

16. So far as the perpetrators were concerned, it seemed difficult to agree on general provisions applicable to all the different kinds of crime committed. In the modern day and age, war crimes, which might also take the form of conspiracy, had been or could be planned and organized at a very high level and far from the area of combat. Only after having clearly defined who was the perpetrator of a crime would it be possible to decide to what extent it was necessary to refer to co-perpetrators or accomplices. While in general it could be said that a person who acted by himself or through another or who, in breach of a legal duty, did nothing to prevent the commission of a crime was a perpetrator, it was perhaps necessary to be more specific when dealing with organized State crimes such as aggression, *apartheid* or genocide. In such cases, the Commission had to ensure that those who were in a political position to plan, order and initiate the crime were made responsible—not all those individuals caught in a network of laws and constraints.

17. That brought him back to the problem of individualizing the crimes, in other words determining who could or should be held responsible for a particular crime. The attempt made in that regard in article 12 (Aggression), provisionally adopted by the Commission on first reading,[7] was insufficient. The Commission had adopted paragraph 1 of that article only provisionally, since it had still not defined the potential "perpetrator"—an omission that had met with strong criticism in the Sixth Committee of the General Assembly. While he would not insist on the formulas proposed by Mr. Ushakov in 1985, namely "persons planning, preparing, initiating or causing an act of aggression . . ."[8] and "persons planning, preparing, ordering or causing a State to engage in armed intervention . . .",[9] he wished to refer to them in order to demonstrate the need for an exact description of the perpetrator, tailored to the crime concerned.

18. The Commission could define attempt, complicity and conspiracy in the part on general principles, and it might be a good idea to use at that point the simplified wording proposed by the Special Rapporteur. The Commission should, however, specify in the different parts of the list of crimes, or even when describing the individual crimes, whether attempt—and to what extent complicity—should be punishable.

19. In his view, attempt should be punishable only if it was expressly provided for by the provisions defining a crime or a category of crimes. It should also be clear that attempt might be punished less severely than the completed crime. Even if threat of aggression or preparation of aggression were made separate crimes, there would be no point in doing the same for attempt at aggression. *Mutatis mutandis*, the same was true of participation. If the Commission thought that, in relation to a concrete crime, incitement, assistance or subsequent accessory acts should be punishable, it should say so. At the same time, it should not forget that the law often allowed for differentiation between the punishment of the perpetrator and that of a helper. In the case of conspiracy as a particular form of committing an offence, the Commission must ensure that the punishment was without regard to the participation by others in the crime: that seemed particularly necessary in the case of aggression, *apartheid* and genocide. The point should be made clear in a separate paragraph of draft article 16.

20. The draft articles as submitted were too general and too isolated from the list of crimes. They might serve as elements for definition of different forms of commission of offences, but their practical application depended on a specific reference in connection with each crime.

21. Turning to the question of international illicit traffic in narcotic drugs, two draft articles on the subject were not needed. It might be sufficient to define large-scale transboundary drug trafficking as a crime against humanity. The fact that it might give rise to a series of conflicts endangering peace was no reason to declare it a crime against peace. It was regrettable that the points made about that crime by the Special Rapporteur in the last sentence of paragraph 69 of his report, in his comments on draft article X, were not included in the article itself. He therefore suggested that paragraph 1 of draft article X be amended accordingly and that the whole draft article be transferred to the part of the draft code on crimes against humanity.

22. Finally, the Commission should avoid becoming involved in a dispute on individual responsibility versus collective responsibility. Domestic criminal law and also international criminal law always dealt with individual responsibility. However, the time had come to tackle organized crime, and not only in the case of crimes against peace. The question was that of the distribution of responsibility in the commission of such a crime. In any event, the responsibility remained individual: it depended on the role played by the person concerned in the commission of the crime, even if it carried the burden of acts executed by others as part of the organization of the crime.

23. Mr. CALERO RODRIGUES noted that, in part I of his eighth report (A/CN.4/430 and Add.1), the Special Rapporteur reverted to issues which he had already dealt with in his fourth report,[10] in 1986, and that he remained convinced of the usefulness of a part of the draft code on "related offences" or "other offences". He (Mr. Calero Rodrigues) had not changed his opinion since 1986 either: the specific crimes covered by the code should be those already listed by the Special Rapporteur under the headings "crimes against peace", "crimes against humanity" and "war crimes". Complicity, conspiracy and attempt were only aspects of the commission of a crime. Mr. Tomuschat (2150th meeting) and Mr. Graefrath had recalled that the Commission had not yet addressed the fundamental ques-

[7] *Yearbook . . . 1988*, vol. II (Part Two), pp. 71-72.

[8] See *Yearbook . . . 1985*, vol. I, p. 61, 1886th meeting, para. 44.

[9] *Ibid.*, p. 62, para. 48.

[10] *Yearbook . . . 1986*, vol. II (Part One), p. 53, document A/CN.4/398.

tion of participation, i.e. the definition of the person who was to be considered the main participant, the perpetrator of the crime—a key definition on which would be based the definitions of complicity and attempt.

24. In his comments on draft article 15, on complicity, the Special Rapporteur himself provided arguments in support of his (Mr. Calero Rodrigues's) contention that the Commission was not dealing there with separate crimes but with the definition of responsibility for participation in the commission of a crime. For example, the Special Rapporteur concluded from the laws and judgments he cited that

> there is no hard and fast distinction between the concepts of principal perpetrator, co-perpetrator and accomplice. ... The difficulty of establishing precise criteria for distinguishing between accomplices, principal perpetrators, co-perpetrators and so on probably explains why the Charters of the International Military Tribunals referred, in the same articles and without distinction, to "leaders, organizers, instigators and accomplices"... (A/CN.4/430 and Add.1, para. 13).

The Special Rapporteur concluded by saying that "These brief references illustrate the scope of the concept of complicity and the variety of its content, which are reflected both in the acts of complicity and their characterization and in the status of those committing such acts" (*ibid.*). The Special Rapporteur gave other examples (*ibid.*, paras. 23-25). He stated:

> ... The classic dichotomy of principal and accomplice, which is the simplest schema, is no longer applicable because of the plurality of actors. The dualistic classification gives way to the broader concept of participants, which encompasses both principals and accomplices. It might sometimes be wondered whether all the actors should not be defined as participants, without it being necessary to determine the precise role played by each of them. (*Ibid.*, para. 23.)

The Special Rapporteur himself therefore recognized that complicity was part of the perpetration of the crime. An accomplice was an actor just as the principal perpetrator was. Accordingly, there was no reason to assume that complicity constituted a separate crime.

25. The Special Rapporteur followed the same reasoning in his comments on draft article 17, on attempt, stating: "Generally, attempt means any commencement of execution of a crime that failed or was halted only because of circumstances independent of the perpetrator's intention" (*ibid.*, para. 65). The Commission could certainly accept that truism, but how could it consider that if a criminal action was successfully completed one was faced with one crime, and if it was not so completed, with a different crime?

26. The question of conspiracy was a little more complicated, for it had its own specific features. In his comments on draft article 16, the Special Rapporteur developed the definition of conspiracy and distinguished two degrees in the commission of the crime planned (*ibid.*, paras. 40-41). But those arguments did not altogether accord with the Special Rapporteur's conclusion that the concepts of complicity and conspiracy "are very similar and sometimes overlap" (*ibid.*, para. 62). That was why conspiracy should also be regarded as an aspect of participation in a crime.

27. To sum up, the draft code must include provisions on attempt and complicity, but not as independent crimes. The provisions should be placed in the part on general principles. Furthermore, it was not necessary to have a provision on conspiracy; but if the Commission did not share that view, the relevant provision should be added to the general provisions dealing with attribution of responsibility. That same part of the draft code should include everything that was needed to decide who was to be punished for a crime: at the initial stage, judges should be allowed to decide who was to be considered the author of a crime, a particularly important issue in the case of crimes that were in principle attributable to the State.

28. Since the draft articles had been prepared with a view to defining separate crimes, it was difficult for him to comment on them from his standpoint. He would therefore limit himself to saying that he had difficulty in accepting the concept of complicity based on acts subsequent to the commission of the crime, as provided for in draft article 15, paragraph 2.

29. He could accept the idea that, in some cases, international illicit traffic in narcotic drugs could rise to the level of a crime against the peace and security of mankind. However, the Special Rapporteur's proposals on the matter were not fully satisfactory. In draft articles X and Y, the definition of that crime should have been matched with qualitative or quantitative distinctions, for otherwise both drug barons and small dealers would fall within the scope of the code, which was not of course the Special Rapporteur's intention. It was therefore essential to be specific about the type of traffic covered.

30. The definition given in draft article X, paragraph 2, was not helpful. The language was taken from article 3 of the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, but there was a difference between qualifying the offences covered in that article as crimes under domestic law and elevating them to the highest level of international crimes. He was confident that the Special Rapporteur would be able to solve that problem.

31. Mr. KOROMA said that he would confine himself to a few preliminary comments, specifically on the question whether complicity, conspiracy and attempt should be made separate crimes or whether they should be dealt with in the part of the draft code on general principles. No doubt the position stated by the Special Rapporteur in his comments on draft article 15 (A/CN.4/430 and Add.1, para. 6) was supported by the Nürnberg Principles[11] formulated by the Commission in 1950, but, regardless of those Principles, if complicity or conspiracy could not be made crimes as such it would follow that, unless the crime were carried out, the accomplices or the participants in the conspiracy would go unpunished. He was therefore of the opinion that both the precedents and those theoretical considerations argued in favour of the Special Rapporteur's proposal to treat independently the three crimes which were the subject of part I of his eighth report.

The meeting rose at 11 a.m. to enable the Drafting Committee to meet.

[11] Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal. Text reproduced in *Yearbook ... 1985*, vol. II (Part Two), p. 12, para. 45.