Document:-

A/CN.4/L.454 [and Corr.1]

Draft Code of Crimes against the Peace and Security of Mankind: report of the Working Group established by the Commission pursuant to the request from the General Assembly in paragraph 1 of its resolution 44/39

Topic:

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

Extract from the Yearbook of the International Law Commission:-

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in that respect included concern that such an article would violate the principle of universality which must underlie the concept of crimes against the peace and security of mankind. Furthermore, the view was expressed that such an article would discriminate against States which had entered into the treaties concerned as compared to States which had not done so. The effect might be to discourage the conclusion of such treaties. The draft article was also criticized on the ground that it unjustifiably focused on treaty obligations, and concern was expressed that such an article would raise fundamental questions of treaty law, for example in the area of validity and interpretation of treaties, relations between parties to treaties and the question of treaties and third States. Finally, the general point was made that an article of such a controversial nature would have an adverse impact on the acceptability of the code.

92. The Commission was therefore not able to agree on guidelines for the future work of the Drafting Committee on this question. It furthermore noted that if, at its next session, it was able to agree on such guidelines, for example on the basis of the debate in the Sixth Committee of the General Assembly, the Drafting Committee should revert to the article after the completion of its consideration of the other draft articles on the topic.

C. Question of the establishment of an international criminal jurisdiction

93. At its current session, the Commission, within the framework of the present topic, considered extensively the question of the possible establishment of an international criminal jurisdiction.

1. Terms of reference

94. Two main reasons led the Commission at its present session to an in-depth examination of this question, within the context of the draft Code of Crimes against the Peace and Security of Mankind.

95. On the one hand, the question concerning the draft code's implementation and, in particular, the possible creation of an international criminal jurisdiction to enforce its provisions has always been foremost in the Commission's concerns regarding the topic. The Commission pronounced itself in favour of such a trial mechanism for the first time in 1950.[48] When it resumed its work on the topic at its thirty-fifth session, in 1983, it included in its report to the General Assembly on that session the following paragraph:

> Since some members consider that a code unaccompanied by penalties and by a competent criminal jurisdiction would be ineffective, the Commission requests the General Assembly to indicate whether the Commission's mandate extends to the preparation of the statute of a competent international criminal jurisdiction for individuals.[49]

96. The question concerning the implementation of the draft code, including the possible establishment of an international criminal jurisdiction, also came up in the Commission's discussions at its thirty-eighth (1986),[50] thirty-ninth (1987),[51] fortieth (1988)[52] and forty-first sessions (1989),[53] and the Commission reiterated the above-mentioned inquiry to the General Assembly at its thirty-eighth[54] and thirty-ninth sessions.[55]

97. In particular, the Commission included in article 4 (Obligation to try or extradite) of the draft code, which it provisionally adopted on first reading at its fortieth session, in 1988, a paragraph 3 stating: "The provisions of paragraphs 1 and 2 of this article do not prejudge the establishment and the jurisdiction of an international criminal court." Furthermore, in paragraph (5) of the commentary to that article, the Commission indicated that paragraph 3

> deals with the possible establishment of an international criminal court and . . . shows that the jurisdictional solution adopted in article 4 would not prevent the Commission from dealing, in due course, with the formulation of the statute of an international criminal court.[56]

98. Although the Commission never received from the General Assembly a clear-cut answer to the inquiries referred to in paragraphs 95 and 96 above, it is to be noted that, in paragraph 2 of its resolutions 43/164 of 9 December 1988 and 44/32 of 4 December 1989 on the draft Code of Crimes against the Peace and Security of Mankind, the Assembly

> Notes the approach currently envisaged by the Commission in dealing with the judicial authority to be assigned for the implementation of the provisions of the draft Code, and encourages the Commission to explore further all possible alternatives on the question.

99. It was on the basis of the above-mentioned considerations that the Special Rapporteur included in his eighth report (A/CN.4/430 and Add.1), submitted to the Commission at the present session, a part III entitled "Statute of an international criminal court".[57]

100. The other main reason which led the Commission at its present session to engage in an in-depth examination of this question was a specific request addressed to it by the General Assembly in resolution 44/39 of 4 December 1989, entitled: "International criminal responsibility of individuals and entities engaged in illicit trafficking in narcotic drugs across national frontiers and other transnational criminal activities: establishment of an international criminal court with jurisdiction over such crimes". Paragraph 1 of that resolution reads:

> *The General Assembly,*
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> . . .
>
> 1. *Requests* the International Law Commission, when considering at its forty-second session the item entitled "Draft Code of Crimes against the Peace and Security of Mankind", to address the question of establishing an international criminal court or other international criminal trial mechanism with jurisdiction over persons alleged to

[48] See paragraph 105 below.

[49] *Yearbook . . . 1983*, vol. II (Part Two), p. 16, para. 69 (*c*) (i).

[50] See *Yearbook . . . 1986*, vol. II (Part Two), p. 50, paras. 146-148.

[51] See *Yearbook . . . 1987*, vol. II (Part Two), pp. 9-10, paras. 29-36.

[52] See *Yearbook . . . 1988*, vol. II (Part Two), pp. 67-68, commentary to article 4 (Obligation to try or extradite).

[53] See *Yearbook . . . 1989*, vol. II (Part Two), pp. 65-66, paras. 211-216.

[54] *Yearbook . . . 1986*, vol. II (Part Two), p. 54, para. 185 *in fine*.

[55] *Yearbook . . . 1987*, vol. II (Part Two), p. 17, para. 67 (*c*).

[56] See footnote 28 above.

[57] See paragraph 29 above.

have committed crimes which may be covered under such a code, including persons engaged in illicit trafficking in narcotic drugs across national frontiers, and to devote particular attention to that question in its report on that session.

101. Consequently, a substantial portion of the Commission's discussion on the Special Rapporteur's eighth report (2150th to 2159th meetings) revolved around the question of the establishment of an international criminal court or other international criminal trial mechanism. At the conclusion of that discussion, the Commission decided to establish a Working Group (see para. 7 above) with a mandate to draw up a draft response by the Commission to the request addressed to it by the General Assembly in paragraph 1 of resolution 44/39. After adoption by the Commission,[58] the draft response would become part of its report to the General Assembly.

102. As to the question of "illicit trafficking in narcotic drugs across national frontiers", mentioned in General Assembly resolution 44/39, it was considered by the Commission in the context of its discussion of the eighth report of the Special Rapporteur.[59] As indicated in paragraph 31 above, the Commission provisionally adopted an article to be included in the draft code which defines illicit traffic in narcotic drugs as a crime against humanity.

2. Previous United Nations efforts in the field of an international criminal jurisdiction

103. In considering this question, the Commission was aware of the fact that the Commission itself, as well as other United Nations organs, had been involved in the past in efforts tending towards the creation of some kind of international criminal jurisdiction. Those efforts, although they did not come to fruition for different reasons, could well provide the Commission with a useful background against which to gauge both the feasibility of an international criminal jurisdiction and the conditions under which it may be workable today.

104. The Commission itself was at the centre of the first attempt by the United Nations to examine in depth the possible creation of an international criminal jurisdiction. The General Assembly, by resolution 260 B (III) of 9 December 1948, invited the Commission "to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions" and requested the Commission, in carrying out that task, "to pay attention to the possibility of establishing a criminal chamber of the International Court of Justice".

105. After considering the above request at its first session, in 1949,[60] and its second session, in 1950, the Commission decided that "the establishment of an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions is desirable" and that "the establishment of the above-mentioned international judicial organ is possible". The Commission also decided "to state that it has paid attention to the possibility of establishing a criminal chamber of the International Court of Justice and that, though it is possible to do so by amendment of the Court's Statute, the Commission does not recommend it".[61]

106. After considering the Commission's report on its second session, the General Assembly, by resolution 489 (V) of 12 December 1950, set up a committee composed of representatives of 17 Member States for the purpose of preparing concrete proposals relating to the establishment and the statute of an international criminal court. The Committee on International Criminal Jurisdiction (1951 Committee), which met in Geneva in August 1951, completed a draft statute for an international criminal court to be established by means of an international convention.[62]

107. The report of the Committee, as well as the draft statute, were transmitted to Governments for comments and observations. By resolution 687 (VII) of 5 December 1952, the General Assembly, considering that few Member States had commented on the Committee's report, decided to appoint a second committee consisting again of representatives of 17 Member States, whose mandate was the following: (*a*) to explore the implications and consequences of establishing an international criminal court and of the various methods by which that might be done; (*b*) to study the relationship between such a court and the United Nations and its organs; (*c*) to re-examine the draft statute.

108. This second Committee (1953 Committee on International Criminal Jurisdiction), which met in New York in July-August 1953, in addition to examining points (*a*) and (*b*) referred to above, made a number of changes in the draft statute of the 1951 Committee and, for several provisions of the draft, prepared alternative texts, one applying if the court were to be closely linked with the United Nations and the other if it were to be decided that the court would operate independently from the United Nations.[63]

109. On two occasions, however, the General Assembly, by resolutions 898 (IX) of 14 December 1954 and 1187 (XII) of 11 December 1957, deferred consideration of the 1953 Committee's report, on the ground that, since the question of an international criminal jurisdiction was closely linked both with the question of defining aggression and with the draft Code of Offences against the Peace and Security of Mankind, consideration thereof should be postponed until the Assembly examined again the other two related questions.[64]

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[58] See footnote 30 above.

[59] See paragraphs 77-88 above.

[60] See *Yearbook ... 1949*, p. 283, paras. 32-34.

[61] See *Yearbook ... 1950*, vol. II, pp. 378-379, document A/1316, paras. 128-145, at paras. 140 and 145.

[62] For the report of the Committee on International Criminal Jurisdiction, see *Official Records of the General Assembly, Seventh Session, Supplement No. 11* (A/2136).

[63] For the report of the 1953 Committee on International Criminal Jurisdiction, ibid., *Ninth Session, Supplement No. 12* (A/2645).

[64] By resolution 3314 (XXIX) of 14 December 1974, the General Assembly adopted by consensus the Definition of Aggression. By resolution 36/106 of 10 December 1981, the Assembly invited the Commission to resume its work with a view to elaborating the draft Code of Offences against the Peace and Security of Mankind. No mention was made, however, in either resolution of the question concerning the establishment of an international criminal jurisdiction.

110. The other cases of United Nations involvement in the possible creation of an international criminal jurisdiction concern two specific conventions, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide and the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid.

111. Article I of the 1948 Genocide Convention categorizes genocide as "a crime under international law" and article VI provides that persons charged with genocide "shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction".

112. On various occasions, the Subcommission on Prevention of Discrimination and Protection of Minorities of the Commission on Human Rights, the Commission on Human Rights itself and the Economic and Social Council have adopted resolutions mentioning the possibility of creating an international criminal court to implement article VI of the Genocide Convention, or ordering studies on the question of prevention and punishment of the crime of genocide, including the question of an international criminal jurisdiction.[65] However, no actual draft has so far been recommended by these organs.

113. For its part, the 1973 Apartheid Convention categorized apartheid as "a crime against humanity" (art. I). Article V states that persons charged with the crime of apartheid "may be tried by a competent tribunal of any State Party to the Convention which may acquire jurisdiction over the person of the accused or by an international penal tribunal having jurisdiction with respect to those States Parties which shall have accepted its jurisdiction". On the basis of that provision and of paragraph 20 of the Programme of activities to be undertaken during the second half of the Decade for Action to Combat Racism and Racial Discrimination,[66] the Commission on Human Rights, by resolution 12 (XXXVI) of 26 February 1980 (para. 7), requested the Ad Hoc Working Group of Experts on Southern Africa, in co-operation with the Special Committee against Apartheid, to undertake a study on the question of establishing the international jurisdiction contemplated in article V of the Apartheid Convention. The Working Group, which met in Geneva in August 1980 and January 1981, produced an interim report to the Commission on Human Rights which contained a draft Convention on the Establishment of an International Penal Tribunal for the Suppression and Punishment of the Crime of Apartheid and Other International Crimes, as well as a draft Additional Protocol for the Penal Enforcement of the International Convention on the Suppression and Punishment of the Crime of Apartheid.[67]

114. From its thirty-seventh session in 1981 onwards, the Commission on Human Rights has adopted a number of resolutions inviting, or requesting the Secretary-General to invite, States parties to the Apartheid Convention and all Member States to submit their comments and observations on the above-mentioned drafts[68] as well as drawing attention to "the need to strengthen the various mechanisms for combating apartheid, *inter alia* through the establishment of an international penal tribunal as provided for in article V of the Convention".[69]

115. It should also be mentioned in the context of United Nations efforts in the field of an international criminal jurisdiction that, at its 11th meeting, on 16 February 1990, the Committee on Crime Prevention and Control adopted decision 11/111[70] recommending that the Economic and Social Council transmit to the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, to be held at Havana from 27 August to 7 September 1990, a draft resolution entitled "Terrorist criminal activities" for action under item 5 (topic III) of its provisional agenda: "Effective national and international action against: (*a*) organized crime; (*b*) terrorist criminal activities". Section P of the annex to that draft resolution read:

P. Codification of international criminal law and creation of an international criminal court

31. International criminal law should be codified and the work of the International Law Commission on various aspects of codification should be encouraged, in cooperation with the Committee on Crime Prevention and Control.

32. The possibility of establishing a special penal jurisdiction within the International Court of Justice, or a separate international criminal court, should be considered. Such drafts as the 1951 and 1953 draft statutes for the establishment of an international criminal court and the 1980 draft statute for the establishment of an international jurisdiction to implement the International Convention on the Suppression and Punishment of the Crime of Apartheid should be considered. Also, the United Nations should encourage States to explore seriously the possibility of establishing such an international court under the auspices of the Organization, in which grave international crimes, and particularly terrorism, could be brought to trial. This goal could be achieved by the application of the principle of universal jurisdiction to certain particularly harmful and/or hideous crimes.

3. Discussion of the question by the Commission at the present session

116. Paragraphs 117 to 121 below contain a general discussion of the advantages and disadvantages, for the trial of crimes against the peace and security of mankind, of the possible establishment of an international criminal court as compared, in particular, to the system of universal

[65] See resolutions 7 (XX) of 3 October 1967, 8 (XX) of 10 October 1967 and 7 (XXIV) of 18 August 1971 of the Subcommission on Prevention of Discrimination and Protection of Minorities; resolutions 10 (XXIV) of 5 March 1968 and 9 (XXXV) of 5 March 1979 of the Commission on Human Rights; and resolutions 1420 (XLVI) of 6 June 1969 and 1983/33 of 27 May 1983 of the Economic and Social Council.

[66] General Assembly resolution 34/24 of 15 November 1979, annex.

[67] See document E/CN.4/1426 of 19 January 1981; see also the report of the Commission on Human Rights on its thirty-seventh session, *Official Records of the Economic and Social Council, 1981, Supplement No. 5* (E/1981/25-E/CN.4/1475), chap. XV.

[68] See resolutions 5 (XXXVII) of 23 February 1981, 1982/8 and 1982/10 of 25 February 1982, 1983/9 and 1983/12 of 18 February 1983, and 1984/5 and 1984/7 of 28 February 1984 of the Commission on Human Rights.

[69] Preamble to resolutions 1987/11 of 26 February 1987, 1988/14 of 29 February 1988, 1989/8 of 23 February 1989 and 1990/12 of 23 February 1990 of the Commission on Human Rights.

[70] See the report of the Committee on Crime Prevention and Control on its eleventh session, *Official Records of the Economic and Social Council, 1990, Supplement No. 10* (E/1990/31-E/AC.57/1990/8 and Add.1), chap. I.C.

jurisdiction based on prosecution before national tribunals. Paragraphs 123 to 151 contain an overview of the possible options and main trends evidenced in the Commission with regard to some very specific and significant areas related to the creation of an international criminal court. Paragraphs 152 to 154 deal with other possible international mechanisms for the trial of crimes against the peace and security of mankind.

(a) *General considerations*

117. The Commission has noted that a number of developments in international relations and international law have contributed to making the establishment of an international criminal court more feasible than when the matter was studied earlier, although the Commission is aware that, in the view of some States, the time may not be ripe for the establishment of such a court. It has now emerged that international crime has achieved such wide dimensions that it can endanger the very existence of States and seriously disturb international peaceful relations. There have thus been increased calls for enhanced international cooperation to combat such crime. Of course, the final position of States would depend largely on the form that such a court was to take and therefore the Commission has set out below the various forms in which the court could be conceived.

118. Proposals for the establishment of an international court must be seen against existing mechanisms for prosecuting international crimes. The system of universal jurisdiction exists for a large number of crimes, in some cases with the participation of a large number of States, and prosecution is carried out effectively in national courts. Proposals for an international court must therefore take into account the danger of disrupting satisfactory implementation of the existing systems. The latter, however, depends wholly on the administration of justice in individual national systems. A recognized advantage of an international court is the uniform application of the law with the best possible guarantees of objectivity to try these kinds of crimes.

119. A major concern with respect to the establishment of such a court is its possible curtailment of national sovereignty, although it must be taken into account that existing regimes of universal jurisdiction also have an impact on the exercise of the competences of the State. Some Governments critical of universal jurisdiction refer to the fact that it makes national tribunals responsible for judging the conduct of foreign Governments. Considered in this context, and in the long term, the acceptance of the competence of an international criminal jurisdiction constitutes, on the contrary, the exercise by States of their sovereign competences.

120. In the light of the fact that an international crime often involves more than one State and may relate to a dispute between States, the international court, in providing recourse to a third-party dispute-settlement mechanism, would contribute to the prevention and settlement of international conflicts and thus to the maintenance of international peace and security. In some cases, referring to the court a case against an individual could result in the case not being regarded as relating to an inter-State dispute.

121. Although concerns have been expressed that an international court could not be totally insulated from political currents, the Commission is convinced that the court's independence and integrity may be guaranteed by devising a structure with adequate safeguards. In any event, the court could be expected to provide better safeguards against arbitrary proceedings and for the protection of the rights of the accused than the existing system of universal jurisdiction.

122. Subsections (*b*) (iii) and (*g*) below discuss in more detail other possible means of implementation of the draft code, as well as possible systems of relations between an international court and national jurisdictions.

(b) *Jurisdiction and competence*

(i) *Subject-matter*

123. Three options appear to be possible:

(*a*) The court would exercise jurisdiction over the crimes defined in the code.

(*b*) The court would exercise jurisdiction over only some of the crimes defined in the code.

(*c*) The court would be established independently of the code and exercise jurisdiction over all crimes in respect of which States would confer competence on it, particularly under existing international conventions.

124. As regards the first option, an argument in favour of limiting subject-matter jurisdiction to the crimes under the code is that, in the code, the crimes can be expected to be defined in a manner which meets the standards of criminal law, particularly the rule *nullum crimen sine lege*. Furthermore, restricting subject-matter jurisdiction to the crimes under the code would not preclude a possible later extension to other crimes. Another advantage of this option is that the code would include only the most serious crimes, as agreed to by the international community.

125. On the other hand, a possible disadvantage of this option would be that the court could not be established until the Commission's work on the draft code had been completed.

126. The second option envisages the possibility that the court would, for reasons of practicability or acceptability, be granted competence over only some of the crimes defined in the code, at least at the initial stage of its creation. This limitation could be implemented either in the statute *ab initio* or through the provision of clauses allowing States to opt out of the court's jurisdiction. In this latter case, problems of reciprocity and universality could arise: if only some States agree to confer on the court competence over certain crimes, these States would resort to the international criminal court, while other States would not, and would, for example, continue to prosecute these crimes through their national jurisdictions.

127. The main advantage of the third option is that it would entirely free the establishment of the court from any possible delay in the adoption of the code.

(ii) *Competence and jurisdiction over persons*

128. The draft code being prepared by the Commission is restricted in application to individuals (art. 3). The

question of extending the scope of the code to States, although discussed, was left open for consideration at a later stage.

129. The possibility was also discussed of extending jurisdiction to legal entities other than States, at least for certain crimes, for example drug trafficking.

(iii) *Nature of jurisdiction*

130. As to the nature of the court's jurisdiction, there are three possible options:

(*a*) an international criminal court with exclusive jurisdiction;

(*b*) concurrent jurisdiction between the international criminal court and national courts:

(*c*) an international criminal court having only review competence.

Competence to provide legal opinions could also be envisaged as a complement to any one of these options.

131. In the case of exclusive jurisdiction by the court, individual States would refrain from exercising jurisdiction over crimes falling under the competence specified for the court.

132. Under the option of concurrent jurisdiction between the international criminal court and national courts, a State would choose whether to institute an action before a national court or before the international court. This possibility would detract from the advantages of uniformity of application. Under this option, means would also have to be devised to overcome difficulties which might arise if one party wished to initiate an action before a national court and another party wanted it brought before the international court.

133. Under the third option, the court would have competence only to re-examine decisions of national courts on international crimes, where that became necessary.

134. As regards the possibility of endowing the court with the competence to issue legal opinions on criminal matters, these could be, *inter alia*, binding opinions requested by national courts or advisory opinions requested by an organ of the United Nations. The court could be entrusted with the task of harmonizing the interpretation of international criminal law, leaving to national tribunals the function of deciding on the merits.

(iv) *Submission of cases*

135. On the question of who could submit a case to the court, different options were considered: (*a*) all States: (*b*) all States parties to the court's statute; (*c*) any State which has an interest in the proceedings, because (i) the crime was alleged to have been committed on its territory or directed against it; (ii) the victim was its national; (iii) the alleged perpetrator was its national; or (iv) the accused was found on its territory; (*d*) intergovernmental organizations of a universal or regional character; (*e*) non-governmental organizations; (*f*) individuals.

136. Two possible restrictions on the right of submission were discussed. The first was the possibility of requiring the consent of all States which had an interest in the case (as provided under option (*c*) above). The second was to require the authorization of either the General Assembly or the Security Council of the United Nations.

137. The choice among these options relates to the question of how limited the right to submit cases should be. As an example, the most limited access would result from a requirement that cases could be brought only by States parties to the court's statute which had an interest in the case and subject to the consent of all other directly concerned States and authorization by either the General Assembly or the Security Council. The most liberal access would be provided by granting the right of submission to any State, organization or individual.

(c) *Structure of the court*

(i) *Institutional structure*

138. The question whether there should be established a permanent court or an ad hoc court was addressed. The latter would raise questions of uniformity in the implementation of the code.

139. The court could be established: (*a*) by a separate convention; (*b*) within the framework of the convention adopting the code; or (*c*) by an amendment to the Charter of the United Nations, for example, if the court was to be an organ of the United Nations. The possibility of the court being established by a General Assembly resolution was also discussed.

140. Whatever the method of establishment, the relationship between the court and the United Nations would have to be clearly determined, both for reasons of general policy and with respect to institutional aspects as dealt with elsewhere (e.g. appointment of judges, submission of cases and financing). The role of the Security Council in determining the existence of aggression under the code (article 12 as provisionally adopted by the Commission at its fortieth session[71]) should be noted.

(ii) *Composition of the court*

141. It was presumed that the court should be of moderate size and that the judges should represent the main legal systems of the world. The desirability of allowing for the formation of chambers was discussed. One idea was to try all cases in chambers and allow for review by the plenary court. The system of chambers in the International Court of Justice, allowing for some role for claimants in the selection of judges, was also considered.

(iii) *Election of judges*

142. Three options for the election of judges were considered: (*a*) in the same manner as for the ICJ;[72] (*b*) by a qualified majority in the General Assembly; (*c*) by the parties to the statute of the court.

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

[72] The procedure for the election of members of the International Court of Justice is set out in Articles 4 to 16 of the Court's Statute. They

(*Continued on next page.*)

(iv) *Organs responsible for criminal prosecution*

143. Different possibilities regarding a prosecuting attorney were envisaged. The role of such an attorney would vary depending on the various options for the court's jurisdiction listed in paragraph 130 above. The possibilities discussed were appointment of a prosecuting attorney and establishment of an independent body associated with the court.

(v) *Pre-trial examination*

144. Various possible methods of pre-trial examination were discussed: one method would entrust it to the court, and others to the prosecutor or to a judge.

(d) *Legal force of judgments*

145. With regard to the legal force of judgments in cases where there was concurrent jurisdiction and the international court had made a decision, it was envisaged that a national court could not re-examine the case. This conclusion was consistent with paragraph 1 of article 7 (*Non bis in idem*) of the draft code, provisionally adopted by the Commission at its fortieth session.[73]

146. As to the legal force of judgments in cases where a national court had taken a decision, re-examination by the international court could be envisaged, for example: (*a*) if a State concerned had grounds for believing that the decision was not based on a proper appraisal of the law or the facts; (*b*) if the acts had been tried as ordinary crimes although they were characterized as crimes falling under the jurisdiction of the court (see, for example, paragraph 3 of article 7 of the draft code); (*c*) in the case of an appeal by the convicted individual.

147. Of course, if the court were established only to consider appeals against judgments handed down by national courts, its decisions would take precedence over the judgments of national courts.

(e) *Other questions*

(i) *Penalties*

148. The question of penalties was addressed in the context of the rule *nulla poena sine lege*. The options are to have either a general description of penalties or a specific penalty for each crime.

149. In the discussion of penalties, it was stated that a penalty should be proportionate to the gravity of the crime committed. The possibility of excluding the death penalty was also suggested.

(ii) *Implementation of judgments*

150. A general discussion was held on the different aspects of implementation. There are basically two options. One would require an international detention facility. The other would provide for implementation under national systems, in which case the advantages and disadvantages of according priority to the State which had submitted the case to the court would need to be considered.

(iii) *Financing of the court*

151. Two options for financing the court were considered, namely financing by the parties to its statute or by the United Nations. The latter option, which has the advantage of guaranteeing greater efficiency and continuity in the financing of the court, presupposes that the majority of the Members of the United Nations become, at the same time, parties to the statute of the court.

(f) *Other possible international trial mechanisms*

152. The understanding was reached that, instead of establishing separate courts for different categories of crimes, as is provided for in relevant conventions, it would be preferable to have a single organ for international criminal justice.

153. The option of entrusting the International Court of Justice with jurisdiction in criminal actions against individuals was discussed. It was pointed out that such jurisdiction would require amendments to the Court's Statute. It would be necessary to obtain the views of the ICJ on this option.

154. A proposal was made to complement national courts with judges from other legal systems in cases of international crimes. This proposal was not made as an alternative to an international court but, rather, as a transitional step possibly to overcome certain difficulties in the application of the system of universal national jurisdiction.

(g) *Conclusions*

155. The Commission's consideration of the question reflected broad agreement, in principle, on the desirability of establishing a permanent international criminal court to be brought into relationship with the United Nations system, although different views were expressed as to the structure and scope of jurisdiction of such a court. There are at least three possible models, varying mainly with respect to the competence and jurisdiction of the court:

(i) *An international criminal court with exclusive jurisdiction*

This would necessitate that States cede their criminal jurisdiction as regards crimes coming under the jurisdiction of the court.

(*Footnote 72 continued*)

provide, *inter alia*, that members shall be elected by the General Assembly and by the Security Council from a list of persons nominated by the national groups in the Permanent Court of Arbitration (Art. 4 (1)); that the General Assembly and the Security Council shall proceed independently of one another to elect the members of the Court (Art. 8); and that no distinction will be made in the Security Council vote between permanent and non-permanent members of the Council (Art. 10 (2)). Those candidates who obtain an absolute majority in the General Assembly and in the Security Council shall be considered as elected (Art. 10(1)).

[73] *Yearbook ... 1988*, vol. II (Part Two), pp. 68-69.

It may raise problems in relation to existing treaty obligations establishing universal jurisdiction under national tribunals.

Recourse to a review procedure within the court's system has to be provided for.[74]

This model necessarily leads to the establishment of a system of pre-trial examination and a public prosecutor. It also requires rules for the handing over of the accused to the court, as well as an agreement on the establishment of an international detention facility and rules on implementing the judgment.

It also raises the question of reciprocity (States parties to the statute of the court; States not parties) and the question that the jurisdiction of the court may depend on the consent of the States concerned (territorial State, State whose national is accused, State where the accused is found).

(ii) *Concurrent jurisdiction between the international criminal court and national courts*

States parties would not have to cede their national criminal jurisdiction but could decide on a case-by-case basis whether to submit a case to the international criminal court or exercise national jurisdiction. For instance, according to this model, some States might choose to exercise national jurisdiction in cases where their own nationals are involved, where the crime was directed against them or where the crime was committed in their territory.

Such a system could lead to conflicts of jurisdiction between the States concerned.

All the other aspects of model (i) will apply to model (ii) (prosecution, appeal, handing over of the accused, implementation of judgments, reciprocity).

(iii) *An international criminal court having only review competence*

States parties would not have to cede their national criminal jurisdiction.

They would have to accept that judgments of their courts on crimes coming under the code could be brought for review to the international criminal court.

In addition to those who could bring a case before the court under the other two models, namely other States concerned (territorial State, State whose national has been tried, States against which the crime was directed) or all States parties to the court's statute, this model could allow for the possibility of the convicted individual bringing a case.

This model would not interfere with existing international obligations on universal jurisdiction. It would not require the consent of other States.

It would not require a further procedure for appeal.

It would establish a permanent international criminal court, the competence of which could be extended when States had gained some experience with the court and if they agreed to do so.

156. It is possible to choose from among the various elements discussed in subsections (*b*) to (*e*) above for incorporation in each of the envisaged models. Each of the three models could also provide for the competence of the court to give legal opinions, if so requested, either binding or advisory, or both (see paras. 130 and 134 above).

157. Establishing an international criminal court would in the end be a progressive step in developing international law and strengthening the rule of law, and be successful, only if widely supported by the international community.

D. Draft articles on the draft Code of Crimes against the Peace and Security of Mankind

1. Texts of the draft articles provisionally adopted so far by the Commission

158. The texts of draft articles 1 to 8, 10 to 16, 18 and X provisionally adopted so far by the Commission are reproduced below.

CHAPTER I

INTRODUCTION

PART I. DEFINITION AND CHARACTERIZATION

Article 1. Definition

The crimes [under international law] defined in this Code constitute crimes against the peace and security of mankind.

Article 2. Characterization

The characterization of an act or omission as a crime against the peace and security of mankind is independent of internal law. The fact that an act or omission is or is not punishable under internal law does not affect this characterization.

PART II. GENERAL PRINCIPLES

Article 3. Responsibility and punishment

1. Any individual who commits a crime against the peace and security of mankind is responsible for such crime, irrespective of any motives invoked by the accused that are not covered by the definition of the offence, and is liable to punishment therefor.

2. Prosecution of an individual for a crime against the peace and security of mankind does not relieve a State of any responsibility under international law for an act or omission attributable to it.

Article 4. Obligation to try or extradite

1. Any State in whose territory an individual alleged to have committed a crime against the peace and security of mankind is present shall either try or extradite him.

2. If extradition is requested by several States, special consideration shall be given to the request of the State in whose territory the crime was committed.

3. The provisions of paragraphs 1 and 2 of this article do not prejudge the establishment and the jurisdiction of an international criminal court.*

[74] Reference was made to article 14, para. 5, of the International Covenant on Civil and Political Rights.

* This paragraph will be deleted if an international criminal court is established.