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Summary record of the 2154th meeting

Topic:

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

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to the principal offence constituted sufficiently serious offences for them to be regarded as crimes against humanity and therefore to be treated as criminal acts under the code. The same was true of attempt: it did not seem to be of sufficient gravity to be regarded as a crime against humanity. There was a danger in characterizing those offences as crimes against humanity: the concept of extreme gravity which must be inherent in the acts treated as crimes under the code risked becoming somewhat vague in the public mind.

63. The wording of draft article X, on illicit traffic in narcotic drugs, should be amended to make it quite clear that the article applied only to organized large-scale traffic.

64. It would also be a good idea to add to the list of crimes covered by the code a new form of crime—narco-terrorism. At its forty-sixth session, the Commission on Human Rights had adopted resolution 1990/75 entitled "Consequences of acts of violence committed by irregular armed groups and drug traffickers for the enjoyment of human rights", in which it expressed its deep concern at the crimes and atrocities committed in many countries by irregular armed groups and drug traffickers and its alarm at the evidence of growing links between them. There were now grounds for thinking that the terrorist movements rife a few years previously in Europe had had links with drug traffickers at one time. The same was currently true in several countries of Latin America where that new form of crime constituted a real threat to society. What was involved was therefore not only a crime against humanity, but also a crime against peace which must definitely be treated as a crime in the code.

65. The CHAIRMAN, speaking as a member of the Commission, noted first of all that, in parts I and II of his eighth report (A/CN.4/430 and Add.1), the Special Rapporteur raised extremely controversial issues. Complicity, conspiracy and attempt were internal-law concepts whose content varied from one legal system to another. Before including them in an international instrument, it was necessary, if the instrument was to be universally accepted, to carry out a difficult task of unification and harmonization. Even if an international criminal court was to be established in the near future, the crimes covered by the code would no doubt be tried most often by national courts.

66. Unfortunately, draft articles 15, 16 and 17 as currently worded were not fully acceptable.

67. He had no objection if the code treated complicity and conspiracy as crimes, but he wondered whether it was a good idea to list attempt among the crimes against the peace and security of mankind. Indeed, the Special Rapporteur himself seemed to have some doubts on that point, admitting in his report (*ibid.*, para. 66) that the theory of attempt could be applied only to a limited extent in the area of the crimes under consideration. Yet a reading of draft article 17 gave the impression, in contrast to that comment, that it was dealing with a theory of general application.

68. As to methodology, he thought that the provisions on complicity, conspiracy and attempt should be placed in the part of the code dealing with general principles, since those were not crimes specific to crimes against the peace and security of mankind. They were in fact offences committed most often in connection with criminal acts such as murder, theft, etc. Indeed, it was perhaps for that reason that, in the penal codes of various countries, including his own, the provisions on those concepts appeared in the part devoted to general principles.

69. He was glad that the Special Rapporteur had submitted provisions on illicit traffic in narcotic drugs. Coming from a people which had been the first victim of a traffic in narcotic drugs organized by the imperialists, he was intimately convinced that, by characterizing that offence as a crime against the peace and security of mankind, the international community would be taking a landmark decision in the history of the world. As for the draft articles submitted on the subject, he recognized that illicit traffic in narcotic drugs constituted both a crime against peace and a crime against humanity, but he could not see the need to have two separate articles.

70. Lastly, as the Special Rapporteur himself had indicated, in order to be treated as a crime under the code the traffic in question must be extremely serious; it thus had to be massive and carried out on a large scale by associations or private groups or by public officials. Unfortunately, that point did not emerge from a reading of draft article X.

The meeting rose at 12.50 p.m.

2154th MEETING

Wednesday, 9 May 1990, at 10 a.m.

Chairman: Mr. Jiuyong SHI

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

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

[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 ... 1989*, vol. II (Part One).

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

[4] *Ibid.*

[Agenda item 5]

EIGHTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

ARTICLES 15, 16, 17, X AND Y[5] *and*

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

1. The CHAIRMAN pointed out that, in accordance with the timetable agreed for the present topic, the meetings of the current week were intended primarily, though not exclusively, for discussion of part III of the Special Rapporteur's eighth report (A/CN.4/430 and Add.1), on the question of establishing an international criminal court.

2. Mr. BARBOZA noted that the question had arisen during the debate whether complicity and attempt were autonomous offences, as the Special Rapporteur considered, and were therefore to be included in the list of crimes, or whether they were simply modes of commission of offences which should appear in the general part of the code. In his opinion, there could be some grounds for the latter view regarding complicity, but it must be borne in mind that the acts perpetrated by an accomplice were always of an accessory character. If considered by themselves, they were not, then, a form of commission of the crime. As for attempt, its principal feature was precisely that the conduct of the criminal was frustrated before the crime was committed. That being the case, attempt could not be conceived of as a mode of commission of the crime. Having said that, he considered that the place attempt and complicity should occupy in the code was not an important issue. It could not be among the principles, because they certainly were not principles, but they could appear in the general part as in many international conventions.

3. The question then arose as to the desirability of including some definition of those concepts. He had found that a number of important relevant international instruments invariably declared that complicity and attempt were punishable, but did not give a definition of the concepts in question. He would draw attention in that connection to Principle VI of the Nürnberg Principles,[6] article 4 of the 1989 International Convention against the Recruitment, Use, Financing and Training of Mercenaries, article 3, paragraph 1 (*c*) (iv), of the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, article III of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide and article 1 of the 1979 International Convention against the Taking of Hostages.

4. Since no definition of attempt and complicity was incorporated in those instruments, the result would be that each national court would interpret those terms according to its internal law, the drawback being that interpretations might differ. To avoid that difficulty, it would perhaps be advisable to include in the draft code, and in the commentary, some guidelines to sketch out an international doctrine in the matter. As far as complicity was concerned, the essential element was its accessory character; it should also be indicated that the notion of complicity covered acts subsequent to the main offence. In the case of attempt, the main ideas to be stressed were that it implied a commencement of execution of the crime and that performance had been thwarted by factors beyond the control of the prospective perpetrator. With such guidelines, judges would be able to distinguish between preparatory acts and the attempt to commit a crime.

5. Another question was whether to include a definition of the principal perpetrator. Actually, the draft code defined each of the various crimes listed in it and the definitions provided an indirect but complete description of the perpetrator. The International Convention against the Recruitment, Use, Financing and Training of Mercenaries had been cited in the debate as an example of an instrument in which a description of the perpetrator of the crime was given. In fact, however, the Convention described the mercenary, but not the perpetrator of the crime, namely the person recruiting, using, financing or training the mercenary, since under the terms of article 3 the mercenary himself became an offender only when he participated directly in hostilities or in a concerted act of violence.

6. Yet another point to be clarified was the distinction between a co-perpetrator and an accomplice. The instigator of a crime, for example, was a co-perpetrator and not a mere accomplice.

7. In the matter of conspiracy, the introductory clause of draft article 16 and the definition in paragraph 1 were acceptable, even if the second alternative of paragraph 2 was adopted. Under that second alternative, responsibility for conspiracy would be personal, since each participant would be punished according to his own participation, without regard to participation by others. The first alternative, on the other hand, made provision for collective responsibility.

8. The notion of conspiracy, when applied to such crimes as aggression, referred to what were normally preparatory acts. Making conspiracy a separate punishable offence was an approach adopted by certain legislations in order to protect some vital interest. It was a well-known legal mechanism for additional protection. For instance, in some countries mere possession of plates to counterfeit banknotes was in itself a crime, even if they had not been used in any way. Similarly, in some countries mere possession of firearms constituted an offence. Again, many national legislations punished as a separate crime mere participation in a common plan to commit a crime, even if no offence was committed. The first alternative text proposed for paragraph 2, however, dealt at the same time with the autonomous crime of conspiracy, for which each participant was responsible, and with the responsibility attaching to each participant for the crimes committed by others. At the Commission's thirty-eighth session, in 1986, he had already expressed some reservations. That form of criminal liability went beyond what was customary in the civil-law systems which were familiar to him. The

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

[6] See 2151st meeting, footnote 11.

concept of conspiracy was alien to those legal systems, but since it existed in the common-law system, which was particularly attentive to the protection of personal freedom, he was prepared to accept it if the Commission endorsed it as a means of defence against organized crime.

9. Lastly, he could agree to the idea of including drug trafficking in the draft code, but it should be placed under the heading of crimes against humanity rather than under crimes against peace. He shared the view that only large-scale crimes should be covered.

10. Mr. KOROMA congratulated the Special Rapporteur on his skill in handling the subject-matter of his eighth report (A/CN.4/430 and Add.1), for the complex concepts of complicity, conspiracy and attempt in domestic criminal law were difficult to transpose to international law.

11. Two main positions had emerged during the debate, some members maintaining that complicity, conspiracy and attempt should be dealt with in the part of the draft code devoted to general principles, and others arguing that they should be treated as separate offences. In that connection, it was appropriate to refer to the Nürnberg Principles formulated by the Commission in 1950[7] and endorsed by the General Assembly. They were perhaps open to adjustment through experience or changing circumstances, but they commanded respect not only because of the way they had been adopted, but also because they had been framed by some of the finest legal minds of the times. The Principles reflected historical necessity and legal integrity, and, having been reaffirmed by the General Assembly in 1946,[8] could not be criticized as lacking in validity.

12. He had no objection to complicity, conspiracy and attempt being included in the general part of the code, but they should be retained as specific offences as well. As was well known, the chief reason for deciding to codify the Nürnberg Principles had been to eliminate the problems generated by the absence of clearly defined offences and sanctions. In a code like the one under discussion, the crimes had to be specific: only in that way could the prosecution provide the required evidence against the accused and the accused know the specific nature of the offence with which he was charged and of the evidence adduced against him. Accordingly, to charge all accused persons merely as "participants" would not be specific enough. It would make the task of the prosecution difficult, if not impossible, since the evidence might well vary from the principal offender to the accomplice before the fact and the accessory after the fact. Moreover, a whole spectrum of defences—justification, self-defence, necessity, coercion, obedience to superior orders, error of law or fact—were open to the accused, and where the indictment was not sufficiently specific it could fail and the accused would go free.

13. Consequently, in attempting to apportion legal responsibility, various forms of responsibility of the accused persons would have to be defined, as would the proof: the apportionment of punishment would depend on what each accused person was charged with. The maxims *nullum crimen sine lege* and *nulla poena sine lege* would thus be observed.

14. A proper approach might be, first, to define complicity, conspiracy and attempt as categories of crimes, and then examine the question whether they should be regarded as autonomous. Unfortunately, the Special Rapporteur's report did not define those offences. It merely stated that the actions listed constituted crimes against the peace and security of mankind and added that being an accomplice in any of the crimes covered by the code was punishable. There was no indication whatsoever as to what an accomplice was. For his part, he would suggest a simple definition along the lines of: "Any person who aids, abets, counsels or procures the commission of any of the crimes under this Code shall be liable to be tried or is guilty of that crime."

15. Similarly, conspiracy could be defined as an offence in which two or more persons agreed to act together with a common purpose for the commission of any of the crimes under the code; it would be stated that each of them would be guilty of conspiracy to commit that crime. Such a definition brought out more clearly the twofold responsibility—individual and collective—involved in the case of conspiracy as envisaged by the Special Rapporteur (*ibid.*, para. 45).

16. A person would be individually responsible for committing a crime under the code when, with intent, knowledge or recklessness, he engaged in an act in violation of any of the provisions of the code. Collective responsibility, as distinct from individual responsibility, would arise when an individual acted in concert with others with intent, knowledge or recklessness in an illegal act in contravention of the code and when the commission of that act could be attributed to a legal entity as well as to each individual who had participated in the decision-making process or the implementation of the decision to commit the act. The nature of the crime was obviously of great importance in ascertaining which type of criminal responsibility was involved, since certain crimes such as aggression, genocide and *apartheid* could not be committed by an individual: they required group or collective participation. The tendency to broaden the scope of collective responsibility for crimes against the peace and security of mankind was understandable, and the legal basis for that tendency was clearly set out in the Special Rapporteur's report (*ibid.*, para. 55).

17. The Special Rapporteur's suggestion not to disregard the concept of attempt met with his approval. Viewed in the abstract, it might seem an arcane, not to say nebulous, concept, yet its importance lay in preventing the commission of the crime, in other words in acting as a deterrent. The Special Rapporteur had entered the caveat that the theory of attempt could be applied only to a limited extent in the area of the crimes under consideration (*ibid.*, para. 66).

18. On the question whether an attempt could be made to commit the crime of genocide or *apartheid*, one answer was in the affirmative. Under the 1948 Convention on the Prevention and Punishment of the

[7] *Ibid.*

[8] General Assembly resolution 95 (I) of 11 December 1946.

Crime of Genocide, States parties agreed that genocide and conspiracy or incitement to commit genocide, as well as attempt and complicity therein, should be punishable by national courts or by an international criminal tribunal. As for the crime of *apartheid*, an attempt might conceivably be made to murder or to inflict grievous bodily or mental harm on members of a racial group for the purpose of establishing and maintaining domination by one racial group over another and of systematically oppressing it. Therefore the focus should be on the specific criminal acts constituting the main crime, rather than on the main crime itself; *apartheid*, after all, was only, as it were, a term of art. The specific acts committed within the main crime, whether genocide or *apartheid*, were what should be taken into account.

19. International drug trafficking was a prime candidate for inclusion in the draft code. It was perhaps regrettable that the Special Rapporteur had omitted to look into the historical evidence for drug trafficking being characterized as a crime against peace; such evidence, though scant, was available, as Mr. Shi had briefly mentioned at the previous meeting. His own view, however, was that the Commission would be on firmer ground if it qualified drug trafficking as a crime against humanity. A recent statement on the subject by the President of Colombia supported that view.

20. It had been suggested that drug trafficking should not be internationally criminalized unless a considerable quantity of drugs was involved. In view of the difficulty of deciding what was and what was not a considerable quantity of a particular drug, as well as the fact that the Special Rapporteur provided no guidelines in that respect, he would not be in favour of focusing on the quantity element. The legal basis for the proposed article should be the international conventions on narcotic drugs already in existence.

21. Mr. PAWLAK said that, in principle, and subject to certain conditions, he was in favour of the establishment of an international criminal court as a separate judicial organ for the trial of individuals, whether private persons or officials, charged with crimes for which jurisdiction would be conferred upon the court by the code or by other international conventions. The urgency of establishing such a tribunal had been eloquently argued, *inter alia*, in the explanatory memorandum presented by the Permanent Representative of Trinidad and Tobago[9] prior to the forty-fourth session of the General Assembly in connection with the proposal for the establishment of an international criminal court with jurisdiction over illicit trafficking in narcotic drugs and other transnational criminal activities. The international community was increasingly aware that some forms of crime had assumed such transnational dimensions as to require action by most, if not all, States. Illicit drug production and trafficking now fell in that category.

22. The main weakness of international law today lay in enforcement and lack of effective sanction mechanisms. Besides the offences traditionally classified as international crimes, the world was witnessing the emergence of individual offenders who possessed the power to endanger the security of all States and to wage war against entire Governments. To control such forms of crime, States strengthened extradition treaties or enforced their domestic criminal law through mutual assistance and transfer of proceedings, but such traditional means were not proving sufficient to combat drug-related offences, and new forms of international co-operation were needed. In that context, it might be worth while to explore the question whether more tangible results would not be achieved by approaching the problem of the establishment of an international criminal court from the point of view of enforcement, focusing on a well-defined category of offences and leaving aside the traditional methodological approach. Certain traditional habits of thought might have to be overcome. He strongly endorsed the principle that individuals, not States, should be the subjects of international jurisdiction, but many States might today be more prepared than before to submit their nationals to the jurisdiction of an international criminal court and to assist such a court in legal and procedural matters.

23. Turning to the questionnaire in part III of the eighth report (A/CN.4/430 and Add.1), in the matter of the jurisdiction of the court he supported, with some minor changes, version B submitted by the Special Rapporteur (*ibid.*, para. 80), and also agreed entirely with the Special Rapporteur's conclusion (*ibid.*, para. 83).

24. With regard to the procedure for appointing judges, provided there was broad adherence to the statute of the future court and other international agreements directed against international crimes he would opt for their election by the General Assembly and therefore favoured version A (*ibid.*, para. 86). If the elections took place at regular sessions, there would be no need to involve the Secretary-General in convening the General Assembly. Moreover, a qualified two-thirds majority rather than an absolute majority should be required.

25. On the submission of cases to the court, he would opt for version C (*ibid.*, para. 88), on the understanding that the case might be brought by any State Member of the United Nations subject to the agreement of the General Assembly.

26. With regard to the functions of the prosecuting attorney, he supported version A (*ibid.*, para. 90). In his view, there was no risk of confusing the prosecuting attorney with the agent of a State, since their functions were clearly distinct.

27. On the issue of pre-trial examination, the text proposed by the Special Rapporteur (*ibid.*, para. 92) was acceptable, although the formulation needed further refining, for example in order to deal with the nationality of members of the proposed committing chamber.

28. As regards the authority of *res judicata* by a court of a State, version B (*ibid.*, para. 93) was more appropriate to the nature of international crimes. The *non bis in idem* rule should be regarded as an indication rather

[9] A/44/195, annex.

than as an excuse for the lenient verdicts of some national courts.

29. He supported the Special Rapporteur's proposal in respect of the authority of *res judicata* by the court (*ibid.*, para. 96); no other solution was, indeed, possible. With regard to withdrawal of complaints, version B (*ibid.*, para. 98) was preferable. In the matter of penalties, he supported version A (*ibid.*, para. 101), taking the view that the international criminal court should not be limited in regard to the degree of punishment it could impose.

30. Lastly, on the question of financial provisions, version A (*ibid.*, para. 106) was better, because it would give the court a feeling of independence from individual States. However, if the statute of the court was not universally accepted, a *pro rata* basis of financing by the States parties should be introduced.

31. Mr. GRAEFRATH said that he greatly appreciated the Special Rapporteur's decision to submit part III of his eighth report (A/CN.4/430 and Add.1) in the form of a questionnaire, for it coincided with the General Assembly's request in resolution 44/39 of 4 December 1989 for a legal opinion on the question of establishing an international criminal court or other international criminal trial mechanism with jurisdiction over illicit trafficking in narcotic drugs and other transnational criminal activities.

32. Although the questionnaire-report was not submitted specifically for the purpose of assisting the Commission in the preparation of the paper requested by the General Assembly, it would undoubtedly be most helpful in that respect. As he had explained at the opening meeting, the General Assembly, in adopting resolution 44/39 by consensus, had neither requested the Commission to draft a statute for an international criminal court, nor decided to give an affirmative answer to the question put by the Commission in 1983 as to whether its mandate to draft the code also extended to the drafting of such a statute. The Assembly had requested the Commission to produce an options paper pointing to the different questions and aspects involved in taking a decision on the matter. The Commission had been asked to draft a legal opinion so as to prepare the ground and to facilitate a political decision by the General Assembly on that important and far-reaching issue.

33. The question of an international criminal court had come up repeatedly over the past 40 years, without ever being successfully resolved. States had obviously not been prepared to take a decision on a matter which was so closely connected, on the one hand, with the principle of State sovereignty and, on the other hand, with the step-by-step development of an international legal order. The establishment of such a court would be a historic move in the progressive development of international law, and extreme care and circumspection had to be applied in approaching the issue. The advantage of the General Assembly's request and, to a certain extent, of the Special Rapporteur's questionnaire-report was that the Commission would not be tempted to embark at once upon the drafting of a statute, but was obliged to think first about various possibilities for a feasible structure and for the competence of an international criminal court. To think that the court could materialize in one form alone would be a serious mistake; the most appropriate form under the prevailing international conditions called for unhurried consideration.

34. Thus it would make a great difference whether the court had exclusive jurisdiction for certain crimes or only concurrent jurisdiction with national courts; whether it functioned as a court of first instance or as a court reviewing final national judgments with a view to guaranteeing objective and uniform jurisprudence; whether all States or only the States concerned had access to the court; and whether the court was or was not dependent on other United Nations bodies. Those and similar matters should be examined to facilitate a clear-cut political decision by the General Assembly, which would in turn enable the Commission to draft a statute in line with the legal intentions of the majority of States and give the court a chance of working effectively. The Commission should, from the outset, work towards proposing a court that would not be doomed to powerlessness and could contribute towards stabilizing international relations, enforcing the basic principles of international law and promoting the peaceful settlement of disputes between States. The need was for an international criminal court which had its place within the international legal order and might progressively expand its competence and importance.

35. Over the years, many States had voiced different positions and objections; in particular, it had often been contended that the time was not yet ripe for the establishment of such a court, or that it might interfere with existing national jurisdictions and the system of universal jurisdiction provided for in many multilateral treaties on the prosecution and punishment of international crimes. The Commission had to consider the question of the advantages and drawbacks of an international criminal court as compared with existing methods of bringing criminals to justice. It also had to explain why the need for an international criminal court was more urgent today than 40 years ago, and why, in present-day international relations, the establishment of such a court was more feasible than in the past. A closely related question was whether establishing a court or similar trial mechanism was advisable or even possible from the point of view of international relations at the present time.

36. The answer to both those questions would greatly depend on the structure and competence envisaged for the court. Those factors would also influence the answer to a question which was often raised but rarely elaborated upon, namely the legal implications for State sovereignty of establishing an international criminal jurisdiction. It was often forgotten that universal jurisdiction would, in practice, lead to considerable limitation of sovereignty, in particular with regard to crimes covered by the draft code. That, rather than the possibility of chaos in criminal jurisdiction, was the main reason why some States were definitely opposed to the principle of universal jurisdiction in relation to the draft code. On the other hand, it was clear that the

extent to which national sovereignty was affected by the establishment of a court would very much depend on whether the court was intended to replace, compete with or complement national jurisdiction.

37. Another important question was the kind of crimes to be dealt with by the court and whether States should be allowed to exclude the competence of the court for certain crimes. Again, the issue had often been raised, even within the Commission, as to what influence a trial before an international criminal court might have on an ongoing conflict between States or on proceedings in progress in the United Nations.

38. Such considerations of legal policy would plainly have a powerful impact on the legal issues connected with the establishment of an international criminal court, its structure and its competence. The Commission's legal opinion should draw the attention of States and the General Assembly to the different legal consequences of each possible solution. Furthermore, the Commission itself had to take that aspect into account in dealing with part III of the Special Rapporteur's report.

39. While the Special Rapporteur was right to say that the competence of the court should be limited to trying individuals, the Commission should none the less consider whether it might not also be necessary to establish competence to try legal persons or entities other than States, at least in the case of certain crimes. He also agreed with the Special Rapporteur that the court's competence should not be confined to crimes referred to in the code, or even to certain international crimes as defined in specific international instruments. If the decision was taken to establish an international criminal court, then there should be only one such court and not a whole series of courts, each limited to particular international crimes. The question also arose, however, whether the court should have competence to deal with crimes defined by customary international law or by the domestic law of the States concerned. He would not be in favour of such an extension of the applicable law.

40. The Commission could not examine the problem of competence without deciding what type of proceedings might be instituted before the court. Did it want a court of first instance or only a court to review final national court decisions? Should the court be competent to give binding legal opinions on questions of international criminal law, or should it establish *prima facie* evidence of international criminal activities for the purpose of instituting proceedings before a domestic court? It would be better if, for the time being, the court was established as a review court also competent to give binding legal opinions if so requested. Such competence would greatly facilitate the establishment of the court; it could easily be brought into line with the existing system of universal jurisdiction, would promote co-operation among States, and would operate in the interests of uniform application of international law.

41. The need for a prosecuting attorney, a committing chamber or an international commission of criminal inquiry also depended on the decision regarding the competence of the court. If the court was established to review national decisions on international criminal law, it might be sufficient to have the reasoned complaint of a State concerned, without the need for any other prosecutor. That raised the question of submission of cases to the court and entitlement to institute proceedings or request an advisory opinion. The possibilities were numerous and it might be counter-productive to open the door too wide. It would be preferable for access to be limited to the States concerned, which might be States in which the crime had been committed, whose nationals were involved, or in whose territory the perpetrator was found. Should the court be competent to review final decisions by national courts, it would be useful to limit access to States complaining either that no proceedings had been instituted by a State in whose territory the alleged offender had been found or that a judgment rendered in another State in a case falling under the code was insufficient, if the crime had been directed against the complaining State or had been committed in its territory or if its nationals had been punished by another State. It therefore seemed that the issues relating to the submission of cases were much more far-reaching and complicated than those discussed in the report.

42. Another matter touched on by the Special Rapporteur was how jurisdiction was to be conferred upon the court. With regard to version A submitted by the Special Rapporteur in that connection (A/CN.4/430 and Add.1, para. 84), he would point out that article 27 of the 1953 draft statute (*ibid.*, para. 85) required conferment of jurisdiction not by one or other of the States concerned, but by the State of which the perpetrator was a national and by the State in which the crime was alleged to have been committed. That would of course be an unacceptably restrictive clause.

43. Furthermore, would the court have exclusive jurisdiction, or would the competence of national courts continue to exist concurrently? The 1953 draft statute had favoured concurrent jurisdiction, as did the very recent drafts of the International Law Association. Despite the serious problems that might arise, such a solution had been proposed because States were not prepared to give up their jurisdiction over criminal offences committed in their territory or against their very existence.

44. It would also be important to decide on the methods for conferring jurisdiction: by convention, unilateral declaration, *ad hoc* agreements, and so on. However, the main legal implication of the establishment of an international criminal court would not be the question of *res judicata*, but the question whether the jurisdiction of the court would replace national jurisdiction or merely open another choice for the States concerned.

45. As far as the relationship between judgments of national courts and the competence of the court was concerned, version B submitted by the Special Rapporteur (*ibid.*, para. 93) was preferable: the court could try and punish a crime on which the court of a State had handed down a judgment (or not instituted proceedings), if the State in whose territory the crime had

been committed, or the State against which the crime had been directed, or the State whose nationals were the victims (or whose national was the convicted person) had grounds for believing that the judgment handed down by that State (or the decision not to open proceedings) was not based on a proper appraisal of the law or the facts. Once again, the provision should not be a rule regulating an exception, but the main rule determining the competence of the court.

46. He could agree to the Special Rapporteur's proposal (*ibid.*, para. 96) that no national court might hear a case which had already been referred to the court, but the formulation did not solve the problem of whether a State concerned could submit to the international court a case which was under examination by a court of another State. That possibility should be ruled out, and States should wait until the national court had handed down a final judgment. All those issues were important ones because of the need to avoid not only conflicts of jurisdiction, but also political conflicts between States. The Commission should always tend to prefer alternatives which furthered co-operation between States.

47. There were a number of serious procedural questions to be resolved, such as the procedural law to be applied by the court and the possibilities of appeal. If the court was to be a court of first instance, then there had to be a possibility for appeal, in accordance with the fundamental human right set out in article 14, paragraph 5, of the International Covenant on Civil and Political Rights. Such a possibility would not be needed if the court's competence were confined to reviewing national decisions on international criminal law. The Commission must also give thought to the most advisable methods of enforcing judgments by the court, and there might be a need for provisions on mutual assistance in international criminal matters at the court's request. The Commission would also have to settle such matters as the method of establishing the court and its relationship with the United Nations.

48. One of the main objectives of the present discussion was to pinpoint the questions and problems to be tackled in the options paper for the General Assembly. The Commission had to air the issues he had discussed, and indeed others, in order to demonstrate the implications of alternative answers to the questions, and it must give its opinion on the advisability and feasibility of the options available.

49. Mr. CALERO RODRIGUES said that the Commission would not be breaking new ground in drafting a statute for an international criminal court: the revised draft statute prepared by the 1953 Committee on International Criminal Jurisdiction[10] had considerable technical merits and would be of much assistance. The Special Rapporteur was prudent to suggest that the Commission should initially concentrate on a general examination of a few points on which choices must be made, and his "questionnaire-report" approach was a good one.

50. On the question of competence, if the court was established within the framework of the code its jurisdiction should be exercised over persons accused of having committed the crimes defined in the code. Version B submitted by the Special Rapporteur in his eighth report (A/CN.4/430 and Add.1, para. 80) suggested that the court be given competence to try persons accused of "other offences defined as crimes by the other international instruments in force", thus setting boundaries to the enlargement of the court's competence but rightly excluding any reference to customary law. The code did not cover all international crimes, but the definition of such crimes outside the code tended to be loose, as the list given by the Special Rapporteur (*ibid.*, para. 81) showed. Limiting the crimes under the jurisdiction of the court to those defined in international instruments brought some certainty, but not enough. Was it the Commission's intention that a person accused of committing a crime defined in an international instrument should automatically come under the jurisdiction of the court? If so, how was the question of penalties to be resolved? The notion of "broadest possible jurisdiction" (*ibid.*, para. 83) was acceptable, but it must be carefully defined. The court's competence should be established primarily for the crimes defined in the code, with the possibility of extension to crimes defined in other international instruments when those instruments expressly recognized the court's competence. It would be easy for the parties to existing international instruments to supplement them with a provision recognizing the competence of the court.

51. With regard to the part played by States in the exercise of jurisdiction, the only acceptable suggestion made in the two versions submitted by the Special Rapporteur (*ibid.*, para. 84) was that States should simply have a preliminary role in the initiation of proceedings. There was no reason not to apply the principle of the independence of the judiciary to an international institution. An international criminal court established to deal with crimes against the peace and security of mankind must be able to consider allegations that a crime had been committed and to punish the perpetrators. In internal criminal law, some persons came to trial only if there was a complaint from the victim, while in the case of more serious crimes the activation of the trial machinery was a matter of public policy. The seriousness of crimes against the peace and security of mankind and the common interest to secure justice were such that no State should be able to prevent or halt the action of the court.

52. It seemed logical that pre-trial matters should be entrusted to the office of a prosecuting attorney attached to the court, and the interests of justice argued very strongly in favour of a permanent prosecuting attorney. States should be entitled to bring to his attention indications that a crime had been committed, but their action should stop there, and the main responsibility for presenting the case should rest with the prosecuting attorney. They should also be entitled to appoint agents to follow his actions, but it would be for the prosecuting attorney to decide whether there were grounds for bringing a case to the court. Hence none of the three versions proposed by the Special Rapporteur regarding the submission of cases to the court (*ibid.*,

[10] See 2150th meeting, footnote 8.

para. 88), or his suggestion in version A on the functions of the prosecuting attorney (*ibid.*, para. 90) that the latter might be appointed by a complainant, was acceptable. The prosecuting attorney should be a permanent official and have the functions described in version B, and should also be associated with the pre-trial examination by a committing chamber.

53. With regard to penalties, under any of the three versions submitted (*ibid.*, para. 101) the court would have a free, or almost free, hand. Like any criminal court it should have some latitude, graduating penalties according to the offence and the degree of participation of the individual involved; but it would be running counter to basic principles of criminal law to give the court the power to impose "whatever penalty it deems fair". The penalties should be specified in the code. As he had argued for many years, and as most members of the Commission agreed, if the code was to be a useful instrument it must define the crimes, indicate the jurisdiction and set out the penalties. The Commission was at last turning its attention from the definition of crimes to the question of jurisdiction, and it must tackle the question of penalties as well.

54. The Special Rapporteur was right not to have given too much attention to matters concerning the organization and financing of the court, which did not raise fundamental legal issues. A final answer could only be given at a later stage. If the draft code and the draft statute of the court became part of the body of international law generally accepted by the international community, then the court might be linked to the United Nations. If the code and the court proved, regrettably, to be expressions of the will of a limited number of States, then those States should appoint the judges and provide the financing.

55. As to the question of the application by the court of the principle *non bis in idem* in relation to judgments by national courts, the proposed version A (*ibid.*, para. 93) reasserted the principle laid down in paragraph 2 of article 7 of the draft code as provisionally adopted by the Commission on first reading,[11] while version B allowed a trial by the court to take place if certain States had grounds for believing that the earlier judgment was "not based on a proper appraisal of the law or the facts". That exception corresponded to some extent to the exception set out in paragraph 4 of article 7. It could not correspond more exactly, because article 7 had been drafted without first resolving the question of jurisdiction. The spirit, however, was the same.

56. With regard to the application by national courts of the principle *non bis in idem* in relation to judgments by the international court, the wording of the Special Rapporteur's proposal (*ibid.*, para. 96) was not perfect, but the sense was entirely clear: full application of the principle, corresponding to paragraph 1 of article 7 of the draft code. However, article 7 was not yet in its final form and, while the *non bis in idem* principle was likely to be retained in the draft code, it might not be wise to have provisions on the same matter in the draft statute: any differences could make for legal uncertainty. On the other hand, if the provisions coincided there would be undesirable duplication. The Commission should therefore think twice before introducing in the draft statute provisions such as those suggested in paragraphs 93 to 97 of the report.

57. Mr. MAHIOU said that the question of an international criminal court had arisen at almost every session since the start of the Commission's work on the draft code, something that was only natural, for it underlay a number of solutions envisaged in the code and, without provision for a court, the code would be incomplete. The General Assembly's request that the Commission consider the question in connection with the need to combat illicit trafficking in narcotic drugs afforded an opportunity to discuss the matter directly and to decide on the need for such a court. The Special Rapporteur's eighth report (A/CN.4/430 and Add.1) provided the basis for the Commission's work, and a number of drafts that would supply the Commission with valuable material were also available. Rather than make firm proposals for a draft statute for the court, the Special Rapporteur had rightly preferred to renew the debate on certain substantive points and, accordingly, 10 points were submitted for consideration by the Commission.

58. His own remarks would be confined to five of those points on which the Commission should concentrate, and which should form the basis on which the edifice of an international criminal court could be constructed: the competence of the court; submission of cases; the functions of the prosecuting attorney; pre-trial examination; and the authority of *res judicata*. Other points of a more technical nature, such as the method of financing the court, the appointment of judges, such procedural aspects as the withdrawal of complaints, and even the way of establishing the court, could be dealt with later.

59. The first point—competence—was of particular importance, for once it had been clearly established it would help to resolve a number of other questions at the outset. To his mind, it prompted three questions in particular: Which crimes should be dealt with by the court? Which perpetrators should be tried and punished by the court? And what should be the relationship between the jurisdiction of the court and that of domestic courts? Those three questions must be resolved in order to avoid, on the one hand, a conflict of jurisdiction that could give rise to contradiction and hence difficulty at both the legal and the political level, and on the other hand, the risk of a denial of justice should certain crimes not be tried either by the international court or by a domestic court.

60. His answers to the three questions were, first, that only the crimes covered by the code should be tried by the international criminal court. Accordingly, he approved of version A submitted in that connection (*ibid.*, para. 80) and disagreed with the Special Rapporteur's statement (*ibid.*, para. 83) that it would seem preferable to confer the broadest possible jurisdiction upon the court. The court was simply the logical outcome of the code, and matters should go no further than that.

[11] *Yearbook ... 1988*, vol. II (Part Two), p. 68.

61. The perpetrators to be tried and punished by the court should be the natural or legal persons who committed the kind of crime concerned. In that way, the Commission would simply be complying with General Assembly resolution 44/39 of 4 December 1989, which referred to individuals and entities engaged in illicit trafficking in narcotic drugs and other transnational criminal activities. He would not refer at the present stage to the delicate question of the involvement of States.

62. The third and last question, namely the relationship between the jurisdiction of the court and that of domestic courts, was one of the most delicate to be resolved and had already been encountered in connection with articles 4 and 7 of the draft code as provisionally adopted by the Commission on first reading.[12] Clearly it would remain an issue in the Commission's debates for some time to come.

63. None of the three versions proposed regarding the submission of cases to the court (*ibid.*, para. 88) was entirely satisfactory, since it was necessary to confine the initiation of proceedings to the States concerned and to avoid universal proceedings, as it were, open to all States, something which might create more problems than it resolved. To that end he favoured the adoption of some appropriate criterion. In criminal law, of course, the two classic criteria were territoriality and personality. The former enabled the State in which the crime took place to initiate proceedings, while the latter—whether active or passive personality—relied either on the nationality of the victim of the crime or on the nationality of the perpetrator of the crime to enable a State to institute proceedings.

64. As to the functions of the prosecuting attorney, his preference was for version B (*ibid.*, para. 90), since it would make for an independent service and for a court that operated on a more detached basis. The same applied to pre-trial examination, for which the Special Rapporteur had, in his view, suggested an appropriate text (*ibid.*, para. 92).

65. The authority of *res judicata* had already been discussed by the Commission in connection with the *non bis in idem* rule, and the solution which the Commission proposed with regard to the statute of the court should follow logically upon the solution adopted for article 7. For his own part, he believed it would be difficult to make an international criminal court a kind of court of appeal to review decisions of domestic courts, which had their own remedies, including appeals on points of fact and of law. To introduce into the international criminal court a further degree of control over domestic courts would pose not only a legal problem, but also a political one, for States were unlikely to accept such control.

66. The question whether domestic courts should be bound by the decisions of the international criminal court was somewhat delicate and he would favour a solution that avoided any conflict of jurisdiction. In the interests of consistency in the prosecution and punishment of crimes, therefore, he supported the Special Rapporteur's solution, along with a division of jurisdiction between the domestic courts and the international criminal court.

67. Mr. BENNOUNA said that the Commission was arriving at a convergence of views which he trusted would enable it, with the Special Rapporteur's assistance, to reach agreement on a constructive proposal in response to the General Assembly's request. The question of an international criminal court was not new, and the time had come to consider all the implications in the further work on the draft code with a view to pinpointing the substantive issues raised and, if need be, supplementing its provisions.

68. He welcomed the method adopted by the Special Rapporteur and would comment on the questions raised largely in the order in which they were submitted. The first question, competence, was the most important in that it determined all the rest. He was entirely in favour of version A submitted by the Special Rapporteur in that regard (A/CN.4/430 and Add.1, para. 80), whereby jurisdiction would be limited to the crimes covered by the code. It should not be forgotten that the definition of crimes laid down in the draft code still posed a problem, as reflected by the inclusion of square brackets around the words "under international law" in article 1 (Definition) as provisionally adopted by the Commission on first reading.[13] He personally did not think it possible in the international community at the present time to have a criminal court with jurisdiction for all kinds of crimes. The Commission was working within the context of a code which dealt with crimes of a certain degree, and that was why provision was included for a court. To enlarge on its jurisdiction, however, might unduly encumber the court's task and cause it to replace some of the functions of domestic courts, which was not its role. The code, however, once adopted, would not remain static forever. Indeed, a possible review or adjustment of the code in the light of developments in international law or of new crimes against the peace and security of mankind had already been envisaged. Such crimes could be likened to a virus: once an antidote had been found, other crimes would emerge, human imagination being very fertile in such matters. The code could therefore very well be enlarged, in accordance with an agreed procedure, to cover other crimes against the peace and security of mankind.

69. The second question was to determine the basis for the jurisdiction of the court. The two versions proposed (*ibid.*, para. 84) were not in fact alternatives: they involved very different concepts of international law, namely jurisdiction and *saisine* (submission of cases to the court). Moreover, the second sentence of version B merely restated a general and universally recognized rule of procedure before international courts; in other words, when the jurisdiction of the court was challenged, it was for the court itself to decide the issue.

70. There was a link between the attribution of jurisdiction to the court and the right to refer a case to it—a point on which the jurisprudence of the ICJ was

[12] *Ibid.*, pp. 67 and 68-69.

[13] *Yearbook ... 1987*, vol. II (Part Two), p. 13.

fairly instructive. That link, moreover, had been clearly established by article 26 of the revised draft statute for an international criminal court—which he regretted was not before the Commission—prepared by the 1953 Committee on International Criminal Jurisdiction,[14] which read:

Article 26. Attribution of jurisdiction

1. Jurisdiction of the Court is not to be presumed.

2. A State may confer jurisdiction upon the Court by convention, by special agreement or by unilateral declaration.

3. Conferment of jurisdiction signifies the right to seize the Court, and the duty to accept its jurisdiction subject to such provisions as the State or States have specified.

4. Unless otherwise provided for in the instrument conferring jurisdiction upon the Court, the laws of a State determining national criminal jurisdiction shall not be affected by that conferment.

71. Paragraph 1 of that article was an application of the rule of international law, restated by the ICJ on many occasions, whereby limitations on the sovereignty of a State were not to be presumed. Paragraph 2 related to prior consent to jurisdiction, apart from any accession to the statute, and was the technique currently adopted by the ICJ. Paragraph 3 provided the link between recognition of jurisdiction, the right to refer a case to the court, and the duty to accept its jurisdiction "subject to such provisions as the State or States have specified". That raised a number of questions with which the Commission should deal, in particular the question whether the acceptance of jurisdiction could be made subject to a reservation. It was an important matter as it would enable a State to list restrictively the crimes for which it recognized the jurisdiction of the court and hence would perhaps enlarge the number of countries prepared to accept the court's jurisdiction. Paragraph 4 of the article was also fundamental in that it demonstrated the problem of the relationship between the jurisdiction of national courts and that of the international court, while recognizing the possibility that the two could coexist. The problem was that the attribution of jurisdiction to an international court could, if a State so wished, divest a domestic court of all jurisdiction.

72. So far as the force of *res judicata* by a national court was concerned, he favoured version B (*ibid.*, para. 93), which would enable a case to be submitted to the international court even if the national court had delivered judgment. It would be necessary to establish the basis on which a case would be referred to the international court. Would it be referred to that court as a court of appeal on a point of fact or of law? If the former, the court would have to review the entire proceedings; in the latter instance, however, the court would have to pronounce only on a breach of the law by a State. Personally, he would endorse the latter, as in the case of European Community law. For an international court to have total control over national courts would be a major infringement of national sovereignty and therefore unacceptable.

73. The three versions proposed with respect to submission of cases to the court (*ibid.*, para. 88) were all very wide-ranging and unsatisfactory. He continued to favour a link between jurisdiction and *saisine* as provided in article 26 of the 1953 draft statute (see para. 70 above).

74. Turning to matters of secondary importance, version B on the functions of the prosecuting attorney (A/CN.4/430 and Add.1, para. 90) commanded his full support in view of the need for an independent service. He also agreed that a chamber of the court should be responsible for pre-trial examination. As to withdrawal of complaints, he favoured version B (*ibid.*, para. 98).

75. So far as penalties were concerned, it would be inconceivable to allow the court to establish any penalty it saw fit. That would be contrary not only to human rights, but also to the basic legal principle *nulla poena sine lege*. A code of law must lay down the penalties for any infringement of that law, failing which there should be no code.

76. From his own experience with the United Nations he knew that, whenever financial provision was made for some committee to be financed by States parties, there were difficulties because of delays in payments. The best course, therefore, would be to provide for financing from the United Nations regular budget.

The meeting rose at 1.05 p.m.

[14] See 2150th meeting, footnote 8.

2155th MEETING

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

Chairman: Mr. Jiuyong SHI

Present: Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Graefrath, Mr. Illueca, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Roucounas, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

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

[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 ... 1989*, vol. II (Part One).

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

[4] *Ibid.*