Document:-

A/CN.4/SR.2155

Summary record of the 2155th meeting

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:-

1990, vol. I

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.*

[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. Mr. THIAM (Special Rapporteur) recalled that, in introducing his eighth report, he had clearly indicated (2150th meeting, para. 27) that he wished to withdraw item 1 (*b*) (Necessity or non-necessity of the agreement of other States) of the list of points submitted for consideration in part III, on the statute of an international criminal court (A/CN.4/430 and Add.1, para. 79). Members of the Commission should therefore not comment on that point.

2. He also wished to clarify his position on the question of the attribution of jurisdiction, because he totally disagreed with what Mr. Bennouna had said in that regard at the previous meeting. The proposed court would have to deal with crimes committed in breach of international public order. The issue was one of international criminal law and there could thus be no question of slavishly copying the Statute of the International Court of Justice, whose sphere of competence was entirely different. A State which violated international public order had to be brought to justice. It should not be able to refuse to recognize the jurisdiction of the international criminal court in order to avoid being tried. If it had that option, in other words if, in order to try a State, it would first be necessary to obtain its consent, the court would not have any reason to exist. In addition, how could a State party to the statute of the court say that it did not confer jurisdiction upon the court? His own view was that, in becoming parties to the statute of the court, States implicitly recognized its jurisdiction. There was, of course, no intention of disregarding the principle of the sovereignty of States, but that principle had to have its limits; otherwise, what was the use of formulating principles relating to the rights and duties of States, as the Commission had done?

3. Members of the Commission should therefore state their positions on the question of the attribution of jurisdiction. That was a fundamental point that should be considered in the context of the progressive development of international law. The Commission was formulating a new law, namely international criminal law, and, since nothing was certain in that regard, it could not be too sure of itself.

4. Mr. OGISO said that the establishment of an international criminal court was necessary in order to ensure fairness in the punishment of the crimes against peace and security covered by the code and so that those guilty of such crimes—during a conflict, for example—should be tried, whether they were the victors or the vanquished. The establishment of such a court would, moreover, be the logical consequence of article 2 of the draft code as provisionally adopted by the Commission on first reading,[6] which provided that "the characterization of an act or omission as a crime against the peace and security of mankind is independent of internal law".

5. On the other hand, it would not be appropriate to place under the jurisdiction of the court all the crimes mentioned in the code. The crimes to be tried by the court had to be limited to those of an extremely serious nature which had grave consequences for the international community, and the criminals to be tried by it should be only the principal perpetrators. Other offences and other participants should be dealt with by national courts in accordance with paragraphs 1 and 2 of article 4 as provisionally adopted on first reading.[7] The criterion of gravity should thus be used to determine whether or not a certain crime under the code should be subject to the jurisdiction of an international criminal court.

6. Moreover, the jurisdiction of the court should extend to both the factual and the legal issues of cases referred to it, in conformity with the precedents of the Nürnberg International Military Tribunal and the International Military Tribunal for the Far East.

7. Following those general observations, he wished to make some more specific comments on parts II and III of the eighth report (A/CN.4/430 and Add.1).

8. With regard to illicit traffic in narcotic drugs, dealt with in part II, he shared the Special Rapporteur's view that the code should deal only with large-scale trafficking by associations or private groups, or by public officials, which constituted a threat to international peace and security. The international criminal court should deal only with that type of traffic. To combat the problem of illicit traffic in narcotic drugs in general, a task which was incumbent upon national courts, it would suffice to apply the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, which was an effective instrument. The same approach should be adopted in cases of unlawful seizure of aircraft.

9. Turning to part III of the report, he reviewed the points raised by the Special Rapporteur in the "questionnaire-report" on the statute of an international criminal court. With regard to item 1 (Competence of the court), he again noted that there should be a single permanent court to deal only with the most serious offences that threatened the peace and security of mankind. For example, even some war crimes did not fulfil that condition and it would be preferable to leave it to national courts to try them. Whether the Commission adopted version A or version B (*ibid.*, para. 80), it was important to ensure that only the most serious crimes covered by the code were tried before the international criminal court. Some members of the Commission might find version A much too restrictive. In order to meet that concern, the code should be formulated in such a way that crimes which might be characterized in future as serious crimes against the peace and security of mankind

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

[6] *Yearbook ... 1987*, vol. II (Part Two), p. 14.

[7] *Yearbook ... 1988*, vol. II (Part Two), p. 67.

would be covered by it. In that connection, the possibility had been suggested of adopting additional protocols listing the new categories of offences constituting crimes against the peace and security of mankind. That was one possible solution.

10. The Special Rapporteur also appeared to consider that an international criminal court could try only natural persons. He himself was of the view, like some other members of the Commission, that legal entities other than States could also be brought before such a court.

11. Item 1 (*b*) (Necessity or non-necessity of the agreement of other States) should be discussed in conjunction with item 3 (Submission of cases to the court), since they dealt with two aspects of the same question, namely that of determining who could bring cases before the international criminal court and under what conditions.

12. On the question of the submission of cases to the court he was in favour of version B (*ibid.*, para. 88), because it would be contrary to the generally accepted rules for a State which was not a party to the statute of an international court to be able to submit cases to it. Version C appeared to provide for a sort of political "screening" by a United Nations organ. However, there was no reason why a State party to the statute of the international criminal court wishing to bring a case before it should have to obtain the agreement of such an organ.

13. As to the question whether or not the jurisdiction of the court depended on the consent of the State concerned, he took the view that, if the State in question was a party to the code and to the statute of the international criminal court and, in addition, the person to be tried before the court was one of its nationals, it should be considered to have conferred jurisdiction upon the court for the crimes covered by the code, provided that the code contained a provision to that effect. The position would, however, be different if the State concerned was not a party either to the code or to the statute. Since tacit consent could not be assumed in such a case, it would be necessary to seek its consent to the jurisdiction of the court on a case-by-case basis. One way out of that difficulty might be for the statute of the court to be incorporated in or to form an annex to the code so that every State which became a party to the code would automatically accept the statute of the court and, hence, its jurisdiction.

14. Referring to the texts proposed on that question (*ibid.*, para. 84), he could not accept version B because it was not appropriate to leave the settlement of possible disputes on jurisdiction solely to the court without giving it any guidance in the statute. As the Special Rapporteur indicated (*ibid.*, para. 85), version A was based on—not identical with—article 27 of the 1953 draft statute. That article, which stated that "No person shall be tried before the Court unless jurisdiction has been conferred upon the Court by the State or States of which he is a national and by the State or States in which the crime is alleged to have been committed", nevertheless provided the Commission with valid guidance in the matter.

15. With regard to item 2 of the questionnaire-report (Procedure for appointing judges), he, like the Special Rapporteur, preferred version A, which would stress the universal character of the international criminal court, rather than version B, which provided for a small court. At the same time, he was not altogether satisfied with the wording of version A, which specified that "The judges shall be elected by the General Assembly of the United Nations . . .". In his opinion, the judges should be appointed in accordance with the procedure applicable to the judges of the International Court of Justice: those who obtained an absolute majority of votes in the General Assembly and in the Security Council would be elected.

16. As to item 4 (Functions of the prosecuting attorney), he did not believe that the system provided for in version B was either workable or practicable. He therefore supported version A and shared the Special Rapporteur's view that the functions of the prosecuting attorney called for a degree of specialization and technical expertise and that he was called upon to uphold the interests not only of States, but also of the international community. That did not mean, however, that a prosecuting attorney-general should be assigned to the international criminal court. In his view, it would be perfectly realistic and feasible to provide that the functions of the prosecuting attorney would be performed by a jurist appointed by the complainant from among the staff of the national organ with the necessary specialization and technical expertise. Such a person would be in a good position to collect evidence or to investigate the crime committed in the territory of the complainant State or against that State.

17. There might, however, be cases where grave crimes against the peace and security of mankind were of a transnational nature and concerned more than one State. In such cases, the States concerned would have to co-operate, in particular in the collection of evidence, the summoning of witnesses, investigations, etc. It would therefore be useful to set up a small organ to ensure co-ordination and co-operation among States in that regard. The question whether such an organ should belong to the international criminal court or report to the Secretary-General of the United Nations could be considered at a later stage.

18. With regard to item 5 of the questionnaire-report (Pre-trial examination), he recalled that the question of the need for a pre-trial examination by an organ other than the international criminal court had given rise to intense discussions in the 1953 Committee on International Criminal Jurisdiction. That system did not exist in Japanese criminal procedure, but he believed that some sort of preliminary examination of the evidence could be useful. He nevertheless stressed that the most crucial problem in an international criminal proceeding would be to determine whether or not the evidence showed that the alleged offence was serious enough to be tried before an international criminal court. In his opinion, that was a problem to be decided by the court itself and not by a pre-trial chamber, because it sometimes related to the merits of the case.

19. As to item 6 (Authority of *res judicata* by a court of a State), he endorsed in principle version A, the golden rule in the matter being *non bis in idem*.

20. With regard to item 7 (Authority of *res judicata* by the court), he endorsed in principle the formulation submitted by the Special Rapporteur, which seemed to be similar in substance to article 50 (Double jeopardy) of the 1953 draft statute.[8]

21. For item 9 (Penalties), he was in favour of version B or version C, taking into account recent trends in various States and in international human rights instruments towards the abolition of the death penalty or the restriction of its application.

22. He drew the Commission's attention to the question of the execution of sentences. Article 51 of the 1953 draft statute provided that "Sentences shall be executed in accordance with conventions relating to the matter", but it was to be feared that a provision of that kind would remain a dead letter. In addition, he could not agree that the execution of sentences should be entrusted solely to the complainant State. Accordingly, he believed that the code should specify that the execution of sentences would in principle be decided by the international criminal court in its judgment and that only in the absence of such a decision would the execution be entrusted to the complainant State.

23. Lastly, with regard to item 10 of the questionnaire-report (Financial provisions), he did not believe that the idea of establishing a special fund was either realistic or workable. He therefore proposed the adoption, *mutatis mutandis*, of the same provisions as those which applied to the ICJ.

24. Mr. TOMUSCHAT said that Trinidad and Tobago should be thanked for having taken the initiative of proposing that the question of the establishment of an international criminal court, which the Commission invariably raised when discussing the draft code, but which the General Assembly had preferred to shelve, should once more be placed on the General Assembly's agenda.[9] The Commission had now definitely been mandated to deal with the question of the establishment of such a body. True, it had not been requested to draw up the court's statute, but the responsibility entrusted to it was none the less great. The Commission was expected to inform the General Assembly about the matters of principle of both a legal and a practical nature which would have to be settled with that purpose in mind and the task was an urgent one. Within the General Assembly, there was at least one group of States which was firmly resolved to press forward and it would be unfortunate if the Commission failed to meet those States' wishes. The opportunity was all the more favourable in that, as far as drug trafficking was concerned, it was unanimously agreed, even though tactical considerations were also involved, that the activity was a scourge which had to be combated energetically.

25. The Commission was thus called upon to give the General Assembly a precise answer even though it might not be able to prepare a very detailed document. He therefore agreed with the Special Rapporteur that the Commission should concentrate on the guiding principles of its fascinating undertaking and, in doing so, follow the outline provided in part III of the eighth report (A/CN.4/430 and Add.1). It was important that the Commission's response be placed before the General Assembly at its next session. To that end, he suggested that the Commission's conclusions be included in a study which could be issued as a separate document, but which might, as an exceptional measure, be annexed to the Commission's annual report to the General Assembly.

26. For the time being, he would refer to the most crucial problems connected with the establishment of an international criminal court. The first question which arose was whether the court should be an organ of the United Nations or an institution falling wholly within the responsibility of the States parties to the treaty establishing it. In his view, it would be preferable, despite all the technical difficulties involved, to associate the court as closely as possible with the United Nations system. Assuming that the court would have competence only in respect of States which had accepted its jurisdiction, it could be envisaged that its judges would be elected by the General Assembly and the Security Council and that its costs would be paid out of the regular budget of the United Nations, as, for example, in the case of the Human Rights Committee; failing that, the court could easily become an institution which might be held dear by a small group of States, but which other States would tend to ignore. Such an arrangement would obviously require the unreserved support of the international community as a whole and, in particular, of all regional groups.

27. An international criminal court would be quite unrelated to the International Court of Justice, and to establish it as a chamber of the Court would be a mistake. It seemed essential that it should be established by a treaty; action under Articles 7 or 22 of the Charter of the United Nations would hardly be practical. The fact that the ICJ had approved the establishment of the Administrative Tribunal of the United Nations on the basis of those two provisions was not a relevant precedent. The purpose of the Administrative Tribunal was to provide legal protection for United Nations officials and it was therefore necessary for the smooth operation of the Organization itself. The establishment of an international criminal court, on the other hand, would be a tremendous step forward, a genuine legal revolution. But at a time when so many revolutions were taking place, why not have a small one in the United Nations?

28. Recalling that, at the previous meeting, Mr. Graefrath had demonstrated that an international criminal court could take several different forms—that of a court of first instance which established the facts and applied the law or that of a court of appeal, a court of cassation or a court which merely stated the applicable law at the request of a national court which decided not to pronounce judgment and referred a preliminary issue to the international court—he expressed the view that, all things considered, only one solution was accept-

[8] See 2150th meeting, footnote 8.

[9] See A/44/195.

able. There were two kinds of situations in which justice could not be left to national courts. The typical situation was that in which serious crimes were committed by the State itself or, rather, by a ruling group. In such circumstances, the courts of the State in question would not be qualified to try those responsible unless there was a change of government and a return to the rule of law. The future international criminal court would therefore also have to establish the facts. The other situation was more recent, but had the same results. It was that in which a State wanted to bring to justice certain individuals who had committed serious crimes, but was not strong enough to do so: judges were intimidated; witnesses refused to speak for fear of reprisals. In that case, too, it was of course not possible to dispense with investigating the facts of the case and merely confer powers of appeal or cassation upon the international criminal court. A procedure for preliminary issues might conceivably be established, but it would first have to be seen whether it would serve any purpose.

29. With regard to the competence of the court, he said that, in his view, the court should try only crimes against the peace and security of mankind. He therefore preferred version A submitted by the Special Rapporteur in that regard (*ibid.*, para. 80), with, however, some amendments, the first being that reference should be made to crimes already covered by earlier instruments, particularly genocide. Another point was that, if the court was to receive the support of a massive majority of States, it had at first to be given a limited mandate. A court which was made competent from the outset to try cases of aggression or intervention would encounter almost insurmountable political obstacles, but that would not be so if it was to try cases of drug trafficking or genocide. With more restricted jurisdiction, the court could begin to exist and to prove itself. A victory of principle would have been won.

30. The next problem was that of the recognition of the court's jurisdiction. Article 26 of the revised draft statute prepared by the 1953 Committee on International Criminal Jurisdiction[10] provided that States could confer jurisdiction upon the court "by convention, by special agreement or by unilateral declaration". Being sovereign, States had to be free to submit to the judgment of the court either generally or for a specific category of cases or even for one particular case. Contrary to what the Special Rapporteur seemed to think, it would not be easy to divest States of their right to accept, to recognize partially or to refuse the competence of an international judicial authority. In fact, there was no international legislative body or international jurisdictional system to which States were mandatorily subject. All that could be done was to propose solutions to them and seek their consent. The Special Rapporteur seemed to fear that States which were guilty of crimes would refuse to accede to the statute of the court, which would be recognized only by irreproachable States. There were nevertheless good periods and bad periods in the lives of States and it might well be possible to get them to recognize the competence of the court at a good time when the sense of justice and legality prevailed.

31. The question of the jurisdiction of the court gave rise to the even thornier problem of the persons who could be prosecuted as a result of recognition of that jurisdiction. A State always had authority over its own nationals and could refer them to an international court instead of trying them itself. That was also true of the State in whose territory a crime had been committed. In that connection, he noted that the territorial criterion would not be easy to apply in the case, for instance, of threat of aggression[11] or in a case where the organizer of an aggression did not leave his national territory. All things considered, version A proposed in that connection (*ibid.*, para. 84) would be preferable.

32. The criteria established in version A did not, however, solve every problem. Genocide, in particular, raised the question of the link which had to exist between a State and the individuals on behalf of whom it acted. When a Government murdered members of a national minority, who could confer competence on the court to judge the persons responsible? The 1948 Convention on the Prevention and Punishment of the Crime of Genocide was of little assistance. It referred only to the jurisdiction of an international penal tribunal with respect to States, whereas in the present context it was a question of individuals. Another problem might be the time-honoured principle that treaties were not binding on third States. Could that principle be waived in the case of unanimously condemned crimes? Genocide would seem to be a case in point, yet the 1948 Convention had received only 90 ratifications after 40 years of existence, which meant that a surprisingly large number of States did not recognize it.

33. The meaning of "submission of cases to the court" (*ibid.*, para. 88) in a criminal context was not altogether clear. Rules were necessary, of course, in order to avoid abuses and a system of checks by an appropriate body had to be instituted. A right of initiative could well be conferred upon States. But the indictment had to be drawn up by a prosecuting attorney assigned to the international criminal court. He therefore preferred version B on that point (*ibid.*, para. 90). In no case, however, would one prosecuting attorney-general be sufficient. A college in which all legal systems were represented would have to be envisaged.

34. Other members of the Commission had already drawn attention to the complexity of relations between the proposed court and national courts. There would, of course, be some simple cases, for example a crime falling within the jurisdiction of a single State which decided to refer it to the court. As a general rule, however, several States would have competence, one on the basis of nationality, another on the basis of the territorial link, etc. Priorities would then have to be estab-

[10] See 2150th meeting, footnote 8.

[11] See article 13 (Threat of aggression) of the draft code as provisionally adopted by the Commission on first reading (*Yearbook ... 1989*, vol. II (Part Two), p. 68).

lished. Without wishing to sketch out a system, he emphasized that it must be recognized that the establishment of an international criminal court would, of necessity, have repercussions on the jurisdiction of national courts.

35. Mr. McCAFFREY said that he had always supported the idea of an international criminal court, since it would ensure that the code did not become overly politicized by States and would guarantee the uniformity of its interpretation and application. It was precisely because such a court was important that the Commission must be realistic and, at the present stage, propose practical solutions to the General Assembly that might be acceptable to States: it was better to have a modest court that was generally accepted than some ideal one that existed only on paper. Moreover, the current international climate seemed particularly favourable to the idea of such a court. By way of illustration, he referred to a recent initiative by the United States Senate, which had investigated the establishment of a criminal court to try the crimes of international terrorism and international drug trafficking; to a meeting of experts due to be held in Syracuse (Italy) in the summer of 1990 on the same subject; and to the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, which was to be convened in August 1990. Progress in the discussion of the matter was thus being made elsewhere as well, and the subject was now ripe.

36. The actual nature of the international criminal court nevertheless raised many questions. In the first place, should it be an *ad hoc* or a standing tribunal? Mr. Beesley (2153rd meeting) had suggested an *ad hoc* mechanism composed in such a way as to take account of the States involved in each individual case: that idea deserved consideration. In his eighth report (A/CN.4/430 and Add.1, para. 86), the Special Rapporteur proposed two solutions for the appointment of judges. In that connection, he noted that the International Court of Justice had been resorted to much more frequently and by a wider variety of States since the chamber procedure had come to be used. The same consideration would apply in connection with an international criminal court and the possibility should perhaps be envisaged of having a standing list of judges from which the States involved in a case could select those who would be asked to constitute the tribunal, as was now done for the ICJ chamber procedure. In short, the acceptability of an international criminal court was, for some States, closely connected with its composition: if States felt that they had some degree of control over its membership, the court would be more acceptable to them and, as pointed out by Mr. Graefrath (2154th meeting), less of a threat to their sovereignty than a national court exercising universal jurisdiction.

37. The questions which arose in connection with the competence of the court were even more numerous. Mr. Bennouna (*ibid.*) had suggested that the report of the 1953 Committee on International Criminal Jurisdiction, and the revised draft statute annexed thereto,[12] should serve as the starting-point and, indeed, that draft statute covered questions not addressed in the Special Rapporteur's report. For instance, whereas, under article 3 of the draft code as provisionally adopted by the Commission on first reading,[13] individuals were the subjects of the code, it would be better to specify, as did article 25 of the 1953 draft statute, that the court had jurisdiction over individuals irrespective of their status. Secondly, while the subjects of the code were individuals, jurisdiction was conferred on the court by States, a point covered by articles 26 to 28 of the 1953 draft. It therefore seemed essential to add some provision along the lines of article 26 of the 1953 draft to what the Special Rapporteur proposed on the issue (A/CN.4/430 and Add.1, para. 84), since both of the texts he had submitted seemed to be flawed: the jurisdiction of the court must have been conferred upon it by the State in which the crime was alleged to have been committed. Since that was difficult in the case of genocide, a special provision should be envisaged in its case. Lastly, a provision concerning withdrawal from the court's jurisdiction, along the lines of article 28 of the 1953 draft, should also be envisaged.

38. Still on the question of competence, the Special Rapporteur proposed two versions to deal with the crimes to be tried by the court (*ibid.*, para. 80). In his own view, the Commission should be very modest with respect to the competence of the court *ratione materiae*. Very few States would accept the jurisdiction of a court empowered to decide whether the crimes of aggression, intervention or colonialism had been committed. On the other hand, control over the membership of the tribunal might make that question less important. For the time being, it was clear that an international court to try the crime of international drug trafficking would have broad support. For those reasons, he would opt for version A because of the indeterminate nature of the definition laid down in version B.

39. Another point concerning competence was raised by the Special Rapporteur under the heading "Submission of cases to the court" (*ibid.*, paras. 88-89). That point was dealt with in article 29 of the 1953 draft statute, entitled "Access to the court", and squarely raised the question of the relationship of the court to the Security Council. For reasons he had already explained, he doubted whether it would enhance the court's acceptability if it was seen as a means of circumventing the Security Council. Consequently, and somewhat reluctantly, he would prefer a provision along the lines of alternative B of article 29 of the 1953 draft. Once again, however, the problem would probably be mitigated if the States involved consented to the proceeding and had some say in the composition of the tribunal.

40. Mr. Graefrath had raised one extremely important aspect of the problem of competence, namely whether the court's jurisdiction should be exclusive or concurrent with that of national courts. For his own part, he believed that its jurisdiction should be exclu-

[12] See 2150th meeting, footnote 8.

[13] *Yearbook ... 1987*, vol. II (Part Two), p. 14.

sive; otherwise, the objectives of uniformity of interpretation and application would be frustrated. To facilitate acceptance of the court, however, it might be wise, as Mr. Graefrath had suggested, to start by providing for it to give legally binding opinions on questions of law alone, at the request of a State party.

41. Apart from those general problems, there were various other technical questions which the Commission would have to consider at some stage. With regard to extradition, provision should be made for procedural machinery, since the general obligation laid down in article 4 of the draft code as provisionally adopted[14] was not enough. In any event, that article would have to be revised if the court had exclusive jurisdiction. With regard to incarceration of the accused pending trial, it was necessary to determine the conditions in which it would take place. Should bail be provided for? What should be the duration of incarceration?

42. Trial *in absentia* should probably be prohibited to minimize the risk of politicization of the code. United States law, for instance, generally prohibited criminal trials *in absentia*. As to the question of the prosecuting attorney, he agreed with Mr. Calero Rodrigues (2154th meeting) that there should be a standing institution or position, but considered that the prosecutor should not necessarily be the same individual for each case. There might conceivably be a panel from which the judges in a case could choose the prosecuting attorney. With regard to the taking of evidence, the Special Rapporteur's proposal (A/CN.4/430 and Add.1, para. 92) was a good starting-point, but needed refinement. For example, what would be the extent of the authority to gather evidence, for which provision should be made, in order for States to agree to allow the taking of evidence in their territory and to assist in that process?

43. There were two further problems, the first being enforcement of judgments of the court and execution of sentences. Would they be carried out by some international correctional system or through existing State institutions, and, if the latter, which ones? It seemed doubtful that States would agree to a sentence being executed by the complainant State. The second problem was that of penalties. It was an extremely difficult matter, but, as Mr. Calero Rodrigues and Mr. Bennouna had stated, penalties must none the less be indicated for each crime in the code. Given the major differences among the various municipal laws in that regard, he was not sure that it would be possible to arrive at a less general solution than that proposed by the Special Rapporteur (*ibid.*, para. 101).

The meeting rose at 11.30 a.m. to enable the Drafting Committee to meet.

[14] See footnote 7 above.

2156th MEETING

Friday, 11 May 1990, at 10.05 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. 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)

[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. Mr. ROUCOUNAS, referring to part III of the Special Rapporteur's eighth report (A/CN.4/430 and Add.1), said that he did not think it sufficed merely to say that the Commission opted for a particular alternative text, since many other far more wide-ranging problems might arise in the course of its work. As he saw it, the Commission was engaged in work of a preliminary nature and its technical effort should be matched by scholarly excellence.

2. A number of earlier drafts for the statute of an international criminal court had been mentioned during the discussion. The ideology behind those drafts, however, had differed from that of the statute for the international criminal court with which the Commission was now concerned. The Commission's task was to reflect a collective conscience that had not existed at the time when the earlier drafts had been elaborated. He would therefore urge the Commission to treat them with some caution, despite their undoubted technical excellence, bearing in mind that there was now a wider acceptance of the need for the United Nations to ensure the effective protection of fundamental human rights.

[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.*

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