Document:-

A/CN.4/SR.2156

Summary record of the 2156th 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**

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.

3. An international criminal court—far more than the International Court of Justice, which was concerned with disputes between States—would give rise to constitutional difficulties for States which struck at the very heart of domestic law and the concept of separation of powers within a State. Accordingly, the Commission should inform the General Assembly that it was fully aware of the problem and should produce effective arguments and guarantees with a view to ensuring the improved application of the law at the national and international levels.

4. Turning to the Special Rapporteur's questionnaire-report, he said that the code, on the one hand, and the statute of the international criminal court, on the other, were two different matters and should not be confused. The code dealt with substantive law—the law that governed the conduct of persons—and would be universally applicable. An international criminal court would not have jurisdiction in that area alone, although that would certainly form the basis of its jurisdiction. It was therefore necessary to distinguish between participation in the code and participation in the statute of the court. So far as the former was concerned, he agreed that the aim should be a compact code to which there would be no reservations. To that end, the Commission should endeavour to distil within the code the universal conscience reflected in international criminal law as generally recognized or in what might be termed customary international law. Provisions unacceptable to the international community should not be introduced into the code, for that would only cause problems for States and inevitably result in restricted participation in the code. So far as the statute of the court was concerned, the Commission could not just tell States to "take it or leave it". Rather, it was necessary to ascertain in what circumstances the court would have jurisdiction, and that involved the question of submission of cases to the court, to which the Special Rapporteur had referred several times.

5. Another question was who would elect the judges, and it had been suggested that the General Assembly could perhaps do so. In that connection, he noted that the members of the organ that monitored the implementation of one of the international human rights conventions were elected by a United Nations body and not by the parties to that convention. In the case of the proposed international criminal court, however, it might be possible, at an initial stage, to envisage the election of judges from among States parties to the statute, because, unless the Charter of the United Nations was amended, that court, unlike the ICJ, would not be an organ of the United Nations. He would, however, be happy to leave it to the Special Rapporteur to consider the participation of States parties to the statute in the election of judges and to find some link with the General Assembly.

6. One crucial question to which it was not possible to give a definite answer was whether the international criminal court should have exclusive jurisdiction or concurrent jurisdiction with domestic courts. In its further work, the Commission should examine a number of points in that connection. What, for instance, would be the position during the period between the commission of an act and submission of the case to the court? Who would determine whether an act was covered by the code or whether it fell outside the code and therefore came within the jurisdiction of the domestic courts? What would be the relationship between the lower domestic criminal courts, the higher domestic criminal courts and the international criminal court? Should some kind of exhaustion of domestic remedies be envisaged in the event that the international criminal court did not have exclusive jurisdiction? Should the question of cases being brought before the courts of different countries, on the basis either of *ratione materiae* or of *ratione personae*, be considered? Who was to initiate proceedings before the court? Could any State do so, including the State in whose territory the act had been committed and the State whose nationals were implicated in the act either as victims or as perpetrators?

7. Yet another question concerned the injured State and it should be discussed in the context both of State responsibility and of the criminal responsibility of a person who acted on behalf of the State. That question had been the subject of a recent symposium on crime held in Florence, at which it had been pointed out that the expression "international community as a whole", which was so often misinterpreted, referred to an entity the elements of which were still not clear. That point should also be referred to the General Assembly.

8. Mr. ARANGIO-RUIZ, noting that the Commission had received a green light from its parent body on a vital issue, said that a code of international crimes without an equivalent international body to implement it would either be a dead letter or be arbitrarily applied by national courts. Much had been said of the conflicts, especially of jurisdiction and interpretation, to which the application of the code could give rise. It was, however, his firm belief that, no matter how many cases of friction arose out of the establishment of an international criminal court within the framework of a code, they would still be fewer and less serious than those that would arise within the framework of a code whose implementation was based on the so-called principle of universal criminal jurisdiction. Such jurisdiction was, moreover, likely to be less productive in terms of the effectiveness of both prosecution and trial and, above all, of justice. As rightly noted, the human rights both of the victim and of the accused had to be protected and an international criminal court was the only means whereby both the victim and the perpetrator of an international crime, along with their respective States, could expect and receive correct and impartial treatment in all circumstances.

9. The General Assembly was to be congratulated on the removal of an artificial obstacle to the Commission's treatment of the question of the establishment of an international criminal court, and the fact that it had seized the occasion of the heightened threat to mankind from the scourge of drug trafficking to request the Commission to tackle the problem of an international criminal court was further evidence that that question had been within the Commission's mandate ever since it had started work on the draft code.

10. The question was, of course, a very difficult one and he himself had had occasion to refer to some of the problems involved. The establishment of an international criminal court would entail the creation of a supranational body with jurisdiction over individuals that would go far beyond that of the International Court of Justice, for, even though the latter had compulsory jurisdiction and unilateral applications could be made to it, its decisions were addressed to States as sovereign entities and not to individuals. By contrast, the decisions of the international criminal court would be addressed to individuals.

11. On reflection, it was apparent that the acceptance of such a court by States would be no more difficult to achieve than the assent of States to the entry into force of criminal-law provisions designed to constitute, through the proper legislative channels, a uniform branch of the domestic criminal law of all participating States. States were notoriously more jealous of their sovereignty *vis-à-vis* each other than *vis-à-vis* an international body. The Commission must, however, make it clear, especially to the General Assembly, that difficulties would arise at every step in the elaboration and operation of the code. It was difficult, for instance, to define the general principles and the crimes; to determine the relationship between the crimes of individuals and those of the States on behalf of which those individuals acted; to determine the penalties; to investigate, try and punish the crimes; and to draft a statute of an international criminal court and secure its acceptance by States.

12. He agreed that it was not possible to have a list of crimes without penalties. Consequently, if the Commission, the General Assembly and States in general were unable to establish an international criminal court or some other institution to apply the code, there could be no code. Just as there could be *nulla poena sine lege*, so could there be no *codex sine iudice*; and the *iudex* must be an international one, for otherwise the exercise would be doomed to failure. He believed that that had always been the view of the Special Rapporteur, to whom appreciation was due for having promptly produced a helpful report in the form of a questionnaire that would at least allow a start to be made on a difficult task. He was convinced that those who favoured implementation on the basis of so-called universal jurisdiction were simply sweeping the difficulties of that approach, which were equally great, under the carpet.

13. Referring to the questionnaire-report, he agreed that the competence of the court should be confined, at least for the time being, to crimes covered by the code, including drug trafficking. The possibility of entrusting the court with an interpretative role or of enabling it to hear appeals on points of law and of fact also required further study. The court's competence *ratione personae* should, moreover, be confined to physical persons and to given legal entities, although it would be difficult to identify the kind of legal entity that should be subject to the code. He had no doubt that the court should be endowed with competence to rule on competence.

14. The fact that reference had been made to article 26 of the revised draft statute prepared by the 1953 Committee on International Criminal Jurisdiction[6]—a provision that had some analogies with Article 36, paragraphs 1 and 2, of the Statute of the ICJ—might indicate that some members of the Commission favoured the adoption of a system of competence not directly attributed by the statute of the international criminal court. In his view, no such analogy should be accepted. There should be no question of the jurisdiction of the international criminal court being created on a piecemeal basis, as it were, by States parties to its statute as and when they pleased. The competence of the court should not be subject to any kind of optional clauses or to reservations and should derive directly from the statute.

15. He was inclined to agree with Mr. Calero Rodrigues (2154th meeting) concerning the submission of cases to the court. Neither of the texts proposed by the Special Rapporteur in paragraph 84 of his eighth report (A/CN.4/430 and Add.1) was satisfactory, being solutions based on a universal-jurisdiction approach. Under an institutionalized system of international jurisdiction, no distinction should be made between the State where the offence had been committed and the State of which the accused or the victim was a national. Any State might be a State injured by the crime and should be entitled to bring an accusation before the competent organ. That would not actually be a question of submission, but of putting the matter into the hands of the appropriate permanent body attached to the court. Once the court had been established, an initiative presented by any State to the prosecuting attorney would not involve the difficulties and dangers feared by Mr. Mahiou and Mr. Bennouna (2154th meeting). He was referring, of course, to the situation in which a clear demarcation line had been drawn, mainly *ratione materiae*, between international jurisdiction and the criminal jurisdiction of individual States, and the decision as to whether any specific case fell on one side of the line or the other would rest with the court by virtue of its competence to rule on competence.

16. On the questions of the prosecuting attorney and pre-trial examination, he agreed that both offices should be permanent parts of the international machinery and Mr. McCaffrey (2155th meeting) had been right to urge that neither office should be entrusted to a single person.

17. With regard to *res judicata*, the decisions of the court would have to be final and the *non bis in idem* principle embodied in article 7 of the draft code as provisionally adopted by the Commission on first reading[7] must stand. As to whether national judgments should have the same value *vis-à-vis* the court, he would reserve his opinion until the entire matter had been explored in greater depth. Further analysis seemed essential on the issues of appeal and possible *cassation*.

18. He fully agreed with Mr. Calero Rodrigues and Mr. Bennouna that penalties must be provided for in the code. The court could decide between a maximum and a minimum, but it would be absurd to leave it to

[6] See 2150th meeting, footnote 8.

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

the court to choose between different kinds or qualities of penalty.

19. In his view, no member of the Commission could give a final opinion on any of the problems involved in the establishment of an international criminal court. Most of the problems were of course not new, but no member had had sufficient time to go deeply enough into the wealth of relevant documents to be properly informed in the matter. That consideration led him to the question of what the Commission should do in response to General Assembly resolution 44/39, which clearly set the Commission an immediate task and a medium-term or long-term one. The few members of the Commission who had addressed the question seemed to be concerned exclusively with the immediate task, namely whether the Commission was complying with the mandate set forth in resolution 44/39 to the best of its ability at the present session. That mandate clearly required the Commission to devote "particular attention" to the question of establishing an international criminal court. But it was equally clear that it could not deal thoroughly with such a complex subject within the limits of a single session without setting aside the other topics on its agenda.

20. His conclusion was that the Commission's immediate task was to report to the General Assembly on the following points: (*a*) the Special Rapporteur's questionnaire on the establishment of the court; (*b*) the Commission's discussion of the issue in the light of the questionnaire and its cursory reading of the immediately available documents; (*c*) the provisional results of that discussion and the comparative merits of the possible solutions represented by (i) an international criminal jurisdiction, (ii) a system of universal jurisdiction, or (iii) any conceivable combination of the two approaches; (*d*) the consequent necessity, both in response to the specific request contained in resolution 44/39 and in fulfilment of its general mandate concerning the draft code, including the problem of the establishment of an international criminal jurisdiction, for the Commission to consider the establishment of such a jurisdiction at its next sessions within the framework of its work on the draft code. It was precisely with a view to drafting such a response to the General Assembly that a working group could be established, although the matter could probably be dealt with by the Rapporteur in co-operation with the Special Rapporteur.

21. As to the medium-term task, and subject to the more competent opinion of the Special Rapporteur, the Commission must simply proceed to a thorough analysis of the whole problem in the light of all the contributions made so far, without exception. The materials to be studied went far beyond the documents available to the Commission and it would be for the Special Rapporteur to decide whether to include a broader study of the problems in his report for the next session. In that case, a working group would have nothing to do and the matter could be left entirely to the Commission as a whole and to the Special Rapporteur, who for the future could perhaps include in his report a section on each of the questions dealt with in the questionnaire and on the further issues raised by members of the Commission.

22. Mr. EIRIKSSON said that the Special Rapporteur had been too modest in terming part III of his eighth report (A/CN.4/430 and Add.1) a "questionnaire-report", since he had set out the fundamental issues in a form enabling the Commission to carry its work forward and respond to the request of the General Assembly.

23. He generally supported the establishment of an international criminal court, but, as he had stated in his earlier remarks on the draft code, he would keep an open mind on the project as a whole until agreement had been reached on the crimes to be included and would then assess the results in relation to the extent to which the list was confined to the most serious crimes, on which there would be general agreement in the community of States. A linkage to the court would make the Commission more likely to move in the acceptable direction.

24. The acceptability of the court was another question. Although he shared the concerns of those members who had called for caution and realism as opposed to idealism, he thought that the Commission should frame the results of its work in a structure that could be readily adapted to political realities at the time a decision was taken. In other words, the Commission should not lock itself into a "take it or leave it" situation, as had been done in the past. Striking changes had taken place in the international negotiating climate since the 1953 Committee on International Criminal Jurisdiction had prepared its revised draft statute.[8] Mr. Roucounas had just made some pertinent remarks on that point. The Commission must be wary both of trivializing the draft code and of providing an opportunity for abuse of the court for political ends. The requirement of a large number of ratifications for the entry into force of the court's statute would ensure general acceptability and justify the linkage to the United Nations.

25. With regard to subject-matter jurisdiction, the Commission should confine itself to the crimes set out in the code; the relevant section of the statute might be organized so as to allow a selection even among the agreed crimes, perhaps with the possibility of extension to other crimes after a certain period. As to crimes other than those contained in the code, provision could be made for additional protocols subject to the conditions that applied to the statute. The court should have original jurisdiction, not merely appellate jurisdiction or other variations referred to by Mr. Graefrath (2154th meeting).

26. On the appointment of judges, he could not support either of the texts proposed by the Special Rapporteur (A/CN.4/430 and Add.1, para. 86). Judges should be appointed in the same way as Judges of the International Court of Justice.

27. The right to submit cases to the court was linked to the question of the court's personal jurisdiction. Cases might be brought only by a State party to the statute which had a link to the alleged crime for one of the following reasons: the crime was alleged to have

[8] See 2150th meeting, footnote 8.

been committed in its territory or had been directed against it; the victim was its national; or the accused was its national or had been found in its territory. For crimes such as genocide and *apartheid*, the last-mentioned ground would probably be the only one available. There should not be a requirement that, with regard to any single submission, any other State in one of those categories would also have to agree to submission, which was not a State-versus-State exercise. His conclusion took account of the reasoning of the 1953 Committee on International Criminal Jurisdiction in explaining article 27 of its draft statute.

28. As to prosecution of the case, he preferred version B submitted by the Special Rapporteur (*ibid.*, para. 90). With regard to the procedural matter raised at the previous meeting by Mr. McCaffrey, it should be specified that a case should be heard by a chamber of the court. To take account of Mr. Graefrath's point about article 14 of the International Covenant on Civil and Political Rights, the right of appeal should be made available to the court in plenary in circumstances to be set out at a later time. He agreed with the general guidelines on pre-trial examination set out in the report (*ibid.*, para. 92).

29. The question of *res judicata* by a national court should be dealt with as in paragraphs 2 to 4 of article 7 of the draft code as provisionally adopted by the Commission on first reading,[9] with retrial by the international court being allowed only in the circumstances referred to in paragraph 3. If the Commission had wished to provide for the possibilities set out in version B submitted by the Special Rapporteur (*ibid.*, para. 93), it would have included a reference to an international criminal court in square brackets in paragraph 4 of article 7, or in a similarly drafted article. Such a solution would require the revision of article 7, with which many members of the Commission were still not satisfied.

30. As to the effect of a decision of the international court on proceedings in a national court, article 7, paragraph 1, clearly excluded trial in a national court. The text submitted by the Special Rapporteur (*ibid.*, para. 96) seemed to have the same effect, but it must be carefully redrafted in the same terms in order to avoid misinterpretation.

31. With regard to the withdrawal of a complaint by a submitting State, his impression was that one of the essential bases of competence would be removed in such a case and that proceedings could not continue, but the court might be given discretion to allow proceedings to continue if the interests of justice so dictated.

32. The question of penalties was very important, but he was not convinced that a specific schedule was needed. The possibility of a death sentence should be ruled out, but, if the list of crimes was limited to the most serious ones, then the possibility of life imprisonment should be available in all cases. The statute needed to be more specific only if the Commission envisaged a lesser maximum sentence in some cases. Version C submitted by the Special Rapporteur (*ibid.*, para. 101) would therefore appear adequate and he hoped that he was not departing too much from Mr. Calero Rodrigues's position (2154th meeting), with which he basically agreed.

33. Although the Special Rapporteur had not dealt directly with enforcement, the place of detention could be covered in the rules of the court, States having assumed the obligation to provide facilities in accordance with a decision of the court. The rules would also provide for the possible review of sentences. The Commission did not have to take a position on financial questions, but he would favour the system used for the ICJ.

34. Turning to parts I and II of the eighth report, he said that complicity, conspiracy and attempt should not be included as separate crimes, but should be placed in the general part of the draft code together with the identification of the perpetrator. A separate reference to complicity was not needed, for the appropriate court could determine whether the level of participation in a crime was sufficient to make a person a perpetrator. In order to avoid the misuse which had been the case in some common-law systems, a general definition of conspiracy should be provided, combining the elements of intent, agreement with another person and attempt to complete the crime. He agreed with Mr. Al-Baharna (2153rd meeting) that a definition of attempt should be provided, including the elements of intent, steps towards the completion of the crime and frustration of that intent by some factor extraneous to the actor. If the completed draft code had structural differences in the definitions of some of the crimes, it might be necessary to evaluate those questions with respect to each individual crime.

35. On the question of international illicit traffic in narcotic drugs, he again pointed out that there was no practical reason to have separate sections in the draft code identifying crimes as being against peace or against humanity, for no difference in treatment seemed to be envisaged for the two categories. There was thus no need to determine whether drug offences should be in one category or the other; they could simply be identified as crimes against the peace and security of mankind. He agreed with other members of the Commission that draft article X should be reworded to include the elements of seriousness and large scale.

36. Mr. DÍAZ GONZÁLEZ, referring to part I of the eighth report (A/CN.4/430 and Add.1), stressed that complicity, conspiracy and attempt could not be regarded as autonomous offences. Those criminal acts were accessory to the principal act and totally dependent on it.

37. With regard to part II of the report, on international illicit traffic in narcotic drugs, he noted that the Commission had often been accused of working in an ivory tower, but had now been invited by the General Assembly to study and give an opinion on an issue that had been a matter of concern to the international community for a long time.

38. The Special Rapporteur had submitted two texts: one characterized illicit traffic in narcotic drugs as a crime against peace and the other treated it as a crime against humanity. In his own view, it was both a crime against peace and a crime against humanity. Many his-

[9] See footnote 7 above.

torical examples could be given to illustrate that point. Mr. Shi (2153rd meeting) had thus noted that, in the nineteenth century, two imperialist Powers had introduced opium consumption in China not only for profit-making purposes, but also as a means of weakening the Chinese people. The situation had now changed, however, and the great Powers were suffering as much from the drug problem as small countries were. In recent years, there had been increasing references in United Nations circles to the shared responsibility of producer and consumer countries in stamping out the drug traffic.

39. He took the view that illicit drug trafficking was a crime against peace because organizations and State bodies had been known to engage in it and to use the proceeds to finance mercenaries and provide weapons for military activities to destabilize the Governments of small countries. Illicit traffic in narcotic drugs had, for example, been used as a pretext for the invasion and occupation of a small Latin-American country in which thousands of people had died and entire neighbourhoods had been destroyed.

40. In the light of the foregoing, it was appropriate for the Commission to give careful consideration to the inclusion of illicit drug trafficking in the draft code. It should also consider the establishment of an international criminal court to punish those responsible for drug trafficking.

41. At a conference recently held in Quito, illicit drug trafficking had been characterized for the first time as a crime against humanity. In 1988, the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances had been adopted in Vienna. Moreover, at the Ninth Conference of Heads of State or Government of the Movement of Non-Aligned Countries held in Belgrade in September 1989, illicit traffic in drugs had been characterized as a threat not only to the health of peoples, but also to the political, economic, social and cultural structures of producer and consumer States.

42. He supported the Special Rapporteur's suggestion that the draft code contain two articles to deal with illicit drug trafficking as a crime against peace and as a crime against humanity. The code should also include a specific provision on the question of narco-terrorism.

43. Turning to part III of the report, he thought that the Commission should indeed study the question of the establishment of an international criminal court and give an opinion on the subject to the General Assembly. That question had been under discussion ever since the time of the League of Nations. The Nürnberg Principles[10] could not provide much guidance, since a court set up by the victors to try the vanquished was not a valid precedent, but there seemed to be good prospects for setting up an international criminal court in which the more powerful States would not be able to impose their own ideas of justice. In that connection, he noted that paragraph 3 of article 4 of the draft code as provisionally adopted by the Commission on first reading[11] stated that the provisions of paragraphs 1 and 2 of that article relating to the obligation to try or extradite "do not prejudge the establishment and the jurisdiction of an international criminal court".

44. With regard to the competence of the proposed court, he was in favour of version A submitted by the Special Rapporteur (A/CN.4/430 and Add.1, para. 80), which would limit jurisdiction to "natural persons accused of crimes referred to in the Code". It would be too ambitious to try to extend that jurisdiction to any other crimes.

45. As to the procedure for appointing judges, he considered that the best solution would be to have judges appointed in exactly the same way as Judges of the International Court of Justice, in other words by the General Assembly and the Security Council. Since the right of veto did not apply for the purpose of the election of judges, there should be no fear of obstruction on that score.

46. On the question of submission of cases to the court, he favoured version A (*ibid.*, para. 88), which provided that cases could be brought before the court by any State Member of the United Nations. As for the functions of the prosecuting attorney, he found version B more acceptable than version A (*ibid.*, para. 90).

47. With regard to the authority of *res judicata* by a court of a State, he preferred version B (*ibid.*, para. 93). A national court could not examine a case which had been tried by the international criminal court, whereas the international court would be able to deal with a case which had been tried by a national court in the circumstances set forth in version B. As to the authority of *res judicata* by the international criminal court, the text submitted by the Special Rapporteur (*ibid.*, para. 96) was acceptable.

48. On the subject of penalties, he was opposed to the idea of giving the court complete freedom to sentence defendants "to whatever penalty it deems fair", as stated in version A (*ibid.*, para. 101). It would be totally unfair to allow the judges to create the law while trying an offender. His own view was that the code itself should set forth the penalty applicable to each crime.

49. Lastly, the problem of financial provisions could be dealt with at a later stage when work on the substantive matters was more advanced.

50. Mr. NJENGA said it was particularly important that each of the crimes listed in the draft code be carefully and explicitly defined, leaving no room for ambiguity and no loopholes for those who might be tempted to indulge in a course of action or conduct amounting to a crime against the peace and security of mankind. Judged by that standard, the efforts of the Special Rapporteur in his eighth report (A/CN.4/430 and Add.1) could be regarded only as a first step. Further endeavours would be required before the proposed draft articles could be considered complete. In that connection, he was glad to see that new texts for some of the articles had already been drafted by the Special Rap-

[10] See 2151st meeting, footnote 11.

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

porteur and were being circulated, albeit only in unofficial translation. As Mr. Koroma (2154th meeting) had said, the basic elements of possible definitions were already contained in the Special Rapporteur's comments on the draft articles, which should not be too difficult to revise.

51. Referring to draft article 15, he said that he fully endorsed the Special Rapporteur's arguments concerning methodology (A/CN.4/430 and Add.1, para. 6), but considered that the definition provided in the article should include both physical acts of complicity, such as aiding, abetting, provision of means, etc., and what the Special Rapporteur called "intellectual or moral" acts and what he personally would prefer to call "conceptual acts", which included the inspiration, instigation or ordering of the commission of the criminal act.

52. In his view, the Commission should not be unduly concerned with the distinction between principal perpetrators, co-perpetrators and accomplices, since all were guilty of the crime and the extent of their responsibility and, consequently, the sentence pronounced would depend on the precise role played by each of the actors. That would seem to be the approach adopted both in the Charter of the Nürnberg Tribunal[12] (art. 6 *in fine*) and in the Charter of the Tokyo Tribunal[13] (art. 5 (*c*)). As the Special Rapporteur pointed out in his report (*ibid.*, para. 22), the hierarchical relationship which sometimes existed between the actual perpetrator of the act and his superior made it difficult to conceive of the latter as the accomplice of the former, in so far as the role of the accomplice was acknowledged to be a secondary one. In that context, the correct approach was that of the Supreme Court of the British Zone (*ibid.*, para. 24), which had considered that the act of complicity and the principal act were both crimes against humanity.

53. As to the concept of complicity in respect of acts committed prior to, concomitant with or subsequent to the principal offence, a qualitative distinction would be justified by the practice adopted in many municipal jurisdictions. If the antecedent act was part of a plan agreed to in advance, the actor was also held responsible for the principal crime. However, complicity in a subsequent unplanned act should be treated as an autonomous criminal act. That distinction should be clearly brought out, since the degrees of culpability in the two situations were quite different.

54. Turning to draft article 16, he associated himself with the conclusions reached by the Special Rapporteur (*ibid.*, para. 62), but took the view that the proposed alternatives for paragraph 2 were not really alternatives, but rather complementary elements, the first defining the crime of conspiracy and the second determining the degree of culpability and hence the penalties incurred by individual participants in the conspiracy. If the article were recast in that way, he believed it would command general support. Each participant in the conspiracy was responsible not only for acts he had committed personally, but also for all acts committed collectively by his co-conspirators in the plan, even if he himself had not been present when the acts had been committed. However, the degree of culpability and the sentence would depend on the individual's involvement in the execution of the common plan.

55. He could not agree with the solution adopted in the Charter of the Nürnberg Tribunal, which had restricted the application of conspiracy to crimes against peace, and noted that, in the 1954 draft code, the Commission had extended the concept to cover all crimes against the peace and security of mankind. Genocide and *apartheid*, which were directed not against the State, but against ethnic, religious, racial, tribal or cultural groups, were precisely the types of crimes which could not be committed by single individuals, but only by organized groups, usually with the involvement of a State, working collectively in a conspiracy to achieve a common criminal objective.

56. In draft article 17, it would have been preferable to define "attempt" along the lines of the first sentence of paragraph 65 of the report. Despite the doubts raised by previous speakers, he was inclined to agree with the Special Rapporteur's conclusion (*ibid.*, para. 67) that, in the case of crimes such as genocide and *apartheid*, attempt should not be ruled out as a crime against humanity.

57. The Special Rapporteur was to be commended for dealing in part II of his report with a problem—illicit traffic in narcotic drugs—that was now generally recognized as a major threat to mankind. The report (*ibid.*, para. 74) drew attention to the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. In addition, article 108 of the 1982 United Nations Convention on the Law of the Sea required all States to co-operate in the suppression of illicit traffic in narcotic drugs and psychotropic substances engaged in by ships on the high seas.

58. He considered that illicit traffic in narcotic drugs was a crime against humanity rather than a crime against peace and that attention should therefore focus on international co-operation in fighting the threat which such trafficking represented for the international community. International co-operation, not the unilateral self-help all too often resorted to by individual States, should be the watchword. As to the wording of the proposed provision, he was pleased to note that the Special Rapporteur's new draft, circulated in unofficial translation, provided a revised definition of the crime and that paragraph 1 of draft article X had been dropped.

59. The Special Rapporteur should be further commended for the efforts he had made to comply with the requests by the Commission and the General Assembly for a preliminary study on the statute of an international criminal court, which most members considered to be an indispensable part of any meaningful code of crimes against international peace and security. The presentation of a questionnaire-report in part III of the eighth report offered the Commission an opportunity to address some of the crucial issues involved in the establishment of an international criminal court. Like those of previous speakers, his views at present were

[12] See 2150th meeting, footnote 9.

[13] See 2152nd meeting, footnote 13.

preliminary and might be revised or abandoned in the light of subsequent debate.

60. Proposals on the question of the competence of the court had to be realistic in order to be broadly acceptable. In the present circumstances, even allowing for the favourable climate currently prevailing on the international scene, States were unlikely to go further in derogation of their sovereignty than to accept an international criminal court whose competence was confined to the gravest crimes affecting the peace and security of mankind. For that reason, he preferred version A submitted by the Special Rapporteur (*ibid.*, para. 80). While the provision excluded jurisdiction over States, it should not preclude the possibility of jurisdiction over legal persons such as corporations, which might be involved in the furtherance or facilitation of crimes under the code.

61. With regard to the question of the necessity or non-necessity of the agreement of other States, he noted that version A (*ibid.*, para. 84) was based on article 27 of the revised draft statute prepared by the 1953 Committee on International Criminal Jurisdiction.[14] Version A was a practical and all-encompassing provision, provided that it was not construed to mean that the State in question could confer jurisdiction upon the court only by becoming a party to its statute or to the code. It should be possible for the State in question to confer such jurisdiction on a case-by-case basis even without becoming a party to the statute.

62. Referring to the procedure for appointing judges, he said that, while it might be possible to envisage *ad hoc* tribunals along the lines suggested by Mr. McCaffrey at the previous meeting, his own preference would be for the establishment of a permanent international court, whose impartiality would thus be guaranteed. Moreover, in view of the grave nature of the crimes in question, the appointment of judges should not be limited to the States parties to the statute of the court. He was therefore in favour of version A submitted by the Special Rapporteur (*ibid.*, para. 86). Despite the differences between the proposed court and the International Court of Justice, which was an organ of the United Nations established under the Charter, he would not rule out the possibility that the Security Council should have a role similar to the one it played in electing Judges of the ICJ as a further guarantee of the broadest international acceptance.

63. Since the cases to be tried would involve the most heinous crimes against the peace and security of mankind, the broadest possible provision should be made for their submission to the court. Any possibility of genuine cases being suppressed by a political organ such as the Security Council had to be precluded. The court must not become a place for trying criminals from small States while the major Powers shielded their own through their power of veto. He therefore preferred version A submitted by the Special Rapporteur in that connection (*ibid.*, para. 88).

64. With regard to the functions of the prosecuting attorney, version A (*ibid.*, para. 90) was the more practical alternative. The pre-trial examination procedure, which was intended to exclude frivolous prosecution, but which was not common to all national systems, had no place in the statute of an international criminal court. If, in the court's view, the evidence was insufficient to sustain a case, the court itself should have the competence to dismiss the case after hearing the case for the prosecution, but without putting the accused to his defence.

65. On the question of the authority of *res judicata* by a court of a State, he considered that the *non bis in idem* rule should be upheld and therefore supported version A (*ibid.*, para. 93). Allowing a case to be reopened if another State was of the view that the judgment of the first State was not based on a proper appraisal of the law or of the facts or was inadequate would seriously challenge State sovereignty and lead to unnecessary friction among States and the court.

66. The text proposed by the Special Rapporteur on the authority of *res judicata* by the court (*ibid.*, para. 96) was generally acceptable, but he wondered what would happen in a situation where a case had been referred to the court and then withdrawn, for whatever reason. Such withdrawal of a complaint should not prevent another concerned State from instituting proceedings on the same complaint before its own court or before the international criminal court. Failing such action by another concerned State, however, it would be unrealistic and impractical, even in the presence of general concern on the part of the international community, to expect the court to proceed with the trial of a case which had been withdrawn. He therefore favoured version A on the withdrawal of complaints (*ibid.*, para. 98).

67. With regard to penalties, there was a growing aversion to the death penalty and other cruel and degrading punishment, including corporal punishment. While he was aware that such sentences continued to be applicable in many countries, including his own, there was a growing body of public opinion in favour of their abolition. That trend was reflected in the proceedings of the Commission on Human Rights and other human rights bodies, as well as in the increasingly common practice in extradition treaties of excluding extradition if the individual was liable to receive a sentence of death. As a progressive body, the International Law Commission should therefore opt for version C (*ibid.*, para. 101).

68. A related issue, which Mr. McCaffrey had raised at the previous meeting, was that of the country in which the sentence should be executed. While understanding the apprehensions expressed in connection with the solution whereby the sentence was carried out in the complainant State, he was equally doubtful, in the light of recent developments in the "*Rainbow Warrior*" case, whether it was appropriate that the sentence should be carried out in the State of the criminal's nationality. Since the possibility of the establishment of an international penal institution seemed remote, despite the quadripartite prison for Nazi war criminals operated until recently in Berlin, it appeared logical that the sentence should be carried out—with, of

[14] See 2150th meeting, footnote 8.

course, all the necessary guarantees—in the complainant State.

69. Turning to the question of financial provisions, he said that he found neither of the texts submitted (*ibid.*, para. 106) to be satisfactory. In view of the gravity of the crimes in question, the General Assembly, as the only representative of the international community, could surely be expected to bear the costs of an international criminal court, particularly if its role in electing the judges were maintained. Such a solution would guarantee not only the court's impartiality, but also its general acceptability.

The meeting rose at 1 p.m.

2157th MEETING

Tuesday, 15 May 1990, at 10.05 a.m.

Chairman: Mr. Jiuyong SHI

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Beesley, 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. Sepúlveda Gutiérrez, 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. SOLARI TUDELA, referring to part III of the eighth report (A/CN.4/430 and Add.1) on the statute of an international criminal court, said that he wished first to make a general comment on the questionnaire submitted by the Special Rapporteur. In the inter-American system, defendants enjoyed among other guarantees the right to appeal to a higher court. That guarantee was embodied in the 1969 American Convention on Human Rights and other human rights instruments currently in force. The Special Rapporteur might perhaps take that into account in his next report.

2. With regard to the first point dealt with in the questionnaire, namely the competence of the court, he said that, of the two versions submitted (*ibid.*, para. 80), one limiting the court's jurisdiction exclusively to the crimes referred to in the code and the other empowering the court to try not only those crimes, but also other offences defined as crimes by the other international instruments in force, the second seemed to be preferable for the practical reasons set out in the report (*ibid.*, para. 83).

3. The Special Rapporteur had also submitted two versions on the procedure for appointing judges (*ibid.*, para. 86), providing for their election either by the General Assembly or by representatives of the States parties to the statute of the court. Like Mr. Eiriksson and Mr. Díaz González (2156th meeting), he thought that the precedent of the International Court of Justice should be followed, in view, on the one hand, of the positive experience acquired in the matter and, on the other, of the opportunity thus offered to involve the permanent members of the Security Council in the election.

4. With regard to the submission of cases to the court, he favoured the first of the three texts proposed by the Special Rapporteur (A/CN.4/430 and Add.1, para. 88), which would allow any State Member of the United Nations to bring cases before the court. Under all three texts, only States would have the right of submission, as the Statute of the ICJ also provided, but with the difference that the proposed criminal court would have to try individuals. Accordingly, it might also be useful to explore the possibility of not granting the right of submission exclusively to States, but to extend it to international organizations, non-governmental organizations, national organizations and even private individuals. Of course, the right should not be available to individuals directly, but indirectly through an organ that would examine the substance of their complaints. There was after all nothing new in such a procedure. For example, the Inter-American Court of Human Rights heard not only petitions of States, but also indirectly those of private persons or groups of persons, in which case the petitions were sent to the Inter-American Commission on Human Rights, which, if it found them admissible, brought them before the court. It would be a good idea, in the case of war crimes, to give, for example, ICRC the right of submission to the court and, in the case of environmental damage, to grant it to environmentalist movements, which would be in a much better position to exercise the right than States themselves, whose room for manoeuvre might be hampered by the exigencies of international relations.

5. On the question of the prosecuting attorney, he preferred version B (*ibid.*, para. 90), for the reasons

[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.