Document:-

A/CN.4/SR.2157

Summary record of the 2157th 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**

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.

given by the Special Rapporteur (*ibid.*, para. 91). He also approved of the text submitted on pre-trial examination (*ibid.*, para. 92). He supported version B on the authority of *res judicata* by a court of a State (*ibid.*, para. 93), and endorsed the text submitted on the authority of *res judicata* by the international court (*ibid.*, para. 96).

6. The consequences of the withdrawal of a complaint would depend on the competence of the court. If it was limited exclusively to crimes against the peace and security of mankind, the withdrawal of a complaint could not, *ipso facto*, entail the discontinuation of the proceedings. But if it was extended to other offences defined as crimes by the international instruments in force, then in some cases the withdrawal of a complaint might, *ipso facto*, entail the discontinuation of the proceedings.

7. He had a general comment to make on penalties (*ibid.*, para. 101). The American Convention on Human rights leaned towards the elimination of the death penalty in prohibiting States parties which had abolished it from re-establishing it (art. 4, para. 3). That was why he rejected the version allowing the possibility of imposing the death penalty. Furthermore, under the American Convention, the prison term imposed must have as an essential aim the reform and social readaptation of the prisoner (art. 5, para. 6). In view of the inter-American system, he could therefore not approve of the version providing for life imprisonment, for that amounted to denying the possibility of social readaptation. Nor could he approve of the idea of a sentence of imprisonment for such a long period as to be comparable to life imprisonment. Accordingly, none of the three texts proposed by the Special Rapporteur satisfied his wishes.

8. Lastly, for practical reasons, he was in favour of version B on financial provisions (A/CN.4/430 and Add.1, para. 106).

9. Mr. ILLUECA recalled what Mr. Díaz González had said at the previous meeting when he had drawn attention to the participation of the countries of Latin America in the fight against illicit traffic in narcotic drugs and had stated his belief that such traffic should be made a crime against the peace and security of mankind, while pointing out that, in the fight against illicit trafficking, an act of aggression against a small country and the violation of its sovereignty also constituted crimes against peace. He had also paid a tribute to Simon Bolivar, "El Libertador", who, at the Congress of Panama in 1826, had sought means of institutionalizing concerted action by the countries of Latin America to defend their peoples against domestic despotism and foreign domination. Referring to the traffic in narcotic drugs, Mr. Díaz González had cited cases in which the great Powers had intervened brazenly in third countries, scorning the rules which militated in favour of the peace and mankind in international relations. He had mentioned the historical example of China, on which the Western Powers had once imposed the use of narcotic drugs, and the example of Panama.

10. In that connection, he wished to make a statement —a personal one, of course, since he did not hold and had not held for six years any public post in his country's Government. Illicit traffic in narcotic drugs had become for several Latin-American countries a destabilizing factor which undermined the institutions of States and the economic, social and cultural situation of peoples. As a centre of communications and sea, air and land transport, Panama had had to pay a higher price than other countries from the humanitarian, political, economic and social standpoints, owing to transnational criminal activities and action to combat them. In that exorbitant price should be included in particular the military invasion and occupation of the country by the United States of America in December 1989. He had no wish to take sides for or against General Noriega, who was accused by the United States of drug trafficking and whom that country had wished to take into custody and bring to trial, but he thought that, when it was a matter of defending his country's honour, questions of personalities paled before the imperative need to put an end to the military and foreign occupation and to restore the sovereignty, independence and territorial integrity of Panama.

11. The results of the inquiry carried out by the organization Americas Watch, reported by the newspaper *El País* on 11 May 1990, gave some idea of the extent of the hardship suffered by Panama's civilian population. The United States troops, the country's now disbanded defence forces and their paramilitary groups—the so-called dignity battalions—had clearly violated the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War during the largest military operation carried out by the United States since the war in Viet Nam, totally destroying a densely populated district of Panama City located near the headquarters of the defence forces: many civilians had been killed on that occasion. According to the Americas Watch report, the invasion forces had not discharged their responsibilities when drawing up the list of victims among the civilian population and the enemy forces and had not fulfilled their obligations with regard to the thousands of Panamanians who had been left homeless and who were entitled to full compensation.

12. In the fifth preambular paragraph of the Political Declaration on international co-operation against illicit production, supply, demand, trafficking and distribution of narcotic drugs and psychotropic substances,[6] adopted two months after the invasion of Panama, the States Members of the United Nations reaffirmed their

> determination to combat the scourge of drug abuse and illicit trafficking in narcotic drugs and psychotropic substances in strict conformity with the principles of the Charter of the United Nations, the principles of international law, in particular respect for the sovereignty and territorial integrity of States, the principle of non-interference in the internal affairs of States and non-use of force . . .

All those principles had been violated in Panama, as the General Assembly had recognized in its resolution 44/240 of 29 December 1989 on the effects of the military intervention by the United States of America in Panama on the situation in Central America, in

[6] General Assembly resolution S-17/2 of 23 February 1990, annex.

which the Assembly demanded full respect for and strict observance of the letter and spirit of the Torrijos-Carter Treaties on the Panama Canal and also demanded immediate cessation of the intervention and the withdrawal from Panama of the armed invasion forces of the United States.

13. The case of Panama posed a serious problem to Latin America, not only because of the colonialism of which the military invasion and occupation by the United States was typical, but also because of the consequences for the future of Latin America. Panama gave the impression of a destabilized region, quite unaffected by the upheavals in Eastern Europe and the consequent changes on the world social and political scene.

14. He welcomed with satisfaction the new draft article on illicit traffic in narcotic drugs submitted by the Special Rapporteur, which had just been circulated (see para. 26 below), but he thought that the word "illicit" should be inserted after the opening word "Any".

15. Turning to the questionnaire-report on the statute of an international criminal court in part III of the Special Rapporteur's eighth report (A/CN.4/430 and Add.1), he said that version A on the competence of the court (*ibid.*, para. 80) was more satisfactory than version B as matters stood at present.

16. With regard to the necessity or non-necessity of the agreement of other States, four principles were at play in version A (*ibid.*, para. 84): the principles of territoriality, nationality, protection of interests and passive personality. Given those principles, it was also necessary to invoke in some cases the principle of universality, applicable to acts which aroused universal condemnation and whose perpetrators were regarded as enemies of mankind liable to trial by the State which held them. He had in mind cases of piracy *jure gentium* and, following the Nürnberg Trial, war crimes. The alarming escalation in the illicit production of and traffic in narcotic drugs and their unanimous condemnation by the international community justified placing that crime in the same category. Apart from that, version A was acceptable.

17. Concerning the procedure for appointing judges, several members of the Commission had adduced weighty arguments in favour of the same method of election as the one used for Judges of the International Court of Justice. He therefore supported the proposed version A (*ibid.*, para. 86).

18. Version A on the submission of cases to the court (*ibid.*, para. 88) was also satisfactory. On the functions of the prosecuting attorney, version B seemed wiser than version A (*ibid.*, para. 90). As for the proposed text providing for a committing chamber (*ibid.*, para. 92), just as article 26 of the revised draft statute prepared by the 1953 Committee on International Criminal Jurisdiction[7] no longer seemed suited to the circumstances in the case of submission, so article 33 of that draft, on the committing chamber, would be a source of complications.

19. Version B on the authority of *res judicata* by a court of a State (*ibid.*, para. 93) was acceptable, as was the proposed text on the authority of *res judicata* by the international court (*ibid.*, para. 96). He had no objection to the arguments given by the Special Rapporteur (*ibid.*, para. 100) in support of version B on the withdrawal of complaints.

20. He understood the considerations of caution which had prompted the Special Rapporteur to draft three alternative texts on penalties (*ibid.*, para. 101). Those three texts contrasted with the principle *nullum crimen, nulla poena sine lege*, which had a direct impact on the punishable nature of an act and was expressed as the rule *nullum crimen sine poena*.

21. Lastly, experience counselled him to approve version A on financial provisions (*ibid.*, para. 106).

22. Mr. THIAM (Special Rapporteur) said that he had revised the draft articles proposed in parts I and II of his eighth report (A/CN.4/430 and Add.1) to take account of the criticisms formulated with respect to them.

23. Referring to the revised draft article 15 on complicity, he pointed out that he had deleted the word "order" in paragraph 2 (*b*) of the text just circulated because an unlawful order was an autonomous crime and the person giving the order had to be treated on an equal footing with the perpetrator. The Drafting Committee would have to deal with that aspect of the question and would also have to give further thought to the wording of paragraph 2 (*c*), relating to complicity *a posteriori*. The revised text read:

Article 15. Complicity

1. Participation in the commission of a crime against the peace and security of mankind constitutes the crime of complicity.

2. The following are acts of complicity:

(*a*) aiding, abetting or provision of means to the direct perpetrator, or making him a promise;

(*b*) inspiring the commission of a crime against the peace and security of mankind by, *inter alia*, incitement, urging, instigation, threat or abstention, when in a position to prevent it;

[(*c*) aiding the direct perpetrator, after the commission of a crime, to evade criminal prosecution, either by giving him refuge or by helping him to eliminate the evidence of the criminal act.]

24. The revised draft article 16 read:

Article 16. Conspiracy

1. Participation in a common plan to commit any of the crimes defined in this Code constitutes conspiracy.

2. Conspiracy means any agreement between the participants to commit jointly a crime against the peace and security of mankind.

25. The revised draft article 17 read:

Article 17. Attempt

1. Attempt to commit a crime against the peace and security of mankind constitutes a crime against the peace and security of mankind.

2. Attempt means any commencement of execution of a crime against the peace and security of mankind that failed or was halted only because of circumstances independent of the perpetrator's intention.

26. Lastly, he proposed the following revised text combining draft articles X and Y on illicit traffic in narcotic drugs:

Any mass traffic in narcotic drugs organized on a large scale in a transboundary context by individuals, whether or not acting in associ-

[7] See 2150th meeting, footnote 8.

ation or private groups, or in the performance of official functions, as public officials, and consisting, *inter alia*, in brokerage, dispatch, international transport, importation or exportation of any narcotic drug or any psychotropic substance constitutes a crime against peace and a crime against humanity.

In that connection, he took note of the suggestion by Mr. Illueca that the word "illicit" should be inserted after the opening word "Any".

27. The CHAIRMAN, speaking as a member of the Commission and referring to part III of the Special Rapporteur's eighth report (A/CN.4/430 and Add.1), said that the Commission's task was not to draft the statute of an international criminal court, since the General Assembly had not taken a decision to establish such a court. It had merely encouraged the Commission to explore further all possible alternatives on the question (para. 2 of General Assembly resolution 44/32) and had requested it to address the question of establishing an international criminal court or other international criminal trial mechanism (para. 1 of resolution 44/39). The Commission's first task was therefore to explore seriously the issues of principle relating to the establishment of an international criminal court and the feasibility of such a court. Accordingly, the Special Rapporteur had been wise to submit part III of his report in the form of a questionnaire dealing with specific issues relating to the statute of an international criminal court.

28. In order to combat international crimes of ever-increasing seriousness, including illicit drug trafficking, and to give teeth to the code, the ideal solution would, of course, be to establish an international criminal court as an expression of international co-operation and solidarity. In practice, however, the very principle of the establishment of an international criminal court gave rise to a number of problems that were difficult to resolve.

29. One of those problems, and perhaps the most important one, was the result of the current state of international relations. Very few States would be prepared to surrender even a small part of their sovereignty in respect of jurisdiction. The Nürnberg and Tokyo Tribunals, which advocates of an international criminal jurisdiction often cited as examples, could not serve as models because they had been set up under extraordinary circumstances. It was difficult to see how major war criminals who were the rulers of an aggressor State could be brought before an international court unless the State concerned had suffered a complete military defeat and had surrendered unconditionally. Proponents of the establishment of an international court also often cited the relevant provisions of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide and the 1973 International Convention on the Suppression and Punishment of the Crime of *Apartheid*, but the wording used in those instruments was very guarded. Moreover, although those two instruments did provide for the possibility of establishing an international criminal court, it had to be recognized that the States parties had taken no positive steps in that direction.

30. Under the circumstances, the rule of universal jurisdiction expressed in the formula "obligation to try or extradite" might make it possible to reconcile State sovereignty and international co-operation to combat international crimes. In view of the seriousness of certain international crimes, however, that formula, which had been used with some success in certain conventions, might, in the present case, not fully meet the needs of the international community. In the resolutions to which he had referred, the General Assembly had envisaged solutions other than the establishment of an international criminal court. In exploring that question, the Commission should therefore be more imaginative, bearing in mind the reality of international relations. Idealism rarely helped to solve problems of a practical nature.

31. Turning to the specific questions raised by the Special Rapporteur in the questionnaire-report, he noted that, if an international criminal court were to be established, it would have to be based on a multilateral convention adopted within the framework of the United Nations.

32. He considered that it would be unwise and too ambitious to extend the competence of the court to all international crimes, which were legion. He therefore preferred version A on that point (A/CN.4/430 and Add.1, para. 80), which specified that the court would deal only with the crimes referred to in the code, including international illicit drug trafficking. When international relations had genuinely improved and the international criminal court had proved its effectiveness, then its competence could be broadened.

33. With regard to the attribution of jurisdiction, the basic idea embodied in article 26 of the revised draft statute prepared by the 1953 Committee on International Criminal Jurisdiction[8] deserved serious consideration. The mere fact that a State was a party to the statute of the court did not warrant the assumption that it agreed to confer jurisdiction upon it. Once it was established, the court could have jurisdiction only with the consent or express agreement of the States parties to its statute. Jurisdiction could be attributed to the court by convention, by special agreement or by unilateral declaration. The Special Rapporteur had submitted two alternative texts on the matter (*ibid.*, para. 84). He himself had no objection to version A, which emphasized the fact that jurisdiction had to be attributed to the court by the State whose courts had possible jurisdiction over the alleged perpetrator of a crime under the code, either by reason of the nationality of the alleged perpetrator or of the victims of the crime or by reason of the place of commission of the offence.

34. On the submission of cases to the court, he preferred version B (*ibid.*, para. 88), which provided that cases could be brought before the court only by States parties to the statute.

35. As some members of the Commission had already pointed out, it was not wise to leave it to the complainant to appoint the prosecuting attorney. The task of prosecution should be the responsibility of a collegiate body whose members would be elected by the States

[8] *Ibid.*

parties to the statute. That formula would perhaps offer a better guarantee of impartiality.

36. The imposition of penalties was an indispensable element of criminal law. Any statute for an international criminal court would have to provide for the power of the court to pronounce penalties. That question was, however, a very complicated one. As the Special Rapporteur admitted (*ibid.*, para. 105), criminal penalties not only varied according to the times and according to country, but also involved moral, philosophical and religious concepts. Apart from the problem of penalties themselves, there was the still more complex problem of the mechanism for their enforcement. To entrust that task to a single State was perhaps not a good solution.

37. Lastly, concerning financial provisions for the establishment of a court, he did not think that a fund should be established, because undesirable pressures might thus be exerted on the court.

38. Mr. RAZAFINDRALAMBO welcomed the fact that, on the initiative of the Government of Trinidad and Tobago,[9] the General Assembly had finally included the question of an international criminal court in its agenda and requested the Commission to consider the possibility of establishing an international criminal court or other international criminal trial mechanism.

39. It must be remembered, however, that the Special Rapporteur himself had already suggested that, in due course, consideration should be given to the steps to be taken for the implementation of the code and, in particular, to the formulation of a statute for a supranational criminal court. General Assembly resolution 44/39 of 4 December 1989 therefore simply echoed the concerns of the Special Rapporteur and the Commission. The adoption of that resolution had, moreover, taken place at a particularly favourable time. The international situation and the new climate of inter-State relations held out hope for a less antagonistic attitude on the part of States which had so far been opposed to the formulation of a code of crimes against the peace and the security of mankind.

40. In order to have a clearer understanding of the Special Rapporteur's approach in preparing the questionnaire contained in part III of his eighth report (A/CN.4/430 and Add.1), it was appropriate to refer back to the Commission's mandate. The Commission was not being requested merely to patch up the 1954 draft code. The General Assembly had entrusted it with the more ambitious task of drawing up a list of crimes against the peace and the security of mankind, together with provisions relating to implementation and, in particular, the setting up of a mechanism for sanctioning any violation of the code. It was, moreover, in that spirit that the Special Rapporteur had always worked, since the draft articles which he had undertaken to formulate would include a part relating to general principles, a catalogue of crimes and a part dealing with the implementation of the code, in other words with criminal procedure and jurisdiction, both national and international.

41. In paragraph 1 of its resolution 44/39, the General Assembly had requested the Commission to address the question of establishing an international criminal court or other international criminal trial mechanism during its work on the elaboration of the draft code, thereby endorsing the approach the Commission had followed thus far. According to the General Assembly, the statute of the criminal court should form an integral part of the code. The court would have jurisdiction to try the crimes covered by the code, but not all international crimes *lato sensu*. That was the main difference between the mandate of the 1953 Committee on International Criminal Jurisdiction and that of the Commission. The international criminal court envisaged by the 1953 Committee had been intended to deal with international crimes in general. It was therefore not at all surprising that the revised draft statute prepared by that Committee[10] had contained provisions on jurisdiction (arts. 26 and 27) similar, *mutatis mutandis*, to those of Article 36 of the Statute of the International Court of Justice.

42. The international criminal court envisaged by the General Assembly would be intended to try various crimes which threatened the peace and security of mankind and were characterized by their extreme gravity. It was therefore inconceivable that States would agree to remove one or another of those crimes from the jurisdiction of the court.

43. During the discussion, reference had been made to the more or less close relationship that should exist between the United Nations and the court. As he saw it, the court would be viable only if it were established in the framework of the United Nations and were placed under the authority of the General Assembly. It was only on that condition that its activities, which were bound to encroach upon State sovereignty, could be accepted by States.

44. The question of the modalities for the establishment of the international criminal court did not really arise because its statute would have to be adopted at the same time as the other parts of the code.

45. Some members of the Commission had raised the question whether the court was to be a permanent or an *ad hoc* body. In his view, an *ad hoc* court would not be in keeping with the requirements of independent and universal justice and would not enjoy the credibility and respect that were essential to its operation. There was, of course, the precedent of the *ad hoc* chambers of the ICJ, but it must be remembered that those chambers were part of a permanent institution and benefited from all the resulting advantages. An *ad hoc* criminal court would be similar to an *ad hoc* arbitral tribunal constituted to deal with a specific case. That type of jurisdiction, which was not based on any pre-existing structure, had so many drawbacks that, as far as arbitration was concerned, there was more and more of a tendency to turn to permanent institutions, whether of an international or of a regional nature.

46. The question of the level of jurisdiction of the court had also been raised. Would it adjudicate in first

[9] See A/44/195.

[10] See 2150th meeting, footnote 8.

instance, on appeal or even on review? One thing was certain: since the court would be born of a partial surrender of judicial sovereignty by States, it could only be sovereign itself and its decisions had to be final. It could therefore not try cases in first instance. Provision might, however, be made, as proposed by Mr. Eiriksson (2156th meeting), for a mode of operation based on a system of small chambers to consider cases in first instance, subject to the right for the parties to appeal to the full court or make an application to it for review. That was, for example, the way in which the Supreme Court of Madagascar operated.

47. He did not believe that an international criminal court could have jurisdiction to consider on appeal or review cases decided by national courts. The 1973 International Convention on the Suppression and Punishment of the Crime of *Apartheid* and the 1948 Convention on the Prevention and Punishment of the Crime of Genocide did provide for the concurrent jurisdiction of national courts and an international criminal court, but, in practice, it was unlikely that a State which had elected to bring a case before a national court rather than the international court would later agree to have the decision of the former reviewed by the latter.

48. Of course, the international criminal court would have the power to review its own decisions, particularly in the event of the discovery of decisive new facts or documents, since review was based on the general principles of law which, as the ILO Administrative Tribunal had recognized on several occasions, applied even in the absence of texts. At a later stage, the Commission would also have to address the crucial question of the enforcement of the court's decisions.

49. In the light of those general considerations, he would comment on some essential points raised in part III of the report.

50. With regard to the jurisdiction of the court, the Special Rapporteur proposed a remarkably concise and precise text in version A (A/CN.4/430 and Add.1, para. 80) which dealt with both jurisdiction *ratione personae* and jurisdiction *ratione materiae*. According to that text, only natural persons would be subject to the jurisdiction of the court. Having started from the assumption that the code could deal only with the criminal responsibility of individuals, the Commission could hardly extend the jurisdiction of the court to crimes committed by public or private entities—as some members of the Commission had suggested during the debate—before knowing the position of Governments on the question of the criminal responsibility of the State. It should be noted in that connection that the word "entities", which was used in the explanatory memorandum presented by Trinidad and Tobago,[11] did not appear in paragraph 1 of General Assembly resolution 44/39.

51. As to jurisdiction *ratione materiae*, the international criminal court would, as stated in the above-mentioned version A, deal only with crimes referred to in the code, namely crimes against the peace and security of mankind. The Commission could not suggest a different solution, which would dissociate the statute of the court from the rest of the code. That would be contrary to the letter and spirit of the mandate it had received from the General Assembly, which was to elaborate the statute of an international court having jurisdiction to try persons alleged to have committed the crimes referred to in the code.

52. That allegation was enough to justify the initiation of what was known in traditional criminal procedure as a "public action"—the lodging of a complaint against an individual accused of having committed a crime under the code. He was inclined to think that the lodging of a complaint should not be subject to the agreement of a State, regardless of the link between the crime committed or its alleged perpetrator and that State. The principle which should apply was that of universality. The Special Rapporteur had therefore been perfectly right to withdraw item 1 (*b*) (Necessity or non-necessity of the agreement of other States) of the list of points submitted for consideration in the questionnaire-report (*ibid.*, para. 79).

53. With regard to the submission of cases to the court, he wished to adopt a maximalist position. In view of the specific nature of crimes against the peace and security of mankind, all States having an interest in the maintenance of peace and security, in other words all States Members of the United Nations, should be able to submit cases to the court. Mr. Solari Tudela had even proposed that that right be extended to non-governmental organizations. In that connection, it should be recalled that, in considering State responsibility, the Commission had agreed that, in the event of an international crime, all States other than the author State were deemed to be injured. Would it be going too far also to agree that, in the event of a crime against the peace and security of mankind, all States could legitimately consider that they were entitled to defend the interests of the international community and thus to institute a kind of *actio popularis*?

54. He therefore supported the proposed version A (*ibid.*, para. 88). Versions B and C were based on the assumption that the statute of the international criminal court would be dissociated from the code and that States could become parties to one without being parties to the other. That assumption was, however, totally incompatible with the Commission's mandate.

55. It was essential to establish strict and precise rules for the submission of cases to the court, for failure to comply with those rules would invalidate the procedure. It was important in that regard to impose a system of rigorous formalism in order to guarantee respect for the rights of the defence.

56. The application of procedural rules meant that there would have to be a permanent prosecution body composed of experienced jurists selected according to the same criteria as judges and enjoying the same status. The main task of that body would be to receive complaints, carry out all procedural actions preparatory to the criminal proceedings and draw up

[11] A/44/195, annex.

the indictment to be expanded on during the trial hearing. Pre-trial examination should take place exclusively in public in accordance with the adversary system. He could not therefore agree with the idea of appointing examining magistrates, as was the practice in the inquisitorial system.

57. The Special Rapporteur had thought it necessary to prepare special provisions on the authority of *res judicata*, but article 7 of the draft code as provisionally adopted by the Commission on first reading,[12] which was included in the general principles and dealt with the *non bis in idem* rule, would be amply sufficient to deal with that question, unless of course it was assumed that the statute would be independent of the code, something which was unacceptable.

58. Lastly, on the question of penalties, he, like other members of the Commission, considered that it was necessary to abide strictly by the *nulla poena sine lege* rule. It was inconceivable that, *de lege ferenda*, the Commission should draw up a list of crimes not accompanied by penalties, leaving it to the judge to apply the penalty he deemed appropriate in each case. The problem was to decide whether to formulate a general provision valid for all crimes against the peace and security of mankind without distinction or to determine what the applicable penalty was in each particular case. Since the crimes under the code were all equally serious, the simplest thing would obviously be to draw up a list of penalties and establish a minimum and a maximum for penalties other than life imprisonment and, possibly, the death penalty.

59. Mr. AL-BAHARNA said that he welcomed the questionnaire-report on the statute of an international criminal court in part III of the eighth report (A/CN.4/430 and Add.1), for, without an international criminal trial mechanism, a code of crimes against the peace and security of mankind would be meaningless. That preliminary report was, moreover, wholly in keeping with article 4 of the draft code, on the obligation to try or extradite, provisionally adopted by the Commission on first reading,[13] and responded to the request made by the General Assembly in paragraph 1 of its resolution 44/39 of 4 December 1989.

60. The question of an international criminal jurisdiction was not new to the Commission. Indeed, it had been considered as far back as 1950. The 1953 Committee on International Criminal Jurisdiction had prepared a revised draft statute for an international criminal court[14] and various schemes in that connection had also been considered by the Commission. But a number of factors, in particular the delay in adopting a definition of aggression and the preparation of the draft code, had resulted in the postponement of consideration of the issue. The recent upsurge in international drug trafficking, leading to the adoption in 1988 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, had brought the issue to the fore.

61. He would first make a few general observations before commenting on the proposals put forward by the Special Rapporteur.

62. In the first place, he had no doubt as to the desirability of establishing an international criminal court. Such a court would be an improvement on the current system, which involved the obligation to prosecute or extradite. In addition, an international criminal court would perhaps prove to be more objective and impartial than a national court and might also help to promote a uniform and consistent interpretation of the law. But was it feasible at the present stage of international law? Some States had expressed reservations in that connection on the ground that the establishment of an international criminal court would give rise to serious difficulties. It was said that a consensus would be required on many complex issues such as the means of obtaining evidence, the rules of procedure to be applied, the question as to who would conduct the investigation and prosecution and the rules governing sentences and the execution of sentences. Those were undoubtedly practical problems, but they were not insurmountable. The Commission would have to undertake a critical examination of all the issues involved and formulate rules and procedures that were viable and realistic.

63. Secondly, on the question whether the jurisdiction of the court should be limited to the crimes covered by the code or to certain categories only, he had an open mind. While it might be more expedient, in the existing circumstances, to restrict the jurisdiction of the court to well-recognized international crimes, he doubted the wisdom of such a measure. He preferred a flexible procedure, enabling the court to try an increasing number of international crimes, to a "minimalist" or "maximalist" approach. In that connection, he noted that the consent of States had formed the basis of the jurisdiction of the International Court of Justice and, in his view, the Commission should adopt that principle in the present case. Otherwise, it might construct an unduly idealistic system.

64. Thirdly, with regard to the important issue of the structure and organization of the proposed court, once again he had an open mind and would urge the Commission also to have an open mind. On an earlier occasion, the Commission had voiced opposition to the idea of using the ICJ to try international crimes even though it was possible to do so by amending Article 34 of the Court's Statute, but that decision need not stand in the Commission's way. The matter must be examined afresh. As the Commission had been requested by the General Assembly, in paragraph 1 of resolution 44/39, to address the question of establishing an international criminal court or "other international criminal trial mechanism", the Commission should also study the Charters of the Nürnberg and Tokyo Tribunals to see whether they offered any guidance in that regard. Similarly, it should study the constitution and procedural law of the International Tribunal for the Law of the Sea.

65. Fourthly, the question of the relationship between an international criminal court, or other international machinery, and national courts involved both policy

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

[13] *Ibid.*, p. 67.

[14] See 2150th meeting, footnote 8.

and technical considerations. At the present time, the crimes of genocide, hijacking and international drug trafficking fell within the purview of national courts. It might be that for policy reasons some States would prefer that system. Assuming, however, that they were willing to accept an international mechanism, in addition to national courts, under what conditions would each jurisdiction be exercised and what would be the relationship between them? Would it be practicable to constitute national courts as courts of first instance, with the international court or machinery sitting as an appeal body? All those and other issues required close examination.

66. Lastly, the question of the proposed court having competence to try States, in addition to individuals, posed special difficulties. The mere fact that a State was a legal person raised theoretical problems. For instance, would the defence pleas available to individuals apply to States? Would the investigatory procedures applicable to individuals apply to States? And could a State be punished in the same way as an individual?

67. In conclusion, he supported in principle the idea of establishing an international criminal court, or an appropriate international mechanism, for the purpose of trying international crimes. If that idea was to take form, however, the Commission must proceed in an extremely statesmanlike manner and produce a plan that would be acceptable to the largest number of States.

68. Turning to the various points raised in the questionnaire-report, he said that he had a flexible attitude with regard to the competence of the court. The questions to be determined were whether the jurisdiction of the court should be limited to the most serious crimes covered in the code, whether it should apply to all the crimes defined in the code and whether it should apply not only to the crimes defined in the code, but also to other international crimes covered by other international instruments. In his view, it would be more logical to adopt the second of those options. Accordingly, he favoured version A submitted by the Special Rapporteur (*ibid.*, para. 80), although he had some reservations about the expression "natural persons", since there was some cogency in the argument that the jurisdiction of the court could properly be extended to "legal entities", some of which should not be exempt from culpability in the case of certain crimes. With regard to the necessity or non-necessity of the agreement of other States, his preference was for version B (*ibid.*, para. 84) and he fully agreed with the Special Rapporteur that version A, which was based on article 27 of the 1953 draft statute, was quite inappropriate.

69. As to the procedure for appointing judges, he preferred version A (*ibid.*, para. 86), for crimes against the peace and security of mankind were of concern to the international community as a whole and not only to States parties to the statute of the proposed court. He had an open mind with regard to the suggestion that the judges be elected not only by the General Assembly, but also by the Security Council, as in the case of Judges of the ICJ.

70. With regard to the submission of cases to the court, like other members he did not agree with versions A and C (*ibid.*, para. 88), as it would be contrary to the rules of general international law to bring a case against a State that was not a party to the statute of the court. Version B was more acceptable, but, as some members had suggested, it should also provide that parties to the code should automatically become parties to the statute of the court.

71. He had no hesitation in accepting version B on the functions of the prosecuting attorney (*ibid.*, para. 90). The functions of the prosecuting attorney, which called for a degree of specialization and technical expertise, were too important for appointment to that office to be left in the hands of the plaintiff State on a case-by-case basis.

72. The text proposed by the Special Rapporteur on pre-trial examination (*ibid.*, para. 92) was, in his own view, an improvement on article 33 of the 1953 draft statute. It therefore did not seem to give rise to any problem at the present stage, although it provided that the number of judges sitting in the committing chamber would be determined by the statute of the court.

73. The Special Rapporteur seemed to favour version B on the authority of *res judicata* by a court of a State (*ibid.*, para. 93), although it would apparently amount to review by, or appeal to, the international criminal court. That text would be acceptable only if the statute of the court included an express provision to that effect. Otherwise, version A, which lay down the *non bis in idem* rule as set forth in article 7 of the draft code,[15] should be retained.

74. He supported the text proposed by the Special Rapporteur on the authority of *res judicata* by the court (*ibid.*, para. 96), but, to enhance the authority of the court, he would prefer the word "may" to be replaced by "shall". He shared the view of other members that a national court should refrain from hearing a case within its jurisdiction if it had been informed that the case had already been brought before the international criminal court. That would avoid a conflict of jurisdiction between the international court and national courts.

75. He preferred version B on the withdrawal of complaints (*ibid.*, para. 98), for, as the Special Rapporteur rightly noted (*ibid.*, para. 100), the crimes in question were of concern to the international community as a whole.

76. In his view, none of the three texts submitted on penalties (*ibid.*, para. 101) was satisfactory. As he had already stated, provision should be made for penalties for each of the crimes covered, failing which the international criminal court could not function or, indeed, exist. Like article 32 of the 1953 draft statute, the proposed texts conferred a general discretion on the court to determine such penalty as it "deems fair". That was not acceptable in a code of crimes against the peace and security of mankind, which called for a definition of penalties. Fines and confiscation of

[15] See footnote 12 above.

property would be the most appropriate penalties for legal entities, should the code be applied to them.

77. With regard to financial provisions, the international criminal court could not, in his view, function properly, independently and continuously as a judicial body if it had to be financed through a fund established by States parties to the statute, as provided for in version B (*ibid.*, para. 106). He therefore supported version A and also considered that the international criminal court, like the ICJ, should be a judicial organ of the United Nations.

78. Many details remained to be settled as to, for instance, the rules of evidence, examination of witnesses, execution of judgments and pre-trial matters. There were also questions concerning police and prisons. Would there be an international police force and international prisons? To whose custody would the accused be committed pending trial? All those questions called for detailed consideration in due course.

79. For the time being, the Commission was required, under paragraph 1 of General Assembly resolution 44/39, to submit a legal opinion to the General Assembly at its next session, not to present a draft statute for an international criminal tribunal, although it might be asked to do so at some time in the future.

80. Mr. KOROMA said that consideration of the question of the establishment of an international criminal court was consistent with the provisional adoption by the Commission of article 4 of the draft code,[16] on the obligation to try or extradite, which was now a general principle of international law, and in keeping with the wishes of the General Assembly, as expressed, in particular, in paragraph 1 of its resolution 44/39 of 4 December 1989. The question had given rise to lengthy discussions which had been both interesting and learned. The Commission and the General Assembly had contributed to it on various occasions. There was every reason to believe that the problems considered, such as State sovereignty and possible conflicts of jurisdiction between the international criminal court and national courts, were not insurmountable.

81. The international criminal court would assist the United Nations in maintaining international peace and security and in encouraging respect for human rights and fundamental freedoms for all, without distinction as to race, colour or creed. It would ensure the implementation of the future code of crimes against the peace and security of mankind and its establishment, together with the adoption of the code, would obviate the criticism of lack of legal force in criminal law which had been levelled in the past against tribunals set up to try crimes on an *ex post facto* basis. The code would thus strengthen the rule of law in international relations, and the international criminal court, if it ever came to be established, would act both as a deterrent and as a safeguard for States whose institutions were currently being threatened.

82. Referring to the question of the competence of the court, he said that, since the Commission had decided that the code should cover only the most serious crimes against the peace and security of mankind and since States would be unwilling to yield their full sovereignty in respect of all offences, the court's jurisdiction should be limited to those crimes on which there was international consensus. Other offences defined in international instruments already in existence or yet to be adopted could be added at a later stage.

83. As to the necessity or non-necessity of the agreement of other States, he did not consider either of the texts submitted in part III of the eighth report (A/CN.4/430 and Add.1, para. 84) comprehensive enough, since both proposals would imply the consent of Governments guilty of having organized or tolerated criminal acts. The international criminal court should have universal jurisdiction; in other words, it should be empowered to try crimes wherever they had been committed. In that connection, he asked whether the words "competence" and "jurisdiction" were being used interchangeably.

84. Concerning the appointment of judges, he was in favour of election by the General Assembly by an absolute majority. The Commission should borrow from the Statute of the International Court of Justice by stipulating that candidates should be persons of recognized competence in international law and that the main legal systems should be represented. The number of judges would also have to be determined.

85. With regard to the submission of cases to the court, it would be advisable, in view of the gravity of the crimes under consideration, to provide that cases might be brought before the court by any State Member of the United Nations subject to the agreement of the United Nations organ specified in the statute of the court. However, as Mr. Solari Tudela had suggested, international organizations, non-governmental organizations or even private individuals should be allowed to bring cases where States were not prepared to prosecute their own nationals. Some non-governmental organizations had proved their worth in the field of international humanitarian law and could be regarded as impartial institutions. The proposal should certainly be borne in mind.

86. Concerning the functions of the prosecuting attorney, he would be in favour of setting up a college and a permanent secretariat which would assist the prosecuting attorney in charge of a case and deal with its institutional aspects. Such a system would preserve what was known as "institutional memory".

87. With regard to pre-trial examination, he said that the committing chamber proposed by the Special Rapporteur offered an acceptable solution. However, the types of verdict which such a chamber could return should be specified; could it, for example, decide to dismiss the charge? The nature of the action that could be taken following the verdict should also be specified; for example, would there be a right of appeal? In that connection, he said that a hierarchy of appeal procedures within the court could be visualized thanks to the committing-chamber process.

88. Penalties should be stipulated for every crime. No one was in favour of cruel or inhumane forms of punishment, but the Commission had to try to find a

[16] See footnote 13 above.

rational basis for agreement on that point. The impression should be avoided that the court had the interests of the accused more at heart than those of the victim. Furthermore, penalties varied very considerably between different courts and even between the States of a federation. Penalties would therefore have to be rationalized, it being borne in mind that the crimes covered by the code were extremely serious ones and that, therefore, excessive indulgence should not be shown. As a matter of principle, however, he was against the death penalty.

89. From another point of view, he wished to propose that, in its report to the General Assembly, the Commission should highlight the general standards of fairness embodied in the Universal Declaration of Human Rights, such as the rights of the defence, the authority of *res judicata*, etc.

90. In response to the General Assembly's request in resolution 44/39 concerning the possible establishment of an international criminal court with jurisdiction over persons engaged in illicit trafficking in narcotic drugs, the Commission should, as Mr. Arangio-Ruiz (2156th meeting) had suggested, forward to the General Assembly the questionnaire in part III of the Special Rapporteur's eighth report, together with the comments made during the discussion. Such an approach would offer a prompt response to the urgent need expressed by the international community.

91. Referring to the new draft articles submitted by the Special Rapporteur (see paras. 23-26 above), he said that the revised text on complicity seemed to be greatly improved in that it drew a clearer distinction between the main perpetrator of the crime and his accomplices, both before and after the event. The revised texts on conspiracy and attempt were also to be welcomed. The revised text on drug trafficking, however, referred only to acts. In his opinion, mention should also be made of criminal intent.

92. Mr. BARSEGOV said that the establishment of an international criminal court, which had been considered necessary for many years, had now become possible. That was the first point the Commission should make in its report to the General Assembly. There were still many obstacles to be overcome, but a change was taking place and it was in keeping with the spirit prevailing in the Soviet Union. As the representative of his country's legal system, he was prepared to go as far as justice and international law would require.

93. The questionnaire form chosen by the Special Rapporteur for part III of his eighth report (A/CN.4/430 and Add.1) was a happy solution and enabled the Commission to comply with the General Assembly's request pending a reply concerning the best possible solutions. The first problem raised was that of the limits of jurisdiction of the proposed international court and it held the key to all the others. It was closely related to the question of the basis for the court's jurisdiction. The possible solutions lay somewhere between two extremes. The first was to consider that a State retained the sovereign right to try its nationals accused of crimes committed in its territory, but that it might, at its discretion, recognize the competence of the international court. The other was that the jurisdiction of the court would be recognized outside existing political structures and it would try all cases concerning all crimes under the code without such jurisdiction having to be attributed by States.

94. At the present stage in the development of international law, he considered it inappropriate to contrast the idea of an international court with the concept of the sovereign State which had taken shape in the nineteenth century and had been reinforced during the cold war. To make the court a supranational body with jurisdiction independent of the will of the international community would not be very realistic. After all, the rules of international criminal law emanated from States, the establishment of the court was decided upon by States and its jurisdiction was recognized by States, which thereby considerably limited their sovereignty. There were as yet no supranational rules and no supranational legislative organ. The legal basis for the establishment of the court had to be its statute. A State which became party to that statute recognized *ipso facto* the jurisdiction of the international court and, by so doing, agreed to limit its sovereignty.

95. Since what were being discussed were extremely serious international crimes, of which entire peoples could be the victims, the temptation was great to make the court competent to try all international crimes, even including future crimes. However, at the present stage in the development of international law, it was essential to provide a clear definition of the scope and basis of the court's jurisdiction. Only thus would it be possible to overcome the problems that had been encountered during the consideration of that question at a time when State sovereignty had been the main concern. At the present time, when States were still cautious in their approach to the question, the decisive factor was the degree of precision with which the jurisdiction of the court could be defined. If the court was to be able to function properly, it would also be essential to formulate the substantive law. Version A proposed by the Special Rapporteur (*ibid.*, para. 80) would best meet those two concerns: the States parties to the statute would give their consent to the court's having jurisdiction in all cases involving the crimes covered by the code.

96. That did not mean, however, that other States not parties to the statute of the court would not be able to bring before it cases involving other categories of crimes covered by international conventions. General Assembly resolution 260 B (III) of 9 December 1948 provided for such a possibility, which the adoption of the code did not rule out. It might be possible to go even further and provide that the jurisdiction of the court as laid down in its statute, as well as the list of crimes included in the code, could be expanded by adding crimes referred to in international conventions. A question which would arise in both cases was what States would be considered to have recognized the court's jurisdiction with regard to each category of crimes.

97. Of course, if the court became an organ of the United Nations and if the Charter was amended accord-

ingly, its jurisdiction could be recognized by all Member States. But if the court was set up as an autonomous body, it would have jurisdiction in respect of the States parties to its statute, for the crimes referred to in the code, and it might also have jurisdiction in respect of other crimes on the basis of international conventions. It could also be envisaged that cases might be brought before the court on an *ad hoc* basis, even if the State concerned was not a party either to its statute or to the relevant international conventions.

98. In each of those cases, the procedures for the attribution of jurisdiction would be different. But the basis for the court would continue to be its statute, in which definitive recognition of its jurisdiction in respect of the crimes referred to in the code would be enshrined. Consideration might be given to the possibility that the States parties to the statute could choose which crimes under the code were to be subject to the jurisdiction of the court, but that might call in question the very concept of the establishment of an international court or even invalidate it altogether.

99. With regard to competence, the Commission had considered the relationship between the code and the statute of the court. From that viewpoint, the list of punishable criminal acts was of the utmost importance. The code had to cover all crimes which were recognized as such by the international community and whose constituent elements were established. However, the question involved another aspect. As Mr. Roucounas (2156th meeting) had said, the code and the statute were two different things and it would not be possible to speak of the universality of international criminal law unless the code had been widely accepted. In his own view, a further aspect was that of the legal basis for the rules embodied in the code. Those rules could be contained in non-universal conventions but still be universal on account of their customary nature. Thus the 1948 Convention on the Prevention and Punishment of the Crime of Genocide had been ratified by only 90 States, but genocide had been recognized as an international crime even before the Convention's adoption and genocide trials had been held at Nürnberg and before national courts. The charge of genocide therefore had a broader basis than that offered by the Convention. States which were not parties to conventions of that kind could not claim that the provisions of the code relating to the crimes covered by those conventions were not binding on them. It was thus open to discussion whether the words "under international law" in article 1 of the draft code as provisionally adopted by the Commission on first reading[17] should have been placed in square brackets.

100. With regard to the question raised by Mr. Graefrath (2154th meeting) concerning the delimitation of jurisdiction as between national courts and the future international criminal court, national courts and an international criminal court were not necessarily mutually exclusive. The international court would not be able to try all the crimes committed everywhere in the world. However, the coexistence of the two systems presupposed that the line of demarcation between them had to be clearly marked out and was in keeping with the interests of justice. The international court might thus act as a court of second instance if there were grounds to believe that a judgment of a national court violated international rules or was founded on an erroneous basis (for example, if participation in an act of genocide had been tried as an ordinary crime) or if new facts had come to light. That was not mere speculation, for experience showed that national courts were reluctant to convict nationals of their State who were accused of having committed the crime of genocide in the territory and with the apparatus of that State. If the national courts refused to hear a case even though there were grounds for instituting proceedings, the international court could even try the case as a court of first instance. No human right would be violated as a result. On the contrary, the international nature of the court offered the best guarantee of objectivity and of protection of the rights of both the accused and the victim. He was thinking of a system which would combine the two jurisdictions without, however, ruling out the possibility that, in some cases, the international court would be the only court; that possibility was provided for by some national systems where certain types of cases were tried directly by higher courts and no one suggested that human rights were being violated.

101. The question of the authority of *res judicata* by a national court was closely linked to the principle *non bis in idem*. The Commission's decision on that question should be consistent with the interests of justice. In listening to the discussion, he had had the impression that the Commission had forgotten the decision taken in that regard with the assistance of the late Paul Reuter, who had been instrumental in formulating article 7 of the draft code[18] in the section on general principles. He was thinking of the case where an individual had committed an international crime, such as the crime of genocide, and had been tried by a national court as for an ordinary crime (murder or hooliganism). In such a case, the judgment of the national court would be contrary to international law. It was clear that such judgments should be regarded as violating the rules of the code, which would be compulsory for national courts and for the international court.

102. That was the hypothesis which the Commission had had in mind when drafting paragraph 3 of article 7. The international criminal court, if it came into being, would be able to try the individual for the crime he had actually committed without breaching the *non bis in idem* rule; the reverse, however, would not apply, for a national court could not review the decisions of the international court, which was more competent to characterize crimes under international law. For those reasons, he would prefer version B submitted by the Special Rapporteur on the matter (A/CN.4/430 and Add.1, para. 93), provided its wording was brought into line with that of article 7, paragraph 3.

103. The solution to other types of problems was linked to political rather than legal considerations: the

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

[18] See footnote 12 above.

procedure for the appointment of judges and the identification of the entity responsible for conducting the prosecution would depend on the answer to the question whether the court would be an organ of the United Nations and that question was linked to that of the revision of the Charter of the United Nations, an issue which had so far been regarded as very problematical. If the court was a United Nations organ, all Member States of the United Nations would be parties to the statute and the judges would be appointed in the same way as those of the International Court of Justice. Since there could be no certainty that such a solution would be adopted, it would be advisable to consider an alternative whereby the judges would be elected only by the States parties to the statute of the court.

104. The problem of submission of cases to the court was not insurmountable. There again, the solution depended on the court's position *vis-à-vis* the United Nations. If it was an organ of the United Nations, versions A and C (*ibid.*, para. 88) would be the most appropriate. If not, several alternatives, all precluding United Nations participation, would be possible. One would be, for example, to set up a prosecuting attorney's office in the form of a college of judges representing all legal systems, which might be attached permanently to the court and which would also conduct investigations. The solution that would be most in keeping with the nature of crimes under international law was obviously to provide that any State party to the statute of the court could institute proceedings. Account also had to be taken of the danger of political abuse, but such abuse would be neutralized by the court itself as an international body which would be responsible in the final analysis for deciding whether or not to try a particular case.

105. The question of penalties was much more complex than it seemed at first sight. The code should, of course, specify the penalties attaching to each crime, as did national codes. But which scale was to be chosen? How could the various approaches taken in 160-odd penal codes be brought into line with one another? And who would choose between them—the Commission, the Sixth Committee of the General Assembly or some other body? Moreover, most of the international crimes referred to in the code were not covered by national legislations. Establishing a scale of penalties was desirable, of course, but it was hard to see how it could be done: should it range from the minimum provided for in one penal code to the maximum provided for in another? All those questions were still outstanding.

106. There were also many other problems still to be solved, but a solution would be possible only when agreement had been reached on the fundamental issues relating to the establishment of an international criminal court.

The meeting rose at 1.10 p.m.

2158th MEETING

Wednesday, 16 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.

Jurisdictional immunities of States and their property (A/CN.4/415,[1] A/CN.4/422 and Add.1,[2] A/CN.4/431,[3] A/CN.4/L.443, sect. E)

[Agenda item 4]

THIRD REPORT OF THE SPECIAL RAPPORTEUR

CONSIDERATION OF THE DRAFT ARTICLES ON SECOND READING

1. The CHAIRMAN invited the Special Rapporteur to introduce his third report on the topic (A/CN.4/431), in which he again reviewed the whole set of draft articles on jurisdictional immunities of States and their property provisionally adopted by the Commission on first reading at its thirty-eighth session, in 1986,[4] which read as follows:

PART I

INTRODUCTION

Article 1. Scope of the present articles

The present articles apply to the immunity of one State and its property from the jurisdiction of the courts of another State.

Article 2. Use of terms

1. For the purposes of the present articles:

(*a*) "court" means any organ of a State, however named, entitled to exercise judicial functions;

(*b*) "commercial contract" means:

(i) any commercial contract or transaction for the sale or purchase of goods or the supply of services;

(ii) any contract for a loan or other transaction of a financial nature, including any obligation of guarantee in respect of any such loan or of indemnity in respect of any such transaction;

(iii) any other contract or transaction, whether of a commercial, industrial, trading or professional nature, but not including a contract of employment of persons.

2. The provisions of paragraph 1 regarding the use of terms in the present articles are without prejudice to the use of those terms or to the meanings which may be given to them in other international instruments or in the internal law of any State.

[1] Reproduced in *Yearbook ... 1988*, vol. II (Part One).

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

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

[4] *Yearbook ... 1986*, vol. II (Part Two), pp. 8 *et seq.*