Document:-

A/CN.4/SR.2210

Summary record of the 2210th 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:-

1991, vol. I

had indeed been tried in Germany and Japan, but by courts of another nationality. It could, of course, be argued, as certain writers had submitted, that the courts in question had been set up by the victors to exercise the jurisdiction of the courts of the vanquished. But the precedent cited by the Special Rapporteur in that connection was neither satisfactory nor convincing, particularly since it was not certain that the jurisdiction of the Nürnberg and Tokyo Tribunals had been limited to crimes committed in Germany and Japan: they might have had to try crimes committed outside the borders of those countries. The Special Rapporteur had demonstrated very clearly the drawback to his proposed solution, which was based on the difficult, if not impossible, reconciliation of the principle of territoriality, the system of active and passive personality and the system of real protection—so much so that one might even wonder whether he really believed in it. At any rate, his analysis justified the conclusion that the solution was impracticable and that, even if it were adopted, other problems would arise that would in turn have to be solved. Paragraph 2 of the draft provision submitted to the Commission was no more than a starting point or outline. In other words, the Special Rapporteur and the Commission still had much to do, unless they managed to win the support of States for the principle of the exclusive jurisdiction of the international criminal court.

36. Fourthly and lastly, with regard to criminal proceedings and in particular to the respective roles of the Security Council and the international criminal court in the case of the crime of aggression, he recalled that the problem had already arisen in connection with draft article 12 and had yet to be solved. The clause in that article relating to relations between the Security Council and national courts—namely to the question whether it was for the Security Council or for national tribunals to determine that a crime of aggression existed—had thus far remained in square brackets. In his view, the international criminal court and the Security Council were two organs that operated on different levels. The Security Council was an organ vested under the Charter of the United Nations with special political powers and prerogatives which could not be usurped by any other organ. The court, for its part, would be a judicial organ on which the Code conferred judicial powers. The proceedings of the international court should on no account depend on other organs, particularly where some of their members had a right of veto under their statute. In that connection, he endorsed what Mr. Pellet had said when he had recalled that the problem had arisen at ICJ in the case between Nicaragua and the United States of America.[8] It was that independence of the law which would ensure that criminals received due punishment.

The meeting rose at 11.10 a.m.

[8] See footnote 6 above.

2210th MEETING

Friday, 17 May 1991, at 10.05 a.m.

Chairman: Mr. Abdul G. KOROMA

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Illueca, Mr. Jacovides, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Draft Code of Crimes against the Peace and Security of Mankind[1] (*continued*) (A/CN.4/435 and Add.1[2] A/CN.4/L.456, sect. B, A/CN.4/L.459 and Corr.1 and Add.1, ILC(XLIII)/Conf.Room Doc.3)

[Agenda item 4]

NINTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE Z *and*

JURISDICTION OF AN INTERNATIONAL CRIMINAL COURT[3] (*continued*)

1. Mr. JACOVIDES said that the topic under consideration had acquired added importance in the light of recent developments on the world scene. He was firmly convinced that a code of crimes against the peace and security of mankind had a rightful place in the corpus of international law. As a complete legal instrument encompassing the three essential elements of crimes, penalties and jurisdiction, it could and should serve the important purpose of deterrence and punishment. It was gratifying that recent events had moved some of those who had viewed the draft Code with scepticism to join in the support for the proposed establishment of an international criminal jurisdiction. The overall impact of the Gulf crisis and its aftermath, by highlighting the need to observe the relevant rules of international law and to implement United Nations resolutions, was conducive to promoting the international legal order that his country had advocated long before the crisis had begun.

2. As to part one of the Special Rapporteur's report, concerning the issue of penalties, it was clear that the principle of *nulla poena sine lege* called for a relevant provision in the Code. Since only the most serious

[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... 1991*, vol. II (Part One).

[3] For texts of draft article Z and of possible draft provisions on jurisdiction of the court and criminal proceedings, see 2207th meeting, para. 3.

crimes should be included in the Code, it followed that the penalties should be of equivalent severity. Again, there existed in international law a diversity of concepts and philosophies, and hence a uniform system of punishment presented difficulties, particularly in the matter of the death penalty, on which there was no generally acceptable rule; even where the death penalty did exist, very often it was not carried out in practice. The penalties should be included in the Code itself, so as to ensure uniformity of sentencing, in preference to the alternative of incorporating the provisions of the Code directly into domestic law. On the other hand, the text proposed by the Special Rapporteur in draft article Z, prescribing life imprisonment and, in extenuating circumstances, imprisonment for a term of 10 to 20 years, required further reflection and was an issue on which the views of the General Assembly and of States should be taken into account before the Commission reached any final conclusion. The same could be said of the third paragraph, on partial or total confiscation of stolen or misappropriated property even though, personally, he agreed with the principle of confiscation. In addition to the possibilities mentioned by the Special Rapporteur for making use of confiscated property, namely, assigning it to ICRC, UNICEF or an international organization fighting illicit drug traffic, other possibilities might be envisaged, including a fund to finance United Nations peace-keeping operations or even a fund of the Secretary-General to finance recourse to ICJ by States which lacked the necessary financial means.

3. As to the establishment of an international criminal jurisdiction, it was frustrating that the General Assembly had refrained from choosing between resort to a system of universal jurisdiction, the establishment of an international criminal court or the establishment of some other trial mechanism. It was likewise unfortunate, although not unusual, that the Assembly had not taken a clear position on the possible options and main trends that had emerged from the Commission's deliberations, as set out in its latest report (A/45/10),[4] with regard to specific and significant areas related to the creation of an international criminal court. Often, clear guidance was not forthcoming from the General Assembly on key issues of concern to the Commission. There was no alternative but to seek such guidance again and for all members of the Commission who participated in the work of the General Assembly as representatives of Member States to endeavour to assist the Commission by focusing on such issues. The position taken by his own country, Cyprus, during the debate in the Sixth Committee,[5] had been one of wholehearted support for the Commission's broad agreement, in principle, on the desirability of establishing an international criminal court connected with the United Nations system, because Cyprus was convinced that such a court would be a progressive step in further developing international law and, if widely supported by the international community, would strengthen the rule of law internationally. It was to be hoped that at the Assembly's next session, delegations as a whole would address the issue more positively so as to achieve more concrete and constructive results.

4. He agreed with the Special Rapporteur on the issue of jurisdiction: in international law there was no general rule limiting criminal jurisdiction to the law of the place where the crime was committed. But the principle of the territoriality of criminal law was the principle generally applied, something that was confirmed by the Nürnberg[6] and Tokyo Charters.[7] At the same time, as confirmed by PCIJ in the *Lotus* case,[8] there was no rule of international law preventing a State from exercising jurisdiction over foreigners in respect of offences committed against that State. As the Court had put it, territoriality was not an absolute principle of international law and by no means coincided with territorial sovereignty. Thus, the Special Rapporteur was correct in combining, in paragraphs 1 and 2 of his proposed text, the territoriality system with the active and passive personality system and the so-called real-protection system. The benefit of that approach outweighed the possible drawbacks of, in some cases, the trial being conducted by the assigning State that might have ordered the criminal act to be perpetrated or, in other cases, of jeopardizing impartiality and objectivity by conferring jurisdiction upon the victim State.

5. Paragraph 3 was also based on sound logic and followed the general practice in authorizing the court to decide whether it had jurisdiction in a given case. Since it was the highest international criminal court, there was no possibility of appealing such a decision. The same could be said for paragraph 4 in a dispute between two or more States concerning the jurisdiction of one of the States concerned, and it would also serve the standardization of judicial practice in the event of a conflict of laws and jurisdiction and ensure observance of the *non bis in idem* principle in the event of proceedings in respect of the same crime in the courts of two or more States.

6. Paragraph 5 was particularly welcome in that it afforded the international criminal court the possibility of interpreting authoritatively the provisions of international criminal law, thus enabling it to play an important role in unifying the law and in clarifying the content under international law of a number of concepts and principles, including conspiracy, complicity and attempt, *nullum crimen sine lege*, *nulla poena sine lege* and *non bis in idem*.

7. The Special Rapporteur had rightly proposed a text whereby criminal proceedings in respect of crimes against the peace and security of mankind were to be instituted by States, but further examination was needed of the proviso in paragraph 2 thereof that:

> ... in the case of the crimes of aggression or the threat of aggression, criminal proceedings shall be subject to prior determination by the Security Council of the existence of such crimes.

[4] Reproduced in *Yearbook ... 1990*, vol. II (Part Two).

[5] *Official Records of the General Assembly, Forty-fifth Session, Sixth Committee*, 36th meeting, para. 85.

[6] See 2207th meeting, footnote 5.

[7] Charter of the International Military Tribunal for the trial of the major war criminals in the Far East, Tokyo, 19 January 1946. *Documents on American Foreign Relations* (Princeton University Press, vol. VIII, 1948), pp. 354 *et seq.*

[8] *P.C.I.J., Series A, No. 10*, judgment No. 9, 7 September 1927, pp. 18-19.

A number of delegations in the Sixth Committee had proposed that the Code should include, in addition to draft article 12 (Aggression)[9] and article 13 (Threat of aggression),[10] another provision to cover the case of deliberate non-compliance with binding decisions of the Security Council aimed at ending the aggression and punishing those responsible for non-compliance. Such a proposal for a third phase after the threat and the act of aggression was indeed a logical step in filling a gap, as had been illustrated more than once in the recent past.

8. The question arose as to the role of the Security Council in instituting proceedings before the international criminal court. As stated in the commentary on the possible draft provision, it was hard to envisage sole jurisdiction for the Security Council in instituting criminal proceedings, for the Council's functions were primarily political, not judicial. On the other hand, under Article 39 of the Charter of the United Nations, the Security Council had the power to determine the existence of any threat to the peace, breach of the peace or act of aggression, and had done so, most recently in the Gulf crisis. It could only be a matter of speculation whether, in the future, developments would warrant a repetition of the rare unanimity displayed by the Security Council in that instance or whether that was an isolated example dictated by the particular circumstances. A number of other instances could be cited in the recent and not-so-recent past where the Security Council had proved unable to make a determination of a threat or act of aggression and where it could be validly argued that such a threat or act had occurred and had continued because the right of veto had been exercised on political grounds, regardless of the legal merits of the case. The question, therefore, was whether it would be appropriate to make the instituting of proceedings before the international criminal court subject to such extra-legal considerations. In theory, the answer should clearly be no. In practical terms, in the light of political realities and depending on the future course of events and the relationships between the permanent members of the Security Council, the answer was not so clear. If the price to be paid for setting up an international criminal court that effectively administered a code of crimes against the peace and security of mankind was to make the instituting of proceedings before the court subject to a veto by any of the permanent members of the Security Council in a case of aggression, that was something that had to be weighed very carefully, and the views of the General Assembly should be taken into account before the Commission took a decision.

9. Mr. BEESLEY said that he had consistently supported the Commission's work on the Code and the creation of an international criminal court, but had also put forward a number of suggestions as to the possible development of an ad hoc tribunal system pending the establishment of such a court. He supported the idea of a code and of a tribunal system that would ensure effective application and implementation in order to provide a measure of deterrence as well as a means of punishment and rehabilitation, as in most systems of domestic law. A system of criminal procedures and jurisdiction at the international level was needed for the same reasons as it was needed at national level, namely, reasons of public or legal policy. The main difference between the two systems was that only the most serious crimes fell within the ambit of the proposed Code.

10. He agreed that it was necessary to include penalties in the Code and not in the statute of the court. He did, however, have a number of reservations on certain points, the first being the possible consequences of the elimination of the death penalty. The trend in many, but not all, States, and in the field of international human rights, was towards abolition, but the question arose as to how to reflect the position of those States which still retained the death penalty, if the widest possible acceptance of the Code was to be encouraged. He did not doubt that the vast majority of the Commission favoured its abolition, yet the Commission could take no decision on such an important subject without the Sixth Committee's clear-cut guidance, which was not forthcoming. The question of life imprisonment presented a similar dilemma. States which punished murder, treason or terrorism more severely than the Commission proposed for the most heinous crimes could well challenge such leniency. Once again, the Sixth Committee must be asked to provide the Commission with guidance.

11. In the matter of lesser penalties, he would not object to including a range of penalties, perhaps in square brackets, and a commentary making it clear that it was not that the Commission had not been able to take a decision but rather that it did not consider it its function to reach such conclusions at that stage, given the diversity of opinions, legal systems, moral and legal attitudes, and the paucity of guidance reflected in the topical summary of the debate of the Sixth Committee (A/CN.4/L.456, sect. B). The Commission was dealing seriously and expeditiously with the topic because it had been told that it was one of priority. It was not appropriate for the Sixth Committee to avoid the issues, since its guidance was needed in the decision-making process.

12. He had no objection to lesser penalties, including even community service, which he supported, although the latter must be approached with the greatest caution to avoid creating misunderstanding about the seriousness with which the Commission approached crimes against humanity.

13. It was problematic to see why the question of confiscation of property was so difficult. Surely, the simple solution was to return the property to its rightful owner. Where that was not possible, a system of a hierarchy of prior claims might be worked out; when no one was alive to inherit what had been taken, the beneficiary might be the State of the victim or an international humanitarian agency.

14. On the question of whether it was better to stipulate a penalty for each offence, the easy answer would be to have one single range of penalties. However, the various crimes were sufficiently diverse to warrant establishing separate penalties, if there was enough time available. That issue, too, should be raised with the General Assembly, perhaps in the commentary. He was not persuaded that the best solution was to have one range of

[9] See 2208th meeting, footnote 5.

[10] For text and commentary, see *Yearbook ... 1989*, vol. II (Part Two), pp. 68 and 69.

penalties applicable to all crimes. Aggression, genocide and terrorism were all quite different from one another.

15. With regard to the jurisdiction of the court, he favoured the establishment of a permanent international criminal court as the best course, but he recognized that it was also the most difficult to achieve. The second-best solution would be to continue to develop and maintain, but also improve, the existing system of "universal jurisdiction", which was actually national jurisdiction applying and implementing internationally agreed rules. He had certain reservations about that system, because it was unwieldy, inconsistent in application, and there was real difficulty in harmonizing the variety of national judicial systems. Yet such a system did exist and, before it was eliminated, very careful thought should be given to whether it would be replaced by something better. It might prove necessary to have two systems in parallel, if that was the only way to evolve gradually towards the establishment of an international criminal court, which, in his view, was an idea whose time had come. There must be guarantees of impartiality and uniform application of the Code, and that was not at all easy to achieve in view of the diversity of legal systems, the variety of legal procedures, and the problems inherent even in national legal systems in ensuring uniformity and fairness in applying the law.

16. A third possibility, and one which he had informally raised from time to time as being the most practicable short-term solution, was some form of ad hoc tribunal. The principle of territoriality should not be deemed sacrosanct in all circumstances. A flexible approach which provided fairness and a degree of certainty, and was perceived to do so, was preferable to an all-or-nothing approach. Use might even be made of existing national tribunals strengthened by panels of judges from other jurisdictions, e.g. from the victim State, the State of nationality of the accused or the State in which the crime had allegedly been committed (if that was not the State of prosecution) and, possibly, one or more judges from States with quite different legal systems not directly involved. A solution of that kind might help to reassure all concerned that the proceedings would be impartial.

17. With regard to paragraph 2 of the possible draft provision on criminal proceedings, he had never been convinced of the need to obtain the Security Council's permission in order to institute proceedings against someone accused of the heinous crimes of aggression or threat of aggression. As many members had already pointed out, a finding or the absence thereof by the Security Council would have great weight, but it might not be determinative in all cases on all issues. Even where the Security Council had declined to find that aggression had been committed or threatened, it should not necessarily be impossible to initiate proceedings in an international tribunal. Whereas the Security Council was a political organ with certain important legal functions, the court would be a judicial body, with purely legal functions and powers. Moreover, it was important to avoid any double standard inherent in the Security Council's system of operation.

18. On the question of whether the court should have original, concurrent, appellant or advisory jurisdiction, his own view was that it should be a court of original jurisdiction but should also be empowered to hear appeals from national courts and even to give advisory opinions to States, international organizations, and possibly even national courts. For the same reasons as those advanced by other members, he was opposed to the concept of simple concurrent or overlapping jurisdiction, which might give rise to competing claims and other undesirable consequences. Lastly, he re-emphasized the need to obtain clear-cut directives from the Sixth Committee in connection with the Commission's continuing work on the present topic.

19. Mr. OGISO said that, in making his first statement before the Commission at its thirty-fifth session, in 1983, he had expressed the view that an international criminal court was essential.[11] The reaction of other members at the time had been less than positive, and it therefore gave him special pleasure to find a chapter in the Special Rapporteur's ninth report on the question of the establishment of an international criminal jurisdiction.

20. According to part two of the report, the judicial competence of the international criminal court would be the same with regard to all crimes listed in the Code. Personally, he wondered whether that approach was necessarily the right one. From the standpoint of the court's competence, crimes under the Code should be divided into two broad categories, one covering crimes against peace and crimes against humanity such as those dealt with at the Nürnberg and Tokyo military trials, and the other category covering war crimes and crimes relating to illicit traffic in narcotic drugs, which, in the majority of cases, had been dealt with in the past by national criminal courts. The international criminal court should have exclusive jurisdiction over crimes in the first category, but only review competence in the case of those in the second, over which the courts of the State in which the crime was committed should be given primary jurisdiction. However, if the State in which the crime was committed failed to initiate proceedings, States whose nationals were the victims of the crime should be permitted to institute proceedings before the international criminal court. That would take account of the principles of the territoriality of criminal law, which were also reflected in some provisions of relevant international conventions, such as the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances and the 1949 Geneva Convention Relative to the Treatment of Prisoners of War.

21. Crimes in the first category, however, were new crimes in the sense that the individuals responsible for them were to be punished under international, rather than national, law. Such crimes were not dealt with in national penal laws: they often involved persons who occupied leading positions in their country, and the effects inevitably extended to State-to-State relations. Those crimes were therefore of an inherently international character.

[11] *Yearbook ... 1983*, vol. I, 1760th meeting, paras. 38-54.

22. On the assumption that the competence of the international criminal court should differ depending on the category of crimes concerned, certain minimum requirements would have to be met in order to make the court an effective judicial organ. First, the court's jurisdiction should extend to individuals of all States which accepted the jurisdiction of the court, and all States parties to the Code should, *ipso facto*, be parties to the statute of the court. The concept was similar to the relationship between membership of the United Nations and of ICJ, except that in the present case it would be taken for granted that becoming a party to the Code signified acceptance of the jurisdiction of the court. As to the question whether States not parties to the Code should be able to bring a case before the international criminal court, a procedure similar to the one set out in article 35, paragraph 2, of the Statute of the International Court of Justice might be adopted.

23. The second requirement for enhancing the court's effectiveness was that to enable the prosecution of individuals for crimes against peace or crimes against humanity the States to which they belonged should have accepted the jurisdiction of the court by becoming parties to the Code. In other words, the State's consent to the jurisdiction of the court should also imply that the State to which the individual belonged agreed to its nationals being tried solely in the international criminal court. However, in cases where specific provisions of the relevant international conventions, such as article VI of the Convention on the Prevention and Punishment of the Crime of Genocide or article V of the International Convention on the Suppression and Punishment of the Crime of Apartheid, allowed a State to opt either for the jurisdiction of its national criminal tribunal or for that of an international penal tribunal, States parties to those conventions would act in accordance with those provisions. Hence they were not necessarily obliged to surrender to the jurisdiction of the international criminal court.

24. The court's review competence in respect of judgements by national criminal tribunals relating to crimes in the second of the two categories he had defined should, in his opinion, be of a recommendatory nature and should not have the effect of overriding the national criminal tribunal's final judgement.

25. He endorsed the Special Rapporteur's decision to include a clause on penalties in the draft Code. Quite apart from the principle of *nulla poena sine lege*, on which everyone was agreed, an international criminal court which, in keeping with the views he had just outlined, should have exclusive jurisdiction over crimes against peace and humanity, would need to apply penalties. He also agreed with the proposal to make life imprisonment the maximum penalty, in view of the current trend towards abolition of the death penalty. He would none the less prefer a formulation whereby the international criminal court could choose, on a case-by-case basis, and in the light of all relevant circumstances, a penalty within a particular range. Furthermore, principal perpetrators or persons who played a leading role in committing the crime should, for the purposes of penalties, be distinguished from subordinates acting on orders, especially in the case of crimes against peace and crimes against humanity. Lastly, a provision on penalties in the draft Code would be useful even where the international criminal court performed only a review function. Decisions or sentences rendered by national courts with primary jurisdiction over crimes in the second category, namely, war crimes or crimes relating to illicit traffic in narcotic drugs, and the like, should be subject to review by the international criminal court in accordance with a procedure to be set out in the draft Code. However, due attention should be paid to ensuring that the court's penalty did not take precedence over the final decision of the national tribunal in such a way as to impede the primary jurisdiction of the State in question. The effect to be given to decisions of the international criminal court in the exercise of review competence should therefore be studied very carefully.

26. With regard to the proposed draft provision on the jurisdiction of an international criminal court, he would like to know whether the terms "conferred jurisdiction" and "conferment of jurisdiction", which appeared in paragraphs 1 and 2 respectively, had the same meaning as "conferment of jurisdiction" in article 26, paragraph 3, of the 1953 revised draft statute for an international criminal court. The 1953 provision read:

> Conferment of jurisdiction signifies the right to seize the Court, and the duty to accept its jurisdiction subject to such provisions as the State or States have specified.[12]

It had been included because the intention was to make it clear that:

> ... by conferring jurisdiction upon the court, a State was not bound to bring specific cases before the court. Such a State ... might well choose to bring cases before its own national courts according to the laws determining national criminal jurisdiction ... or before special international tribunals ... the only duty following from the conferment of jurisdiction would be passively to allow persons to be tried.[13]

Accordingly, "conferment of jurisdiction", as opposed to "accept jurisdiction", the form of words used in, for example, article VI of the Genocide Convention, could never mean specific acceptance of the jurisdiction of the international criminal court or acceptance of the exclusive jurisdiction of that court over a specific kind of crime. Rather, it meant that the State concerned retained the right to bring, or not to bring, a particular case before the court even after jurisdiction had been conferred. If the Special Rapporteur was using the terms in question in the sense in which they were employed in the 1953 draft, therefore, paragraphs 1 and 2 of his proposed text might compromise the idea behind the jurisdiction of the international criminal court.

27. For his own part, he was unable to accept the need for the concept of "conferment of jurisdiction" by the State or States in which the crime had allegedly been committed or of which the perpetrator or victim was a national. Crimes such as waging of wars of aggression or crimes against humanity should be brought under the exclusive jurisdiction of the international criminal court, and such jurisdiction should be accepted unconditionally by States that became parties to the Code. Moreover, those States should, by virtue of their acceptance of the Code, become parties to the statute of the international

[12] Official *Records of the General Assembly, Ninth Session, Supplement No. 12* (A/2645), annex.

[13] Ibid., *Supplement No. 12* (A/2645), para. 95.

criminal court and be deemed to accept its jurisdiction. Any persons accused of crimes against humanity should then be tried solely by the court, save where a national court acquired jurisdiction over such persons under the terms of a special convention.

28. One or more States might bring crimes such as war crimes or drug trafficking before the international criminal court. In that event, two different situations could arise. On the one hand, a case might occur in which the State that acquired, or had an obligation to exercise, national jurisdiction over persons accused of such crimes did not exercise that jurisdiction; in his opinion, the victim State could then bring the case before the international criminal court. On the other hand, applications for the review of judgements handed down by national courts might be filed by other States. In both instances, the parties to the Code should accept jurisdiction in the same way as when the international criminal court had exclusive jurisdiction.

29. As to paragraph 5 of the draft provision, the court could indeed play a very important role in the unification of international criminal law. In particular, the possibility of vesting the international criminal court with the power to give an advisory opinion on legal questions relating to the interpretation of the Code merited consideration. The issue of who could request such an opinion should also be examined.

30. Paragraph 1 of the draft provision on criminal proceedings did not specify which States were entitled to institute proceedings before the international criminal court in respect of crimes against the peace and security of mankind. In his view, where crimes against peace and humanity were concerned, all parties to the Code should be entitled to do so.

31. It had rightly been said that a distinction had to be drawn between a determination by a political body of an act or threat of aggression and such a determination by an international criminal court. When the Security Council took no decision, the international criminal court could determine the existence of aggression of its own motion. However, in the case of threat of aggression, in other words, where aggression had not actually occurred, it would be inappropriate for the court to express a legal opinion on a matter that was of a highly political nature.

32. Mr. ARANGIO-RUIZ said he would be grateful for some elucidation as to the distinction between the two possibilities advanced in the report for ways in which the Code should be incorporated into domestic law. The problems raised by the two main questions discussed in the report—penalties and the implementation of the Code—were so many and varied that his remarks would necessarily be of an entirely provisional nature.

33. As to penalties, he agreed that recognized principles such as *nullum crimen sine lege* and *nulla poena sine lege* called for a decision on the part of the Commission. As far back as 1764, before ideas about the death penalty and human rights had developed, Cesare Beccaria, an aristocrat from Milan, had published a work entitled *Dei delitti e delle pene*, one of the basic propositions of which had been that the death penalty was pointless and unnecessary, and that no man had the right to take another's life. The death penalty was plainly out of the question.

34. He fully endorsed the views of members on imprisonment, but was somewhat less hesitant on two points. Mr. Tomuschat took the view (2208th meeting) that it should be left to States at the diplomatic conference to adopt the Code to specify the penalties applicable. For his own part, however, he could not see in what way any guidance the Commission offered to the General Assembly—which would, in any event, then make recommendations to States—would curtail the freedom of States to make the final choice in the matter. Again, he did not see how the making of such choices could enhance the commitment of States to the Code. A decision on the establishment of an international criminal court seemed to him to be just as significant as a decision on the adoption of the Code.

35. Further, he agreed on the need to provide for confiscation of property, either for the purpose of compensating the victims of crimes or as an additional penalty. Looting had always been, and remained, an element in aggression and annexation. At the very least, those who perpetrated the crime of aggression, or indeed of drug trafficking, should not be allowed to profit from their deeds.

36. The other point on which he would be less hesitant than some other members concerned life imprisonment. Admittedly, the establishment of an international penal institution presented considerable difficulty, but he would find it difficult to contemplate the release, even after 20, 25 or 30 years, of a dictator of the type common around 1930 who had been guilty of aggression, genocide and other crimes of similar magnitude, or even the release of a major drug trafficker. Such people could not just be returned to society, as the English had soon realized in the 100 days following Napoleon Bonaparte's exile on the island of Elba. It was a question of fitting the punishment not only to the crime but also to the gravity of the danger, and of preventing a recurrence at all costs. Dictators who survived defeat tended to revert to type, if not at their own initiative, then with the encouragement of former allies or supporters. The Commission would therefore be better advised to provide for differentiated penalties for the various crimes, something which would in no way undermine the sovereign liberty of States.

37. The Special Rapporteur was to be commended for his prudent approach to the question of establishing an international criminal court and to the various options involved. It was also perfectly understandable why the Special Rapporteur had decided, in the absence of a mandate from the Commission, not to submit a draft statute for the court. Two things were quite clear. In the first place, a code of the type contemplated would have no chance of being accepted by a sufficient number of States, or indeed of ever being implemented impartially, if there was no international criminal court. The difficulties of creating such an institution were no greater than those of obtaining the consent of States on the primary provisions of the Code or on the more complex rules on national universal jurisdiction. Once those difficulties had been surmounted, States would have less difficulty in accepting the Code and it would be easier to draw up

rules for implementing it. The problems that would have to be resolved in order to establish such a court would to a large extent be compensated by the elimination of a mass of problems that would have to be resolved in the context of a system characterized by a multitude of national—and rival—universal jurisdictions.

38. Secondly, in his view it could not be asserted that the Commission had received insufficient guidance from the General Assembly to enable it to interpret its mandate as one to devise a code which included, quite naturally, such institutional and procedural rules as the Commission deemed necessary in order to guarantee effectiveness. By effectiveness, he meant that the Code should be applied in the case of all of the numerous and varied crimes it covered and which encompassed, for instance, drug trafficking, genocide, environmental offences, and aggression. If the uncertainties about extending the Commission's mandate to institutional and procedural matters might to some extent have been justified until 1988—though he doubted it—there was no longer any reason for such uncertainties, particularly in view of the terms of General Assembly resolution 45/41, paragraph 3 of which made it clear that it was now for the Commission to decide at what time to begin detailed discussion of the question of an international criminal court and to take a position, within the limits of its advisory function, on "the possibility of establishing an international criminal court or other international criminal trial mechanism". In his opinion the time had come.

39. That consideration determined his position on the issues raised in part two of the report. Paragraph 1 of the possible draft provision on the jurisdiction of the court, should be simplified by vesting the court with competence for all of the crimes covered by the Code, regardless of any territorial considerations. All States parties should accept the international criminal court system, including all the necessary subsidiary machinery, and of course they should accept the competence of the court. The only crimes lying outside the court's competence would be crimes in respect of which States parties were not entitled under general international law to exercise their criminal jurisdiction, i.e. crimes over which States not parties to the system had jurisdiction.

40. Mr. Mahiou had asked (2209th meeting) in what sense "territoriality" would have applied in the case of the Tokyo and Nürnberg Tribunals and had argued that the options of seizing the courts of the State of the accused or an international tribunal set up by the victors were not available in the case of an international criminal court. There were two main problems: first, the problem of States not parties to the system, and secondly, that of war crimes in the strict sense which were not serious enough to fall within the Code and the competence of the international criminal court. Presumably, the rules of general international law would continue to apply to such crimes. Once an international criminal jurisdiction was accepted, the criteria of the active or passive personality of the accused or of the victim no longer applied. In the possible draft provision on jurisdiction, paragraph 3, on the competence of an international criminal court to rule on competence, and paragraph 5, on competence to interpret, remained generally acceptable.

41. With regard to the possible provision on criminal proceedings, Mr. Calero Rodrigues (2208th meeting) and other members had rightly said that the instituting of criminal proceedings should remain in the hands of States, which would also have the task of drawing attention to crimes and their alleged perpetrators. But the conduct of the proceedings would be the responsibility of a separate international institution.

42. On the respective roles of the Security Council and the international criminal court he endorsed the position taken by Mr. Pellet at the previous meeting. The present situation, as set out in draft article 12 of the Code, would be radically altered by acceptance of an international criminal court. If the Security Council made a prior determination of a crime of aggression, proceedings could be instituted against the alleged perpetrator in accordance with the procedures of the international criminal court. Even if the Security Council did not make such a determination, there was nothing to prevent criminal proceedings from being instituted. The distinction between the political functions of the Security Council and the legal functions of the court must be maintained: even if the Security Council designated State A as the aggressor, it might still be concluded that there were no legal grounds for proceeding against State A. Such problems could not be ignored: they demonstrated the impracticability of any solution which did not place the necessary judicial institutions at the core of the Code. Otherwise, the Code would remain a dead letter or would work in favour of the perpetrators of the crimes by creating even more sources of conflict between States.

43. The Commission should therefore explore the option of an international criminal court in detail, leaving aside for the moment the option, preferred up to now, of multiple national universal jurisdictions. It must, however, be remembered that the draft Code was more Utopian than realistic. It would prove practicable only if the Commission could offer States a serious prospect of impartial implementation and operation by going beyond the mere formulation of the rules to the establishment of an institutional system of which the international criminal court would form the core.

44. Since August 1990 there had been much talk of a new international order, but no one had ever explained the origins of the idea or in what sense the order was "new". It was certainly hard to say whether the promise of a new international order had been realized in the Middle East region. It was to be hoped that the new order would manifest itself in all parts of that region in the same way and with the same degree of justice and balance. The Commission's work on the draft Code might prove both a normative and an institutional contribution to the new order, but that would depend largely on whether the Code offered a minimum guarantee of the objectivity and impartiality without which there could be no valid or lasting order. The only way to provide such a guarantee was to establish an international criminal court.

45. Mr. NJENGA said that the debate in the Commission had revealed a general agreement that penalties must be included in the draft Code. A draft article 5 for the 1954 Code, quoted by the Special Rapporteur in his

report, had been criticized by several States as leading to diversity of sentencing. The Commission must therefore specify the penalties for the crimes covered by the Code on the basis of the second of the two approaches mentioned by the Special Rapporteur, namely, to include the penalties in the Code itself and to adopt it by means of an international convention. However, that approach did not inevitably lead to a single penalty for all of the crimes, as suggested by the Special Rapporteur, despite the fact that they were all extremely grave. Such crimes as genocide, aggression, apartheid and colonialism could not be viewed in the same way as drug trafficking or mercenarism. The crimes included in the Code therefore warranted severe, but differentiated, sentences.

46. The Special Rapporteur had rightly excluded the death penalty from draft article Z, because of the clear trend among States to abolish that penalty. In that connection, the revised version of part I, section A of the ninth report was welcome, for it clarified the position regarding the death penalty in Africa, where it had been abolished by many States. Despite the fact that States which imposed severer penalties for the crimes in question would be unlikely to surrender accused persons to an international criminal court which would impose lighter sentences, the Commission could not specify the sentence for every crime in the Code. Yet to settle for a single penalty would be defeatist, and the solution was to leave it to the international court to determine the sentence in the light of the circumstances of the case and within minimum and maximum limits established in the Code itself.

47. Life imprisonment was unacceptable as the maximum sentence, for the objective was justice, not blind retribution. A life sentence imposed on an elderly person, without any possibility of remission, did little credit to the conscience of mankind, and in domestic systems the prerogative of mercy or parole was frequently exercised. Again, many countries had abandoned the life sentence on the ground that it infringed human rights. He could not concur with Mr. Calero Rodrigues (2208th meeting) that the minimum sentence should be 12-15 years and the maximum 30-35 years, but he did agree that the sentences must be firm. The best solution might be to establish an international clemency and parole board which could not consider release until the prisoner had served at least two thirds of his sentence.

48. He could not accept the provision concerning confiscation of stolen or misappropriated property, for such property did not belong to the thief or to his family or heirs, nor could it be given to any humanitarian organization. The only course was to return it to its rightful owners where possible, and to the State concerned as *bona vacantia*, for it to be allocated to deserving charitable organizations. He was, however, in favour of monetary penalties, including confiscation of property of the convicted person for the purposes of reparation, in addition to the imposition of a term of imprisonment.

49. As to the establishment of an international criminal jurisdiction, it was disappointing that the General Assembly had not given an opinion on the options and main trends which had emerged in the Commission at the previous session, for without such an opinion it would be difficult for the Commission to make further progress. The possible draft provision on the jurisdiction of the court left much to be desired in its present form. Paragraph 1, on territoriality, was acceptable, but paragraph 2, which would apparently also require consent to jurisdiction to be given by the State of nationality of the perpetrator, the victim State or the State whose nationals had been the victims of the crime, would contradict the whole purpose of the establishment of criminal jurisdiction, opening a Pandora's box by allowing many States to deny such jurisdiction. The paragraph would be acceptable if it was worded as an enabling clause to confer jurisdiction, but in its present form it could not be included in the Code. Paragraphs 3 and 4 were consequential on paragraph 2 and required no comment. Paragraph 5 was welcome in that it would promote the harmonization of international criminal law.

50. Nor was the possible draft provision on criminal proceedings acceptable in its present form. There was general agreement that competence to bring criminal proceedings before an international court was vested exclusively in States, but paragraph 2 would require the Security Council to make a prior determination of the existence of aggression or threat of aggression. Such a provision was entirely out of place in the Code. The functions of the Security Council were political, while those of the international court were legal, and the two should be kept separate. The Court would, of course, be bound to take cognizance of such a determination by the Security Council, but it must be remembered that the draft Code related to individuals, whereas the Security Council's competence related to States.

The meeting rose at 12.55 p.m.

2211th MEETING

Tuesday, 21 May 1991, at 10 a.m.

Chairman: Mr. Abdul G. KOROMA

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Illueca, Mr. Jacovides, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.
