Document:-

A/CN.4/SR.2211

Summary record of the 2211th 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

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.

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.4/459 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 many members of the Commission, together with other experts, had spent part of the previous weekend at Talloires, France, discussing the Commission's objectives under the present agenda item, at the invitation of the Foundation for the Establishment of an International Criminal Court and International Criminal Law Commission, a non-governmental organization on the roster.

2. The late Zenon Rossides, a former Permanent Representative of Cyprus to the United Nations and former member of the Commission, had posthumously retained the title of honorary president of the Foundation. A passionate believer in the international legal order and, more particularly, in the establishment of an international criminal jurisdiction, he had been instrumental in reviving that issue before the General Assembly, following the adoption of the Definition of Aggression.[4]

3. As one who was as firmly convinced as Mr. Rossides had been of the importance of the item under consideration, he expressed the hope that, during the United Nations Decade of International Law, which the General Assembly had proclaimed in resolution 44/23 of 17 November 1989, and in the present propitious international climate, major progress could be made towards the establishment of an international legal order. The completion of that undertaking would be a fitting tribute to the memory of Zenon Rossides.

4. Mr. TOMUSCHAT, referring to part two of the ninth report on the question of the establishment of an international criminal jurisdiction, said that, despite the General Assembly's reticence on that issue, which was difficult to understand, the international situation was favourable to the establishment of an international court. If the Commission failed to take advantage of present circumstances in order to make progress, it was to be feared that the task would be handed over to an ad hoc committee. There were many models on which it could base its work. The seminar just held at Talloires seemed to have been extremely fruitful and the scholarly work done by the American author Cherif Bassiouni also offered a useful guide to legal thinking on the subject.

5. The problem of the conferment of jurisdiction on the international criminal court was extremely complex. The internal law of States was not relevant; the problem had to be solved according to the general principles of international law. States which accepted the court's statute would, by that token, recognize the competence of the court to try their nationals. To reproduce the dissociation between being party to the statute, on the one hand, and accepting jurisdiction, on the other, which characterized the regime of ICJ would be a mistake.

6. Regrettable as that might be, it did not seem feasible to establish uniform rules for all crimes to be covered by the Code. The legal position was relatively simple when the Commission confined itself to codifying rules already in force in the form of customary or treaty law. In the case of war crimes, for example, where it was established under humanitarian law that the victim State was entitled to institute criminal proceedings before its own courts, the consent of that State would suffice for proceedings to be instituted before the future international court. Similarly, in the case of crimes against the peace and security of mankind, nothing could prevent the international community, acting through the court, from trying the perpetrator of an offence which was already in that category under the law in force. Neither the consent of the State of which the perpetrator was a national nor that of the State in which the crime had been committed would be required in such cases.

7. It was not easy, however, to provide for all possible cases. In his view, there was only one crime—genocide—which left no room for doubt. The 1948 Convention on the Prevention and Punishment of the Crime of Genocide clearly stated that persons charged with genocide could be tried by an international penal tribunal or by a competent tribunal of the State in the territory of which the act had been committed. Referral to the international court would therefore not be subject to any preliminary condition.

8. If the Commission wanted to innovate, it had to refer to the rules of the Vienna Convention on the Law of Treaties concerning the relative effect of international treaties. The case of apartheid was a good example in that regard. There could be no doubt that, as ICJ had found in its advisory opinion concerning the legal consequences for States of the continued presence of South Africa in Namibia,[5] apartheid constituted a denial of fundamental human rights and was therefore contrary to generally accepted rules of international law. However, the Commission was concerned with individual responsibility and the question at issue was therefore whether apartheid was a crime whose perpetrators were liable to incur an international criminal penalty. It had to be admitted that the International Convention on the Suppression and Punishment of the Crime of Apartheid had thus

[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.

[4] General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

[5] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16.

far had only very limited success and that none of the States of one specific region had acceded to it. It was therefore not possible to speak of universally recognized customary law and, that being so, the *pacta tertiis nec nocent nec prosunt* rule was fully applicable.

9. What then of aggression and intervention? According to Mr. Graefrath (2208th meeting), the victim State would be competent to institute proceedings under any circumstances, but he himself did not think that the matter was so simple. To the extent that not all States recognized them as crimes against the peace and security of mankind, the conventional rule of the immunity of persons acting on behalf of the State came into play and nothing short of international consensus could set such immunity aside in the interest of justice. There again, the rule of the relative applicability of international conventions had to be taken into account and the consent of the State of which the suspect was a national would appear to be indispensable—a situation which led to deadlock.

10. The hypothesis of the international court acting as a court of appeal or of review should not be dismissed *a priori*, especially where the law in force gave national courts jurisdiction to try war crimes, for example. In the case of aggression, intervention or colonialism, it would be almost shocking to leave the decision in the hands of a national court and, in the case of crimes against international peace, he shared Mr. Ogiso's view (2210th meeting) that only an international court could have jurisdiction. There again, however, some distinctions would have to be made and the Commission would have to mobilize all its intellectual resources in order to find satisfactory solutions.

11. With regard to the possible draft provision on criminal proceedings, he endorsed the views expressed by the preceding speakers. The right to bring charges should be entrusted to a Government prosecutor's office attached to the court, the role of States being limited to drawing the attention of that office to the facts warranting the opening of an investigation. The preparation of the charge should be accompanied by guarantees of impartiality and objectivity and it would be dangerous to entrust that task to States, which might be tempted to misuse their power for political ends.

12. He opposed the idea of giving the Security Council a right of veto in cases of aggression. The Commission had already established a certain link with the Security Council in terms of substantive law in the text it had provisionally adopted at its fortieth session for article 12, paragraph 5, which read:

[5. Any determination by the Security Council as to the existence of an act of aggression is binding on national courts.][6]

but to grant the Council the possibility of blocking criminal proceedings would create a basic inequality between persons accused of the crime of aggression, that would be contrary to the principle of all being equal before criminal law. In that connection, he noted that there was some inconsistency in the texts already adopted by the Commission. Whereas the provisions of article 12, paragraph 5, made the decisions of the Security Council applicable also with regard to aggression, nothing of that kind was to be found in article 14 (Intervention),[7] despite the similar nature of the situations involved. The Security Council would thus be able to block criminal proceedings in one case, but not in the other.

13. In conclusion, he said he shared Mr. Graefrath's view (2208th meeting) that the statute of the court should be supplemented by a system of cooperation and mutual judicial assistance similar to that provided for in the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

14. Mr. AL-KHASAWNEH said that a provision on penalties was motivated by the principle of *nulla poena sine lege* and the need for the uniformity of applicable law. The Commission should pursue that task in a functional rather than a dogmatic way. The word *lex* could be, and had been, interpreted to mean more than written law, but, in view of the paucity of precedents, the lack of explicit provisions was more immediately felt. Similarly, with regard to uniformity, the Special Rapporteur himself had said in one of his earlier reports that criminal law was steeped in subjectivity,[8] thus the reprobation elicited in the public conscience as a reaction to a particular act could never be uniform. Criminal law was all the more subjective in an international setting and that raised a question about the wisdom of seeking to design a system of uniform sentences for a heterogeneous world. The Commission should have a clear idea about its objective and pursue it pragmatically; that objective should be, first and foremost, to prevent abuse through nominal or excessively severe penalties.

15. The Special Rapporteur advocated a provision with minimum and maximum penalties. However, the exclusion of the death penalty was likely to be a contentious matter and would not enhance the prospects of acceptability of the draft Code for those States under whose law capital punishment was prescribed for certain particularly heinous crimes. It was misleading to speak of a general trend towards abolishing the death penalty. The Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, adopted by the General Assembly in resolution 44/128 of 15 December 1989, was controversial and was also optional, as its title indicated. The Code, which covered only particularly grave crimes, must not become an instrument for settling the issue of capital punishment.

16. The best solution would be to let the States concerned deal with the question of penalties in accordance with their internal law. The need to guard against abuse should be met by a general provision stipulating that crimes should be punished by sentences that took into account their extreme gravity. All conventions against terrorism incorporated such a provision and it had worked reasonably well.

[6] See 2208th meeting, footnote 5.

[7] For text and commentary, see *Yearbook... 1989*, vol. II (Part Two), p. 69.

[8] *Yearbook... 1985*, vol. II (Part One), p. 69, document A/CN.4/387, para. 47.

17. Neither General Assembly resolution 45/41 nor the debate in the Sixth Committee gave the Commission the necessary guidance; hence the need for a bold approach. It was therefore surprising to read in the ninth report that the Special Rapporteur had opted for a "makeshift solution, a necessary concession to State sovereignty". Yet a permanent solution under which the jurisdiction of the court would be free from the constraints of internal law was possible. Another solution, along the lines of the one suggested by Mr. Graefrath, would give the court a review competence and, in certain cases, a role as the court of first instance.

18. In the possible draft provision on jurisdiction, the Special Rapporteur was correct in assigning priority to the territoriality principle and grouping other criteria for the conferment of jurisdiction under paragraph 2. However, those criteria probably did not all have the same standing. For example, the passive personality principle was particularly controversial, not only because some States did not claim it for themselves, but also because it was based on an assumption of bad faith, namely, that the States that had jurisdiction under the territoriality or active personality principle would not fulfil their obligation. The Special Rapporteur might wish to look into the possibility of establishing a hierarchical order for those various principles.

19. With regard to paragraph 5 of the possible draft provision, he supported the view expressed by earlier speakers that international organizations should also be able to seek an interpretation of a provision of international criminal law.

20. During the consideration of article 12, paragraph 5, at the fortieth session, he had argued in favour of making a distinction between the court's judicial function and the political function of the Security Council, which, as the guardian of international peace and security, should be directly involved in dealing with acts of aggression in a way that cut across divisions between political and legal problems; in that connection, Mr. Beesley (2210th meeting) was right in saying that the determination of an act of aggression by the Security Council would have great weight, but at the same time, there was some incongruity in making criminal responsibility dependent upon a determination of aggression because, then, political criteria rather than legal standards were the decisive factors.

21. The problem was all the more pressing in view of the fact that the international system lacked a set of checks and balances or a mechanism to determine whether a political body was acting *ultra vires*. International law divorced from international justice could not be the expression of an ideal. An independent judicial function would enhance the effectiveness of the system which derived from the Charter of the United Nations and complement it in such a way that it would not be seen as embodying a dichotomy between law and justice.

22. Mr. ROUCOUNAS said that the very fact of referring, as the Special Rapporteur had done in part one of his report, on the difficult question of applicable penalties, to differences in national legislation might suggest that consideration was being given to the possibility of establishing a mechanism to guarantee the uniform application of the Code or even a completely separate regime of penalties within the framework of the Code. But that result could not be achieved by setting minimum and maximum penalties in the abstract or by picking up the debate where it had left off in 1954.

23. Criminology had made considerable progress since the Second World War and research in that area could be very helpful to the Commission.

24. It was essential to include provisions on penalties in the Code itself, but such provisions must not just state a few simple ideas. For example, indicating that a certain scale of penalties was suitable for all the crimes envisaged would assume that agreement had already been reached that all the crimes listed in the Code were of the same nature, that the penalties were those that criminologists considered to be the most suitable and that the scale of penalties would guarantee the uniform application of the Code.

25. The Special Rapporteur had not attempted to solve all the problems that arose in respect of penalties, rightly choosing instead to proceed cautiously. It was not enough to draft a substantive provision; such a provision must be complete in order to avoid having to rely on national legislations, with all the distinctions they made between the various categories of wilful killing, supplementary and accessory penalties, extenuating and aggravating circumstances, and so forth.

26. The basic question being raised was which jurisdiction would be responsible for applying the Code. In the case of the crime of genocide, for example, what was the current scale of penalties in each of the 100 States or so that had acceded to the 1948 Convention on the Prevention and Punishment of the Crime of Genocide? If the same court must apply both the Convention and the Code, to which of the two would it give priority?

27. A number of other as yet unresolved preliminary questions must also be raised in connection with penalties. That was the case in particular of an order given by a hierarchical superior, whose effect for individual responsibility was the subject of a considerable body of legal decisions and an abundant bibliography. Yet the judge, whether at national or international level, would need to be able to find provisions on that question in the Code.

28. With regard to the death penalty and the undeniable progress made throughout the world towards its abolition, although Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty[9] provided for the abolition of the death penalty in times of peace (article 1), it also contained a proviso for the case of war and even for the case of imminent threat of war (article 2), which, in accordance with the interpretation that some had given to that provision, the authorities of the State concerned would be free to determine.

29. In other words, the Commission would sooner or later be faced with a dilemma: either to establish a single

[9] Council of Europe, *European Treaty Series*, No. 114 (Strasbourg).

scale of penalties (excluding capital punishment) or to institute a special scale of penalties for certain categories of crimes, including war crimes.

30. It would be preferable for the Code to contain a separate regime of penalties rather than setting forth a few general provisions that would be mere guidelines. He also doubted whether creating a single scale of penalties for all the crimes in the Code was an effective method. It would be better to take as a basis the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and to provide, as in that instrument, that States parties must pledge to impose upon the authors of crimes enumerated in the Code penalties proportional to the gravity of their acts.

31. In its last report to the General Assembly (A/45/10),[10] the Commission had dealt with the question of the jurisdiction of a possible international criminal court only very superficially, confining itself to repeating the brief comments on the subject formulated by the Working Group, and it was therefore not surprising that the General Assembly had not given it specific guidance for the follow-up to work on that aspect of the subject. It was up to the members of the Commission to pay closer attention to all of the questions raised, some of which, such as those concerning the possible independence of the court and its relations with national courts, were both difficult and crucial, and to submit the results of their reflections to the General Assembly.

32. More precisely, it would be useful to examine whether to confer on the international criminal court both exclusive jurisdiction and jurisdiction concurrent with that of national courts. Under such a system, the court would have exclusive jurisdiction for all crimes of an extreme gravity, such as the crimes of aggression or threat of aggression, whereas, for the other crimes in the Code, both the international court and the national courts would have jurisdiction.

33. With regard to aggression or threat of aggression, he agreed with other members of the Commission that the Special Rapporteur's idea of making criminal proceedings subject to a prior determination by the Security Council was open to criticism. It might happen that action by the Security Council and by the international criminal court was complementary, but the opposite could also occur, for example in the event of a deadlock in the Security Council. In the case between Nicaragua and the United States of America,[11] ICJ had demonstrated that certain basic norms of general international law were independent of the Charter of the United Nations. Subordinating the intervention of the international judge to the determination of an act by the Security Council would be tantamount to calling into question the principle of the universality of international crimes.

34. Mr. RAZAFINDRALAMBO said that he would first make some general comments on the jurisdiction of the international criminal court and then consider in more detail the approach adopted by the Special Rapporteur, who, in part two of his report, tended to favour a system of parallel jurisdiction in which the international criminal court would operate concurrently with national courts.

35. Nothing in General Assembly resolution 45/41, however, seemed to allow for such a clear-cut choice. As the Special Rapporteur himself stated, the General Assembly had refrained, at least at that stage, from choosing between the different options proposed by the Commission. Admittedly, the General Assembly's attitude might appear to be open to criticism; there were also those who would like the Assembly to be urged to provide the Commission with more specific guidance, but if the Commission wanted to maintain harmonious relations with the General Assembly, it would have to get down to its task as a technical body and consider all possible jurisdictional formulas, including, if need be, the establishment of an interim body which would fill the gap and function until a permanent international criminal court had been set up, with all the attributes, privileges, guarantees and characteristics attaching to it.

36. It was therefore regrettable that, at the current stage, the Commission was not in a position to indicate the advantages and disadvantages of an international court with exclusive jurisdiction and an international court with concurrent jurisdiction.

37. Undue stress should not be placed on the principle of State sovereignty in order to rule out exclusive jurisdiction. It could not be validly argued that States would refuse to abandon their judicial sovereignty, preferring to retain the right to try all crimes, including and especially the gravest, while being willing to confer such jurisdiction on an international court on a case-by-case basis as and when they wished. That reasoning, if carried through, would inevitably lead to the conclusion that the establishment of an international criminal court worthy of the name smacked of Utopia, for such a system was bound to give rise to conflicts the solution of which would itself be hampered by the very same principle of State sovereignty.

38. Furthermore, the principle of sovereignty had changed, evidence of that was the current integration of Europe or the idea of a new world order which had been revived by the Gulf crisis. It therefore did not seem consistent with current trends to invoke the concept of sovereignty in order to rule out exclusive jurisdiction.

39. That being so, the Commission would sooner or later have to take a serious look at the advantages and disadvantages of exclusive jurisdiction and the Special Rapporteur would have to propose an alternative that would enable the Commission, and the General Assembly in particular, to take a decision concerning the possible options with regard to jurisdiction in full knowledge of all the facts.

40. Turning to the question of applicable penalties and to the draft article proposed by the Special Rapporteur in that connection, he said that, by virtue of the principle *nulla poena sine lege*, a criminal code necessarily had to provide for penalties. Like many other members, he did not agree that the judge should be empowered to determine the penalty to be imposed, particularly since, in the case of crimes against the peace and security of man-

[10] *Yearbook ... 1990*, vol. II (Part Two).

[11] See 2209th meeting, footnote 6.

kind, the gravity of the offence called for a severe penalty. The imposition of unduly light penalties would expose the international criminal court to ridicule, if not paralysis. Given the nature of the crimes in question, the penalties should be both afflictive and infamous, in other words, they should affect the actual life of the guilty person and his moral reputation, legal and political status and family and social situation. It would be difficult as a matter of *lex ferenda* to treat the perpetrator of such crimes more leniently than the perpetrator of an ordinary crime or of the traditional kind of political crime. Moreover, as several members had already pointed out, that kind of criminal could certainly not receive more favourable treatment before the international criminal court than that laid down with respect to him under national criminal codes: that would only make the international court itself less acceptable.

41. As to the death penalty, before it could simply be expunged from the vocabulary of criminal law, as some recommended on humanitarian—and, moreover, highly commendable—grounds, a replacement penalty of a sufficiently exemplary and dissuasive nature had to be found. In his view, the only possible substitute in the case of crimes against the peace and security of mankind was a penalty that deprived the guilty person of his liberty either for a specific period or for life. However, caution should be exercised in selecting the term to designate deprivation of liberty. The word "imprisonment" was too vague. There were many forms of imprisonment under criminal law, such as rigorous imprisonment, detention, deportation and even forced labour, although the last-mentioned penalty would seem to be excluded in the present instance, as it was contrary to human rights and, in particular, to the conventions on forced labour. Until such time as the international community was in a position to define an adequate penitentiary regime, therefore, it would be better to stick to the term "deprivation of liberty".

42. With regard to the duration of imprisonment, while it might be necessary to lay down a minimum on the basis of the terms of imprisonment provided for under national codes, it was difficult to see how agreement could be reached on a maximum penalty. He did not, however, share the misgivings of some regarding life imprisonment; it was well known that, unless there was some express provision on the subject, the convicted person could normally benefit from a reduction of sentence, release on parole for good behaviour or early release on grounds of health. The judge could also adjust the sentence if he considered that there were extenuating circumstances. If extenuating circumstances were allowed, however, then aggravating circumstances should also be allowed.

43. He agreed that confiscation of property should be a supplementary penalty and that a distinction should be drawn between stolen property and property of the perpetrator. In the first case, the measure would actually be in the nature of recovery rather than of confiscation; but the fact of the matter was that it was difficult to distinguish between money stolen from the people and money belonging to the guilty person which might, for instance, form part of the joint estate of the spouses. Confiscation was thus very much a patrimonial penalty which could, unfortunately, affect the criminal's family. He therefore suggested that a fine should be added to the list of penalties, which would be payable to the victim State or, where appropriate, to the United Nations, if the General Assembly so wished, and which would be imposed on the guilty person in the same way as afflictive penalties.

44. Turning to part two of the report, he underlined the fundamental importance of the proposals submitted by the Special Rapporteur for the Commission's consideration. The discussion of the principle of concurrent jurisdiction showed how difficult it was to establish an international criminal court that functioned concurrently with national courts. The drawback of the proposed system was that it would bring into play simultaneously jurisdiction *ratione materiae* and jurisdiction *ratione personae*, when clarity dictated that they should be dealt with separately. So far as jurisdiction *ratione materiae* was concerned, the Special Rapporteur considered that it should apply to the crimes covered by the Code or, alternatively, to the crimes to be defined in the annex to the statute of the court. However, in view of the difficulty of drawing up the list of crimes to be covered by the Code, it did not seem advisable to endeavour to draw up a second separate list. It would be better to adopt a minimalist approach, in other words, to provide that the international criminal court would try only certain crimes, including those that were already the subject of the international conventions in force, such as the crimes of genocide and apartheid.

45. With regard to the application of jurisdiction *lato sensu*, the Special Rapporteur suggested that the proposed international criminal court should function only where jurisdiction was conferred on it by one of the four States concerned, which should be defined according to the principle of territoriality, the system of active and passive personality and the system of real protection. It should be noted that the revised draft statute drawn up by the 1953 Committee on International Criminal Jurisdiction[12] had adopted only the criteria of territoriality and nationality. Since the Committee had, however, opted in favour of jurisdiction *ratione materiae* relating to all international crimes, some of which had already been subject to national jurisdiction, its draft had understandably been based on concurrent jurisdiction, without any need to provide for special machinery for the settlement of disputes. In adding two new criteria, the Special Rapporteur seemed to be complicating the situation unduly and it was doubtful whether the procedure he envisaged for the settlement of positive conflicts of jurisdiction had any practical value. There were two possibilities: either States would have conferred jurisdiction on the international criminal court *post factum* and thus precluded bringing the case before their own courts, or they would prefer to go immediately to their courts, in which case they would not refer the judgements handed down by those courts to the international criminal court for reconsideration. In other words, what States refused to do *post factum* they would be even less likely to do after a judgement, for any reconsideration that might take place would be an even more serious infringement of their judicial sovereignty. There remained the possibility

[12] See 2207th meeting, footnote 7.

of negative conflicts of jurisdiction, when there would be no conferment of jurisdiction and the case would not be referred to any court, whether national or international. That, however, would be more in the nature of a denial of justice than of a negative conflict of jurisdiction, which was highly unlikely to arise.

46. It was also doubtful whether the review procedure proposed by the Special Rapporteur could be implemented. In that connection, it was important first to define clearly the concept of review. In its traditional meaning, whether in French law or the common law, it was a procedure whereby a convicted person could appear again before the court that had sentenced him with a view to the trial being reopened following the discovery of a new fact. That did not, however, seem to be the case envisaged in paragraph 4 of the Special Rapporteur's possible draft provision, which provided for the sentences handed down in respect of the same crime by the courts of the different States to be reviewed. The issue, therefore, would rather be one of conflicting judgements, which prompted the following comments. The problem in the instant case was one of a dispute that arose out of a conflict between two judgements. In order to deal with the dispute, all the States concerned would have to confer jurisdiction on the international criminal court and the judgement submitted for review would have to be final, in other words, all the domestic remedies must have been exhausted. In the light of all those factors, the question arose whether a State which had not felt able to decline jurisdiction in a case at first instance in favour of the international criminal court would agree to submit for review by that court a decision of, say, its supreme court. It was understandable in the circumstances that those who had formulated the 1953 draft statute had not deemed it advisable to grant such a power of review to the criminal jurisdiction they had proposed.

47. He agreed that the international criminal court should be vested with advisory jurisdiction. The power to seek an advisory opinion should, however, be extended to the General Assembly and the Security Council, as well as to governmental organizations.

48. With regard to criminal proceedings, valid points had been made against the intervention of the Security Council and he would therefore simply point out that there were two aspects to criminal proceedings: a public right of action and an action for damages. The latter was absolutely essential to secure the sentencing of the guilty person to payment of damages or to the restoration of stolen property, by virtue of the legal principle inherited from Roman law whereby a court could not render judgement *extra petita* or *non petita* except where its decision took the form of a patrimonial penalty, in which case the beneficiary could not, in principle, be a private person. A special provision relating to an action for damages therefore seemed to be indicated.

49. Mr. McCAFFREY congratulated the Special Rapporteur on a report which should enable the Commission to make progress in its work, in particular by providing the General Assembly with food for thought on the possible establishment of an international criminal jurisdiction. For its part, the Commission had to be modest and practical, all the more so in that recent events—not only the Gulf war, but also the initiatives taken, for example, by the United States Congress and the United Kingdom Parliament—opened a "window of opportunity" for the possible acceptance of the idea of setting up an international criminal court to try individuals accused of having committed a very narrow class of extremely serious crimes under international law.

50. With regard to the first part of the report, in which the Special Rapporteur dealt with the penalties to be applied, he believed that the Code should certainly make some provision for the applicable penalties by virtue of the *nulla poena sine lege* principle, but he agreed with Mr. Tomuschat that the issue was also a political one. More precisely, he believed that the penalty to be applied for each crime could be determined only by States, either the States which would be represented at a future conference convened to consider the draft Code and the establishment of an international criminal court or perhaps the States that would become parties to the statute of such a court. As Mr. Roucounas had pointed out, the best the Commission could do was to establish a hierarchy of penalties, determining, for example, that genocide was the most serious of all crimes under the Code and should be punished most severely, while some forms of intervention should receive less severe penalties. The Commission should therefore propose a range of penalties—even though that would be difficult and the death penalty, for example, was controversial—instead of laying down a specific penalty for each crime or, as the Special Rapporteur had suggested, one penalty for all crimes. While it was true that the crimes in question were taken to be the most serious ones, they did differ in their gravity. The Commission would achieve nothing by trying to impose a penalty of deprivation of freedom for a specific period or by recommending the penalty of life imprisonment, with or without the possibility of conditional release. At all events, there could be no doubt that the Commission should recommend against the death penalty on the basis of the practice of States which the Special Rapporteur had so usefully analysed.

51. Like other members of the Commission, he believed that, in determining the applicable penalty, the judge should take account of all circumstances: not only extenuating circumstances, but also aggravating circumstances, such as disregard of Security Council resolutions, particularly outrageous conduct and premeditation, planning and methodical execution, for example, of a programme of genocide. The court must be given discretion to set the penalty that fit the crime, perhaps within certain prescribed parameters and in the light of all the relevant circumstances.

52. Referring to the question of the establishment of an international criminal court and, in particular, its competence *ratione materiae*, he was inclined, in order to make the court more acceptable, to support the second alternative proposed by the Special Rapporteur, namely, to limit that competence to the crimes defined and widely accepted in the conventions in force. As to the States which would be able to institute proceedings in the court, it would probably be useful to take advantage of the results of the Talloires seminar referred to by Mr. Jacovides. In other words, since the crimes in question were crimes against the international community as

a whole, any State should have the right to institute proceedings before the court by submitting a complaint in writing to the authority which was competent under the court's statute and which had to be an independent and impartial body entrusted with the task of investigating the charges and determining whether there was a *prima facie* case. In any event, the court could have jurisdiction only with the consent of the injured State, the State of nationality of the accused, the State of nationality of the victim or the State in whose territory the accused had been arrested. In practice, the consent of the latter State would be crucial because, in order to prevent abuse for purely political reasons, trial *in absentia* must not be permitted. The consent of that State would, moreover, make it unnecessary to have the rather complicated system envisaged by the Special Rapporteur in paragraph 2 of his possible draft provision, whereby a number of States would have to confer jurisdiction on the court in cases in which their own domestic courts also had jurisdiction to try the accused. Such a system might well jeopardize the jurisdiction of the court in the gravest cases, such as those involving war crimes or the crime of genocide.

53. He believed that States would be even less inclined to accept the review function of the court referred to in paragraph 4 of the possible draft provision than the conferral of jurisdiction on the court in first instance.

54. With regard to the relationship between the international criminal court and the Security Council, he continued to believe that the crimes of aggression and threat of aggression were *sui generis*, in that, by definition, they existed only if the Security Council characterized certain acts as such. In those circumstances, it was very difficult to see how an international criminal court could find an individual guilty of having committed the crime of aggression or threat of aggression if the Security Council had not acted or if it had found that aggression or threat of aggression had not been committed. On that point, he did not fully agree with Mr. Pellet's comments (2209th meeting) concerning the judgment of ICJ in the case between Nicaragua and the United States of America, in so far as the Court, rightly or wrongly, depending on one's view on the admissibility of the claim, had dealt with self-defence, which was very different from aggression. It would not only be strange to have two different determinations by the Security Council and the court, but it would also be detrimental to the international legal order for an international criminal court to find, for example, that a senior official was guilty of the crime of aggression when the Security Council had held that there had been no aggression on the part of the State to which that official belonged. That did not mean that the international criminal court would not be able to deal with cases involving an armed conflict: it would have to do so if it was called upon to try war crimes.

55. In conclusion, he expressed the hope that the Commission would rapidly be able to agree on a specific proposal concerning the establishment of an international criminal court in particular.

The meeting rose at 11.35 a.m.

2212th MEETING

Wednesday, 22 May 1991, at 10.05 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. 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.

Expression of condolences on the death of Mr. Rajiv Gandhi, former Prime Minister of India

1. The CHAIRMAN said that he had learned with horror of the circumstances of the death of Mr. Rajiv Gandhi, former Prime Minister of India. All members of the Commission would no doubt wish to join him in mourning the loss of a great statesman. On behalf of the Commission he extended heartfelt sympathy to Mr. Sreenivasa Rao, to Mr. Gandhi's family and to the people of India in their irreparable loss.

2. Mr. Sreenivasa RAO thanked the Chairman and all members of the Commission for their expression of sympathy on the tragic loss suffered by the Indian people. The assassination of a promising and much-loved political leader provided fresh evidence, if such were needed, of the timeliness of the task on which the Commission was currently engaged.

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*)

3. Mr. SOLARI TUDELA said that, in part one of his report, the Special Rapporteur advocated a single penalty

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[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.