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Summary record of the 2212th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
1991, vol. I

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.

for all crimes against the peace and security of mankind, with extenuating circumstances reducing the penalty to 10 to 20 years' imprisonment. In his own view, however, it would be preferable, in the absence of such extenuating circumstances, to lay down a minimum and a maximum penalty and leave it to the court to exercise its discretion in applying the appropriate penalty according to the circumstances.

4. The worldwide trend in favour of the abolition of the death penalty was also to be seen in the Latin American region, as reflected not only in the municipal law of the various Latin American countries but also in the American Convention on Human Rights. The Convention did not prohibit the death penalty itself, but did prohibit its reintroduction once it had been abolished. Life imprisonment did not seem to be compatible with the Latin American legal system. The criterion adopted in the American Convention on Human Rights, for instance, was that penalties should not only be correctional in nature but should also rehabilitate the convicted person so that he could resume his place in society. A more realistic penalty would be imprisonment for a minimum of 10 years and a maximum of 25 years, which was the longest term of imprisonment in many Latin American countries. One advantage was that the prisoner could not be released on parole.

5. He shared the reluctance of other members about extending the penalty of confiscation of property to the heirs and relatives of the accused. None the less, such a penalty would be appropriate in some cases, for instance, unlawful trafficking in narcotic drugs. Money and means of transport could be confiscated where it was clear that they had not been restored to those from whom the property had been taken unlawfully. It would, however, be advisable to specify to whom any confiscated property should be assigned.

6. The establishment of an international criminal jurisdiction, which was the subject of part two of the report, had aroused great interest throughout the world and the recent press campaign reflected public opinion in the matter. In the circumstances, the Commission had a political responsibility to expedite its work with a view to establishing an international criminal court. It might therefore wish to appoint a working group to study the matter or to adopt some other appropriate procedure. The first reading of the Code could then be accompanied by an initial draft of a statute of the international criminal court.

7. The Special Rapporteur proposed a possible provision on the jurisdiction of the international criminal court, suggesting two possible alternatives, namely, that jurisdiction should be confined to the crimes defined in the Code, or that it should extend to the crimes listed in an annex to the statute of the court. His own view was that the court's jurisdiction should not be confined to crimes against the peace and security of mankind but that the court should be able to try international crimes in general. If that was what was meant by a list of crimes annexed to the statute of the court, he could agree to the Special Rapporteur's second alternative. It should, however, be specified that, in the case of crimes against the peace and security of mankind, the court's jurisdiction would be compulsory, which did not mean that it would be exclusive. It could have exclusive jurisdiction at first and at second instance, or at second instance only where the crime had been tried by a competent national court as provided for under subsequent paragraphs of the proposed draft provision. In that event, there would be concurrent jurisdiction.

8. The provision on criminal proceedings suggested by the Special Rapporteur embodied two ideas: first, that only States could institute criminal proceedings and, second, that, in the case of crimes of aggression, there must be a prior determination by the Security Council that such a crime existed. So far as the second idea was concerned, he agreed with Mr. Pellet (2209th meeting) that such a provision would be inadvisable, since it would be tantamount to extending the power of veto vested in the permanent members of the Security Council under the Charter of the United Nations to a power to find the alleged perpetrator of an aggression innocent. That was not in keeping with the intention of the authors of the Charter and it would be unacceptable.

9. It also seemed that access to the court would be reserved for States alone, but it was important to recognize the possibility of access by non-governmental organizations, by international organizations, and indeed, by individuals. In the case of an environmental crime, for instance, it would be far simpler for a non-governmental organization such as Greenpeace or a similar body to institute criminal proceedings, since States had to tread carefully in their international relations. The same was true of war crimes and serious human rights violations, when the Red Cross or Amnesty International, for example, could act more easily. At the same time, to ensure that a non-governmental organization did not institute criminal proceedings directly, a provision could be included in the statute of the court to the effect that a case should be referred to the relevant prosecution authorities, which could then, if they endorsed the case, initiate proceedings on behalf of the non-governmental organization.

10. Mr. AL-BAHARNA said that he welcomed the addendum to the Special Rapporteur's ninth report, which unravelled some of the inherent doctrinal complexities, and also presented two possible draft provisions as a basis for discussion.

11. Paragraph 1 of the possible draft provision on jurisdiction set forth two alternatives regarding the extent of the court's jurisdiction. The first limited jurisdiction to the crimes defined in the Code, while the second extended it to crimes defined in an annex to the statute. It was apparent from the statement in the report, concerning the court's jurisdiction *ratione materiae*, that the Special Rapporteur had not foreclosed the possibility of extending the court's jurisdiction, and the alternative in square brackets was therefore not entirely without utility. On the other hand, since the idea of an international criminal court was linked to the draft Code, it would be inadvisable at that point to extend the jurisdiction of the court beyond the category of crimes defined in the Code. Should States consider it appropriate to extend the court's jurisdiction later on, they would no doubt be able to do so by amending the statute accordingly.

12. As far as the court's jurisdiction *ratione personae* was concerned, the Special Rapporteur had taken account of members' concern that the criminal jurisdiction of States should be respected and, accordingly, paragraph 1 made the court's jurisdiction subject to the consent of the States concerned. The principle of conferment of jurisdiction was essential to the proposed statute, but it would be helpful if the reasons behind the differentiation between territoriality and other principles, including those relating to nationality and to the victim State, were more fully explained. The Special Rapporteur acknowledged that, although there was no general rule limiting criminal jurisdiction to the law of the place where the crime was committed, the territorial principle was none the less the one generally applied.

13. Paragraphs 1 and 2 of the draft provision invited comparison. Whereas paragraph 1 dealt with the exercise of criminal jurisdiction on the basis of the place where the crime was committed, in other words, on the basis of territoriality, paragraph 2 dealt with jurisdiction on the basis of the nationality of the accused or the victim State, in other words, on the basis of the principle of personality. Under paragraph 1, therefore, the court could only try the accused if the State in which the crime had been committed conferred jurisdiction upon it, whereas, under paragraph 2, conferment of jurisdiction by the State or States concerned was only necessary where such States also had jurisdiction over the individuals in question under their domestic legislation. The effect of paragraph 2 was to reduce, in theory, the number of States required to confer jurisdiction on the court. Hence it was necessary to consider whether the nationality principle was of less legal significance than the territoriality principle as far as conferment of jurisidiction was concerned. A State might, for instance, consider it necessary to exercise jurisidiction on the basis of the personality rather than the territoriality principle, for as PCIJ had opined in the *Lotus* case,[4] nearly all systems of law extended their action to offences committed outside the territory of the State. Furthermore, the territoriality principle was itself capable of creating what the Special Rapporteur called a "veritable obstacle course" in terms of the number of States seeking and withholding conferment. In the light of those facts, it would be extremely useful if those principles, and in particular the territoriality principle, could be reviewed in detail.

14. Paragraph 3 was to be welcomed, for the power to challenge a court's jurisdiction was a generally recognized right that was inherent in every court. In addition, all international courts recognized the principle of competence. Paragraph 4 was likewise essential in that it confirmed rights that were an integral part of any judicial institution. For example, if two or more States were to claim the exclusive right to confer jurisdiction on the basis of the criteria laid down in paragraphs 1 and 2, the court should obviously have jurisdiction to adjudicate upon those claims.

15. Paragraph 5 was acceptable, since clarification of principles of law was a necessary function of courts of law, but the question arose of the scope of the paragraph, and in particular of the expression "international criminal law". In his view, the terms of paragraph 5, like those of paragraph 1, should be confined to the draft Code or to the annex to the statute. To that end, paragraph 5 could be reworded to read: "The court may be seized by one or by several States with the interpretation of the provisions of the Code of Crimes against the Peace and Security of Mankind". Furthermore, a number of different words had been used to express the same idea and it would be preferable to replace such words as "competence", "seize" and "cognizance" by "jurisdiction".

16. The draft provision on criminal proceedings stipulated that the proceedings should be instituted by States. However, both logic and principle dictated that the court should be accessible to other bodies and to individuals as well, failing which its action might be stultified. For instance, States might not wish to take proceedings for policy considerations, and the Secretary-General of the United Nations for example, or bodies such as ICRC or intergovernmental organizations might be more interested in doing so, particularly since the crimes under the draft Code concerned crimes against the peace and security of mankind. It might also be necessary to consider whether the court should be accessible to individuals, since individuals could be subjected to unduly severe penalties by national courts for crimes under the Code. Such individuals should surely have the right to seek review by the international criminal court of the sentences handed down against them.

17. Paragraph 2 contained a questionable proposition and one that he found hard to accept. The Security Council was a political body governed by the veto system; to make criminal proceedings subject to its consent would be tantamount to subjecting international judicial machinery to the power of veto vested in the five permanent members of the Security Council and that might impede the development of an international criminal jurisdiction. The power vested in the Security Council under Article 39 of the Charter of the United Nations to determine the existence of any threat to the peace, or act of aggression did not preclude the instituting of criminal proceedings by States and other entities empowered to do so under the statute. The nature of the competence under Article 39 was political and, as such, could not be regarded as an impediment to the exercise of jurisdiction by the court with regard to crimes of aggression and threat of aggression.

18. Mr. PAWLAK said that, like almost all members, he was in favour of including provisions on penalties: without penalties and instruments for implementation the draft Code would be a paper tiger. The Code had direct meaning both as an instrument of punishment and as an important deterrent. Admittedly, the principle of *nulla poena sine lege* called for penalties, but it did not indicate what the penalties should be or how they should be applied. He agreed with the Special Rapporteur that the penalties should be included in the Code itself and not incorporated with the Code in domestic legislation. In view of the variety of possible crimes, degrees of guilt and circumstances, there should be a separate penalty for each crime. The adoption of a single penalty was the eas-

[4] See 2210th meeting, footnote 8.

ier approach, but it was not justified. He could not, therefore, support the proposals made in draft article Z.

19. The severity of the penalties should depend on the nature of the crime and the circumstances in which it was committed. The matter should not be left to the judge, but should be dealt with in the Code itself. The trend in criminal policy in many States was away from the death penalty, but the Commission must be realistic and must not exclude any form of punishment, especially as far as grave war crimes were concerned. For the same reason, life imprisonment should be viewed as an important penalty and should not be ruled out. Both extenuating and aggravating circumstances should also be taken into account. Provision should, of course, be made for supplementary penalties, but the aim must be punishment, not simply restoration of stolen or misappropriated property. Such property should be returned to the rightful owners, but property confiscated by the court must be property actually owned by the perpetrator of the crime.

20. At the previous session he had commented on the question of an international criminal jurisdiction, and the report on that session[5] had set out a number of options. The Commission must now take a position on the establishment of an international criminal court based on paragraph 3 of resolution 45/41 without waiting for further guidance from the General Assembly. It was time for the Commission to decide whether it was in favour of establishing a permanent international criminal court with exclusive jurisdiction for such crimes as aggression, apartheid, genocide and large-scale drug trafficking. At the same session a working group had done some work on the subject, and the Commission now needed to address a resolution to the General Assembly giving an outline of the draft Code and its basic principles. A working group might be set up with a view to producing a draft document by the end of the current session.

21. The role of the Security Council with respect to the international criminal court was a complex problem. The special responsibilities of the Security Council under the Charter of the United Nations could not be limited, or ignored by the Commission, but that consideration did not imply any limitation on the prerogatives of an international court. It was a political fact that the era of East-West confrontation was over, and the Commission must reorient its thinking accordingly in its approach to the role of the Security Council. The Council had recently shown unanimity in confronting difficult problems, and there were grounds for optimism that its role in the future would help rather than hinder the activities of the court. If the Council did not make a prior determination of the existence of the crimes of aggression or the threat of aggression, the court should be free to decide, in accordance with the Code, on its own procedures in the matter.

22. Mr. FRANCIS said that he had been surprised by the negative approach taken by the General Assembly to the question of the establishment of an international criminal jurisdiction. Happily, the matter had been referred back to the Commission, which must now press ahead. He endorsed the suggestion that a working group should be set up with a view to concluding the topic as quickly as possible.

23. He had no difficulty with the essence of paragraph 1 of the possible draft provision on the jurisdiction of the court but, read in conjunction with paragraph 2, the provision did not go far enough. To take an example from recent events in the Gulf, it was conceivable that an offender might be found in another State and protected there by a regime which supported the offender's position. Such a State would be unlikely to consent to the jurisdiction of the international court. The Commission must be realistic and send to the General Assembly draft proposals including a "drag-net" which would be effective in bringing all offenders against the Code to trial. Under the 1948 Convention on the Prevention and Punishment of the Crime of Genocide there was an option for an offender to be tried by an international tribunal (article VI). The 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid, which, admittedly, was not universally accepted, also contained principles on which the Commission could draw. For example, in article IV (*b*) it required all States Parties to enact legislation to try offenders, including stateless persons, regardless of where the offence had taken place. Again, in accordance with article V, persons charged under the Convention might be tried by a competent tribunal of any State Party having jurisdiction over the offence in question. He commended that approach to the Special Rapporteur, for the Code deserved no less.

24. He agreed with members who had questioned the advisability of the Special Rapporteur's proposal concerning the court's review competence, as set out in paragraph 4 of the possible provision. Adoption of the proposal would not improve the court's efficiency and would create problems for many States which had appeal regimes.

25. Under the terms of paragraph 1 of the possible draft provision on criminal proceedings, the right to institute proceedings was limited to States. However, in paragraph 137 of its 1990 report[6] the Commission had discussed two options: the most limited access, and the most liberal access, which granted that right not only to any State, but also to any organization or individual. Since the aim of the Code was to try individual offenders rather than States, the most liberal access was clearly preferable.

26. He did not concur with some members of the Commission regarding paragraph 2 of the provision, on the role of the Security Council. His starting point was the Definition of Aggression, adopted by the General Assembly in 1974.[7] At that time, the Assembly had drawn the Security Council's attention to the Definition and recommended that it should be taken into account by the Council in determining the existence of an act of aggression. Now, so many years later, the Council could not argue that it was unaware of the Definition. However, the Assembly had also stated that the list of acts of aggres-

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

[6] Ibid.

[7] See 2211th meeting, footnote 4.

sion was not exhaustive and that the Council might determine that other acts constituted aggression under the Charter of the United Nations. Once the Assembly accepted the acts of aggression defined by the Commission, the Council would have to take them into account as well. There ought to be no difficulty on that point, because the acts of aggression included in the Code were taken from the Definition adopted by the General Assembly. Only in unusual cases would the Security Council need to make a determination.

27. The Special Rapporteur's recommendations on penalties did not go far enough. Several members of the Commission rightly preferred a range of penalties suited to the gravity of the offences, and in that connection he endorsed the suggestions made by Mr. McCaffrey at the previous meeting.

28. States should be allowed to reach the goal of abolition of the death penalty gradually. If a specific reference to life imprisonment was included in the Code, certain States would not adhere to it. It was preferable to show flexibility and allow less rigorous penalties to be imposed. There was much to be gained by that approach, and much to be lost by insisting upon a rigid posture.

29. As to the question of confiscation, he agreed with the Special Rapporteur that confiscated property could be assigned to charities, but would go even further. For example, such property could be distributed among the relatives of the victims, or, in the case of property confiscated in connection with drug trafficking, it could be used to support clinics for rehabilitating drug addicts.

30. Mr. HAYES said that the Commission had reported on the question of an international criminal court to the General Assembly at its forty-fifth session, in response to a specific request made at the forty-fourth session.[8] Although the report had been well received by the Sixth Committee, guidance had not been forthcoming on which of the three models for a court described in the report was most acceptable and on which options were favoured for the competence, jurisdiction and structure of such a court.

31. Paragraph 1 of the draft on jurisdiction dealt with two aspects, the first being jurisdiction *ratione materiae*. Over the years, proposals had been made in various quarters to establish an international criminal court for specific criminal acts, mainly genocide, apartheid and, more recently, international drug trafficking and violations of humanitarian law. The Commission had itself raised the question and reported to the General Assembly several years previously, again without receiving a direct response. The draft Code as it was taking shape included those specific offences as well as others, and, in his view, they were the crimes to which the jurisdiction of the court should extend. He therefore favoured the Special Rapporteur's formulation at the beginning of paragraph 1 rather than the one contained in square brackets. Jurisdiction should not be confined to only some of the crimes in the Code, even temporarily. There was no justifiable criterion for such selectivity, which would inevitably be invidious. There were acts other than those in the Code that amounted to international crimes, yet he did not favour a provision to cover them. Apart from the fact that they were hardly of sufficient gravity to merit international jurisdiction, there was no agreement as to what they actually were, and specific identification of their elements was lacking. The task of the court would thus be impossible.

32. The second aspect raised in paragraph 1 of the possible draft provision on jurisdiction also touched upon paragraph 2 of the draft, namely, the derivation of jurisdiction *ratione personae*. It was his impression that the Special Rapporteur foresaw ratification or acceptance of the statute of the court by a State as conveying that State's will to join in establishing the court, with potential jurisdiction as set out in the provisions in question. In other words, it would not include advance consent by that State to the exercise of jurisdiction. On the contrary, specific consent would be required for each individual case. If that was the Special Rapporteur's understanding, he agreed that the State in whose territory the crime had been committed was the most important State for conferment of jurisdiction upon the international court. That was the most widely used basis for national jurisdiction. He would go further than the Special Rapporteur and say that only the consent of that State should be required for the purpose of conferring jurisdiction on the court. Thus, he would delete paragraph 2, for a requirement for numerous consents would tend to paralyse the court. That might be less likely if ratification of the statute implied the advance consent of the ratifying State in any case in which its consent was required for conferment of jurisdiction. However, if the State where the accused was found was not required to give consent to jurisdiction, another problem arose. Should that State be unwilling to send the accused before the court, there would be the question of an *in absentia* trial, a proceeding which he considered undesirable. If the Commission's proposals raised that question, it would have to be discussed.

33. Paragraph 3 was logical, but he had doubts about the desirability of paragraph 4. What rules or criteria could the court invoke in adjudicating disputes between States on judicial competence or indeed reviewing sentences of rival national courts? The trend in the *Lotus* case decision[9] went against the existence of international law rules prohibiting grounds on which national jurisdiction was claimed, and in his opinion, it was not desirable for the international court to make law on that subject. Review of rival sentences with the consent of the States concerned might be less problematic in that respect, but it would carry implications that ran counter to the *non bis in idem* principle, to which he attached great importance. Nor was he persuaded by an argument that the effect of such review would be to mitigate the consequences of ignoring that principle.

34. Paragraph 5, on advisory opinions on international criminal law, provided for a potentially very useful function of the court and should be retained, even if it was unlikely to be made use of at an early stage. The paragraph was silent as to whether those opinions would be binding. If they were, the usefulness of that jurisdiction

[8] General Assembly resolution 44/32 of 4 December 1989.

[9] See 2210th meeting, footnote 8.

in harmonizing the interpretation of international criminal law would be greatly enhanced.

35. As to the draft on instituting proceedings, he suspected that the problem was partly a semantic one, inasmuch as institution of proceedings often meant setting in motion the court proceedings for a prosecution, which was, of course, the function of the prosecuting authority. The Commission's 1990 report[10] on that issue had referred to States or others submitting cases, wording that might be more appropriate than "institution of proceedings". The international criminal court was unlikely to have the benefit of the equivalent of a police force, which most often took the national initiative that led to the prosecuting authority instituting proceedings. That national initiative might also come from individual complainants, and States would be the equivalent of such persons in the context of an international court. The arguments against an initiating role for the Security Council were convincing, and he felt the case against a General Assembly role, although not mentioned, was even more persuasive.

36. Paragraph 2 concerned the complex and difficult question of the relationship between the court and the Security Council when the alleged crime was aggression or threat of aggression. Two solutions to the problem were feasible, but neither was fully satisfactory. The first was that the Security Council alone was empowered under the Charter of the United Nations to determine the existence of any act of aggression, and that the court, as part of the United Nations system, could not make a finding in the absence of such a determination. Since a finding would be an essential element in successfully prosecuting an individual for the crime of aggression, convicting the individual would be impossible unless the Security Council had already determined that an act of aggression had occurred. It had been pointed out in the debate that that was a non-judicial approach, relying as it did on a positive determination on a question, vital to the proceedings, by a non-legal body in which, moreover, five States had a veto, something that enabled them to shield their nationals or others from the court's adjudication.

37. Modified versions of that approach would permit the court to decide the question, either where the Security Council had not addressed it or, having done so, had failed to reach a decision. It would appear that that modification only partly escaped criticism. From the point of view of those supporting precedence for the Security Council determination, it involved the risk of a delayed clash of conclusions if the Security Council subsequently took a different decision on the situation. For opponents of that view, such an approach would still maintain the vital role to be played by a non-legal body in a judicial proceeding.

38. Those who opposed precedence for the Security Council determination based their argument for the second solution on the conviction that the political function of the Security Council and the judicial function of a court were entirely separate and that, in trying an individual for the crime of aggression, the court might, and indeed must, make its own assessment as to whether an act of aggression had taken place before it moved on to the matter of individual responsibility. They rejected the contention that it would be unacceptable to have differing conclusions by the Security Council and the court. The different functions of the two bodies, they maintained, included the fact that one dealt with relationships between States in a political context, whereas the other would consider individuals in a judicial context. They referred to the autonomous nature of the fundamental principles of international law and the Judgment of ICJ in the *Nicaragua* case.[11] Furthermore, the court could also rely on the Definition of Aggression, as adopted by the General Assembly.[12]

39. Those arguments had echoes of attitudes to such related concepts as separation of powers and a system of checks and balances. Indeed, neither of those elements was particularly prominent in the United Nations system, and he was not sure whether that was an argument for or against findings by the court that differed from a determination by the Security Council.

40. It was not surprising that the Commission had failed to resolve such a complex question when it had addressed it in substance in article 12.[13] He tended to favour the separation approach as being judicially more sound and practically more just, but he was not blind to its disadvantages. Further reflection was needed, and he would suggest that the report should identify that point as one on which the Commission would welcome comments in the Sixth Committee's debate.

41. In its 1990 report the Commission had said that its examination reflected a broad agreement in principle on the desirability of establishing a permanent international criminal court,[14] a view that he had consistently shared. There had not been any clear guidance from the General Assembly or from Governments on the fundamental question of establishing a court or on what kind of jurisdiction, if any, they would find acceptable. It was to be hoped that the Commission would pursue the limited mandate it had been given in 1990 to go further into the issues raised in its own report. It might be useful to establish a working group to make greater headway, the Commission's tight schedule notwithstanding. Moreover, the new term of the Commission should be marked by renewed efforts for an early completion of a draft statute for an international court. By presenting solutions to difficult legal and practical problems, the Commission would disprove the recently repeated allegation that such problems had not received serious consideration. In addition, the presentation of a draft would make it clear that what was required for the establishment of the court was the political will to accept the solutions suggested by the Commission or to seek other more feasible but more acceptable ones. That was the only way to bring the question to a conclusion. In the meantime, the Commission, the most suitable body for accomplishing the preparatory work on such a court, must progress at a rate

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

[11] See 2209th meeting, footnote 6.

[12] See 2211th meeting, footnote 4.

[13] See 2208th meeting, footnote 5.

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

that deflected the danger of being outflanked by other less well-equipped bodies.

42. Mr. BARSEGOV, referring first to the question of the jurisdiction of an international criminal court, said that the limitation introduced in paragraph 1 of the draft provision suggested by the Special Rapporteur meant that the State or States in which the crime was alleged to have been committed could, by failing to bring the offender before a national court or to refer the case to the international court, prevent justice from being done. In his commendable desire to be realistic, the Special Rapporteur had overlooked an important aspect of reality, namely, that virtually all crimes against the peace and security of mankind, such as apartheid, genocide, aggression or State terrorism, were generally committed by States in their own territory but were directed against other States or mankind at large. The question of jurisdiction in respect of that category of crimes, which were crimes under international law, was therefore of concern not only to individual States but to the international community as a whole. The fact that, in order to meet the objections of a few members of the Commission, the Special Rapporteur had decided to drop the concept of a crime under international law was to be regretted, especially as the Special Rapporteur himself had previously appeared to be in favour of the concept. Its rejection represented a disavowal of existing conventions on the crimes in question. If those crimes were not crimes under international law, the question of the establishment of an international criminal court lost its importance; the responsibility for trying offenders would then lie with national criminal courts of which the international court, if it ever came into being, would merely be an adjunct. The solution proposed by the Special Rapporteur would thus signify a return to a state of affairs which had existed before the adoption of such instruments as the Genocide Convention.

43. As repeatedly stated on previous occasions, he was prepared, in the interests of strengthening international legality, to accept the universal jurisdiction of a permanent international criminal court in respect of crimes under international law. Such a solution would undoubtedly be the most conducive to the court's political independence and impartiality, as well as to the uniformity of international criminal justice. At the same time, he was prepared to consider other generally acceptable and realistic solutions whereby an international criminal court would be combined with the existing system of prosecuting persons who committed international crimes, or in other words, with the principle of universal criminal jurisdiction exercised by States individually. One such solution would consist in national criminal courts acting as courts of first instance, with a permanent international court as a supreme court dealing with crimes under international law. That solution, however, presupposed a more advanced degree of political culture and worldwide legal integration than existed at the present time. Another, in his view more realistic, scenario would be based on a clear-cut delimitation of the respective jurisdictions of national criminal courts and the permanent international criminal court according to the type of crime. The most serious crimes, such as genocide, aggression and possibly certain others, which directly affected the interests of all mankind, would fall within the jurisdiction of the international criminal court, and all other international crimes would continue to be tried by national criminal courts.

44. The question of the international criminal court having review competence in its capacity as a higher court was particularly delicate. On the one hand, such competence could ensure that sentences by national courts complied with international standards and were handed down on appropriate grounds; on the other hand, it was likely to encounter objections from individual States. He hoped that agreement could be reached in the Commission on that issue.

45. The coexistence of national and international criminal jurisdictions would help to ensure that, in accordance with the "try or extradite" principle, no crime under international law would remain unpunished. In cases where the national criminal court refused to institute proceedings, the international criminal court had to have the power, given sufficient grounds, to institute proceedings as a court of first instance, its jurisdiction in such cases being founded, not on the State's discretionary powers of referral of individual cases, but on a general rule of international law. In other words, a national criminal court's refusal to institute proceedings in a case of a crime against the peace and security of mankind would automatically give rise to the jurisdiction of the international criminal court.

46. A historical precedent for that approach was provided by the Nürnberg and Tokyo Tribunals, which had not been established on the basis of acceptance by the States where the crimes had been committed. Without wishing to comment upon the current fashion for deprecating the Nürnberg Principles as being based on the right of the victor, he would point out that the General Assembly resolution mandating the Commission to prepare a draft Code of offences against the peace and security of mankind[15] had also directed it to formulate the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal. The existence of those principles and their continuing validity as rules of international law had been recognized by the Commission and could not be ignored.

47. As to the question of whether criminal proceedings in the case of the crimes of aggression or threat of aggression should be subject to prior determination by the Security Council, he disagreed with the argument advanced by some Commission members to the effect that the international criminal court, or even national courts, should not be guided by a prior determination of aggression or threat of aggression by the Security Council because the latter was a political organ, whereas courts of law were legal organs. The Charter of the United Nations required the Security Council to determine the existence of aggression, not the commission of the crime of aggression by individuals. Indeed, an individual could not commit the crime of aggression; aggression being committed by a State had to be determined by the Security Council. Whether an individual had participated in the act of aggression, the extent of his involvement and

[15] General Assembly resolution 177 (II) of 21 November 1947.

the punishment to be applied were questions to be determined by the court.

48. A finding of aggression was not simply a political act, but was founded on international law. Denial of the legal character of a determination of aggression by the Security Council on the grounds that the Council was a political organ would also lead to denial of the legal nature of many General Assembly resolutions setting forth principles and rules of international law. Furthermore, it should not be forgotten that acts such as genocide, apartheid or aggression were not only crimes but also political acts. He shared the fear expressed by some members that conferment of the function of determining an act of aggression upon a criminal court, albeit an international court, might ultimately lead to the destruction of the existing system of international law and order. For States Members of the United Nations, the Charter represented the supreme source of contemporary international law, and any decision in the matter by a criminal court would be without force if it ran counter to a decision by the Security Council. At the same time, he understood the concern of those members of the Commission who did not want acts of aggression to remain unpunished in cases where the Security Council, for political reasons, failed to reach a decision. The problem was, of course, a difficult one, but in seeking a solution it was more advisable to adjust to new realities in international relations than to ignore or destroy the existing legal order.

49. He agreed with the view expressed in the commentary to the draft provision on criminal proceedings, but expressed doubts as to paragraph 1 of the provision, according to which criminal proceedings in respect of crimes against the peace and security of mankind should be instituted only by States. Since crimes of that nature could not be committed by individuals except as part of actions by States, and since States could not be prosecuted under the draft Code, it would seem appropriate to allow criminal proceedings for crimes against the peace and security of mankind to be instituted not only by States but also by the General Assembly, the Security Council—without the power of veto—and by national liberation movements recognized by the United Nations.

50. With reference to the question of penalties, for all its importance, it was subordinate to the decision reached on the establishment of a permanent international criminal court. The question of penalties was difficult not only because of the multiplicity of crimes but also, as the Special Rapporteur himself recognized in the report, because of the diversity of concepts and philosophies involved. He could not agree with the Special Rapporteur's choice of a single penalty applicable to all the crimes as against a separate penalty for each crime in the Code. Uniformity in sentencing was, of course, desirable, but it could be achieved only by linking specific penalties to specific crimes. The task would undoubtedly be difficult, yet an attempt based on a close study of existing national and international practice and of the experience of specialized organizations would be worth making.

51. On the question of the maximum penalty, referred to in the first paragraph of the text proposed by the Special Rapporteur, he pointed out that the existing diversity of penalties was due not so much to different philosophical or conceptual approaches as to different situations as regards crime in different countries. In assessing the seriousness of a specific crime, international justice also had to take into account universal criteria for determining the seriousness of the various types of crimes. So long as the international community remained divided on the subject of the death penalty, the argument that certain countries would not extradite an offender if he risked capital punishment could be countered by the argument that other countries might not want to extradite an individual guilty of, say, the crime of genocide, to a court which would perhaps sentence him to only 10 years' imprisonment. Attempting to settle the difficult question of capital punishment by accepting one of the solutions to be found in national penal systems might be detrimental to acceptance of the Code and to the idea of an international criminal court. For those reasons, he would recommend a more flexible approach, with a maximum and a minimum penalty indicated on the basis of existing practice in different countries. Such an approach would be conducive to greater harmony between national and international justice and would thus enhance the effectiveness of the struggle against international crimes.

The meeting rose at 1.05 p.m.

2213th MEETING

Thursday, 23 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.

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]

[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).