

Document:-  
**A/CN.4/SR.2053**

**Summary record of the 2053rd meeting**

Topic:  
**Draft code of crimes against the peace and security of mankind (Part II)- including the  
draft statute for an international criminal court**

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of the question, it had been said that the matter required further examination; at least two members had taken the view that it should simply be left to States themselves to decide.

49. In the opinion of Mr. Thiam, if the draft articles did not provide for a procedure for the settlement of disputes, there would be no point in referring to good faith. Some members had expressed the view that the draft should contain provisions on dispute settlement for the purposes not only of article 15 [16], but also of other articles as well. Since the general view was in favour of some provision along the lines of paragraph 5, the matter could perhaps be examined further in the Drafting Committee.

50. He thanked members for their constructive comments and suggestions; they would provide a sound basis for work in the Drafting Committee, to which article 15 [16] could now be referred for further consideration.

51. The CHAIRMAN, noting that the Commission had concluded its consideration of the first two chapters of the Special Rapporteur's fourth report (A/CN.4/412 and Add.1 and 2), said that, if there were no objections, he would take it that the Commission agreed to refer draft article 15 [16] to the Drafting Committee for consideration in the light of members' comments.

*It was so agreed.<sup>4</sup>*

*The meeting rose at 11.35 a.m.*

<sup>4</sup> For consideration of draft articles 10 [15] [16] and 20 [15] [16] proposed by the Drafting Committee, see 2071st meeting, paras. 6 *et seq.*, and 2073rd meeting, paras. 62 *et seq.*, respectively.

## 2053rd MEETING

*Tuesday, 31 May 1988, at 10 a.m.*

*Chairman:* Mr. Leonardo DÍAZ GONZÁLEZ

*Present:* Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

### Draft Code of Crimes against the Peace and Security of Mankind<sup>1</sup> (A/CN.4/404,<sup>2</sup> A/CN.4/411,<sup>3</sup> A/CN.4/

<sup>1</sup> 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.

<sup>2</sup> Reproduced in *Yearbook . . . 1987*, vol. II (Part One).

<sup>3</sup> Reproduced in *Yearbook . . . 1988*, vol. II (Part One).

### L.420, sect. B, ILC(XL)/Conf.Room Doc.3 and Corr.1)

[Agenda item 5]

#### SIXTH REPORT OF THE SPECIAL RAPPORTEUR

#### ARTICLE 11 (Acts constituting crimes against peace)

1. The CHAIRMAN invited the Special Rapporteur to introduce his sixth report on the topic (A/CN.4/411), as well as the revised draft article 11<sup>4</sup> contained therein, which read:

#### CHAPTER II. ACTS CONSTITUTING CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND

##### PART I. CRIMES AGAINST PEACE

#### *Article 11. Acts constituting crimes against peace*

The following constitute crimes against peace:

1. The commission by the authorities of a State of an act of aggression.

##### (a) *Definition of aggression*

(i) Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this definition;

(ii) *Explanatory note.* In this definition, the term "State":

a. is used without prejudice to questions of recognition or to whether a State is a Member of the United Nations;

b. includes the concept of a "group of States", where appropriate.

##### (b) *Acts constituting aggression*

Any of the following acts, regardless of a declaration of war, shall qualify as an act of aggression:

(i) the invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

(ii) bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

(iii) the blockade of the ports or coasts of a State by the armed forces of another State;

(iv) an attack by the armed forces of a State on the land, sea or air forces or marine and air fleets of another State;

(v) the use of armed forces of one State which are within the territory of another State with the agreement of the receiving State in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

(vi) the action of the authorities of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

(vii) the sending by or on behalf of a State of armed bands, groups, irregulars (or mercenaries) which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

##### (c) *Scope of this definition*

(i) Nothing in this definition shall be construed as in any way enlarging or diminishing the scope of the Charter, including its provisions concerning cases in which the use of force is lawful;

<sup>4</sup> Revised text of draft article 11 submitted by the Special Rapporteur at the Commission's thirty-eighth session (*Yearbook . . . 1986*, vol. II (Part Two), pp. 42-43, footnote 105).

- (ii) Nothing in this definition, and in particular subparagraph (b), could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, particularly peoples under colonial and racist régimes or other forms of alien domination; nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration.

2. Recourse by the authorities of a State to the threat of aggression against another State.

### 3. FIRST ALTERNATIVE

Interference by the authorities of a State in the internal or external affairs of another State. The term "interference" means any act or any measure, whatever its nature or form, amounting to coercion of a State.

### 3. SECOND ALTERNATIVE

Interference by the authorities of a State in the internal or external affairs of another State:

- (i) by fomenting, encouraging or tolerating the fomenting of civil strife or any other form of internal disturbance or unrest in another State;
- (ii) by organizing, training, arming, assisting, financing or otherwise encouraging activities against another State, in particular terrorist activities.

#### (a) Definition of terrorist acts

The expression "terrorist acts" means criminal acts directed against a State or the population of a State and calculated to create a state of terror in the minds of public figures, a group of persons, or the general public.

#### (b) Terrorist acts

The following constitute terrorist acts:

- i. any act causing death or grievous bodily harm or loss of liberty to a head of State, persons exercising the prerogatives of the head of State, their hereditary or designated successors, the spouses of such persons, or persons charged with public functions or holding public positions when the act is directed against them in their public capacity;
  - ii. acts calculated to destroy or damage public property or property devoted to a public purpose;
  - iii. any act likely to imperil human lives through the creation of a public danger, in particular the seizure of aircraft, the taking of hostages and any form of violence directed against persons who enjoy international protection or diplomatic immunity;
  - iv. the manufacture, obtaining, possession or supplying of arms, ammunition, explosives or harmful substances with a view to the commission of a terrorist act.
4. A breach of the obligations of a State under a treaty designed to ensure international peace and security, in particular by means of:
- (i) prohibition of armaments, disarmament, or restriction or limitation of armaments;
  - (ii) restrictions on military training or on strategic structures or any other restrictions of the same character.

5. A breach of the obligations of a State under a treaty prohibiting the emplacement or testing of weapons in certain territories or in outer space.

### 6. FIRST ALTERNATIVE

The forcible establishment or maintenance of colonial domination.

### 6. SECOND ALTERNATIVE

The subjection of a people to alien subjugation, domination or exploitation.

7. The recruitment, organization, equipment and training of mercenaries or the provision of facilities to them in order to threaten the independence or security of States or to impede national liberation struggles.

A mercenary is any person who:

(a) is specially recruited locally or abroad in order to fight in an armed conflict;

(b) does, in fact, take a direct part in the hostilities;

(c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar rank and functions in the armed forces of that party;

(d) is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict;

(e) is not a member of the armed forces of a party to the conflict;

(f) has not been sent by a State which is not a party to the conflict on official duty as a member of its armed forces.

2. Mr. THIAM (Special Rapporteur) said that his sixth report (A/CN.4/411) consisted of three main parts: part I related to the crimes against peace enumerated in the 1954 draft code; part II proposed new characterizations of acts as crimes against peace; and part III contained the revised text of draft article 11.

3. The report was entirely about one particular category of crimes against the peace and security of mankind, namely crimes against peace, which were acts that threatened international peace and security, either because they constituted a breach of the peace or because they constituted a threat to peace. They differed from crimes against humanity because they affected the sovereignty or territorial integrity of States and accordingly involved State entities. Aggression was a typical example. Crimes against humanity threatened human entities—peoples, populations or ethnic groups—on the grounds of race, religion, political opinion, and so on. Genocide was the best illustration of that kind of crime. The Commission had already discussed that distinction at length at its thirty-seventh session, in 1985, when it had considered his third report on the topic.<sup>5</sup>

4. Referring to part I of the sixth report, it would be noted that nine crimes against peace were enumerated in the 1954 draft code, and the question now before the Commission was the possible revision of that list.

5. The first difficulty concerned the crime of aggression and preparation of aggression. The concept of preparation, which had been taken from the Charter of the Nürnberg International Military Tribunal<sup>6</sup> and from the Charter of the International Military Tribunal for the Far East (Tokyo Tribunal),<sup>7</sup> had also been used by the Commission in the Nürnberg Principles,<sup>8</sup> but the Commission had not given a sufficiently precise indication of the content of that concept. For example, when did preparation of aggression commence? What distinguished it from preparation for defence? When aggression did take place, should the perpetrator be prosecuted both for the crime of preparation and for the

<sup>5</sup> *Yearbook . . . 1985*, vol. II (Part One), p. 63, document A/CN.4/387.

<sup>6</sup> Charter annexed to the London Agreement of 8 August 1945 for the prosecution and punishment of the major war criminals of the European Axis (United Nations, *Treaty Series*, vol. 82, p. 279).

<sup>7</sup> *Documents on American Foreign Relations* (Princeton University Press), vol. VIII (July 1945-December 1946) (1948), pp. 354 *et seq.*

<sup>8</sup> Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal. Text reproduced in *Yearbook . . . 1985*, vol. II (Part Two), p. 12, para. 45.

crime of aggression? Lastly, if aggression did not take place, how could criminal intent be established? He did not have answers to all those questions and was relying on the Commission to enlighten him. If the Commission wished to retain preparation of aggression among the crimes against peace, which seemed somewhat unlikely, it would always be possible to make it the subject of an express provision.

6. Two other crimes listed in the 1954 draft code could be removed from the list, since they were specified in the 1974 Definition of Aggression.<sup>9</sup> They were annexation, and the crime of sending armed bands into the territory of another State. The Commission would therefore have to decide whether it wished to treat those acts as separate crimes.

7. The greatest difficulties, however, were posed by the crime of intervention in a State's internal or external affairs. The concept itself was not in dispute; it was the content that called for further reflection. As he argued in his report (*ibid.*, paras. 12-14), wrongfulness depended on the form and extent of the intervention. If intervention was military in character, it became aggression. It was difficult, however, to exclude from international relations the influence which certain States exerted on other States and which was sometimes mutual. Hence coercion was the factor which made it possible to draw a distinction between lawful intervention and wrongful intervention.

8. The legal basis of the principle of non-intervention raised fewer doubts because it was very firmly established, first of all in treaty law, such as the Charter of the United Nations, the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty<sup>10</sup> and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,<sup>11</sup> and also in judicial precedents. Thus, in its Judgment of 27 June 1986 in the *Nicaragua* case, the ICJ had ruled that the principle of non-intervention was "part and parcel of customary international law".<sup>12</sup> The Commission itself had gone still further by stating, in the commentary to article 50 of the final draft articles on the law of treaties, adopted in 1966, that the prohibition of the use of force constituted a conspicuous example of a rule in international law having the character of *jus cogens*.<sup>13</sup>

9. The most interesting problem raised by the concept of intervention, however, was its legal content. Generally speaking, the tendency was to make it very broad in scope, as could be seen from the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, the Charter of

OAS (Bogotá Charter) (*ibid.*, para. 24), resolution 78 of 21 April 1972 of the General Assembly of OAS (*ibid.*, para. 25) and the ICJ's judgment in the *Nicaragua* case. Those texts confirmed that it was the element of coercion that marked the dividing line between lawful intervention and wrongful intervention.

10. In view of that broad legal content, there had to be room for exceptions, such as the "colonialism exception", which would justify intervention designed to assist colonial peoples struggling for independence. There was also the case of intervention on the basis of the attributes of the United Nations, and that of intervention at the request of the Government in whose territory the intervention occurred.

11. In the 1954 draft code, however, the concept of intervention was very restricted, since it was limited to "coercive measures of an economic or political character" (art. 2, para. (9)). It was for that reason that the 1954 draft code treated as separate offences certain acts—such as the encouragement of civil strife in another State—that it would be difficult nowadays to distinguish from intervention. Furthermore, the 1954 code did not cover certain acts which had become commonplace today: training camps for rebels against the Government of another State, financing terrorism, and so on. Accordingly, he would be inclined to favour broadening the definition of intervention adopted in 1954. Of course, the Commission would still have to decide what was to be done with regard to fomenting civil strife and to terrorism in all its forms: would they or would they not be included in the general definition of intervention in a State's internal or external affairs?

12. Another consideration was that intervention could not be confined to measures of coercion *in* another State, for it would seem to encompass certain activities which, although occurring *outside* the territory of a State, were aimed at intervention in its internal affairs. That was true of military training of armed nationals, of supplying arms and equipment, of financing subversive movements, etc.

13. In part II of his sixth report he had added two new situations that could constitute crimes against peace: colonial domination, a problem on which the Commission had engaged in very lively debate at its thirty-seventh session, in 1985, and mercenarism, which it had also discussed at length. A new provision concerning mercenarism was proposed in paragraph 7 of draft article 11, in the realization that an *Ad Hoc* Committee of the United Nations was working on the matter. The Committee's conclusions were not binding on the Commission, but the Committee's work was not yet completed and the definition of mercenarism he had proposed could only be provisional.

14. Part III of the report contained the revised draft article 11. Most of its provisions were followed by brief comments summarizing the discussions already held thereon and citing the various international instruments on which the provisions were based.

15. Mr. BENNOUNA said that the Special Rapporteur had displayed an interesting approach to the presentation of the problem of intervention, a very complex problem to which the Commission would un-

<sup>9</sup> General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

<sup>10</sup> General Assembly resolution 2131 (XX) of 21 December 1965.

<sup>11</sup> General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

<sup>12</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, I.C.J. Reports 1986*, p. 106, para. 202.

<sup>13</sup> *Yearbook . . . 1966*, vol. II, p. 247, document A/6309/Rev.1, part II, para. (1) of the commentary.

doubtedly have to revert. For the time being, he would confine his statement to a few preliminary remarks.

16. Several principles of international law had a bearing on the question of intervention. The first was the rule on the non-use of force. While cases of military intervention such as armed attack, the sale of arms, the training of armed groups, etc. were fairly well known, international law was much less clear with regard to economic or political intervention. For example, economic coercion was left more or less aside even in the 1969 Vienna Convention on the Law of Treaties, because the practice of States was too fluid to establish a general rule.

17. The concept of intervention was also tied in with the right of peoples to self-determination, but that right also had internal aspects. It implied that a people was entitled to adopt the government of its choice; if it was prevented from doing so from outside, the case was one of intervention. Moreover, the right to self-determination was not confined to liberation from the colonial yoke: it also meant that political debate within the State was to be free of any outside coercion. Besides, international law did not impose in that connection any principle of legitimacy and did not pass judgment on the régimes—whether democratic or authoritarian—chosen by peoples. It was sufficient for a régime to emanate from the State itself.

18. The Special Rapporteur had analysed very clearly the problem of the legal content of the concept of intervention. Was intervention neutral, and did it become wrongful when it took certain forms, or was it wrongful in itself? It should be noted, in passing, that the term “intervention” was no longer neutral, in view of its pejorative connotations in legal opinion and in General Assembly resolutions: perhaps it would be better to use the word “interference”, which did not have such ominous implications. The Special Rapporteur seemed to favour the solution of laying down a general principle of non-intervention, followed by an enumeration of exceptions to that principle. The Commission would have to clarify its position on that particular point, for intervention had become the commonest form of coercion and the commonest manifestation of power relations in the world; it could take very subtle forms to avoid the sanctions on aggression, yet it sometimes led to the same results.

19. That was true, for example, of so-called “intervention by consent” or “requested intervention”, in other words intervention by one State in the territory of another with the latter’s consent. Over the past 30 years, that exception had been frequently invoked in order to justify certain events. On the grounds that the Government concerned had given its consent—whether beforehand or afterwards was another question—the interventions in question had been claimed to be lawful. He did not share that view. In the first place, the right of every people to adopt the régime of its choice was a general and absolute right; any act committed in breach of it had to be declared wrongful, and it was not possible to invoke any other circumstance as an exception. Moreover, the legitimacy of a political régime was often a very uncertain question, for example in the case of civil war.

20. Lastly, the Special Rapporteur could have carried further his analysis of intervention, which was a very common method of practising compulsion and coercion in the world of today. If the Commission failed to pinpoint intervention in legal terms, it would run the risk of bypassing a major aspect of modern international practice.

21. Mr. ARANGIO-RUIZ said that, if he had understood him correctly, he could not agree with Mr. Bennouna’s conception of the right of peoples to self-determination. He was referring, in particular, to Mr. Bennouna’s remark that international law did not pass judgment on the régimes—whether democratic or authoritarian—chosen by peoples and that it was sufficient for a régime to emanate from the State itself. In his own view, that was not exactly the attitude of modern international law with regard to the political régimes of States. In accordance with the international instruments which governed the right of peoples to self-determination—whether originating in the United Nations or in other bodies—and in accordance with the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States,<sup>14</sup> all peoples, including metropolitan peoples, possessed the right to self-determination, and not only colonial peoples. That interpretation was confirmed by the instruments adopted by the United Nations after 1970 and by the Helsinki Final Act adopted on 1 August 1975.<sup>15</sup>

22. The chapter of the Helsinki Final Act on “Questions relating to security in Europe” included in particular a “decalogue”, i.e. 10 principles of conduct which the States participating in the Conference had declared to be in conformity with the Charter of the United Nations and had undertaken to respect in their mutual relations and in their relations with third States.<sup>16</sup> Principle VI concerned non-intervention in internal affairs, which was defined in accordance with the relevant United Nations instruments and framed with even greater precision. Principle VIII concerned the equal rights and self-determination of peoples. Its second paragraph stated that “*all\* peoples always\* have the right, in full freedom, to determine, when and as they wish\*, their . . . political status\**”; and its third paragraph stated that “*the participating States reaffirm the universal significance\* of respect for and effective exercise of equal rights and self-determination\**” and “*also recall the importance of the elimination of any form of violation of this principle\**”.

23. Hence there was unquestionably an internal aspect as well as an external aspect of the right to self-determination. Under the external aspect, States were called upon to respect the right to self-determination of other peoples and States. Under the internal aspect, every State—and thus every Government—was called upon to respect the right of its own people freely to choose its political régime and freely to change it whenever it saw fit. That inevitably implied condem-

<sup>14</sup> See footnote 11 above.

<sup>15</sup> *Final Act of the Conference on Security and Co-operation in Europe* (Lausanne, Imprimeries Réunies, [n.d.]).

<sup>16</sup> *Ibid.*, pp. 77 *et seq.*, sect. 1 (a), “Declaration on Principles Guiding Relations between Participating States”.

nation of any régime which, being undemocratic, was constitutionally or by definition unable to guarantee the exercise of the freedoms without which no popular self-determination was conceivable. In other words, every Government had to ensure its own people's right to adopt a free régime and to change its Government at any time, that was to say the right to internal self-determination. The advent of dictatorships in Europe in the 1930s could be explained by the fact that some countries had tolerated that new state of affairs, and they had suffered the consequences later.

24. He would point out that, in emphasizing the internal aspect alongside the external aspect of the right of peoples to self-determination, the Helsinki Final Act—in which 35 States, including four permanent members of the Security Council, had participated—had stated no new rules compared with the Charter. With regard particularly to freedom of decision, it only made more explicit the universal character of self-determination which was already set out in the Charter and which rightly entailed an internal dimension alongside the external dimension to that right.

25. Mr. CALERO RODRIGUES said that he would caution the Commission against deviating from its task, which was in fact more restricted and more specific. He even wondered whether each crime should not be discussed in turn. As the Special Rapporteur had pointed out, the Commission had devoted no less than 11 meetings at its thirty-seventh session, in 1985, to various aspects and consequences of the crimes against peace covered by draft article 11. Hence there seemed to be no point in reopening that discussion and it would be better to concentrate on the proposed new version of the article.

26. Commenting generally on the draft code, he said that the Commission was required to decide not on the lawfulness of certain acts, but rather on the responsibility of the individual who had committed a particular act. For example, while there was no doubt that intervention in the affairs of a State was forbidden, that did not necessarily mean it fell within the ambit of the draft code. Furthermore, the fact that a particular act was excluded from the code certainly did not mean that the act was lawful.

27. The Special Rapporteur's sixth report (A/CN.4/411), although understandably less comprehensive and detailed than his previous ones, met the needs of the present session. The proposed draft article 11 none the less called for one comment on methodology: in principle, it would be preferable to have as many articles as crimes, rather than deal with all crimes against peace in one single article. But that question could be settled later by the Commission, or by the Drafting Committee.

28. The first of the seven crimes against peace covered by article 11 was, of course, aggression, and it was established at the outset that those guilty of such a crime must be the authorities of a State. Neither a private individual nor even a group of individuals could commit an act of aggression. The same problem would be encountered in the case of all crimes against peace, hence the need to link the responsibility of the individual to the act of a State, whether or not that act was a crime within the meaning of article 19 of part I of the draft ar-

ticles on State responsibility.<sup>17</sup> Was it enough to refer, as did paragraph 1 of article 11, to the "commission by the authorities of a State of an act of aggression"? Possibly a more direct reference could be made, to make it clear that the individual, as an authority of the State, was held accountable in his individual capacity for his participation in an act committed by the State.

29. The Special Rapporteur gave a definition of aggression which was accompanied by an explanatory note and a list of acts constituting aggression. The text was based on the 1974 Definition of Aggression,<sup>18</sup> with some changes to take account of the political elements, for the Commission was concerned only with the legal aspect of the matter. He was not certain, however, that that presentation was satisfactory, and regretted in particular that the definition and the explanatory note, apparently proposed for inclusion in the draft article itself, preceded the list of acts constituting aggression. In his view, the definition of aggression was not essential for the article. As with criminal law in general, the Commission should be concerned with specific acts to which a sanction attached. In his view, the article should be limited to the introductory statement in paragraph 1 and the list of acts constituting aggression. The clarifications given elsewhere were perhaps useful, but they were not indispensable. Also, the more the Commission tried to clarify points, the more it would run into difficulties. A feature of criminal law was its conciseness: it set forth the facts and established the consequences of those facts.

30. Nor was he convinced that the threat of aggression had a place in the draft article. The Special Rapporteur had been wise not to include preparation of aggression and should do likewise in the case of the threat of aggression, which did not of course mean that it would thereby be legalized. How could individuals be punished for the threat of aggression? And what would happen if the threat was not carried out? To cover the threat of aggression would be to extend the scope of the draft code unduly and thus make its acceptance even more difficult.

31. The second crime was "intervention", which, in English, was preferable to the term "interference". It was not necessary, however, to retain intervention as such in the draft code. In 1985, he had recommended that the concept of intervention be broken down and that the acts of intervention to be covered by the code be specified, without dwelling on the actual concept of intervention,<sup>19</sup> which was extremely complex and would give rise to much difficulty. Some of the elements constituting intervention in fact appeared in the second alternative of paragraph 3, which included a reference to terrorist activities. In that connection, there was no reason why the subject of paragraph 7, the activities of mercenaries, should not be added to terrorist activities. Mercenarism was admittedly a problem, particularly so in some parts of the world, but it lacked the specificity necessary for inclusion in the code. The concern of many States on that score was certainly understandable, but the Commission would achieve the same result by

<sup>17</sup> *Yearbook* . . . 1980, vol. II (Part Two), pp. 30 *et seq.*

<sup>18</sup> See footnote 9 above.

<sup>19</sup> See *Yearbook* . . . 1985, vol. I, p. 17, 1880th meeting, para. 38.

referring to the use of mercenaries in paragraph 3, while preserving the economy of the draft and avoiding points of friction.

32. The Special Rapporteur provided a definition and a list of terrorist acts and, there again, a definition was, strictly speaking, unnecessary, although a general definition, like the one proposed, might be useful. Unlike intervention, the concept of terrorism was relatively easy to understand.

33. In paragraphs 4 and 5, both of which dealt with a breach of the obligations of a State, there was the recurring problem of the relationship between the responsibility of the individual and the nature of the act for which that responsibility was incurred and for which the individual would be liable to punishment. In the cases covered, a breach of the treaty obligations in question could only be an act of a State, and the individual could only be part of the mechanism of the State that had caused the breach. The proposed wording was certainly not judicious. On a point of form, since the nature of the obligations was the same in both cases, namely treaty obligations of a military nature, the two provisions could easily be combined.

34. As to paragraph 6, on colonial domination, it would be noted that neither alternative referred to an act of a State, yet only an act of a State could be involved. The proposed wording, at least in the first alternative, was similar to that used in paragraph 3 (b) of article 19 of part 1 of the draft articles on State responsibility, and an act of State was common to all other crimes covered by draft article 11, including aggression, intervention and a breach of the obligations of States. One solution might be to invert the proposition in paragraph 2 of article 3 (Responsibility and punishment), provisionally adopted by the Commission at the previous session,<sup>20</sup> so as to provide in chapter 1 of the draft that the responsibility of the individual was subordinate to the establishment of the responsibility of the State. How, for instance, could an individual who had taken part in an act of aggression be punished if the State concerned was not considered to have committed the act in question? That comment applied equally to intervention and colonial domination. It would perhaps be advisable, therefore, to provide expressly in the draft code for a connection between the act giving rise to the responsibility of the individual and the fact that such an act was ultimately an act of a State.

35. With regard to paragraph 7, he would refer members to his earlier comments on mercenarism (para. 31 above).

36. In conclusion, he considered that there should be one article for each crime; that the threat of aggression and mercenarism should be excluded from the list of acts constituting crimes; and that paragraphs 4 and 5 of article 11 should be combined. In particular, the Commission should, in the light of members' comments, take a decision on the text to be referred to the Drafting Committee, in other words on the content of the list of criminal acts proposed by the Special Rapporteur, and indicate whether the list was to be retained in its present form, expanded or reduced. He trusted that the Com-

mission would be able to do so at the present session. The Commission was not required to draft a general code of international criminal law, and the draft code dealt not with the responsibility of States, but with that of individuals for certain specific acts. For that reason, the code must be specific and precise; otherwise it would be unrealistic and could not be applied.

37. Mr. FRANCIS said that, having listened to the Special Rapporteur, he wished to make a few preliminary comments on preparation of aggression, and to respond to Mr. Calero Rodrigues on one point.

38. Since he understood that the Special Rapporteur did not intend to include preparation of aggression in the draft code, he wished, bearing in mind recent history and particularly the Second World War, to point out that some aggression was inevitably preceded by preparations. He therefore believed that preparation of aggression should be covered by the draft, but it should not affect the legitimacy of activities related to a State's right to self-defence. Indeed, the threat of aggression should also be included.

39. As to Mr. Calero Rodrigues's remarks on mercenarism, no matter what interpretation was given to mercenarism in the Definition of Aggression, it should also be possible to apply the code to cases in which an individual committed a crime against the peace and security of mankind independently of any underlying act of State.

40. He reserved the right to speak on the Special Rapporteur's sixth report (A/CN.4/411) at a later date.

41. Mr. KOROMA pointed out that the Helsinki Final Act was not the only instrument that recognized the right to self-determination at the internal level.

*The meeting rose at 11.35 a.m.*

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## 2054th MEETING

*Wednesday, 1 June 1988, at 10 a.m.*

*Chairman:* Mr. Leonardo DÍAZ GONZÁLEZ

*Present:* Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Reuter, Mr. Roucouas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

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1. The CHAIRMAN said members would surely be pleased to hear that, during the week of 23 to 27 May, the Commission had used 100 per cent of the time and conference service facilities allocated to it.

<sup>20</sup> *Yearbook . . . 1987*, vol. II (Part Two), p. 14.