Document:-

A/CN.4/SR.2055

Summary record of the 2055th 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:-

1988, vol. I

qualify as acts of aggression under article 3 of the Definition of Aggression.

61. The whole problem stemmed from the fact that a code of crimes against the peace and security of mankind had to include acts of a minor character that could nevertheless be of a certain gravity in human terms in that they could involve loss of life, such as the elimination of political opponents. Such crimes might violate the sovereignty of a State, but did they amount to aggression? There was a borderline to be drawn, as well as a problem of method, which would have to be clarified as work on the draft progressed. His own view was that intervention could cover military acts, but that not all military intervention amounted to aggression: it was for the Commission to decide whether minor acts involving the use of force should be covered by the code or not. He had no definite position on the matter, although in his view acts of minor gravity could be crimes even if they did not amount to aggression. That should be made clear from the legal standpoint.

The meeting rose at 1 p.m.

2055th MEETING

Thursday, 2 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. Sreenivasa Rao, 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[1] (*continued*) (A/CN.4/404,[2] A/CN.4/411,[3] A/CN.4/L.420, sect. B, ILC(XL)/Conf.Room Doc.3 and Corr.1)

[Agenda item 5]

SIXTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE 11 (Acts constituting crimes against peace)[4] (*continued*)

1. Mr. PAWLAK recalled that it was in 1947 that the General Assembly had referred the present topic to the Commission, which should endeavour to lose no time in completing the work. It would be remembered that the General Assembly, in resolution 42/151 of 7 December 1987, had invited the Commission, in particular, to elaborate a list of crimes against the peace and security of mankind. Draft article 11 and the comments thereon submitted by the Special Rapporteur in his sixth report (A/CN.4/411) formed a sound basis for that task.

2. In general, he agreed with the list of crimes against peace in draft article 11, on the understanding that it was simply a proposal and that it would need further consideration before it could be referred to the Drafting Committee. The Commission's task in that respect would have been easier if it had adopted at the previous session—at least provisionally—a conceptual definition of crimes against the peace and security of mankind; it would thus have had a criterion to facilitate the preparation of the list of crimes. In fact, the Commission had decided that it would revert to the question of the conceptual definition later.[5] The discussion in the Sixth Committee of the General Assembly at its forty-second session had shown that many States supported the idea of including a definition of that kind (see A/CN.4/L.420, paras. 26-27). He himself had submitted a draft definition to the Commission at the thirty-ninth session.[6]

3. He generally endorsed the list of "acts constituting aggression" in paragraph 1 (*b*) of article 11. While he shared the Special Rapporteur's position that each crime described in the draft code should have a general definition at the beginning of the article relating to it, he supported the suggestion by Mr. Calero Rodrigues (2053rd meeting) that, for the purpose of defining acts constituting aggression or other crimes against peace, the Commission could draw on some of the techniques used in internal criminal law. Furthermore, it would be better if paragraph 1 (*b*) (vii) spoke only of "irregulars" and if there were a separate article dealing with all the aspects of mercenarism. In fact, the idea of dealing with mercenarism in a separate paragraph (para. 7) had been proposed by the Special Rapporteur and had attracted substantial support during the discussion.

4. Again, "recourse by the authorities of a State to the threat of aggression against another State" (para. 2) should be kept as a separate crime. The code was intended to help deter would-be aggressors from preparing aggression, as so eloquently explained by Mr. Reuter at the previous meeting.

5. The question whether the code should refer to "interference" or to "intervention" in the internal or external affairs of another State was not purely a matter of language. The term "intervention" was preferable, because it had a broader connotation. In any case, the definition of that crime would require further elaboration on the basis of the provisions of the Charter of the United Nations, of existing treaties and of judgments of the ICJ. International declarations and other documents of a political or regional character could only be regarded as indicative material. The second alternative of paragraph 3 proposed by the Special Rapporteur

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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 . . . 1987*, vol. II (Part One).

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

[4] For the text, see 2053rd meeting, para. 1.

[5] See paragraph (1) of the commentary to article 1 (Definition), provisionally adopted by the Commission at its thirty-ninth session (*Yearbook . . . 1987*, vol. II (Part Two), p. 13).

[6] See *Yearbook ... 1987*, vol. I, p. 227, 2031st meeting, para. 16.

would provide the best basis for formulation of the definition.

6. The second alternative of paragraph 3 mentioned terrorist activities. Since the first study of terrorism by the United Nations in 1972, the international community had been unable to arrive at a universally agreed definition of terrorism. The Special Rapporteur had relied heavily on the 1937 Convention for the Prevention and Punishment of Terrorism,[7] while drawing attention at the same time to certain new forms of terrorism; but that did not exhaust the subject. There were three sometimes interrelated types of activities: internal terrorism, organized by individuals or local groups without any support from abroad; and two forms of international terrorism, namely State terrorism and terrorism by internationally-operated groups and organizations. Internal terrorism did not concern the Commission, but international terrorism did. Although it was probable that the Commission could not invent a legal remedy for the phenomenon, it none the less had to face the realities of the world by including in the draft code provisions which adequately reflected those realities.

7. In speaking of international terrorism, it had to be borne in mind that the interests and territories of more than one State were involved, for example when the perpetrator or the victim of the act of terrorism was not a national of the country in which the act was committed, or when the perpetrator fled to another country.

8. Various attempts—both official and private—had been made to define international terrorism. In the United States of America, in the 1986 report of the Vice-President's Task Force on Combating Terrorism, terrorism had been defined as the unlawful use or threat of violence against persons or property to further political or social objectives. According to that report, terrorism was usually intended to intimidate a Government, individuals or groups so as to modify their behaviour or policy, or compel them to do so. Robert Oakley had written that the United States Government used the expression "international terrorism" to describe "the premeditated use of violence against non-combatant targets for political purposes, involving citizens or territory of more than one country".[8] Another specialist on the question, the Egyptian General Ahmed Galal Ezaldin, had defined terrorism as a systematic and persistent strategy of violence practised by a State or a political group against another State or political group through a campaign of acts of violence—such as murder, assassination, unlawful seizure of aircraft, and bomb attacks—with the intention of creating a climate of terror and intimidating the population to achieve political ends.

9. Those were but a few examples of studies on international terrorism which could help the Commission to grasp the problem in all its dimensions, formulate the subject in a more up-to-date manner and shape a definition which adequately reflected the concrete manifestations of terrorism.

10. State terrorism constituted the most dangerous form of international terrorism and should therefore be dealt with in the draft code. It included operations which were financed, organized, directed or supported either severally or collectively, materially or logistically, by a State or group of States for the purpose of intimidating another State, person, group or organization.

11. The problem of international terrorism called for urgent action by the international community and for the strengthening of co-operation among its members. There now seemed to be a more favourable climate for solving the problem, as illustrated by an article published in September 1987 in which Mr. Gorbachev had advocated the establishment under United Nations auspices of a tribunal to investigate acts of international terrorism.[9]

12. In its work on the subject, the Commission had to take into account not only the provisions on terrorism contained in the four conventions mentioned by the Special Rapporteur in paragraph (2) of his comments on paragraph 3 of draft article 11, but also all the other international instruments—regional or bilateral—on the matter.

13. The Special Rapporteur was right to supplement the 1954 draft code with a provision in paragraph 5 of draft article 11 specifying that "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" constituted a crime. To the treaties mentioned by the Special Rapporteur in paragraph (2) of his comments on that provision, one could add the 1959 Antarctic Treaty[10] and the treaties on the nuclear-free zones in South America and the South Pacific.

14. Lastly, the Commission should not defer its consideration of mercenarism (para. 7) until the *Ad Hoc* Committee had prepared a convention on the subject. The Commission could work alongside the Committee and benefit from its experience and from the drafts it had already prepared. Mr. Koroma had rightly pointed out at the previous meeting that peoples, especially in Africa, were suffering greatly from the activities of mercenaries, and it was essential to bring those activities promptly to an end.

15. Mr. FRANCIS, reverting to his comments at the previous meeting on paragraph 3 of draft article 11, said that his suggestion had been to merge the two alternatives submitted by the Special Rapporteur. The substance of the first alternative would be retained and would become, with appropriate drafting changes, the introductory part of the new paragraph; subparagraphs (i) and (ii) of the second alternative would then follow.

16. Mr. GRAEFRATH said that the Sixth Committee of the General Assembly regarded the drafting of the code as a task of high political, moral and legal importance, particularly in view of the international community's growing awareness of the need to strengthen existing mechanisms of co-operation or to create new ones in order to face up jointly to the threats posed by weapons of mass destruction, continued regional con-

[7] See 2054th meeting, footnote 7.

[8] R. Oakley, "International terrorism", *Foreign Affairs* (New York), vol. 65, No. 3 (1987), p. 611.

[9] "Reality and the guarantees for a secure world", *Pravda*, 17 September 1987.

[10] United Nations, *Treaty Series*, vol. 402, p. 71.

flicts, acts of aggression and terrorism. In a world becoming more and more interdependent, such co-operation was essential. The code of crimes against the peace and security of mankind, which should become a standard-setting document reflecting the basic values of the international community, could contribute, if States so wished, to the survival of mankind, because of its deterrent effect. The Commission should bear those considerations in mind and adopt a bold and realistic approach in carrying out its task of fighting against crimes of the utmost gravity and against policies and activities that caused loss of life and undermined the achievements of civilization. Far from militating against the drafting of the code, the fact that, since the end of the Second World War, virtually no individual had been punished for crimes against the peace and security of mankind only underlined how timely it was, for such acts were occurring virtually every day.

17. He agreed with the approach adopted by the Special Rapporteur regarding the list of crimes but wished, before entering into the substance of the matter, to make certain comments on methodology.

18. First, he supported Mr. Calero Rodrigues's suggestion (2053rd meeting) that each crime should form the subject of a separate article, which would be in keeping with the Commission's usual method of work and with the normal structure of criminal codes.

19. Secondly, as provided for in article 3 (Responsibility and punishment), provisionally adopted by the Commission at its thirty-ninth session,[11] all the articles in the code should be drafted with a view to the formulation of the criminal responsibility of individuals. Hence it was necessary to start with the words "a person" or "any person" and not with "the authorities of a State". Obviously, an individual could not be punished for the crime of aggression if there was no aggression—which was an act of a State—but once aggression had been committed it was not the responsibility of the State concerned that had to be defined but that of the persons responsible for planning and initiating the aggression. An individual, of course, could commit such a crime only by exercising the power of the State, which meant that he must occupy a position of responsibility, whether political, economic or military. Two further aspects were involved. On the one hand, the planning of an aggressive war could be carried out not only by persons acting as a State authority, but also by persons who, because of their economic power, exerted more influence over such decisions than did ministers or generals. Members would recall that, at Nürnberg, Krupp and others had been among the accused. On the other hand, even in the case of an aggressive war, it would be wrong to hold every soldier who had taken part in the war responsible for a crime against peace. Caution was therefore necessary in attributing responsibility to individuals.

20. Similarly, every breach of an international obligation of a State did not entail the criminal responsibility of individuals. Consequently, the Commission must determine in which cases the breach of an international obligation of a State could be regarded as sufficiently serious to give rise to the criminal responsibility of the individuals concerned and to amount to a crime punishable under the code. That did not, of course, mean that all other breaches of international law were no longer wrongful acts.

21. It was not possible, when defining individual criminal responsibility, simply to transfer to the code the definition of State acts that had been recognized as violations of international law. It might not always be necessary to list all the possible ways of committing a given crime: a definition of the main elements might suffice. If the latter course were followed, as under municipal law, the definition of each crime would be much clearer than if detailed definitions, which already existed elsewhere, were simply repeated, as in the case of aggression. While it was true that the Definition of Aggression[12] provided guidelines for the Security Council, it could not be overlooked that the existence of aggression, as well as the right to react to it, did not depend on a finding by the Security Council.

22. Any court would, of course, have to rely on internationally accepted instruments in determining the responsibility of an individual for his contribution to one of the crimes concerned. Moreover, irrespective of whether aggression, genocide, colonialism or any other crime was involved, an act recognized as an internationally wrongful act of a State necessarily involved many different acts by individuals forming part of the whole. The court could not, however, simply take note of the occurrence of a breach of international law: it had to determine the individual contribution of those responsible for the act of State. In most cases, therefore, the degree of responsibility of the individual would depend on his participation in the act of the State.

23. The Special Rapporteur had raised the question whether planning and preparation of aggression should be included in the list of crimes covered by the code, since he was concerned about the difficulty of laying down specific criteria in the matter and also about overburdening the code with such provisions. For his own part, he shared Mr. Reuter's views (2054th meeting) in that connection and considered that planning and preparation of aggression should be made a specific crime.

24. In the first place, there could be no aggression without planning, and the main responsibility therefore lay with those who were in a position to do the planning and organizing. To illustrate that proposition, he quoted the last paragraph of article 6 of the Charter of the Nürnberg Tribunal,[13] which read: "Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes", namely crimes against peace, war crimes and crimes against humanity, "are responsible for all acts performed by any persons in execution of such plan." Participation in the formulation of a "common plan" had been one of the counts in the indictment at Nürnberg and had also been referred to in the judgment. It was thus possible for a court to hold that a particular individual had par-

[11] *Yearbook . . . 1987*, vol. II (Part Two), p. 14.

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

[13] See 2053rd meeting, footnote 6.

ticipated in the formulation of a plan of aggression even if he did not participate in the actual execution.

25. Secondly, in modern times aggression involved far more complex techniques than formerly, and hence more sophisticated planning: the planning stage assumed greater importance. It was necessary to include planning as part of the crime, otherwise it would be impossible to reach those who were really responsible.

26. Lastly, the inclusion of preparation of aggression among crimes against peace would have a preventive and deterrent effect. To take the case of a nuclear war or a conventional war in Europe, for example, if it were not possible to stop it at the planning stage there would not be much left for a court—national or international—to do at the end of such a war. In the modern world, the preventive function was a vital one, and responsibility for planning a war of aggression should therefore be covered by the draft code.

27. The Commission should not try to make a distinction between lawful and wrongful intervention but should instead decide which acts of intervention were so dangerous for the international community that they entailed not only the responsibility of the State, but also the criminal responsibility of those who planned, organized and implemented the intervention. The second alternative of paragraph 3 of draft article 11 was the more satisfactory, first because it was directed at the goals of intervention and not at the means applied, and secondly because it took special account of the most dangerous forms of terrorist activity. In that connection, one of the aims to be covered by the definition of terrorism should be intimidation of the population. That had been done in Additional Protocol I[14] to the 1949 Geneva Conventions, which prohibited, in article 51, paragraph 2, "acts or threats of violence the primary purpose of which is to spread terror among the civilian population".

28. He agreed that paragraphs 4 and 5 of draft article 11, dealing with breaches of a State's treaty obligations concerning disarmament, should be combined. There again, however, the provision should focus on serious violations and be directed at persons in responsible political, military or economic positions who participated in the perpetration of such crimes.

29. Of the alternative formulations for colonialism and colonial domination in paragraph 6 he preferred the first, which had been convincingly supported by Mr. Francis (*ibid.*). The Drafting Committee would no doubt find a formula to make it clear that a person in a responsible political, military or economic position who participated in the forcible establishment or maintenance of colonial domination should be held responsible for a crime against peace and hence be liable to punishment.

30. The Special Rapporteur was right to say that a provision on mercenaries should be included in the code, particularly as they were used to destabilize vulnerable States and Governments. In that connection, he endorsed Mr. Koroma's remarks at the previous meeting. Mercenarism might perhaps be covered in part by the concepts of intervention and terrorism, but it called for a separate article or paragraph stipulating that any person who organized the recruitment, equipment, training or use of mercenaries or who provided them with the means to carry out their activities would be responsible for a crime against peace. It was clear from recent practice that mercenarism was quite often carried out by private persons or non-governmental organizations, and that it might be difficult to prove direct State involvement, where it existed. It should therefore be dealt with as a separate crime. That was already the position under the law of many countries with different legal systems which applied a definition of a mercenary that was not as narrow as that laid down in article 47 of Additional Protocol I to the Geneva Conventions, since it did not depend on the actual participation of the mercenary in hostilities. It should not be difficult, therefore, to persuade most States to punish that particular kind of activity.

31. Mr. BEESLEY said he welcomed the prudence and judgment displayed by the Special Rapporteur, who in both his sixth report (A/CN.4/411) and his oral introduction (2053rd meeting) had not attempted to give definitive answers to some of the problems he was raising. The Commission thus had the opportunity to reflect on the issues and to examine the variety of approaches possible in regard to the drafting of the text. At the present stage, he too would not try to give definitive answers, but would be content to raise general points or questions which he believed would illuminate the specific decisions the Commission would have to make. In a later statement, he would apply those questions to the text of draft article 11.

32. His first question was what was the purpose of the code? In the matter of the significance of the task the Commission had undertaken, he believed Mr. Francis's argument (2054th meeting) concerning the basic purpose of the code was convincing. It was not enough to say that the General Assembly had given the Commission a job to do: there had to be a precise objective, whether the punishment of crimes, or better still deterrence. But it was also possible to go further and consider that the essential purpose was to contribute to the system of collective security under the Charter of the United Nations. In that case, it became easier to raise certain problems whose importance, theoretical complexity and political sensitivity might otherwise give rise to hesitation. As Mr. Francis had said, the code ought to be a constructive contribution to collective security. It would be too easy to say that the present system did not work as well as the drafters of the Charter had expected and to conclude that the code would be of no use, for its use would lie precisely in the fact that it might provide a further means of achieving the purposes of the Charter. A situation could easily be imagined in which the Security Council could not agree on whether or not there had been a crime against peace: it was at that point that a tribunal—if it was decided to establish one—could find individuals guilty of some aspect of the crime of aggression. In any event, members of the Commission should have a common purpose in mind.

33. His second question was whether there actually had to be a breach of the peace to constitute a crime against peace and security. Members' opinions had been divided about the definition of a crime against peace. Some considered that a code not confined to the actual use of force would not be viable, while others, invoking

[14] See 2054th meeting, footnote 9.

history, held that the code should be extended to include the preparation, planning and threat of aggression. He for one felt that the Commission's work would be incomplete if the draft were limited to cases in which force was actually used, even though preparation of aggression did raise some delicate problems, particularly with regard to proof. It was difficult to prove intent and to judge a potential crime. The same questions arose with respect to threat, with an extra complication in that the threat of using force might make the actual use of force unnecessary. Would the person responsible for the preparation be any less guilty?

34. A third question that had emerged during the debate was whether the code should be restricted to acts of State. In that connection, it had been pointed out that private individuals could commit extremely serious acts that were not acts of State, and that in modern times new forms of crimes against peace and mankind, privately and skilfully organized, were becoming widespread. His preliminary reaction was therefore that the code should not be confined to acts of State, although he appreciated the juridical and political problems that would raise.

35. His fourth question concerned what kind of body should make the judgment that a crime against peace and security had been committed, which raised again the issue of an international tribunal or a national tribunal with international judges—an issue discussed at the previous session. Initially, he had been of the opinion that responsibility called first for a finding by the Security Council that a crime against peace had been committed. He was not so persuaded at the present time, for it was easily conceivable that the Security Council might be divided and not succeed in reaching a decision in that regard. There would then be room for another kind of process under the code. He did not believe that the findings of the Security Council could be disregarded—having in mind the references to the Council in articles 2 and 4 of the Definition of Aggression[15]—but they might not be indispensable.

36. With regard more specifically to the text of draft article 11, he was troubled by the arguments—however well founded—of some members who wished to introduce a distinction between lawful intervention and unlawful intervention. It was the word "intervention" that bothered him in that respect. The term did not have the same meaning for a major Power as for a small country. In his opinion, the term "intervention" should be used by the Commission as a term of art and be confined to its specific legal meaning in international law, without prejudice to the legitimate cases of self-defence provided for in Article 51 of the Charter.

37. The Definition of Aggression had required seven years' work—close to half a century if one considered the efforts of the League of Nations—but it was now referred to as an authoritative text. Thus there was no reason for the Commission to allow itself to be overwhelmed by the difficulties presented by the definition of crimes against peace. Similarly, the elaboration of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States[16] had taken seven years of difficult negotiations. However, the ICJ was now citing the Declaration, which had also acquired some authority. That was a second encouraging precedent.

38. It was in terms of the four questions he had raised that he would evaluate the future draft code. The fact that the Special Rapporteur, despite his obvious talents, had not been able to answer all the questions raised by so wide-ranging a topic was not in the least surprising. The Commission itself would certainly not be able to settle everything. But it should develop a juridically sound instrument that would help to strengthen the system of collective security provided for in the Charter. Much discussion in the past had concerned the value of extending the Commission's mandate to questions of international criminal law. If that had appeared valid in a more peaceful world, it was even more necessary now. Members of the Commission might well feel some scepticism, but they should not be defeatists.

39. Mr. REUTER said that paragraph 3 of draft article 11 called for a few comments. The first alternative was not acceptable, because the Commission, whose task was to draft a criminal law in the present instance, could not limit itself to a text of a general nature that would inevitably be criticized for its lack of substance. If, for example, a State or a political party intervened in elections organized by another State by openly financially supporting one of the parties participating in the elections, could that be termed intervention threatening the sovereignty of a State? Conversely, were trade negotiations possible without any coercion at all?

40. He was grateful to Mr. Graefrath for reverting to and emphasizing a point extensively developed by Mr. Calero Rodrigues (2053rd meeting), namely that the Commission must never lose sight of the fact that it was not States, but individuals that would be covered by the code. Yet there was a tendency to forget that, among the acts of State prohibited by international law, many were not covered in the draft code, for the code dealt only with acts which, under certain circumstances, might be attributable to State officials, but which were of a highly specific nature in that they constituted crimes as acts of the individual.

41. That did not mean that the Commission could simply choose the second alternative of paragraph 3, which was obviously based on the idea that the forms of intervention involved would in one way or another be linked to armed action, in other words recourse to violence, although the Special Rapporteur had gone further—and, in so doing, had raised certain thorny problems.

42. In regard, for example, to subparagraph (ii) of the second alternative, and more particularly the expression "or otherwise", reference could be made to the case—discussed by conferences of specialists—of the use of radio in one State by another State, or at the instigation of another State. Could that be termed intervention in the internal affairs of a State? Many delegations to the conferences in question had taken that view and considered that such activity should be subject to control. However, as a whole the second

[15] See footnote 12 above.

[16] General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

alternative of paragraph 3 essentially covered direct or indirect means of coercion and neglected other forms of intervention. It was therefore inadequate, and he would be in favour of a formula based on article 18 of the Charter of OAS (see A/CN.4/411, para. 24), which concerned action that might be qualified as neo-colonial: that of a State which, while appearing to respect the sovereignty of another State, took that State's action into its own hands on fundamental points. Admittedly, the idea was not an easy one to formulate, and the most important aspect was the notion of identity. Beyond a certain point, indirect intervention caused the State to change its identity, and—what was even more serious—without it being noticeable. That type of intervention was unacceptable. The State must not be distorted and its structures must not be changed, any more than it was lawful to corrupt the public authorities.

43. He was not opposed to a formula expressed in fairly general terms, but the text would have to be more precise than the first alternative of paragraph 3. Moreover, it should cover persons who, through their *de jure* or *de facto* power, bore primary responsibility for intervention which, because of its systematic nature and breadth, had the purpose or effect of jeopardizing a State's identity. He agreed with Mr. Calero Rodrigues that, to secure acceptance of the idea of punishment of the individual, the acts included should be so systematic and extensive as to merit forming the subject of a provision. Yet he also believed that the final text could include examples taken from those appearing in the two proposed alternatives. Nevertheless, in subparagraphs (i) and (ii) of the second alternative, terms such as "tolerating the fomenting of civil strife" and "activities against another State" should be clarified. In the first case, the texts on neutrality in cases of international armed conflict might be of some help. In any event, the Commission would not fulfil its mandate by remaining vague.

44. As to the important new element represented by the words "in particular terrorist activities", in subparagraph (ii), his limited knowledge of the question unfortunately prevented him from making a better contribution to the legal formulation of rules, but he wondered whether terrorism as such did not call for a definition and a régime separate from those of intervention. He shared the view that the most serious terrorism was "State terrorism", in other words terrorism inspired, financed, assisted or directed by a State. But he unreservedly endorsed Mr. Pawlak's comment that mankind was currently suffering from a disease, from a nihilism, from a spontaneous terrorism that eluded the control of each State on its own. In France, for instance, the police had been able to identify the French perpetrators of certain murders, acts of pure and simple collective insanity that demanded an international reaction. Perhaps the Africans had been the first to see matters clearly, for they had included in the Charter of OAU[17] a provision protecting heads of State (art. III.5).

45. Nevertheless, however warranted the disapproval of terrorism, some terrorists were motivated not by insanity but by idealism. Terrorism was at times the weapon of despair, and in that sense perhaps some caution was needed. It would be remembered that, during the discussion of the draft articles which had formed the basis for the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, some members of the Commission had hesitated to condemn terrorism categorically and had called for moderation. For his own part, he categorically condemned terrorism. But the Commission could not ignore the causes, which were not always devoid of a certain nobility, and it might err in being too absolute.

46. Mr. FRANCIS said that, on the basis of the Nürnberg Principles,[18] the Commission should, in appropriate circumstances, attribute the commission of criminal acts to States, on the understanding that, as the State constituted an inanimate entity, it was by punishing the individual that respect for international law could be ensured. Under those circumstances, the problem was to find an umbrella formula under which State officials could be prosecuted for any act, such as aggression, falling under the code.

47. Mr. Reuter had indicated his reservations regarding the inclusion of terrorism in the second alternative of paragraph 3 of draft article 11, on intervention. In that respect, a comparison could be made with mercenarism. Just as mercenarism was encompassed by aggression when it was the act of a State and would appear in other provisions when it involved private individuals acting independently or for an entity other than the State, so too should terrorism be encompassed by intervention when it was the act of a State and appear in other provisions when the act of another State was not involved.

48. Again, State sovereignty must be the target of the intervention dealt with in paragraph 3. The list of acts of intervention would therefore be of little value in itself if the Commission did not combine the two alternatives proposed by the Special Rapporteur and indicate that intervention meant any illicit act or measure, whatever its nature, which constituted constraint on the sovereignty of a State.

49. The CHAIRMAN announced that the meeting would rise to enable the Drafting Committee to meet.

The meeting rose at 11:30 a.m.

[17] United Nations, *Treaty Series*, vol. 479, p. 39.

[18] See 2053rd meeting, footnote 8.

2056th MEETING

Friday, 3 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. Sreenivasa Rao, Mr. Razafindralambo,