Document:-

A/CN.4/SR.2056

Summary record of the 2056th 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

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,

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. THIAM (Special Rapporteur) said that he wished to clarify certain points in the hope of obviating the need to revert to matters that had already been discussed.

2. He agreed that terrorism and preparation of aggression should be the subjects of separate articles. The Commission would recall that it had been decided from the outset that that the draft code should deal solely with the criminal liability of individuals.[5] That did not, of course, preclude the possibility of States being held criminally responsible for the consequences of acts committed by individuals against the peace and security of mankind. The notion of the criminal responsibility of States remained very imprecise, however, and it was unlikely that Governments would accept it.

3. The main point was whether the individuals who incurred responsibility under the code had acted in their private capacity or as agents or representatives of the State. He had decided to leave that point aside until the question of complicity was discussed. For the time being, he would like the Commission to discuss only those acts that were listed in his sixth report (A/CN.4/411) as crimes against the peace and security of mankind.

4. Mr. TOMUSCHAT, congratulating the Special Rapporteur on his concise and pithy sixth report (A/CN.4/411), said that, although the history of the crimes covered by draft article 11 was well known, serious problems remained.

5. In the first place, the Commission should remember that its task was to lay down rules on the international criminal responsibility of individuals, as opposed to inter-State law regulating relationships between States as juridical entities. The draft article submitted by the Special Rapporteur broke new ground, for although the Nürnberg Principles[6] stigmatized aggression as a crime against the peace and security of mankind, little if anything had thus far been done by way of implementation. There was a vast difference between words solemnly pronounced in the General Assembly and actual practice. It was particularly shocking to him that nobody had ever thought of prosecuting the members of a certain Government in South-East Asia which had in recent years killed more than a million of its own nationals simply because they were intellectuals who stood in the way of a "cultural revolution". The representatives of that Government had later appeared at the United Nations, asserting that their acts had all been a deplorable mistake. It seemed that the tolerance of the international community knew no bounds.

6. The Commission should therefore guard against excessive zeal. Only if the proposed list were limited to the hard core of abhorrent crimes could the code hope to win sufficient support later. It was a sad fact that Nürnberg had not set a precedent, but remained an isolated phenomenon. Thus the Special Rapporteur had been right to reject such hazy notions as economic aggression and subversion.

7. A second problem was the characterization of punishable acts, which, as had rightly been said, called for a greater effort. It was not easy to see how, under the Definition of Aggression,[7] which represented typical inter-State law, an individual could incur personal criminal responsibility, since the Definition provided at the outset that aggression was committed by the authorities of a State. The personal link must be spelt out everywhere, for otherwise it would be almost impossible to limit the number of authors of a crime in a reasonable manner. Furthermore, although aggression was never a single-handed operation, since it involved all those who took part in the military action, there would be no sense in seeking to punish every member of the armed forces of the country concerned. The code should therefore be directed at the leading figures, who bore responsibility because they had prepared and planned the aggression.

8. At Nürnberg, the Allied Powers had adopted a pragmatic approach: they had known who the main culprits in the Nazi Government were and had prosecuted them accordingly. The Commission should aim at the same approach by appropriate legal drafting. He would like to see used some such wording as "whoever plans or orders": a mere reference to aggression was too abstract. It should be immediately apparent from a perusal of the draft that it set out rules on individual criminal responsibility, not on inter-State relations, and that it was confined to persons who were the driving force behind the various crimes. For instance, paragraph 1 (*c*) (i) of draft article 11, on the scope of the definition of aggression, was taken word for word from article 6 of the 1974 Definition of Aggression. The disclaimer it embodied, however, would be necessary only if the intention was to elaborate rules governing inter-State relations. In that case, the rules of the Charter of the United Nations would coexist side by side, as it were, with the more specific rules of the definition; but that could lead to inconsistencies. If rules concerning personal conduct were framed, there

[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] *Yearbook . . . 1984*, vol. II (Part Two), p. 17, para. 65 (*a*).

[6] See 2053rd meeting, footnote 8.

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

would be no need to explain that the rules of the Charter took precedence, because the subject-matter would be different.

9. His third point concerned the relationship between the code and existing instruments. Where there was a vacuum, there was, of course, a need for new rules. On aggression and intervention, for instance, there were no rules of international law under which such acts were punishable, nor had any treaty been concluded on those subjects. Customary law could not be said to exist either, since the element of practice was completely lacking. Where there was a treaty, however, as in the case of genocide, what would be the point of including the crime in the code? One possible answer was that the code should serve as a compendium of all crimes that might affect international peace and security: but that answer was more political than legal. Another interpretation was that the Commission wanted a general repertory because of the limitations *ratione personae* by which many treaties were still characterized. Since the status of ratifications often left much to be desired, was the aim perhaps to compel States which had hitherto reserved their position to accept obligations under the code? Such an aim was hardly realistic, for the code would be subject to the general logic of a conventional régime, which was still governed by the maxim *pacta tertiis nec nocent nec prosunt*, as reflected in articles 34 to 36 of the 1969 Vienna Convention on the Law of Treaties. The question deserved careful consideration, and he would welcome the Special Rapporteur's comments on the legal consequences of assembling in one instrument all crimes against the peace and security of mankind, including those already regulated elsewhere.

10. His last general point concerned the criteria by which the Commission should be guided in selecting crimes for inclusion in the code. Focusing essentially on authorship, he saw four different categories, the first of which comprised acts that were the individual reflection of State conduct. The best example of a crime of that type was aggression which, though it could never be committed by one individual alone, inevitably entailed decisions and measures taken by individuals. There was therefore a clearly identifiable need to legislate in regard to individual contributions to State activity. Whereas State agents normally enjoyed immunity with respect to official acts, no such immunity was recognized under the draft code, particularly in cases of aggression and genocide. No one could invoke as a defence the fact that he was acting as a member of the public service and not in a private capacity. It was in that area that the code had its primary meaning, piercing the veil of the domestic legal order.

11. The second category comprised individual conduct unconnected with any State activity, such as piracy, drug trafficking, slavery, forced labour, and individual acts of terrorism, all of which were ordinary crimes and should not be included in the code: to do so would only give them a higher degree of respectability. The international community needed a closely-knit network of mutual obligations to try or to extradite; no other innovative steps were needed. In particular, notwithstanding the allegedly noble motives of certain terrorists, he would prefer to continue to treat individual terrorism at the level of the ordinary law against criminal offences, all the more so because it seemed that completion of the code was going to be an arduous task.

12. The third category comprised cases in which public servants, in the performance of their duties, committed serious violations of the law that were not attributable to the Government concerned. Such violations were covered by the 1949 Geneva Conventions[8] and their 1977 Additional Protocols.[9] It might perhaps be advisable to provide expressly that, for the purposes of criminal law, individual responsibility would be incurred notwithstanding the proviso in article 10 of part 1 of the draft articles on State responsibility[10] whereby, even if an organ of a State had exceeded its competence, the act in question was still to be considered as an act of the State. It might not be superfluous to provide that immunity could not be claimed in that type of case. On the other hand, the question arose as to how useful it would be to restate the terms of the Geneva Conventions, which were adhered to by virtually all States.

13. The fourth category comprised acts by private organizations of a gravity equal to that of acts normally committed only by a hostile State, such as financing mercenaries with a view to overthrowing a Government. It could, of course, be argued that activities of that kind were simply common crimes. But the criminal codes of most countries might not be concerned with protecting the Governments of other countries, in which case there was an obvious gap in the law, which the draft code should attempt to fill.

14. In general, he considered that the Commission's efforts should focus on individual acts that formed an intrinsic part of a grave breach by a State of its basic obligations under international law. Any other categories of acts were merely incidental and, as such, could be dealt with under the classical instruments of international criminal law.

15. He did not believe that all the evils of the world could be remedied by criminal-law judges. Diplomacy would never lose its pre-eminent position. For instance, no one knew who had started the war between Iran and Iraq, which was why Security Council resolution 598 (1987) had provided for the establishment of an impartial commission to inquire into the causes (para. 6). But, if a Government was faced with a real threat of prosecution on the cessation of hostilities, it might do all in its power to prolong a war, even at the cost of human life; and if, after every armed conflict, trials became a legal necessity, the art of achieving peace through reconciliation would fall even further into decay.

16. To qualify as international crimes under the code, acts should not only derive their unlawful character from inter-State law, but also be capable of being qualified as serious misdeeds even if regarded in isolation. A prerequisite for the inclusion of an act in the code, therefore, was that it must be of an abhorrent nature. Acts which simply reflected current foreign

[8] Geneva Conventions of 12 August 1949 for the Protection of War Victims (United Nations, *Treaty Series*, vol. 75).

[9] Protocol I relating to the protection of victims of international armed conflicts, and Protocol II relating to the protection of victims of non-international armed conflicts, both adopted at Geneva on 8 June 1977 (*ibid.*, vol. 1125, pp. 3 and 609).

[10] See 2053rd meeting, footnote 17.

policy practices, although they might involve serious harm for the victim State, should not be included; the more selective the Commission was in its choice of crimes, the more seriously the code would be taken.

17. With regard to the content of draft article 11, he agreed that each crime should be the subject of a separate article. In the case of aggression, the Commission might wish to follow the wording of the last paragraph of article 6 of the Charter of the Nürnberg Tribunal,[11] which referred to the responsibility of "leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy". That would avoid making every member of the armed forces responsible under the code. The explanatory note in paragraph 1 (*a*) (ii) of draft article 11, which was unnecessary in his view, could be transferred to the commentary.

18. He agreed that the threat of aggression differed from the planning of aggression. If the Commission wished to take account of threats, it should do so in a provision under which the criminal responsibility of the authors of the plan would be excluded if they did not execute it.

19. In paragraph 3 of article 11, he would prefer the word "intervention", which was more commonly used. He also preferred the second alternative, since the first was far too broad in scope. He noted that the 1981 Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States[12] would inevitably be used to interpret the code. That was a matter of concern to him since that Declaration, too, was extremely broad in scope. He doubted, for instance, whether hostile propaganda, referred to in section II (*j*) of the Declaration, should qualify as a crime against the peace and security of mankind. And what was meant by "the exploitation and the distortion of human rights issues", referred to in section II (*l*)? Even the second alternative of paragraph 3 of draft article 11 was too broad, in his view: the terms "internal disturbance" and "unrest" (subpara. (i)) were extremely vague. The wording of the 1965 Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty[13] and of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States[14] was far more restrictive. Also, what did "activities against another State" (subpara. (ii)) mean? More precise language was needed to focus on the use of violent means between States.

20. As to terrorism, he would prefer to concentrate on State terrorism, and agreed with much of what Mr. Pawlak (2055th meeting) had said.

21. He had some doubts about paragraphs 4 and 5 concerning breaches of treaty obligations. If, for example, a State agreed to far-reaching disarmament measures, going beyond what other States were prepared to accept, should State agents be internationally responsible for any breach of the commitments entered into by that State? In his view, such violations should qualify as crimes against the peace and security of mankind only if there were a general and universally applicable international standard for disarmament.

22. He preferred the second alternative of paragraph 6, the wording of which was in harmony with existing instruments and in particular with the Declaration on the Granting of Independence to Colonial Countries and Peoples[15] and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States.

23. With regard to mercenarism, he was not certain whether the Commission wished the code to be directed at mercenaries themselves or at the persons and organizations recruiting them and organizing and financing their activities. As he read paragraph 7, it applied to the latter, but that should be made quite clear.

24. Mr. BARBOZA congratulated the Special Rapporteur on his excellent sixth report (A/CN.4/411), whose significance was in inverse proportion to its length.

25. He would not make any general observations; they had been made during the discussion at the thirty-seventh session, in 1985. Nor was it the time to question the viability of the topic; the Commission had a mandate from the General Assembly which it must fulfil. He would confine his comments to aggression, the threat of aggression and the preparation of aggression. The first two notions were covered in paragraphs 1 and 2 of draft article 11, but the Special Rapporteur had decided, rightly or wrongly, not to include a reference to the third. He noted in passing that the status of the explanatory note on the term "State" (para. 1 (*a*) (ii)) was not clear: was it meant to be part of the text or of the commentary?

26. By subdividing paragraph 1 on aggression so as to include a definition of aggression and a list of acts constituting aggression, the Special Rapporteur had remained faithful to the 1974 Definition of Aggression,[16] which had resolved the dispute between the proponents of a definition and those who preferred a list by providing both. The suggestion that the definition of aggression be deleted and the acts constituting aggression set out in separate articles had been supported by a number of speakers, but he found it difficult to accept. It would mean departing from the system established in the 1974 Definition and would amount to taking sides in the dispute on the relative merits of a definition and a list. Precedents for the incorporation of an exhaustive list included the 1933 Convention for the Definition of Aggression,[17] which had been used as a basis for discussion during the drafting of the Charter of the Nürnberg Tribunal.[18] The proponents of a definition, on the other hand, argued that it would be a more flexible formula, allowing unforeseen situations to be taken into account.

[11] *Ibid.*, footnote 6.

[12] General Assembly resolution 36/103 of 9 December 1981, annex.

[13] General Assembly resolution 2131 (XX) of 21 December 1965.

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

[15] General Assembly resolution 1514 (XV) of 14 December 1960.

[16] See footnote 7 above.

[17] League of Nations, *Treaty Series*, vol. CXLVII, p. 67.

[18] See 2053rd meeting, footnote 6.

27. Failing a very good reason for doing so, he believed it would be better not to discard the compromise solution arrived at after so many years of discussion. The deletion of the definition would leave only the seven specific examples listed in paragraph 1 (*b*). The effect would be similar to that of an article on homicide in a criminal code that read:

"Each of the acts listed below constitutes homicide:

(i) the killing of a person by another person using a knife;

(ii) the killing of a person by another person using a revolver;

(iii) the killing of a person by another person using poison;

(iv) the killing of a person by another person using a hammer."

And so on. Although one could easily imagine many ways of killing a person, it would be difficult to include them all in a code. For a judge would then be unable to apply the provisions of that code to an unforeseen event, and the perpetrator would, under a liberal system of criminal law, go unpunished. As paragraph 1 was currently worded, however, a judge would have no difficulty in deciding that a case not listed in it fell under the general definition and thus constituted an act of aggression. The definition of aggression might even, *mutatis mutandis*, be drawn from the criminal code of an internal legal system. In the Argentine Penal Code, the article on homicide simply stated that anyone who killed another person incurred a penalty of 8 to 25 years' imprisonment. Nothing could be less ambiguous, and the system had worked perfectly well for more than 60 years.

28. As to whether article 11 should refer to the authorities of a State or to individuals, it had been pointed out that sometimes individuals who could not be described as authorities of a State were capable of influencing a decision to commit an act of aggression, and that they should be punishable. He concurred with that view, but would add that they must be prosecuted as accomplices or accessories, depending on the part they had played in the crime. It was only the authorities who could be held directly responsible, since aggression was a crime that could be committed only by a State or by its organs, whose activities could be attributed to the State.

29. He favoured inclusion of the threat of aggression, for it was a very serious matter that constituted an attack on international public order, peace and security. There again, it was the authorities of a State that were responsible, for even if an individual made threats of aggression, his behaviour was attributable to the State of which he was an organ.

30. The Special Rapporteur had warned that inclusion of preparation of aggression would raise difficulties. When did it begin? How was it to be distinguished from the preparation of a defence against possible aggression? And if the aggression did not take place, how was criminal intent to be established? Although it was not easy to pin-point the commission of the crime, he was not sure that that justified omitting any reference to the preparation of aggression from the draft code. The problem was one of legislative policy: what was to be the scope of the protection against aggression? Was aggression alone to be punishable, or would the Commission set up a wider shield covering acts that did not constitute aggression itself? It should be borne in mind that some criminal codes provided, as a special public-safety measure, that the mere possession of a military weapon without a permit was a crime, even if the weapon was never used. Furthermore, omitting a reference to the preparation of aggression would be a deviation from the line established by the Charter of the Nürnberg Tribunal (art. 6 (*a*)) and the Charter of the Tokyo Tribunal[19] (art. 5 (*a*)), and subsequently incorporated by the Commission in the Nürnberg Principles[20] (Principle VI (*a*) (i)).

31. As to the question whether a perpetrator should be prosecuted for both the crime of preparation and that of commission of aggression, he thought the lesser crime could be absorbed by the more serious one if there was only one perpetrator. But what of cases in which an individual, acting as an agent of a State, had prepared an act of aggression but had been replaced before the act was carried out? If the act was not carried out, it would be very difficult to prove that an individual had committed the crime of preparation of aggression. But it was possible that the perpetrators of that crime might be surrendered by the very State of which they were formerly the agents—for example, after the replacement of a dictatorial régime by a democratic one.

32. The Special Rapporteur should therefore reflect further on the problem before omitting all reference to the preparation of aggression from the draft code.

33. Mr. REUTER, commenting on paragraphs 4 and 5 of draft article 11, said he agreed that they should be combined, because they referred to similar obligations and had similar objectives. Like other members of the Commission, he believed the paragraphs should be redrafted in order to place greater emphasis on individual responsibility. It was true that only a State could be held responsible for a breach of its obligations, but individuals could play a decisive part in the adoption of decisions leading to such breaches. It should be made clear that not only a head of State, but also the officials and other individuals around him, were responsible for breaches.

34. The gravity of a breach should be stressed, and for that purpose it might be useful to refer to the formulation he had suggested for the definition of intervention, namely "an act having the object or effect of threatening international peace and security". Finally, the ultimate criminal responsibility of the competent authorities should be emphasized. Referring to a time in French history when public figures had unwittingly committed acts that had severely undermined international peace and security, he observed that individuals in positions of authority did not have the right to be wrong.

35. As to paragraph 6, he was equally in favour of both alternatives proposed by the Special Rapporteur. The first seemed to have been chosen for its historical resonances: "colonial domination" evoked events and attitudes that would hardly be condoned today, yet he could recall a time when the term "colonial" had not

[19] *Ibid.*, footnote 7.

[20] *Ibid.*, footnote 8.

been pejorative in the least. In view of its current connotations, however, it might be advisable to delete the reference to the "establishment" of colonial domination, because it was difficult to imagine such an enterprise as being admissible, or even feasible, in the world today. "Maintenance" was the only term that could properly apply to colonial domination.

36. The United Nations system had already done a great deal to end colonialism, and the mechanisms it had established would ensure that the process was carried through to the end. The criminals who must be pursued under legislation such as the code were those who consistently flouted the international community's efforts to rectify existing injustices. Some might say that that description was too limited, but to his mind it had the advantage of being clear and precise.

37. The second alternative of paragraph 6 served a useful purpose, but required drafting improvements. A great deal would depend on the decisions taken regarding the definitions of "intervention" and "colonial domination". He would also suggest adding the words "or State" in the second alternative; he doubted that in modern times there were peoples that did not belong to a State. The Commission should carefully weigh the advantages and disadvantages of a formula that had the effect of carrying to extremes the right of peoples to self-determination, that was to say a secessionist formula. If the Special Rapporteur and other members wished to retain the formula, he would not oppose it, but the risks involved in a political decision of that kind should be carefully considered.

38. Referring to remarks made by Mr. Tomuschat, he said it was true that, in some cases when drafting legal texts, the Commission should not allow itself to be influenced by existing agreements; but he doubted whether that applied to subjects such as mercenarism and *apartheid*. It should be remembered that the General Assembly adopted conventions by simple majority, and that the adoption of a convention on mercenarism would be decided by the countries most threatened by that crime. Similarly, with regard to *apartheid*, many members of the Commission might have preferred a convention that was more respectful of the legal precepts of the Western countries. But those issues were viewed differently by people living in provincial France and by those who lived in the heart of Africa. He, for one, would hesitate to "improve" conventions by restricting their effects, especially when they were already in force and had the approval of the States most concerned. One possible solution would be to include in the draft code a provision to the effect that accession to the code would entail the obligation to ratify existing United Nations treaties, unless a reservation were made.

39. Mr. FRANCIS, referring to Mr. Tomuschat's remarks, expressed his agreement with the Special Rapporteur's approach to the question whether the draft should emphasize crimes by individuals. First, it was clear that certain acts specified in article 19 of part 1 of the draft articles on State responsibility[21] fell within the ambit of the draft code. Moreover, the judgment of the Nürnberg Tribunal[22] had made it clear that crimes under international law were committed by men, not entities, and that the individuals committing the crimes should be punished. It was therefore legally correct for the Special Rapporteur first to draft a text clearly specifying crimes committed by States, and then to establish a juridical link between each act and the individual committing it.

40. On the matter of colonial domination, he had stated earlier (2054th meeting) his preference for the first alternative of paragraph 6 of draft article 11, the reasons for which did not detract from the validity of the second alternative. He was, on reflection, prepared to accept a combination of the two, either separate or in the same paragraph. He was heartened to hear that Mr. Reuter also favoured including both ideas, and he would go so far as to say that the second alternative was also appropriate even out of the colonial context.

The meeting rose at 11.35 a.m.

[21] *Ibid.*, footnote 17.

[22] See United Nations, *The Charter and Judgment of the Nürnberg Tribunal. History and analysis* (memorandum by the Secretary-General) (Sales No. 1949.V.7).

2057th MEETING

Tuesday, 7 June 1988, at 10 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Present: 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, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

1. The CHAIRMAN, speaking on behalf of all members of the Commission, welcomed the participants in the International Law Seminar, who would be attending the Commission's meetings.

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]

[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).