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Summary record of the 2058th 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:-
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request of another State, in accordance with a system of pre-established priorities. Another solution would be to establish an international criminal court. In the view of some who had spoken on that point both in the Sixth Committee of the General Assembly and in the Commission itself, failure to establish such a court would make the code meaningless. Mr. McCaffrey (2054th meeting) had said that the fate of the code depended on the existence of an international court. Unfortunately, however, the realities of the modern world had for a long time prevented that idea from taking shape. The radical and far-reaching changes that were now taking place in the world, the new thinking that was emerging in relations between States and the pressing need for an order that would make the rule of law prevail in political affairs nevertheless called for a different approach to such questions.

63. The question of an international criminal court had to be viewed in the general context of the task of guaranteeing the peace and security of mankind. States had to establish an international criminal court or courts which would meet the strictest requirements of international legitimacy, guarantee the irreversibility of the penalties imposed on individuals convicted of grave crimes against mankind and thereby contribute to the maintenance of the peace and security of mankind.

64. It was possible to imagine several types of international courts. Courts could be set up to deal with cases involving specific crimes. Mr. Gorbachev, for example, had had occasion to suggest the idea of the establishment under United Nations auspices of a tribunal with jurisdiction in cases of terrorism.³⁰ The Convention on the Prevention and Punishment of the Crime of Genocide and the International Convention on the Suppression and Punishment of the Crime of *Apartheid* both made provision for special tribunals. He himself would have no objection if the Commission also discussed the possibility of establishing an international criminal court of a general nature: the idea of combining international criminal jurisdiction and universal jurisdiction should also be carefully considered. A flexible mechanism that could be adapted to international criminal law might find its place among the many international bodies that were called upon to guarantee stability and order in the world by specific means. The role of mechanisms of that kind was becoming increasingly important. That was particularly true in the case of the ICJ. In that connection, he recalled that, in view of developments in the international situation, the Soviet Union had put forward the idea of the acceptance by all States of the compulsory jurisdiction of the ICJ on the basis of mutually agreed conditions. Obviously, the first step in that direction would have to be taken by the permanent members of the Security Council.

65. Those developments merely confirmed that the draft code had a promising future. He was convinced of its undoubted usefulness as an instrument of peace. The formulation of the draft code would be a sign of the international community's maturity. The Commission should therefore focus its efforts on the drafting of the text in order to complete it as soon as possible and thus

comply with the request made of it by the General Assembly. In conclusion, he supported the suggestion that draft article 11 as submitted by the Special Rapporteur be referred to the Drafting Committee.

The meeting rose at 1 p.m.

2058th MEETING

Wednesday, 8 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. Eiriksson, 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 Mankind¹ (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. SHI thanked the Special Rapporteur for his excellent sixth report (A/CN.4/411), which was a valuable continuation of and complement to his third report on the topic.⁵
2. He noted that draft article 11 as submitted in the sixth report had, in accordance with the Commission's decision, been formulated on the basis of the 1954 draft code, with revisions and additions in the light of new developments.
3. Despite the unity of the concept of crimes against the peace and security of mankind, he found the subdivision of those crimes into three major categories—crimes against peace, war crimes and crimes against humanity—fully justified. He also subscribed to the Commission's decision that the draft code should cover

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 . . . 1985*, vol. II (Part One), p. 63, document A/CN.4/387.

³⁰ See 2055th meeting, footnote 9.

only the most serious international crimes, determined by reference to a general criterion and to the relevant conventions and declarations. Furthermore, he agreed with the Special Rapporteur that, in order to maintain a certain unity of approach, the general criterion should be in line with article 19 of part 1 of the draft articles on State responsibility;⁶ it should accordingly emphasize the weight of opinion of the international community and the importance of the subject-matter of the obligation violated. Crimes against the peace and security of mankind were distinguished from other international crimes by their brutality and barbarity and by the fact that they constituted attacks against the very foundations of contemporary civilization and the values on which it was based.

4. With regard to crimes against peace in particular, he agreed with the Special Rapporteur that they resulted from a breach of an international obligation of essential importance for the maintenance of international peace and security; that they took the form of a breach of, or threat to, peace; and that they had the common characteristic of being crimes which directly and seriously attacked or threatened the sovereignty, independence or territorial integrity of a State.

5. Turning to the sixth report, his first comment was that crimes against peace could be committed only by a State against another State; hence, where such crimes were concerned, the transgressions of individuals were inseparable from those of the State. Nevertheless, at the present stage of the Commission's work, criminal responsibility under the draft code was to be confined to individuals. In that connection, he agreed with many other speakers that draft article 11 did not give clear expression to the intention to attach criminal responsibility to individuals. The text should perhaps be refined.

6. He had no objection to paragraph 1 of article 11, concerning acts of aggression as crimes against peace, since it adhered closely to the 1974 Definition of Aggression.⁷ The explanatory note in subparagraph (a) (ii) should, however, be transferred to the commentary.

7. He agreed that the threat of aggression against another State, dealt with in paragraph 2, constituted a crime against peace. It was a concrete manifestation of a State's intention to commit an act of aggression, which might take the form of intimidation, troop concentrations or military manoeuvres near another State's border, mobilization, etc. The purpose was to put pressure on a State to make it yield to demands; the result was thus exactly the same as that of aggression itself. The Special Rapporteur was therefore fully justified in making the threat of aggression a specific crime against peace.

8. The concept of "preparation of aggression" as a crime against peace had been omitted because of its controversial character and lack of precise content. The Special Rapporteur had, however, invited the Commission to decide whether preparation of aggression should be retained as a separate crime. It had been included in

Principle VI (a) (i) of the Nürnberg Principles and in the Charters of both the Nürnberg and Tokyo Tribunals (see A/CN.4/411, para. 7); but the intention then had probably been to ensure that major war criminals did not go unpunished. Moreover, in the case of the Second World War, preparation of a war of aggression had not been difficult to determine. The fact was that, before the former Fascist countries had launched wars of aggression against neighbouring countries, both the major Western Powers and the victim States had been fully aware of the active preparations being made. If sanctions could have been imposed in time, the world might have been spared the horrors of the Second World War. It was true, as the Special Rapporteur had pointed out, that criminal law sanctioned offences, but did not authorize measures to prevent them. As he saw it, however, measures taken against the preparation of aggression would not be preventive, but punitive.

9. Many years before the outbreak of the Second World War, there had been attempts to make preparation of aggression an act prohibited by international law. It was worth noting that the criminal codes of some countries, including China, treated preparations for committing a crime as a criminal act in itself. The necessary elements of that crime were the criminal intent and the material preparation and creation of conditions for the implementation of the criminal intent. He urged the Commission, bearing those elements in mind, to search for factors which constituted preparation of aggression as a separate crime against peace. Generally speaking, that preparation would not consist simply of military measures such as the increase of armaments and armed forces, which would be difficult to distinguish from preparation of defence. It would consist rather of a high degree of military preparation far exceeding the needs of legitimate national defence, the planning of attacks by the general staff, the pursuit of foreign policies of expansionism, intervention and domination, propaganda of aggression in various disguises, and persistent refusal of the pacific settlement of disputes. Preparation of aggression should be made a crime against peace because it clearly endangered international peace and security. The difficulty of determining such preparation was no argument for not including it in the code.

10. Intervention in the affairs of another State contravened the fundamental principles of modern international law, but only serious acts of intervention constituted crimes against peace. The first alternative of paragraph 3 was a general definition of intervention, which seemed rather too broad, giving a judge too much latitude in determining whether an act constituted intervention that could be characterized as a crime against peace. The second alternative was acceptable; the specific acts it enumerated were no less serious than acts of aggression.

11. Acts of terrorism were given a prominent place in draft article 11, in response to the need of the international community to combat that crime. The Special Rapporteur had been right in distinguishing acts of terrorism, as understood in the draft code, from terrorist acts under ordinary criminal law. Acts of terrorism under the draft code were international in character and were directed by a State against another State to

⁶ See 2053rd meeting, footnote 17.

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

threaten its security and stability, although terrorist acts also affected the security of the inhabitants of a State and their property. He therefore hesitated to endorse the sufficiency of the definition proposed by the Special Rapporteur.

12. He preferred the first alternative of paragraph 6, on colonialism, although the wording of the second was taken from the Declaration on the Granting of Independence to Colonial Countries and Peoples⁸ and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States.⁹ His reasons for that preference were, first, that the word "colonialism", although perhaps not a legal term, was well known to ordinary people, particularly in the developing countries; and secondly, that despite the advances of decolonization, remnants of old colonialism still existed and there was no assurance that new forms of colonialism would not appear.

13. He agreed that mercenarism, which had been treated as a form of aggression in the 1974 Definition of Aggression, should be dealt with in a separate paragraph of the draft code. The wording of the paragraph could, however, be left open, pending the outcome of the work of the *Ad Hoc* Committee on the subject.

14. Mr. RAZAFINDRALAMBO said that, as he had already had occasion, at the thirty-seventh session, in 1985, to express his views on the general questions raised by the present topic, he would concentrate on draft article 11 as submitted by the Special Rapporteur in his sixth report (A/CN.4/411).

15. First, in the interests of greater clarity, he suggested that the provisions on the various acts constituting crimes under the draft code should form separate articles, instead of the seven paragraphs of article 11. Each article should contain the definition of a specific crime, followed by an exhaustive enumeration of the acts which constituted that crime. Explanatory passages relating to the scope of a definition had no place in the body of the articles: the explanatory note in paragraph 1 (a) (ii) on the use of the term "State", together with paragraph 1 (c) (i) on the relationship of the code to the Charter of the United Nations, could perhaps be placed under "Miscellaneous provisions", which would apply to the whole code. All those points could be left to the Drafting Committee.

16. The formulation of the draft code centred on the criminal responsibility of the individual. In that connection, he drew attention to paragraph 1 of article 3 (Responsibility and punishment), provisionally adopted by the Commission at its thirty-ninth session,¹⁰ which read: "Any individual who commits a crime against the peace and security of mankind is responsible for such crime . . . and is liable to punishment therefor." In view of the adoption of that approach, it would be necessary to amend the passages in draft article 11 which referred, for example, to aggression being committed by a State. Of course, it would be difficult to say that aggression

had been committed by an individual. But in the interests of uniformity, and bearing in mind that crimes against peace could be committed on behalf of entities other than States, he suggested that the articles of the code should not refer to the party responsible. The provision on aggression could then read:

"Aggression is the use of armed force against the sovereignty, territorial integrity or political independence of a State . . ."

That formulation would bring the text broadly into line with paragraph 1 (b) (iv), (v), (vi) and (vii).

17. For the various provisions on individual acts of aggression, he was in favour of using the actual terms of the 1974 Definition of Aggression.¹¹ That Definition had resulted from the persevering efforts of the international community and there was no reason to depart from it. The only question that might arise was whether paragraph 1 (b) (vii) of article 11, on the sending of armed bands, groups, irregulars or mercenaries, did not duplicate the provisions of paragraph 7, on mercenarism. As he saw it, there was no such duplication. Paragraph 7 referred to the recruitment, organization, equipment and training of mercenaries, in other words the preparation of aggression by the use of mercenaries. The crime envisaged was then a separate one from that of sending armed bands into the territory of a State. Another difference between the two crimes was that preparations for the sending of mercenaries could be the act not only of the authorities of a State, but also of private persons or entities.

18. The act of preparation of aggression had always been regarded as a crime against the peace and security of mankind. It had been listed among crimes against peace in Principle VI (a) (i) of the Nürnberg Principles¹² formulated by the Commission in 1950. Due note had been taken of the fact that aggression was always preceded by specific preparatory acts, such as rearmament in breach of international treaty obligations, mobilization and troop concentrations. Those acts were more than theoretical plans worked out by a general staff; they involved a concrete threat of the use of force. A court called upon to deal with a case of preparation of aggression should have no difficulty in drawing a distinction between hypothetical planning and actual preparations.

19. The advantage in treating preparation of aggression as a separate crime, distinct from aggression itself, became particularly clear in two cases. The first was the case in which the preparations did not lead to actual aggression, for reasons beyond the control of the potential aggressor, for example as the result of an injunction by the Security Council; the second was the case in which the preparation was the work of authorities other than those committing the aggression.

20. For those reasons he suggested that, in paragraph 2, the words "the threat of aggression against another State" be replaced by "preparation of the use of force against another State". His position was that the threat in itself, if not accompanied by a physical act, could not

⁸ General Assembly resolution 1514 (XV) of 14 December 1960.

⁹ General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

¹⁰ *Yearbook . . . 1987*, vol. II (Part Two), p. 14.

¹¹ See footnote 7 above.

¹² See 2053rd meeting, footnote 8.

serve as a criterion, because of the difficulty of applying it.

21. The concept of intervention in the internal or external affairs of another State had been clearly defined by the ICJ in its judgment in the case concerning *Military and Paramilitary Activities in and against Nicaragua* (see A/CN.4/411, para. 17). The terms used by the Court, however, were somewhat broader than those of the second alternative proposed for paragraph 3, which he preferred. The text should begin with the definition set out in subparagraph (a), and be followed by an exhaustive list of terrorist acts. The acts in question were not terrorist acts in general, but only those constituting intervention by the authorities of one State in the internal or external affairs of another State. In brief, the reference was to what was known as "State terrorism"; acts of terrorism by individuals or private groups fell outside the scope of the terrorist acts contemplated in paragraph 3.

22. If the Commission decided to treat breaches of treaty obligations as crimes against peace, he would suggest that paragraphs 4 and 5 of article 11 should form a single article. Consideration could also be given, if the General Assembly so wished, to the insertion of a third paragraph dealing with the use of nuclear weapons other than in self-defence against a nuclear attack.

23. As to colonial domination, he could not understand those who were afraid to call a spade a spade, particularly since colonial domination was a phenomenon that persisted even in modern times. That was clear from the list—kept by various international organizations—of territories which had formerly been under colonial administration but had still not attained independence, and which were known in the United Nations as Non-Self-Governing Territories and in ILO as Non-Metropolitan Territories. While it was barely conceivable that a State would nowadays try to establish the traditional type of colonial domination over the people of another country, there were none the less many instances of the maintenance of such domination. In his view, therefore, paragraph 6—which, as he had said earlier, should form a separate article—should consist of two paragraphs, the first dealing with the maintenance of colonial domination and the second with the establishment of new domination or exploitation that could be classified as foreign. It could perhaps also be made clear in the commentary that the crime of colonial domination applied only to the domination of a non-metropolitan people which had not yet attained independence, and did not cover the case of a minority wishing to secede from the national community. He noted that OAU had taken a firm stand against any policy which, under cover of the principle of self-determination, might encourage secession and destabilize established régimes by calling in question the borders inherited from the colonial era. Examples of such a situation had been the wars in Biafra and Katanga.

24. Mercenarism, as defined in paragraph 7, involved acts other than those covered by paragraph 1 (b) (vii), which dealt with aggression. It was a matter of great concern to young States, and especially to African States, against which mercenaries had often been used.

No State was prepared to take the risks involved in openly sending bands of mercenaries to another State: such operations generally took the form of covert action carried out under the direction of an official or semi-official agency. If the crime of mercenarism was to be wiped out, it was necessary to strike at its roots, namely the recruitment, organization, equipment and training of mercenaries. It was a crime that could be committed by private entities, such as multinational corporations, or even by individuals acting on their own initiative, such as heads of State who had fallen from power. In such cases, however, there might well be complicity on the part of the Governments that had facilitated the recruitment of the mercenaries and provided their training camps.

25. He was not in favour of postponing consideration of the question of mercenarism until the *Ad Hoc* Committee had concluded its work. The Commission should be guided by its own timetable, which was dictated by, among other things, the fact that its members served for a term of five years; it should not be bound by the pace of work of bodies that were more political than legal, although the work of such bodies could be taken into account if necessary.

26. Finally, he agreed that draft article 11 should be referred to the Drafting Committee.

27. Mr. HAYES joined previous speakers in thanking the Special Rapporteur for his sixth report (A/CN.4/411), one of a series remarkable for their clarity and conciseness.

28. A code would be worth while even if it were not possible to provide in it for effective enforcement measures, since identification of certain crimes against the peace and security of mankind would not be without effect. That remark should not be construed as opposition to effective enforcement measures: indeed, he had been encouraged by some of the statements made which indicated that there was an enhanced possibility of such measures being proposed in the Commission. He agreed that, to be effective, the code should clearly specify a number of crimes which, having regard to their content and implications for the international community, were particularly serious. The Commission had therefore been right to decide at its thirty-sixth session, in 1984, to adopt a minimalist, rather than a maximalist approach to the list of crimes.¹³

29. There was one problem regarding the draft articles that he wished to explore a little further. The Special Rapporteur's sixth report dealt specifically with crimes against peace, which was one of the three categories of crimes against the peace and security of mankind covered by the draft code. Furthermore, it had been agreed that the code would be confined for the time being to the criminal responsibility of individuals, an approach reflected in article 3 (Responsibility and punishment), provisionally adopted by the Commission at its thirty-ninth session.¹⁴ Paragraph 1 of that article established the responsibility of the individual and his liability to punishment, while paragraph 2 reserved the

¹³ See *Yearbook . . . 1984*, vol. II (Part Two), pp. 15-17, paras. 52 *et seq.*

¹⁴ See footnote 10 above.

position with respect to State responsibility. The question therefore arose whether the criminal responsibility of an individual for an act falling within the category of crimes against peace arose only with respect to action by the authorities of a State and, if so, whether the draft articles should be formulated accordingly. While he did not disagree with the Special Rapporteur, who apparently favoured such a course, since he had explained in his third report that the scale of the action would be such that it could only be carried out by a State entity,¹⁵ he thought it might be useful to consider how the overall scheme would be affected.

30. There was no requirement under paragraph 1 of article 3 that the individual concerned must be a servant or agent of a State or Government, or that his responsibility must be otherwise linked to State involvement; even paragraph 2 of that article merely implied that State involvement was possible, rather than essential. Accordingly, the provisions of draft article 11 might be expected to provide for a link between personal and State activity, and they did so in all cases except that of the definition of mercenarism (para. 7). Assuming that mercenarism, within the meaning of the code, consisted of organizing mercenaries and sending them into action, there would be many instances in which it would be impossible to establish a link between the organizer and a State, and others in which the organizer would not be acting for a State at all. But if the organizer was working for a State, his crime would come under the definition of aggression, at least in so far as the mercenaries went into action. If involvement of State authorities was an essential ingredient of the crime and if the organizer was not working for a State, his crime would fall outside the scope of that definition and also outside the scope of article 11 as a whole. Logically, therefore, the Special Rapporteur's question as to whether there should be a separate provision on mercenarism (A/CN.4/411, para. 43) seemed to call for a negative answer. Yet the activities of mercenaries had been particularly harmful in Africa, and the Commission had heard Mr. Koroma's appeal (2054th meeting) that they should be adequately covered.

31. A similar question arose in connection with terrorism, which was included under intervention in the second alternative of paragraph 3 of article 11 and, as such, would be confined to State-sponsored terrorism. Again, however, there were many instances of international terrorism that were not overtly State-sponsored, or not State-sponsored at all. Should those cases be covered by the code, or be left to the international anti-terrorist measures already devised by States? If they were to be covered by the code, should a suitable provision be included under crimes against humanity? On the other hand, he did not think that non-State mercenarism could be adequately covered under that category; and even if it could, there was still no system of international measures against mercenarism comparable to those against terrorism. Thus mercenary activities might fall outside the code, although they were no less heinous than similar acts that fell within it.

32. Those arguments added weight to the suggestion that any decision on mercenarism should be deferred until the *Ad Hoc* Committee had finished its work on the subject. It also seemed too early to decide that the involvement of State authorities was an essential element in the category of crimes against peace.

33. Turning to the text of draft article 11, he agreed that it would be more appropriate for each of the crimes covered to be dealt with in a separate article.

34. He endorsed the Special Rapporteur's approach to the crime of aggression, which was based on the 1974 Definition of Aggression.¹⁶ The link with the Charter of the United Nations was essential, in order to avoid any danger of inconsistency that might arise as a result of parallel development of the concept of aggression. The explanatory note in paragraph 1 (a) (ii) of article 11 provided clarification and should be included in the commentary, rather than in the body of the article.

35. The threat of aggression should be included in the list of crimes, for the reasons already stated by other members. The commentary on that subject would be of particular importance.

36. Preparation of aggression raised some very difficult problems, as pointed out by the Special Rapporteur in his sixth report (A/CN.4/411, para. 8). The concept was particularly important, however, as evidenced by the fact that it appeared in a number of instruments to which the Special Rapporteur referred (*ibid.*, para. 7). The Commission should therefore consider the matter in depth and seek solutions to the problems, so that it could include preparation of aggression in the list of crimes.

37. The Special Rapporteur referred in his report to a number of developments that were relevant to a definition of intervention (*ibid.*, paras. 16-20), including the facts that the Commission had concluded in 1966 that certain provisions in the Charter prohibiting the use of force were declaratory of customary international law and that that prohibition amounted to a rule of international law having the character of *jus cogens*; and that the ICJ, in its judgment in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, had decided that the rules on the non-use of force and non-intervention formed part of customary law. As to the difficult question of the point at which intervention became wrongful, according to the authorities, coercion was the determining factor, but that was only part of the answer. In response to the Special Rapporteur's question regarding methodology (*ibid.*, para. 34), a combination of a broad definition and a non-exhaustive list of acts constituting intervention would seem to be the most effective approach.

38. Terrorism was also covered under the heading of intervention in the second alternative of paragraph 3 of article 11, and on that point the remarks made by Mr. Njenga (2057th meeting) and Mr. Razafindralambo merited consideration.

39. He agreed that paragraphs 4 and 5, on the breach of the treaty obligations of a State, should be combined in a single provision.

¹⁵ *Yearbook* . . . 1985, vol. II (Part One), pp. 65-66, document A/CN.4/387, para. 12.

¹⁶ See footnote 7 above.

40. His initial reaction regarding colonialism was to favour the second alternative of paragraph 6, since it was wide enough to cover the traditional forms of colonialism as well as any other forms of domination. That alternative could perhaps be adopted, with the addition of the word “colonial”. That would also help to remedy the vagueness of the term “exploitation”.

41. Mr. YANKOV thanked the Special Rapporteur for his sixth report (A/CN.4/411) and for a very useful conference document (ILC(XL)/Conf.Room Doc.3 and Corr.1) which brought together all the draft articles proposed since the submission of the third report¹⁷ in 1985.

42. In the sixth report, the Special Rapporteur had clearly identified the areas in which the search for the most important components of crimes against peace should be concentrated. Although the methodological problems relating to the scope and implementation of the code could be assumed to have been solved, general problems kept re-emerging in connection with specific items. Such issues were important, but the Commission would be best advised to focus on matters directly related to draft article 11.

43. With regard to the scope and content of crimes against peace, fundamental criteria needed to be elaborated in three areas: the special features which differentiated such crimes from other offences; ways of measuring the gravity of the crime; and the means of characterizing an offence as a crime against peace. It was the threat or use of force, however, which was the common denominator of all crimes against peace, and which could indicate the dividing line between offences under general international law and the crimes under the draft code. The main problem was to identify those offences against peace which constituted international crimes engaging the responsibility of the individuals making decisions or giving orders to commit the act. The use of force could take a multiplicity of forms and could involve aggression, annexation, intervention, colonial domination, terrorism or mercenarism. The interrelations of acts constituting crimes against peace should be considered, but the main component must always be the use of force, for it determined the higher degree of common danger to peace.

44. While the threat or use of force was one element that could enable a distinction to be drawn between various illicit acts or offences, another factor was whether the act was of such gravity that it could constitute or cause a breach of peace. In his report, the Special Rapporteur quoted the Commission’s statement in 1966 that the prohibition of the threat or use of force was a “conspicuous example of a rule in international law having the character of *jus cogens*” (A/CN.4/411, para. 20). The 1987 Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations¹⁸ went even further in spelling out the prohibition of recourse to force and the injunction to maintain international peace and security. The provisions of paragraphs 1 to 3 of that Declaration were particularly relevant to the Commission’s work: paragraph 1 affirmed, *inter alia*,

that the threat or use of force against the territorial integrity or political independence of any State constituted a violation of international law and entailed international responsibility.

45. Of course, the most devastating use of force was the use of nuclear weapons. He drew attention to paragraphs 1 to 3 of the Declaration on the Prevention of Nuclear Catastrophe,¹⁹ which included the provision that there would “never be any justification or pardon for statesmen who take the decision to be the first to use nuclear weapons” (para. 2).

46. With regard to the preparation of aggression, reference had been made to the Charter and Judgment of the Nürnberg Tribunal²⁰ and to Principle VI (a) (i) of the Nürnberg Principles.²¹ The Nürnberg experience had provided history’s first lesson in establishing an international legal order incriminating the use of force, and the draft code should follow up that work by taking preventive measures into account. It should pursue the worthy objectives of helping to prevent a war that might endanger the survival of humanity and establishing a set of rules that would be applicable to all crimes against peace.

47. The Special Rapporteur was fully justified in raising questions concerning the precise content of preparation of aggression (A/CN.4/411, para. 8). The law should define the crime as such, on the basis of a serious threat to peace, but the organ which was to adjudicate should be entitled to identify the facts constituting the criminal act. The Nürnberg experience had shown that national legislation and State practice could help in determining the criminal character of preparations for grave and dangerous criminal acts. The Bulgarian Penal Code had recently been amended to qualify preparation of aggression as a crime in itself, no longer covered by the general provisions on terrorism. It was entirely possible to distinguish preparation of aggression from defensive measures on the basis of existing military, technical, legal and political criteria. Of course, preparation of aggression and the use of force were inter-related.

48. Annexation should also be identified in the draft code. The 1987 Declaration on refraining from resort to force in international relations (see para. 44 above) contained a number of relevant points, particularly in regard to the sending of armed bands into the territory of another State. Article 2, paragraph (4), of the 1954 draft code had identified the criminal character of acts endangering the stability of public order and disrupting peaceful relations between States.

49. He agreed with other speakers that intervention had hidden components and an elusive character. Unfortunately, interference in the internal affairs of States and in the conduct of their international affairs had become a part of contemporary international relations—like a chronic illness which was tolerated because its causes could not be revealed or because it was considered to be incurable. The question was how to identify such intervention. Clearly, in a code which dealt

¹⁷ See footnote 5 above.

¹⁸ General Assembly resolution 42/22 of 18 November 1987, annex.

¹⁹ General Assembly resolution 36/100 of 9 December 1981.

²⁰ See 2056th meeting, footnote 22.

²¹ See 2053rd meeting, footnote 8.

with the most serious crimes of all, namely crimes against the peace and security of mankind, intervention had to be characterized by its gravity as a crime against peace. Of the two alternatives of paragraph 3 of draft article 11, he preferred the second, which provided more substantial grounds for qualifying intervention as a crime against peace and stressed the threat or use of force. It should be remembered that article 2, paragraph (9), of the 1954 draft code contained a definition of intervention in which the use of force or of coercive measures was emphasized.

50. Terrorism in itself could constitute a crime against peace only under certain conditions: for example, terrorist acts that involved the use of weapons of mass destruction, acts calculated to destroy life-supporting installations for large populations, etc. The sixth report covered some of those elements, but the gravity and intensity of the harm should perhaps be emphasized in stronger terms. It was also necessary, as Mr. Razafindralambo had pointed out, to draw attention to international ramifications: otherwise, the acts would fall under domestic jurisdiction.

51. Previous speakers had eloquently described the main characteristics of colonial domination as an offence against the peace and security of mankind. With regard to the suggestion that the two alternatives of paragraph 6 of article 11 on colonial domination should be combined, he thought that the use of force should retain a prominent position.

52. The gravity of the crime should also be used in defining the scope of mercenarism as a crime against peace. Not all acts of mercenarism should come under that heading: in most instances the involvement of States would be required, but that was not obligatory. Moreover, as the Special Rapporteur pointed out in his report (A/CN.4/411, para. 43), mercenarism was already covered in the 1974 Definition of Aggression,²² article 3 (g) of which dealt specifically with that phenomenon. It had been suggested that the Commission's work on mercenarism should take into account the work being done on the subject by the *Ad Hoc* Committee. He could not accept that approach if it meant that the attempt to identify the legal parameters of mercenarism was to be deferred. The Commission might be able to help the *Ad Hoc* Committee by furnishing the legal elements of a definition.

53. In conclusion, he emphasized that general recognition of the criminal character of the offences dealt with in the code was an important element, which had been expressed in the second alternative of draft article 3 as submitted by the Special Rapporteur in his third report,²³ and in draft article 4 as submitted in his fourth report.²⁴ Draft article 11 should now be referred to the Drafting Committee.

The meeting rose at 11.40 a.m.

²² See footnote 7 above.

²³ *Yearbook . . . 1985*, vol. II (Part One), p. 81, document A/CN.4/387.

²⁴ *Yearbook . . . 1986*, vol. II (Part One), p. 82, document A/CN.4/398.

2059th MEETING

Thursday, 9 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. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. Mahiou, 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 Mankind¹ (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. The CHAIRMAN, speaking as a member of the Commission, said that, although he would have preferred to confine himself to specific comments on draft article 11, as the Special Rapporteur had requested, some aspects of the topic, particularly regarding intervention, should be dwelt on at greater length because they were of the utmost interest to the countries of Latin America.

2. Intervention and its counterpart, the principle of non-intervention, lay at the heart of American international law and the political and diplomatic history of the Latin-American republics was basically no more than the history of the foreign interventions of which they had been the victims. It was no mere chance, therefore, that the absolute principle of non-intervention was the corner-stone of American international law, whereas traditional doctrine, in Europe or elsewhere, regarded intervention as a right belonging to States and considered that it was legally justified, at least in certain cases. It was a known fact that that doctrine dated back to the era when the concept of national sovereignty and legitimacy, framed and implemented by the European Powers prior to the French revolution, had yielded to the concept of intervention as conceived by the Holy Alliance. As for America, with the arrival of the Spaniards, certain jurists in Spain, like Vitoria and Suárez, had used the term "intervention" in an attempt to justify Spain's occupation of America. Once

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.