Document:-

A/CN.4/SR.2135

Summary record of the 2135th 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:-

1989, **vol. I**

gression. However, if the State to which the warning was addressed interpreted it as a threat of aggression and insisted that such act be punished, the political dispute might escalate.

72. Lastly, he considered that it was for an international criminal court to decide whether there had been a threat of aggression. National courts were not the appropriate forum for such a decision.

The meeting rose at 1 p.m.

2135th MEETING

Wednesday, 12 July 1989, at 10 a.m.

Chairman: Mr. Bernhard GRAEFRATH

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Hayes, Mr. Illueca, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Draft Code of Crimes against the Peace and Security of Mankind[1] (*continued*) (A/CN.4/411,[2] A/CN.4/419 and Add.1,[3] A/CN.4/L.433)

[Agenda item 5]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (*continued*)

ARTICLE 13 (Threat of aggression)[4] (*concluded*)

1. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee), noting that several members had doubts about article 13, said that the Drafting Committee had no set opinion in the matter and considered that it had performed its task, which was not to consider the need for a particular article but to draft a text.

2. Mr. AL-QAYSI said that article 13 was necessary, since it completed article 12, which the Commission had provisionally adopted at the previous session[5] and which defined aggression as a crime against the peace and security of mankind. The proposed text was perhaps the best solution the Drafting Committee could produce. Admittedly, the concept of "threat" was not easy to define, but in the present case it was a matter of defining "threat of aggression", a far more specific expression.

3. His answer to the question whether article 13 was acceptable was in the affirmative, inasmuch as it established a relationship with the concept of aggression, as already defined. The Drafting Committee had none the less allowed a subjective element to remain, as reflected in the phrase "which would give good reason to the Government of a State to believe that aggression is being seriously contemplated". That involved an element of intent on the part not of the State, but of its Government, which was composed of individuals. That was in fact an extension of the criminal responsibility of individuals, which was the essence of the draft code.

4. The object of the article was to define a process of thinking which led to concrete facts, in which connection it had already been said that it approached the matter solely from the standpoint of the threatened State, not from that of the State which made the threat. It thus provided for an escape route, which could be dangerous.

5. Mr. Francis (2134th meeting, para. 66) had proposed that the qualifying clause "which would give good reason to the Government of a State to believe . . ." should be deleted and the reasons he had cited merited consideration. Such an amendment would, however, at the same time have the effect of removing the material element constituted by the reaction of the threatened State. In that case, only the Security Council would be in a position to determine whether or not there had been a threat of aggression.

6. For all those reasons, he considered that, for the time being, it would be best to accept article 13 as proposed by the Drafting Committee and to include in the commentary an explanation of the details of its provisions in order to leave no doubt as to its meaning. In particular, it should be stressed that the article must be read in conjunction with article 12.

7. Mr. BENNOUNA said that, in his view, the text of article 13 proposed by the Drafting Committee had the fewest drawbacks. In any event, it was an improvement over the 1954 draft in that the Drafting Committee had tried to arrive at a definition which was as objective as possible.

8. Contrary to what had been said, there was no question of leaving it to the Government of a State to determine whether or not it was threatened, since the requirement introduced by the words "which would give good reason to the Government of a State to believe . . ." enabled third parties to decide whether or not "declarations, communications, demonstrations of force . . ." constituted a threat.

9. Mr. Reuter had wanted to go further and add the concept of blackmail to that of intent. It was true that a threat was always designed to obtain something, for example a certain conduct on the part of the State that was threatened. Although the Drafting Committee had decided not to endorse that idea, a reference to blackmail might perhaps be included in the commentary, something which could only enhance the content of article 13.

10. Mr. McCaffrey (2134th meeting) had wondered whether intent was adequately represented in the concept of threat. The wording of article 13 left no doubt on that score, but in the interests of clarity a qualification could

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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 . . . 1988*, vol. II (Part One).

[3] Reproduced in *Yearbook . . . 1989*, vol. II (Part One).

[4] For the text, see 2134th meeting, para. 55.

[5] *Yearbook . . . 1988*, vol. II (Part Two), pp. 71-72.

be added, for example by saying "which would *intentionally* give good reason to the Government of a State to believe . . .".

11. Mr. BEESLEY, stressing the importance of article 13, said that threat of aggression could not be excluded, since it could have many practical implications. A powerful State could, for example, achieve its objectives without actually committing aggression. Thus, in cases where there was no actual military action, such a State—and therefore the individuals who directed it—would be exempt from blame, and that was precisely what had to be avoided. The situation was similar to preparation of aggression. Indeed, some national systems of law also differentiated between the threat and the act itself, as, for example, in the distinction between assault and battery.

12. In the case of threat, intent had to be present. If it were left to the victim to determine intent, however, a problem would arise with regard to third States, which could also take action on the basis of such threats. A more objective criterion should therefore be incorporated in article 13 to replace the phrase "which would give good reason . . . to believe", which seemed to be unduly subjective.

13. However, he did not think that any solution would be the right one. Acceptance of the text proposed by the Drafting Committee might be a source of uncertainty, yet rejection of it would pave the way for misleading interpretations.

14. Mr. Sreenivasa RAO said that the main problem with regard to article 13 was one of application, which ideally should be entrusted to an international court, since the difficulties would begin as soon as a national court had to determine whether there had been a threat of aggression. In some instances, as had been the case with the Nazi Government's preparations for war, the threat was fairly easy to determine. Recent history, however, revealed situations which were far more involved and called for a determination by a third party. Threat was essentially subjective and there were many ways of bringing it into play: it was enough to recall, for example, the gunboat politics of yore. Depending on individual judgment, the threat might or might not be seen as genuine. Once the Security Council was entrusted with the task of determining whether there had been a threat, the situation became much clearer.

15. Whether or not it was applied, however, article 13 was in keeping with the ultimate objective of the code, which was prevention. In his view, therefore, the text should remain as drafted and the reservations voiced by members should be reflected in the commentary. It must be recognized that the Commission had not altogether achieved the objective sought.

16. Mr. RAZAFINDRALAMBO said he agreed in principle that the text proposed by the Drafting Committee should be adopted and he appreciated the difficulties in that connection. As already noted, however, the text was still imbued with subjectivity. Were "declarations", for instance, enough to characterize a threat of aggression? That subjective element would acquire still greater significance if article 13 were applied by national courts. The subjective elements in the definition should therefore be supported by more specific elements: other concrete elements such as "military preparations" could be added to the "demonstrations of force" already referred to in the article.

17. As to drafting, the phrase "which would give good reason to the Government of a State to believe . . ." suggested that it qualified only "other measures". It should therefore be amended accordingly.

18. Mr. BARSEGOV said that, in deciding whether or not article 13 was necessary, it must be borne in mind that threat of aggression was a reality, that it was a reprehensible act of State, and that the future code should therefore provide for sanctions against individuals guilty of it.

19. Several members had already said that the proposed text was woolly. That was due to the approach peculiar to the Drafting Committee, which avoided being too specific and sought solutions that were as general as possible. There were, therefore, gaps in the text: for instance, it made no direct reference to the Charter of the United Nations or to the Security Council, whose role in the matter would be decisive. Indeed, the decision of the Security Council would be even more important in the case of threat than in that of actual aggression, since aggression was all too evident.

20. Mr. Sreenivasa Rao had said that, even if article 13 was not applied, it would retain its deterrent character, which would be in keeping with the spirit of the code. In any event, it was conceivable that in practice there would be an overall pronouncement on various aspects of the general situation, such as threat, preparations and actual acts of aggression.

21. As to the court which would have jurisdiction, he was prepared to envisage the establishment of an international criminal court, as indeed the Commission had promised to do. For the time being, he considered that the text, though not perfect, should be accepted as drafted and that efforts should be made to improve it gradually on the basis of all the views that would be expressed on it.

22. Mr. THIAM (Special Rapporteur) said he was surprised that some members questioned the need for the code to include threat of aggression, which was expressly referred to in Article 2, paragraph 4, of the Charter of the United Nations and which the Commission was consequently bound to deal with. The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,[6] which had been adopted unanimously, also contained a number of provisions proscribing threat of aggression. Furthermore, in its judgment in the *Nicaragua* case,[7] the ICJ had held that threat of aggression was included among crimes against the peace and security of mankind, even if it was a less serious crime.

23. The problem could be approached in two ways, either by referring to threat without defining it and leaving it to the court to determine the facts—as was the method under internal law—or, as advocated by those who adopted a restrictive approach to the draft code, by enumerating the various possible forms of threat. The Drafting Committee and he, in his capacity as Special Rapporteur, had endeav-

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

[7] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits*, Judgment of 27 June 1986, *I.C.J. Reports 1986*, p. 14.

oured to give satisfaction to those who favoured the second solution. It was not the time for reopening the debate, but rather for making specific proposals if members so wished.

24. Mr. KOROMA suggested that, in the case of the draft code, the Commission should follow the method adopted at the present session during the second reading of the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, when the Special Rapporteur had been invited to comment on each article after it had been introduced by the Chairman of the Drafting Committee. It would also be helpful if the Chairman of the Drafting Committee and the Special Rapporteur could intervene in the discussion more frequently to provide explanations, which would shorten the debate. However, since it had taken nearly 20 years to formulate the definition of aggression, it was not surprising that the definition of threat of aggression was being discussed at length. Indeed, he welcomed the detailed analysis to which the Drafting Committee's work had given rise, but would invite the Special Rapporteur to draft a commentary to article 13 which was as comprehensive as possible.

25. Article 13 was not perfect, of course, but in the circumstances it was satisfactory. It should be read in the light of the Charter of the United Nations and of the historical context, in other words in the light of the development of the law on the prohibition of the use of force and of article 19 of part 1 of the draft articles on State responsibility.[8] Threat of aggression was unfortunately a reality, which had in the past already had the effects anticipated by the States concerned. The draft code should not remain silent in that regard.

26. When it came to crimes such as threat of aggression, it was pointless to stipulate that specific damage must have occurred: it sufficed to establish the existence of an objective intent in order for threat of aggression to be made an international crime. In other words, it was enough for a State to perceive the threat of aggression against it for that State to have grounds for complaint.

27. Threat of aggression could be imputed both to an individual and to a State, even if, for the time being, only acts attributable to individuals fell under the code. An introductory clause should, however, be inserted before articles 13 *et seq.*, to read: "The following crimes constitute a threat against the peace".

28. With regard to a point made by Mr. Francis at the previous meeting, there was a difference between article 19 of part 1 of the draft articles on State responsibility, which he had already mentioned, and article 13 under consideration. Article 19 laid down an *erga omnes* rule and, if applied in the present case, an *erga omnes* rule would mean that not only the threatened State, but any member or collective body of the international community could allege that an international obligation had been violated. In the case of article 13 the position was different, since it was for the victim to make the allegation.

29. The text before the Commission was, for the time being, the best the Drafting Committee could produce. Nevertheless, an extensive commentary was needed in view of the observations and criticisms to which it had given rise. The Commission could try to improve the article on second reading, or even at a later stage.

30. Mr. TOMUSCHAT said that the Drafting Committee had done its very best to produce a reasonable text that could be implemented, although the text did call for some improvement. The Drafting Committee believed, for instance, that it had introduced a sufficiently objective element into article 13 with the words "which would give good reason", since they would mean that determination of the facts was not left to the threatened State alone. Given the number of members of the Commission who had criticized the subjective character of the article, however, the text might need some strengthening.

31. It had rightly been said that some link should be established between article 12 (Aggression), provisionally adopted at the previous session,[9] and article 13. In particular, the Commission should not exclude the role of the Security Council, whose decisions should have binding force, as provided in paragraph 5 of article 12. A similar provision would be required in article 13.

32. Article 13 was one of the provisions in the draft code that could not be applied by national courts. It was therefore comforting to note an emerging consensus on the idea of establishing an international criminal court to try crimes like the threat of aggression. Two categories of crimes were covered by the draft code, one consisting of crimes in the more or less traditional sense of the term, such as war crimes, where individual acts were at issue, and the other requiring an analysis of a complex historical situation involving a whole pattern of acts which national courts were not in a position to determine. That was why an international criminal court must be established at all costs.

33. Mr. BARBOZA said that he appreciated the difficulties of the Drafting Committee, which had merely performed the task entrusted to it by the Commission. An article on the threat of aggression had its place in the draft code for the reasons given by the Special Rapporteur. Moreover, although aggression as such was the most serious of the crimes against peace, the fact remained that, generally, when a criminal code was drawn up, a legal interest was enveloped in a series of protective rings. In the present case, the legal interest was peace, and aggression and threat of aggression were the evils against which it had to be protected. In general, national criminal codes prohibited the mere possession of weapons even if they were not used to commit a crime and, in so doing, they strengthened protection against the actual crime. In the present case, threat of aggression was one of the additional elements in an even more serious crime against which the international community wished to protect itself.

34. Obviously, it was more difficult to discern intent in some cases than in others. The problem was the same, however, in that intent to commit a crime had to be inferred from the facts. The wording of article 13 proposed by the Drafting Committee was not bad: it could perhaps be amended slightly, but it was sufficiently objective. Whether there was in fact a threat of aggression had to be inferred from the general context in which it occurred,

[8] See 2096th meeting, footnote 19.

[9] See footnote 5 above.

namely from a set of circumstances that would provide the court having jurisdiction with an idea of the intent involved.

35. He, too, considered that threat of aggression, and indeed other crimes covered by the draft code, such as aggression itself and genocide, could not be tried by national courts. Yet the fact that that question had still not been settled was no reason for not having an article on the threat of aggression, the inclusion of which would strengthen the educational and illustrative value of the code.

36. The text itself should, in his view, be cast in more "dramatic" terms and should refer, for example, to "serious" rather than "good" reason and to the "imminence" of the aggression.

37. Mr. ARANGIO-RUIZ said that the arguments put forward in support of article 13 were convincing, since the article was wholly in keeping with the Charter of the United Nations, which prohibited not only the use of force, but also threat of the use of force. The adoption of such an article was, however, an added reason for dealing with the statute of an international criminal court as soon as possible. The draft code would become a living reality in international law only if there were a means of implementation other than national courts, which could provide the solution only in the case of war crimes in the narrow sense of the term, namely in cases of violation of the law of land, sea and air warfare. For all other crimes covered by the code, whether they were crimes against peace—which included the threat of aggression—or against mankind, an international court would be essential. He would lay particular emphasis on the point, as he had the impression that many members shared that view.

38. Although it was not easy to improve the drafting of article 13, some terms, which were rather weak, should be re-examined. For instance, the words "good reason" could perhaps be replaced by "sufficient reason", which would be more objective. Also, what was to be understood by the expression "seriously contemplated"? It would be better to speak of a "planned" threat, which would bring out more sharply the reality of the threat.

39. Mr. THIAM (Special Rapporteur), noting the concern members had again expressed with respect to the court having jurisdiction in the matter, said that, while he intended to submit a draft statute for an international criminal court to the Commission, he first had to deal with the crimes. It was precisely to prevent possible mistakes by national courts that he had endeavoured, with the Drafting Committee's assistance, to determine as precisely as possible the various constituent elements of threat of aggression. In that way, if in the end national courts had to apply the code, they would know which specific elements had to be borne in mind in determining whether there was a threat of aggression.

40. As to the remarks made about the author of the act, he had started by defining the acts but would later concentrate on establishing the link between the act, as defined, and the author of the act. In any event, the author could only be an individual, since the topic did not cover the criminal responsibility of the State. Individuals, inasmuch as they committed crimes against peace, were usually, if not always, persons vested with political power. The Commission would see later how that aspect of the matter was to be reflected in the draft code. The 1954 draft code had referred to the authorities of the State, an expression which had attracted criticism from a number of members. For the time being, it was enough to know that the code would apply to individuals and that, in the case of crimes against peace, it could only apply to individuals vested with the authority of the State.

41. Mr. McCAFFREY observed that the main argument put forward by the Special Rapporteur and other members in support of article 13 derived from the fact that threat of aggression was prohibited under, in particular, the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States.[10] The Commission could not, however, reproduce at random in the code all the elements which appeared in the applicable international instruments. It had to make a choice on the basis of the seriousness of the acts and of how the code would be implemented. Leaving aside the question of the seriousness of the acts—threat of aggression was undoubtedly a serious act—and concentrating on the question of the implementation of the code, it was difficult to imagine that States could entrust to national courts the task of determining whether a threat of aggression had occurred unless that crime was defined with great precision and objectivity. The text proposed by the Drafting Committee failed on that score, for it laid down a general definition which would perhaps suffice for the Security Council or an international criminal court but certainly not for national courts. He would in fact favour an express reference in article 13 to the role of the Security Council, although that role might not always be decisive.

42. While some members were not opposed to including an article on threat of aggression, most of them had serious reservations about the text of article 13 proposed by the Drafting Committee. How then could that text be referred to the General Assembly as a text coming from the Commission? The best solution would probably be to state in the Commission's report, and not just in the summary records, that the Drafting Committee had proposed an article on threat of aggression to the Commission—the text of which would be reproduced in a footnote—and that the discussion in the Commission had been inconclusive and would be resumed at the next session.

43. Mr. REUTER said he considered that an article on threat of aggression was necessary. Also, he could support the text of article 13 proposed by the Drafting Committee, on the understanding that the expression "Government of a State" was taken to mean "any responsible Government of a State", in other words a Government that appreciated the seriousness of its task.

44. Mr. JACOVIDES said that the best course in the circumstances would be to leave article 13 as proposed by the Drafting Committee, subject to possible reconsideration in the context of the draft code as a whole. Whatever the differences about the need for and the wording of the article, the fact remained that the Charter of the United Nations made express reference to threat of aggression.

45. He attached importance to the expression "good reason", which he interpreted as referring not only to the opinion of the threatened State, but also to objective criteria,

[10] See footnote 6 above.

and considered that an international criminal court should determine whether a threat of aggression had occurred.

46. Mr. EIRIKSSON said that, although he too believed that an article on threat of aggression was necessary, he considered that the text proposed by the Drafting Committee could lead to confusion. Was it trying to define threat of aggression or to establish thresholds—in hierarchical order, apparently—beyond which threat of aggression would be covered by the draft code? For his own part, he discerned two thresholds in article 13, one as reflected by the supposedly objective criterion of "good reason" and the other by the words "seriously contemplated". Like other members, he had reservations about both expressions.

47. In his opinion, the article on threat of aggression should be viewed in the context of the confidence-building measures that were familiar to the Conference on Security and Co-operation in Europe, and it should be designed to prevent any possibility of anticipatory self-defence. For that reason, and to remove any impression that the acts constituting threat of aggression were graded in any way, article 13 could be worded as follows:

> "Threat of aggression consisting of any measure, including declarations, communications and demonstrations of force, which would give good reason for a State to believe that aggression is being seriously contemplated against that State."

48. Mr. THIAM (Special Rapporteur), noting that the Commission had discussed the matter thoroughly, said that interesting proposals had been made to improve the text of article 13 proposed by the Drafting Committee, but almost all members seemed to agree on the need for an article on threat of aggression. His intention was to reflect all those drafting proposals in the commentary to the article, something which would assist the Commission at the second-reading stage.

49. He was none the less concerned at the attitude of some members to the draft code as a whole. In the first place, it was at the request of the General Assembly that the Commission had resumed work on the topic, and that decision should be respected. Secondly, if only one member of the Commission had to oppose a particular text in order for it not to be transmitted to the Sixth Committee of the General Assembly, the Commission would never refer anything to the Sixth Committee again. The code was what it was; it might or might not be acceptable, but the Commission must fulfil the mandate it had received from the General Assembly.

50. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) noted that the discussion centred on two main questions, namely jurisdiction (i.e. national courts or an international criminal court), and the relationship between the acts of the State and the responsibility of individuals. Those two questions, however, arose in connection with other articles in the draft code and certainly could not be resolved by the Drafting Committee in the context of article 13.

51. In response to Mr. Barsegov's point, he explained that the need for article 13 was a matter for the Commission to decide, not the Drafting Committee, which was only a subsidiary body. The Drafting Committee had worked on an article on threat of aggression because it had believed that that was the wish of the Commission.

52. With regard to Mr. Razafindralambo's point, it was not only the "other measures", but also the declarations, communications and demonstrations of force which must "give good reason to the Government of a State to believe that aggression is being seriously contemplated against that State". That was clear from the text of the article, but the Special Rapporteur might wish to confirm it in the commentary.

53. In short, there were relatively few proposals for change. Mr. Eiriksson's suggestion (para. 47 above) might have been useful during the Drafting Committee's consideration of the article, but in any case it was not essential and might have some flaws. With regard to Mr. Mahiou's concern (2134th meeting) that the Government of the potential victim State might have too dominant a role in determining whether threat of aggression had occurred, logic dictated that it should be the State which felt threatened that made the allegations of threat of aggression. It would then be for the court having jurisdiction to decide whether that was, or was not, the case. If the State concerned did not itself feel threatened, it would seem difficult to hold that the crime of threat of aggression had occurred. As to Mr. McCaffrey's suggestion, it would further delay the work of the Commission. Moreover, it was very unlikely that, at the Commission's next session, the Drafting Committee would be able to submit a text that differed significantly from the one under consideration. No doubt article 13 was far from perfect and should be carefully reviewed, perhaps at a third-reading stage, which, in the particular case of the code, seemed advisable. For the time being, however, the article could be adopted as drafted.

54. Mr. BEESLEY suggested, in the light of the various proposals, that reference should be made in a footnote to the role of the Security Council—although the Special Rapporteur was probably thinking of doing that. Also, he would suggest—without dwelling on the point—that article 13 be amended to read:

> "Threat of aggression, including declarations, communications, demonstrations of force or any other measures threatening aggression."

55. The CHAIRMAN said that, in his view, the discussion had been necessary, for it had shown that the Commission was well aware of the inevitable problems and difficulties of substance and drafting, that article 13 must be read in conjunction with the other articles in the draft code, and that the question of the introductory clause still had to be settled. He therefore recommended that the Commission should adopt article 13 as proposed by the Drafting Committee and that the commentary should state that the article would be reviewed in the light of the observations made in the Sixth Committee of the General Assembly and of the articles outstanding in the same chapter.

56. Mr. ARANGIO-RUIZ reiterated that he could agree to article 13 only if a statute for an international criminal court was envisaged.

57. Mr. FRANCIS, stressing that the threat of aggression endangered international peace and security, proposed that the phrase "which would give good reason to the Government of a State to believe that aggression is being seriously contemplated against that State" be placed between square brackets for the time being. There was nothing unusual about that proposal and it was his intention

to submit amendments to article 13 at the Commission's next session.

58. Mr. McCAFFREY said that he was not opposed to the Chairman's recommended course of action, provided the commentary reflected the fact that article 13 had given rise to serious reservations on the part of many members.

59. The CHAIRMAN noted that the Special Rapporteur had already stated that those reservations would be reflected in the commentary.

60. Mr. BENNOUNA pointed out that there was a difference between the Commission's report, which reflected the views of members, and the commentaries to articles, which were a collective interpretation of the texts adopted. To refer to reservations in a commentary could only lead to confusion.

61. The CHAIRMAN, noting that Mr. Francis did not insist on his proposal, said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt article 13 as proposed by the Drafting Committee, on the understanding that the commentary would indicate that the article would be examined further in the light of the observations made by Governments in the Sixth Committee of the General Assembly and of the articles outstanding in the same chapter.

It was so agreed.

Article 13 was adopted.

ARTICLE 14 (Intervention)

62. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 14,[11] which read:

Article 14. Intervention

1. Intervention in the internal or external affairs of a State by fomenting [armed] subversive or terrorist activities or by organizing, assisting or financing such activities, or supplying arms for the purpose of such activities, thereby [seriously] undermining the free exercise by that State of its sovereign rights.

2. Nothing in this article shall in any way prejudice the right of peoples to self-determination in accordance with the Charter of the United Nations.

63. The text proposed by the Drafting Committee for paragraph 1 of article 14 combined elements taken from each of the two alternatives submitted by the Special Rapporteur. Like the first alternative, it included the element of impairment of the sovereign rights of a State—which the ICJ, in its judgment in the *Nicaragua* case,[12] had deemed to be an essential element of intervention; and, like the second, it spelt out which concrete acts amounted to intervention. The formula "Intervention in the internal or external affairs of a State" already appeared in those two alternatives as well as in the 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States[13] (third principle).

64. Members would recall that, in the second alternative, the Special Rapporteur had followed the model of the 1954 draft code and, in two separate subparagraphs, had singled out as acts of intervention "civil strife or any other form of internal disturbance or unrest", on the one hand, and terrorist activities, on the other. The text proposed by the Drafting Committee dealt in a single sentence with armed subversive or terrorist activities. In that connection, the Drafting Committee had based itself on the third principle (second paragraph) of the 1970 Declaration, which provided that no State "shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the régime of another State, or interfere in civil strife in another State". The Committee had thought it preferable, however, to refer to "subversive activities" rather than to "civil strife or any other form of internal disturbance or unrest"; in its opinion, the concept of subversion was more comprehensive and more appropriate for the purposes of article 14.

65. The Drafting Committee had been careful to retain only those acts whose gravity warranted inclusion in the code as crimes against peace. That was why some members of the Committee had supported the inclusion of the word "armed" before "subversive or terrorist activities", although others had taken the view that any subversive activity which resulted in impairment of the sovereign rights of States should be regarded as a crime against peace, whether or not it involved the use of armed force. The word "armed" had therefore been placed between square brackets. The word "seriously" had likewise been placed between square brackets to reflect another divergence of views.

66. Paragraph 2, which was in the nature of a saving clause and was based on article 7 of the 1974 Definition of Aggression,[14] was self-explanatory. Its placement in article 14 was provisional, since a similar clause might prove necessary in relation to other crimes against peace. Lastly, members would note the difference between the last part of paragraph 2 and the similar wording at the end of article 15. It might be useful to harmonize the texts, but the Special Rapporteur felt that that should be done after article 15 had been considered.

67. Mr. MAHIOU said that the word "armed" should be deleted so that paragraph 1 did not duplicate paragraph 4 (*g*) of article 12 (Aggression) already provisionally adopted by the Commission.[15] The word "seriously" was necessary to qualify intervention and should be retained.

68. Mr. McCAFFREY said that he had already expressed serious reservations about article 14 when it had been considered in the Drafting Committee and he did not think it should have a place in the code. Although the Drafting Committee had improved the text, the crime of intervention was still not defined sufficiently precisely for the purposes of implementation of the article by national courts or indeed by an international court.

69. Furthermore, he did not understand what was meant by "intervention in . . . external affairs". Even if that kind of intervention existed, he wondered whether it could be sufficiently serious to be included among "the most serious

[11] For the corresponding text (art. 11, para. 3) submitted by the Special Rapporteur and a summary of the Commission's discussion on it at its previous session, see *Yearbook . . . 1988*, vol. II (Part Two), pp. 59 *et seq.*, footnote 276 and paras. 231-255.

[12] See footnote 7 above.

[13] See footnote 6 above.

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

[15] See footnote 5 above.

of the most serious" crimes. Moreover, because the code should include the most serious crimes, the word "armed" ought to be retained, for the concept of subversive activities was too subjective unless it was qualified. A State might very well argue, for instance, that making a contribution to a political party in opposition amounted to intervention.

70. With regard to Mr. Mahiou's point, he did not think that paragraph 1 of article 14 could duplicate paragraph 4 (*g*) of article 12, which dealt with a different situation, namely the sending of armed bands or groups by a State. The word "seriously" should be retained, first of all because the forms of intervention involved were the most serious and also because, strictly speaking, the word "undermining" was not a legal term and should therefore be clarified.

71. He welcomed the introduction of a saving clause in paragraph 2, although he would have preferred a reference to human rights. In that connection, he noted that, in a recent article, Lori Fisler Damrosch had concluded, after studying State practice in the matter, that:

> . . . a State violates the non-intervention norm when its non-forcible political activities prevent the people of another State from exercising the political rights and freedoms that form part of the evolving body of international human rights law.[16]

If that was true, the converse must also be true, and non-forcible political activities which enabled a people to exercise those freedoms and rights should not be regarded as constituting intervention.

72. Mr. HAYES said that he favoured deletion of the word "armed", because subversive activities—in the sense of unconstitutional activities—might not be armed. He was also in favour of omitting the word "seriously", because there were no degrees when it came to undermining the free exercise of the sovereign rights of a State and the word might provide an escape clause for those who perpetrated the crime of intervention. Furthermore, it would be preferable to replace the word "undermining", at the end of paragraph 1, by the words "with the purpose of undermining", for in its present form the text suggested that the activities covered could be sanctioned only if they actually resulted in undermining the free exercise of the State's sovereign rights. Such activities should, however, be sanctioned even if they did not have the expected effect. The objection that a reference to the purpose would provide those charged with the crime of intervention with an escape clause was not well founded, since it would be for the court to take a decision in each case, and the judge could take intent into account. In principle, a person who committed an act was assumed to intend the normal consequences of that act.

73. Mr. ARANGIO-RUIZ said that he recognized the importance of the concept of intervention and appreciated the work done by the Special Rapporteur and the Drafting Committee. He was, however, still too perplexed by the wording of article 14 to be able to comment on it and therefore reserved his position until the second reading of the article.

74. Mr. BENNOUNA said that examples of intervention in external affairs were to be found in State practice, although only some countries were in a position to engage in that kind of intervention, the object of which was to make a State change its international policy. He had in mind, for example, what had taken place in the Mediterranean in connection with the delimitation of the maritime zone of a State, and the activities conducted against the diplomats and representatives of a State to make it alter its policy.

75. He, too, favoured deletion of the two sets of square brackets in paragraph 1 of article 14.

76. Mr. AL-QAYSI said he considered that the words "armed" and "seriously" in paragraph 1 should be deleted, and endorsed Mr. Hayes's suggestion that the word "undermining" should be replaced by the words "with the purpose of undermining". Also, to limit the risk of abuse, it would perhaps be advisable to indicate in the commentary that the "free" exercise of the sovereign rights of a State must be taken to mean "in accordance with international law".

77. Mr. Sreenivasa RAO said that he supported the proposal to delete the words "armed" and "seriously", for the reasons already stated. He also agreed with Mr. Al-Qaysi's suggestion regarding the word "free".

78. Mr. TOMUSCHAT said that the word "armed" should be retained, since the word "subversive" had no legal meaning. Freedom of speech, for instance, was sometimes regarded as subversive, and deletion of the word "armed" would open the door to violations of the most elementary principles of human rights. The word "seriously" was also necessary, at least in the French text: the expression *porter atteinte* was not enough, as there could be different degrees of *atteinte*.

79. Mr. FRANCIS said that he favoured deletion of both of the words between square brackets. Free exercise of the sovereign rights of a State was the quintessence of the existence of a State and anything that might impair it should be regarded as serious. No condition, therefore, should be laid down with respect to the means, namely "armed", or the result, namely "seriously", of undermining such free exercise.

80. At the previous meeting (para. 66), he had pointed out that there was a missing element in article 13, to which Mr. Reuter had referred in the general debate. He thought in that connection, and independently of the position taken by Mr. Reuter, that the Commission should consider adding the words "and endangering international peace and security" at the end of paragraph 1 of article 14. Any act from an external source which undermined the free exercise of the sovereign rights of a State threatened international peace and security. If, in addition, external relations could also be affected, a threat to international peace and security would seem to be an essential component of article 14.

81. Mr. THIAM (Special Rapporteur) said that all the crimes covered by the draft code were included precisely because they were a threat to international peace and security. There did not seem any point in recalling that fact in article 14.

82. He had used the word "armed" because it appeared in the 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among

[16] L. Fisler Damrosch, "Politics across borders: Non-intervention and non-forcible influence over domestic affairs", *American Journal of International Law* (Washington, D.C.), vol. 83, No. 1 (January 1989), p. 6.

States.[17] He was not, however, opposed to deleting it, for he was fully aware that activities did not need to be "armed" in order to be "subversive". In Africa, for instance, there had been a case of a State using the national radio to incite the population of a neighbouring State to rebellion. The best course would perhaps be to leave the word between square brackets and let the Sixth Committee of the General Assembly decide the matter.

83. With regard to the word "seriously", he would point out that the ICJ, in its judgment in the *Nicaragua* case,[18] had held that coercion was a criterion in determining whether intervention had occurred. Did that mean coercion of any kind, or should its seriousness be taken into account? He had no preference in that connection.

84. Mr. RAZAFINDRALAMBO said that he, too, favoured deletion of the words "armed" and "seriously". Since some members would prefer to retain them, however, the best course would perhaps be to leave them between square brackets. As for paragraph 2, the last part should be brought into line with the last part of article 15.

85. Mr. AL-BAHARNA said that the words "armed" and "seriously" should be retained and the square brackets deleted. The concept of subversion was lacking in legal precision and the difference in nature between the 1970 Declaration on Principles of International Law and the draft code also had to be borne in mind. Furthermore, as he had pointed out in the Drafting Committee, the expression "intervention in . . . external affairs" should be clarified, for instance in the commentary, since it reflected a concept that was not very clear. Lastly, he agreed that the end of paragraph 2 of article 14 should be brought into line with the end of article 15.

86. Mr. ILLUECA said that he agreed with those members who were in favour of deleting the word "armed".

87. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said he noted from the discussion that there was no strong objection to the text of article 14 proposed by the Drafting Committee. Personally he would have liked to delete either the square brackets or the words placed between them, but there was apparently no change in the positions in that respect. The decision with regard to a possible amendment to the end of paragraph 2 could be taken when article 15 was considered.

88. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt article 14 as proposed by the Drafting Committee.

Article 14 was adopted.[19]

The meeting rose at 1.05 p.m.

[17] See footnote 6 above.

[18] See footnote 7 above.

[19] See 2136th meeting, paras. 28-41.

2136th MEETING

Thursday, 13 July 1989, at 10 a.m.

Chairman: Mr. Bernhard GRAEFRATH

Present: Mr. Al-Baharna, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Hayes, Mr. Illueca, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Draft Code of Crimes against the Peace and Security of Mankind[1] (*concluded*) (A/CN.4/411,[2] A/CN.4/419 and Add.1,[3] A/CN.4/L.433)

[Agenda item 5]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (*concluded*)

ARTICLE 15 (Colonial domination and other forms of alien domination)

1. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 15,[4] which read:

Article 15. Colonial domination and other forms of alien domination

Establishment or maintenance by force of colonial domination or any other form of alien domination contrary to the right of peoples to self-determination as enshrined in the Charter of the United Nations.

2. Colonial domination had been the subject of the first alternative submitted by the Special Rapporteur and alien subjugation, domination or exploitation the subject of the second. The Drafting Committee had agreed, however, that article 15 should deal not only with colonial domination, but also with other forms of domination in the modern world.

3. The first limb of the article was the "establishment or maintenance by force of colonial domination", a phrase which appeared in article 19 of part 1 of the draft articles on State responsibility[5] (para. 3 (*b*)). In the Drafting Committee's view, the notion of "establishment or maintenance by force of colonial domination" had acquired a sufficiently precise legal content in United Nations practice to warrant inclusion as a crime under the code.

[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 . . . 1988*, vol. II (Part One).

[3] Reproduced in *Yearbook . . . 1989*, vol. II (Part One).

[4] For the corresponding text (art. 11, para. 6) submitted by the Special Rapporteur and a summary of the Commission's discussion on it at its previous session, see *Yearbook . . . 1988*, vol. II (Part Two), pp. 63-64, footnote 294 and paras. 262-267.

[5] See 2096th meeting, footnote 19.