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AN EXAMINATION OF THE PROPOSED CRIME OF INTERVENTION IN THE DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND*

JOHN LINARELLI**

In my estimation, . . . the [Cuban] quarantine is not a legal issue or an issue of international law as these terms should be understood The power, position and prestige of the United States had been challenged by another state; and law simply does not deal with such questions of ultimate power I cannot believe that there are principles of law that say we must accept destruction of our way of life The survival of states is not a matter of law.

Former Secretary of State Dean Acheson¹

Supporters of the draft Code of Crimes against the Peace and Security of Mankind may be "passing fish eyes off as pearls."

Unknown Chinese Delegate to the United Nations²

International law scholars have long attempted to articulate a coherent principle of non-intervention in international law, under which interference by one nation in the affairs of another is unlawful. The contours of this principle have by no means been agreed upon and the United Nations Charter, General Assembly Declarations on the subject,³

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1. Remarks at meeting of the American Society of International Law, in 57 Proc. Am. Soc. Int'l L. 13, 14 (1963), quoted in WILLIAM W. BISHOP, JR., INTERNATIONAL LAW 929 (3rd ed. 1971).

2. Benjamin B. Ferencz, *Current Developments*, 75 Am. J. Int'l L. 674, 676 (1981).

3. See U.N. Charter art. 2(4), (7); *Declaration on the Inadmissibility of Intervention into the Domestic Affairs of States and the Protection of Their Independence and Sovereignty*, G.A. Res. 2131, U.N. GAOR, 20th Sess., Supp. No. 14, U.N. Doc. A/6620 (1965) (United Nations Declaration setting forth principles of non-intervention); *Draft Code of Offenses Against the Peace and Security of Mankind*, 1978 U.N.Y.B. 969 & n.7, U.N. Doc. A/9631 (discussing

and the decision by the International Court of Justice in *Nicaragua*⁴, have not resulted in any settled set of comprehensive rules that would comfortably fit the superabundance of situations in which the principle could be implicated. Moreover, despite the many pronouncements of the norm of non-intervention, state practice supports the view that this norm is either weak or so amorphous as to not be subject to rational or general delimitation except in obvious cases of armed intervention amounting to aggression.⁵

The concept of intervention is of particular relevance in the post-Cold War era. There has been a reconciliation between the East and West, but the world order emerging from this reconciliation is characterized by instability in regions and among the numerous developing countries.⁶ Unilateral humanitarian intervention, although considered by some to be impermissible, has been advocated by others as deserving of an expanded role in today's world.⁷ Thirty-

United Nations Declaration setting forth principles of equal rights among peoples and self determination).

4. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (Merits Judgment of June 27).

5. Recent history provides a state practice rich in conduct that, depending upon one's politics and allegiances, could be interpreted as intervention. See MYRES S. MCDUGAL & W. MICHAEL REISMAN, INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE: PUBLIC ORDER OF THE WORLD COMMUNITY 175-79 (1981); LOUIS HENKIN ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 697-739 (2d ed. 1987). As explained by Professor John Norton Moore in 1983:

The primary violence realized in the post-Charter world has been some variant of civil or mixed civil-international conflict, and terrorist, interventionary, and counter-interventionary actions in such conflicts. We can cite too many examples of this kind of violence since World War II: Nigeria-Biafra, Northern Ireland, the Indo-China conflict, the Korean conflict, the Arab-Israeli conflict, and in the setting of current concern, the conflicts taking place in Central America. Developing an effective framework to control intervention and non-intervention in the contemporary world is what we might call a Rubik's cube of interventionary law. The normative aspects of interventionary behavior present a great puzzle, but not one that is incapable of solution.

John Norton Moore, *Legal Standards for Intervention in Internal Conflict*, 13 GA. J. INT'L & COMP. L. 191, 191 (1983).

6. *Humanitarian Intervention: Caught in the Cross Fire*, 16 HARV. INT'L L.J. 4, 4 (1993).

7. See Barry M. Benjamin, Note, *Unilateral Humanitarian Intervention: Legalizing the Use of Force to Prevent Human Rights Atrocities*, 16 FORDHAM

five countries, many of which are major powers, agreed to the Copenhagen Document at the recent Conference on Security and Cooperation in Europe.⁸ The Copenhagen Document provides that participating States have a responsibility to protect freely elected democratic governments in other states.⁹

Despite the conceptual and practical difficulties relating to intervention in the United Nations Charter based order, the International Law Commission of the United Nations has taken on the daunting task of including intervention as an international crime in its draft Code of Crimes against the Peace and Security of Mankind. This Article examines the history of the consideration of intervention as a potential international crime by the International Law Commission, and the United Nations generally. The Article also contains an analysis of the justiciability of intervention as a crime in the draft Code.

I. THE EVOLUTION OF THE NON-INTERVENTION PRINCIPLE IN THE SUCCESSIVE DRAFTS OF THE PROPOSED CODE

Consideration by the International Law Commission of a draft Code of Crimes against the Peace and Security of Mankind has been intermittent with the initial effort occurring in the 1950's and the subsequent effort, leading to the

INT'L L.J. 120 (1992-93) (discussing commentators for and against unilateral humanitarian intervention and arguing for relaxation of prohibitions against unilateral humanitarian intervention). For an excellent series of articles on humanitarian intervention, see 16 HARV. INT'L REV. 4, 8-32 (1993).

8. Document of the Copenhagen Meeting of the Conference on the Human Dimension of the Conference on Security and Cooperation in Europe, June 29, 1990, reprinted in 29 I.L.M. 1305 (1990); see Malvina Halberstam, *The Copenhagen Document: Intervention in Support of Democracy*, 34 HARV. INT'L L.J. 163, 166 n.17 (1993). The adopting states included the United States, Canada, those in Western Europe and the former Soviet Union, Bulgaria, Hungary and Romania. *Id.* at 166 n.17.

9. See Halberstam, *supra* note 8, at 165. Professor Halberstam explains: What is unique in the Copenhagen Document is that it asserts (1) that the protection of human rights is one of the basic purposes of government, (2) that a freely elected representative government is *essential* for the protection of human rights and (3) that states have a responsibility to protect democratically elected governments — their own and other states' — if they are threatened by acts of violence or terrorism. *Id.*

current draft Code, occurring in the 1980's. The concept of a Code, however, is older than the United Nations itself.¹⁰ Moreover, the United Nations, virtually since its inception, has considered the preparation of a Code to be of paramount importance. By resolution of November 21, 1947, the United Nations General Assembly directed the International Law Commission to prepare a draft Code of Offenses against the Peace and Security of Mankind, in addition to formulating the principles of international law recognized in the Nuremberg Charter ("Nuremberg").¹¹ The International Law Commission worked towards preparing a draft Code, and in its sixth session in 1954, the Commission adopted a draft Code of Offenses against the Peace and Security of Mankind, and submitted the Code to the General Assembly for consideration.¹² The General Assembly, however, postponed consideration of the draft Code until a definition of aggression was adopted by the General Assembly.¹³

Cold War disagreement among the superpowers, as to the definition of aggression, caused a twenty-four year hiatus in the consideration of the Code.¹⁴ From 1954 to 1973, the General Assembly and the International Law Commission preoccupied themselves with defining aggression and other matters. On December 14, 1974, the General Assembly adopted by consensus its "Definition of Aggression" Resolution.¹⁵ In 1978, the General Assembly reinitiated the con-

10. See Robert A. Friedlander, *The Enforcement of International Criminal Law: Fact or Fiction*, 17 CASE W. RES. J. INT'L L. 79, 80 (1984) (explaining that in the twentieth century, proposals for an international code of crimes started with proposals by Professors Quintiliano Saldana in 1925 and Vespasian Pella in 1926).

11. *Report of the International Law Commission to the General Assembly on the Work of the First Session*, reprinted in [1949] Y.B. Int'l L. Comm'n 282, U.N. Doc. A/CN.4/13/1949 (discussing G.A. Res. 177(II)).

12. *Report of the International Law Commission to the General Assembly Covering the Work of its Sixth Session, June 3-July 28, 1954*, U.N. GAOR, 9th Sess., Supp. No. 9, at 9, U.N. Doc. A/2693 (1954).

13. G.A. Res. 897 (IX), U.N. GAOR, 9th Sess., U.N. Doc. A/2807 (1954).

14. See Gerhard O.W. Mueller, *Four Decades After Nuremberg: The Prospect of an International Criminal Code*, 2 CONN. J. INT'L L. 499, 501 (1987) (as explained by Professor Mueller, "[u]nfortunately, the cold war years were not conducive to further action. The superpowers seemed unwilling to proceed and reached a stalemate over the definition of the crucial term 'aggression.'").

15. *Draft Code of Offenses Against the Peace and Security of Mankind*,

sideration of the draft Code, and in 1981, the General Assembly passed a resolution which, *inter alia*, invited the Commission to resume work on the draft Code.¹⁶ The Commission resumed its work on a Code in 1982, and through extensive consideration of several reports of the Special Rapporteur, as well as extensive exercises in legal drafting, the current draft Code was finally conceived in 1991.¹⁷

Throughout the many years of labyrinthine discussions of the Code, there had been a great deal of discussion of whether intervention and related concepts, such as "subversion," should be categorized as crimes in the Code. There also have been various formulations of a proposed crime of intervention or "interference" in the affairs of a state. This section of the Article analyzes these discussions and formulations.

A. *The Initial Drafts of the 1950's*

Pursuant to the General Assembly Resolution, the International Law Commission began its work on the first draft Code in 1949, in its first year of existence.¹⁸

1978 U.N.Y.B. 969 & n.7, U.N. Doc. A/9631 ("Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations . . .").

16. In 1978, the General Assembly passed Resolution 33/97, inviting member states and intergovernmental organizations to submit comments on the draft Code. On December 10, 1981, the General Assembly passed Resolution 36/106, inviting the Commission to resume work on the draft Code. See G.A. Res. 33/97, U.N. GAOR, 34th Sess., Supp. No. 45, U.N. Doc. A/33/45 (1979); G.A. Res. 36/106, U.N. GAOR, 37th Sess., Supp. No. 51, U.N. Doc. A/36/51 (1982); Mueller, *supra* note 14, at 501-02.

17. See *Report of the International Law Commission to the General Assembly on the Work of its Forty-Third Session, April 29-July 19, 1991*, 46 U.N. GAOR Supp. (No. 10), U.N. Doc. A/46/10 (1991) (containing 1991 draft Code).

18. See *supra* note 11 and accompanying text (citing and explaining General Assembly Resolution).

1. *The First Session of the International Law Commission in 1949*

In 1949, the Commission was in its nascent stages and groping with how to comply with the General Assembly Resolution of two years earlier inviting the Commission to draft a Code of Offenses Against the Peace and Security of Mankind.¹⁹ In that first year of the Commission, Jean Spiropoulos ("Spiropoulos"), of Greece, expressed the view that "[t]here might perhaps be other offences [sic] against the peace and security of mankind in addition to those established in the Nuremburg Charter."²⁰ Spiropoulos relied on a text by Professor Vespasian V. Pella, entitled *Plan for a World Criminal Code*, for his views.²¹

19. See *supra* note 11 and accompanying text (directing the International Law Commission to prepare a draft Code of Offenses Against the Peace and Security of Mankind and to formulate the international law principles recognized in the Nuremburg Charter).

20. *Summary Records and Documents of the First Session*, [1949] Y.B. Int'l L. Comm'n 217-18, U.N. Doc. A/CN.4/SR.30/1949. Jean Spiropoulos was later appointed Special Rapporteur for the efforts of the Commission on the Code. See *infra* notes 25-26 and accompanying text (discussing Spiropoulos' efforts) [hereinafter *Summary Records 1949*].

21. Professor Pella proposed the following crimes:

(1) [S]upporting, on his own territory, of armed gangs having invaded another State's territory or refusing, in spite of the invaded State's claim, to take all measures in his power, on his own territory, or refusing, in spite of the invaded State's claim to take all measures in his power, on his own territory, to deprive the said gangs of all aid and support.

(2) [N]on-punishment of crimes prepared on the territory of a State, and directed against the independence and territorial integrity of another State.

(3) The fact of a State allowing, helping or supporting on its territory individuals or organizations which prepare crimes against another State, i.e.: (a) criminal attempts against the life or liberty of either foreign chiefs of State or members of the Government, of official or political assemblies, or judicial authorities of a foreign State; (b) criminal attempts against public buildings, railways, ships, aircraft, and other means of communication with an international character or belonging to a foreign State; (c) association for the accomplishment of any of the foregoing offenses

(4) Any "disloyal action committed or tolerated by one State, to undermine other States by weakening their credit"

Id. The first proposed crime was singled out as not included in the Nuremburg

In 1949, the international community was concerned primarily with the avoidance of another large-scale aggressive war. Latin America, however, had a long history of experience and concern with intervention.²²

In the first session of the Commission, Jesus Yepes ("Yepes"), of Colombia, strongly advocated the inclusion of the principle of non-intervention into the Code.²³ Yepes would continue his advocacy throughout the early considerations of the Code. In support of his position, Yepes referred the Commission to the definition of aggression as presented by Colombia at the Pan-American Conference in Buenos Aires in 1936, and to the International Conference on the Prevention and Suppression of Terrorism, held in Geneva in 1937.²⁴

principles. *Id.*

Some of these acts could be characterized as aggression. The concepts of intervention and aggression are not mutually exclusive.

22. See ANN VAN WYNEN THOMAS & A. J. THOMAS, JR., *NON-INTERVENTION: THE LAW AND ITS IMPORT IN THE AMERICAS* 3 (1956).

23. *Summary Record 1949*, *supra* note 20, at 218.

24. *Id.* The results of the Pan-American Conference of 1936 have been explained as follows:

Even though non-intervention seemed to be the determined policy of the United States, the Latin American nations were still of the opinion that the right to intervene should be legally abrogated by treaty. At the *Inter-American Conference for the Maintenance of Peace* which met at Buenos Aires in 1936, the Latin American nations won a complete victory for non-intervention; for the United States adhered without reservation to the Additional Protocol Relative to Non-Intervention:

The High Contracting Parties declare inadmissible the intervention of any one of them, directly or indirectly, and for whatever reason, in the interval or external affairs of any other of the parties.

The violation of the provisions of this Article shall give rise to mutual consultation, with the object of exchanging views and seeking methods of peaceful adjustment.

By signing this treaty, the United States found itself bound to an unrestricted course of non-intervention — a rather radical change of policy brought about, at least in part, by the approval at the same conference of the Convention for the Maintenance, Preservation, and Reestablishment of Peace, which provided for consultations by all the American republics in the event the peace is threatened. It was reasoned that when such situations occurred as had prompted past interventions, or threat to the peace would ensue which would bring

In the first session of the Commission, Spiropoulos was appointed as the Special Rapporteur for the draft Code.²⁵ Spiropoulos' efforts resulted in the drafting of a working paper concerning the Code.²⁶ The working paper included what was in essence a rough draft of a potential text of the Code. The primary use of the working paper was to have the Commission discuss it so that its members could articulate the various issues relevant to the promulgation of the Code.

2. *Consideration of the First Working Paper of the First Rapporteur*

During the second session of the Commission in 1950, the Special Rapporteur presented the working paper to the International Law Commission on the draft Code. In the consideration of that working paper the initial discussions of non-intervention principles emerged.

a. *Armed Intervention as a Crime Under International Law*

The working paper defined "Crime No. I" as "[t]he use of armed force in violation of international law and, in particular, the waging of aggressive war."²⁷ This provision resulted in debate among the members of the Commission, some of which concerned the concept of armed intervention as a crime against the peace. Roberto Cordova, of Mexico, supported the language "in violation of international law" as a means to include in the scope of the Code offenses that

about collective consultation of all the American republics to seek a solution.

THOMAS & THOMAS, *supra* note 22, at 62-63 (citations omitted). Collective consultations under a regional protocol, however, are a far cry from the criminalization of intervention in a Code which is designed for worldwide application.

25. *Summary Record 1949*, *supra* note 20, at 238, U.N. Doc. A/CN.4/SR.34.

26. *Report by J. Spiropoulos, Special Rapporteur*, [1951] 2 Y.B. Int'l L. Comm'n 253-78, U.N. Doc. A/CN.4/25 (1950).

27. *Id.* at 261.

were not the subject of Nuremburg, such as armed intervention.²⁸ Other Commission members viewed the terminology as vague.²⁹

The first working paper of the Commission also identified as crimes such acts as invasion of armed bands or armed gangs from the territory of one state into the territory of another state, activities in one state designed to foment civil strife in another state, and state-sponsored or state condoned terrorism.³⁰ The initial working paper set the theme for subsequent and far more formal and detailed drafts of the Code.

In connection with Crime No. I, Yepes commented that there are means other than force to "coerce" a State, and proposed that the provision read "[r]esort to violence in any form in violation of international law, and, in particular, the waging of aggressive war."³¹ Yepes was of the view that "the use of any direct or indirect means of coercing a State, including, for example, economic pressure" was an offense under international law.³² Yepes's concern was whether the Commission would condemn such unarmed intervention, which in his view was more pernicious than armed intervention. In Yepes's view, a State that used armed force was subject to United Nations sanction and condemnation, but if a State intervened through "economic pressure," it could achieve its ends without incurring the risk of United Nations involvement.³³ The purpose of

28. *Summary Records of the Second Session, June 5-July 29, 1950*, [1950] 1 Y.B. Int'l L. Comm'n 109, U.N. Doc. A/CN.4/SER.A (1950) [hereinafter *Summary Records 1950*].

29. Gilberto Amado criticized "in violation of international law" as vague and offered "in violation of international treaties, agreements or assurances." *Id.* at 109-10. A.E.F. Sandstrom proposed a similar amendment. *Id.* at 109. Faris el-Khoury indicated that there may be difficulty in applying the formulation set forth in the text in a criminal tribunal. *Id.* at 109. Manley O. Hudson was concerned, among other things, about the ambiguity in "the use of armed force" as to who would be responsible for such use. Mr. Hudson also found "in violation of international law" to be imprecise and ill-defined. *Id.* at 109-10.

30. *Spiropoulos*, *supra* note 26, at 262-63.

31. *Summary Records 1950*, *supra* note 28, at 110, 116.

32. *Id.* at 110.

33. *Id.*

Yepes's proposed revision of Crime No. I "was to make a unilateral and illegal intervention a crime in international law."³⁴ Yepes's proposed revision was rejected.³⁵

b. The Yepes Proposal on Intervention

In a subsequent meeting in 1950, Yepes proposed the following crime for inclusion in the Code: "The unilateral and illegal intervention of a State or group of States during the internal or external affairs of another State or group of States."³⁶ This was the first proposal to add intervention to the draft Code. A summary of pertinent parts of Yepes's statements in support of his proposal is as follows:

If intervention by a State in the internal or external affairs of another State were outlawed, the international horizon would be clear, and the state of apprehension in which the world was living would pass away

[L]egally speaking, unilateral intervention in the affairs of a State was no less a violation of international law than aggressive war itself. Very often, such intervention was one of the preliminaries of aggressive war, and in any case it sought to obtain, without a declaration of war, the results accruing from victory in the field.

As long as intervention was not outlawed in America, there was no peace in the New World, but when President Franklin Roosevelt's good-neighbor policy made it possible to proclaim the principle of non-intervention at the Seventh Conference of American States held in Montevideo in 1933, continental solidarity, good-neighborly relations and reciprocal respect became the guiding principles of Pan-American policy. Peace had been solidly established in the western Hemisphere because it rested on the principle of non-intervention. Could not what had been done in America on the continental scale be repeated on a world scale?³⁷

34. *Id.* at 116.

35. *Id.*

36. *Summary Records of the Second Session, June 5-July 29, 1950*, [1950] 1 Y.B. Int'l L. Comm'n 156, 159 n.5, U.N. Doc. A/CN.4/SER.A/1950. According to Yepes, the term "unilateral" was used to refer to intervention "inspired by the self-interest of the intervening state." *Id.* The term "illegal" was used to distinguish United States actions in Korea, which were taken pursuant to Security Council resolution. *Id.* at 160. According to Yepes, any collective or individual action undertaken "on behalf of the international community as a whole" was lawful. *Id.*

37. *Id.*

Yepes believed that he would have the support of the American countries, including the United States, for his proposal.³⁸ According to the summary records of Yepes's presentation before the Commission, "[i]n order to dispel the existing anxiety, the level of international morality must be raised."³⁹ He compared the early post Cold-War era as similar to the period between 1930 and 1939, when, he says, "the peoples were in constant fear of awaking under bombardment."⁴⁰

The comments on the Yepes proposal were critical and his proposal was ultimately rejected. J.P.A. Francois, of the Netherlands, expressed "a great deal of sympathy" for the idea of including intervention in the Code but could not accept the proposal because of the lack of a definition of intervention.⁴¹ He found that the proposal implied that there was such a thing as "legal intervention," but there was no definition as to when intervention was legal.⁴² He was of the view that such questions could not be left to a judge, as this would violate the principle of *nullum crimen sine lege*.⁴³ James L. Brierly ("Brierly") of the United Kingdom distinguished between the "political meaning" and the legal meaning of intervention.⁴⁴ He found intervention difficult to define in sufficiently precise terms for inclusion in a penal code.⁴⁵ To Brierly, if intervention did not fall within one of the categories already in the draft provisions, he was unclear as to what Yepes was proposing.⁴⁶ The view of Manley O. Hudson, from the United States, was that under existing international law at the time, interven-

38. *Summary Records of the Second Session, June 5-July 29, 1950* [1950] 1 Y.B. Int'l L. Comm'n 156, 160, U.N. Doc. A/CN.4/SER.A/1950.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Summary Records of the Second Session, June 5-July 29, 1950* [1950] 1 Y.B. Int'l L. Comm'n 156, 160, U.N. Doc. A/CN.4/SER.A/1950; see *infra* note 160 and accompanying text for an elaboration on the principle of *nullum crimen sine lege*.

44. *Id.*

45. *Id.*

46. *Id.*

tion meant "dictatorial intervention" — intervention by the threat or use of force.⁴⁷

Roberto Cordova, of Mexico, believed Crime No. I should be revised to cover armed intervention, and all that would remain for consideration would be whether to include "economic and political," or "unarmed" intervention in the Code.⁴⁸ Cordova was against including "unarmed" intervention in the Code. According to summary records of Commission proceedings, Cordova explained:

Any attempt to define such intervention would be faced with such a host of state activities that the whole of international relations would be involved. In America, political intervention had been defined very precisely in signed treaties, but it would be very difficult to introduce such a definition into a penal code.⁴⁹

According to Spiropoulos, intervention "as a rule of conduct did not seem to have any meaning from the point of view of international law," therefore, he did not include the term in his draft of proposed crimes in the working paper because of the extreme difficulties in defining it.⁵⁰ Spiropoulos believed certain types of intervention were

47. *Id.* at 161. A summary of Mr. Hudson's statements are as follows:

Mr. Hudson referred to article 3 of the draft Declaration on Rights and Duties of States, according to which "every State has the duty to refrain from intervention in the internal or external affairs of any other State." Mr. Yepes's text was almost identical with that of article 3, and he felt he should mention the opinion expressed by Mr. Hans Kelsen on that article:

Intervention in the internal or external affairs of another State constitutes a violation of the independence of that State. If article 3 is to be interpreted in conformity with existing general international law, 'intervention' means dictatorial intervention, that is, intervention by the threat or use of force. Hence, the duty formulated in article 3 is covered by the duty laid down in article 9 to refrain from the threat of use of force against the political independence of another State, and Article 3 is redundant.

Summary Records of the Second Session, June 5-July 29, 1950, [1950] 1 Y.B. Int'l L. Comm'n 161, U.N. Doc. A/CN.4/SER.A/1950 (citation omitted), quoted in Hans Kelsen, *The Draft Declaration on Rights and Duties of State*, 44 AM. J. INT'L L. 259, 268 (1950).

48. *Summary Records of the Second Session, June 5-July 29, 1950*, [1950] 1 Y.B. Int'l L. Comm'n 160-61, U.N. Doc. A/CN.4/SER.A/1950.

49. *Id.*

50. *Id.* at 161.

prohibited in the draft, and other types were not. Unlike Yepes, he did not consider interventions involving "economic or psychological pressure" to be crimes.⁵¹ Spiropoulos' view was that the Code is concerned with definite acts, and should not include such types of intervention.⁵²

Georges Scelle, of France, found it extremely difficult to distinguish permissible from impermissible intervention.⁵³ Intervention that "constituted a threat" was impermissible under the United Nations Charter, and it would be very difficult to determine other types of intervention that would be a "crime under international law."⁵⁴ Indeed, his view was that even a violation of the Charter may not constitute a crime.⁵⁵

The Yepes proposal was rejected four votes to one, with six abstentions.⁵⁶ Predictably, explanations made for the abstentions and votes against the proposal were based on vagueness, a lack of definition of intervention and a lack of distinction as to what was criminal as opposed to non-criminal intervention.⁵⁷

Intervention *per se* did not make it into the working paper draft of the Code as a separate crime. Certain acts were included in the list of crimes, however, that could constitute intervention, such as fomenting civil strife, incursions by armed bands across borders, and other intervention involving the use of force. These acts could fall within the proposed crimes prohibiting aggression.⁵⁸ The Yepes proposal attempted to go much farther than these provisions; he proposed to make all intervention an international crime under the Code.

51. *Id.*

52. Summary Records of the Second Session, June 5-July 29, 1950, [1950] 1 Y.B. Int'l L. Comm'n 161, U.N. Doc. A/CN.4/SER.A/1950.

53. *Id.*

54. *Id.*

55. *Id.* at 162.

56. *Id.*

57. Summary Records of the Second Session, June 5-July 29, 1950, [1950] 1 Y.B. Int'l L. Comm'n 162, U.N. Doc. A/CN.4/SER.A (1950).

58. See *supra* text accompanying note 30 (listing crimes that could constitute intervention in the Spiropoulos working paper).

c. The Hsu and Sandstrom Proposals

Other Commission members had proposed to include, in the draft Code, certain specific types of activity that might be categorized as intervention. Hsu Shuhsi ("Hsu"), from China,⁵⁹ initially proposed the following additional crimes:

1. The waging by a State of subversive propaganda against another State or the encouragement or toleration of such an activity within its territory.
2. The giving by a State of aid, moral, political and economic, to subversive elements in another State or the encouragement or toleration of such an activity within its territory.
3. The maintenance of subversive agents by a State in another State.
4. The application of coercion, psychological or economic, by a State against another State.
5. The planning by a State of an aggressive war against another State.⁶⁰

He later agreed to revise his proposal to "[t]he use of subversion, including subversive propaganda, aid given to subversive elements, and maintenance of subversive agents in another State."⁶¹ A.E.F. Sandstrom, of Sweden, proposed the additional crime of "[a]cts of sabotage carried out by one State in the territory of another State."⁶²

Quoting President Truman on the Korean Conflict, Hsu based his proposal on a desire to stop communism in the early stages of the Cold War.⁶³ His expressed concern was that the communists would use subversion, in addition to force, to bring independent states under their control, and that the list of crimes under consideration failed to take

59. In 1950, the National Republic of China in Taiwan had the China seat at the United Nations.

60. *Summary Records 1950*, *supra* note 28, at 156 n.15.

61. *Id.* at 157.

62. *Id.* at 158 n.4.

63. "The attack of Korea . . . makes it plain beyond all doubt that the Communists have passed beyond the use of subversion to conquer independent nations and will now use armed invasion and war." *Id.* at 157, *quoting* President Harry Truman (source of statement unknown).

subversion into account.⁶⁴ Hsu distinguished "good propaganda," such as anti-communist statements by the Pope, from subversive propaganda.⁶⁵

Thus, subversion and sabotage, two vague concepts from a legal point of view, were discussed for consideration as part of the draft Code. Neither of these proposals went very far at the time.⁶⁶

3. The 1954 Draft Code

In its sixth session, from June 3, 1954 through July 28, 1954, the International Law Commission prepared a draft Code and submitted it to the General Assembly.⁶⁷ This version of the draft Code was more developed than the earlier identification of proposed crimes in the working paper. The Sixth Committee of the General Assembly considered the new draft Code from November 10, 1954 through November 18, 1954, and decided to postpone consideration of the Code until aggression had been defined.⁶⁸ This 1954 Code was the current draft of the Code until new versions were formulated in the 1980's.

64. *Id.*

65. *Summary Records of the Second Session, June 5-July 29, 1950* [1950] 1 Y.B. Int'l L. Comm'n 157-58, U.N. Doc. A/CN.4/SER.A/1950.

66. Professor Pella, who advised the Commission on the draft Code, submitted a list of proposed international crimes, along with an analytical memorandum. His list contained some activities that could be categorized as either intervention, aggression or neither, depending on one's viewpoint. See *Memorandum Presented to the Secretariat*, U.N. Doc. A/CN.4/39/1950, reprinted in [1950] 2 Y.B. Int'l L. Comm'n 278-362, U.N. Doc. A/CN.4/SER.A/1950. Professor Pella's assistance appears to have influenced the drafting of the initial Code. His early contributions, even before there was a United Nations, form a strong groundwork for the concept of a draft Code. His work, accomplished primarily through the Association Internationale de Droit Penal, constitutes important historical materials on the concept of offenses against the peace and security of mankind. See *Summary Records 1950*, *supra* note 28, at 165-73.

67. See *Summary Records of the Sixth Session, June 3-July 28, 1954*, [1954] 1 Y.B. Int'l L. Comm'n 123-96, U.N. Doc. A/CN.4/SER.A/1954 (1954 draft Code) [hereinafter *Summary Records 1954*]; *Draft Code of Offenses Against the Peace and Security of Mankind: Third Report of J. Spiropoulos, Special Rapporteur*, U.N. Doc. A/CN.4/85 (1954), reprinted in [1954] 2 Y.B. Int'l L. Comm'n 112-52, U.N. Doc. A/CN.4/SER.A/1954/Add. 1.

68. 1954 U.N.Y.B. 409, U.N. Sales No. 1955.I.25; see *supra* notes 13-15 and accompanying text.

a. Intervention Generally as a Proposed Crime

The Special Rapporteur's 1954 report did not contain a separate crime of intervention, but did set forth specific measures which could be characterized as types of intervention in the draft Code.⁶⁹ In the deliberations on the draft Code by the International Law Commission, however, F.V. Garcia-Amador ("Garcia-Amador"), from Cuba, proposed that the following provision be added: "The intervention by the authorities of a State in the internal or external affairs of another State by means of coercive measures of an economic or political character in order to force its will and obtain from it advantage on any kind."⁷⁰ Garcia-Amador stated that his proposal was based on Articles 15 and 16 of the Charter of the Organization of American States.⁷¹ In the manner in which proposals were voted upon in the Commission at the time, Garcia-Amador's proposal was adopted, but not without serious disagreement and controversy.⁷² Hersch Lauterpacht ("Lauterpacht"), of the United Kingdom, was absent on the day in which the Commission voted upon Garcia-Amador's proposal.⁷³ He later provided persuasive reasons for reconsidering the proposal, as set forth in the summary records of the Commission:

He was not less opposed than the other member[s] of the Commission to the intervention of one State in the affairs of another; but the text adopted by the Commission was far too broad for it meant

69. The 1954 draft Code, for example, characterized as offenses the incursion of armed bands from one state into the territory of another and the fomenting of civil strife by one state in another state. *Summary Records 1954*, *supra* note 67, at 127, 130; *Third Report of J. Spiropoulos*, *supra* note 67, at 117.

70. *Summary Records 1954*, *supra* note 67, at 127.

71. *Id.* at 195.

72. *Id.* at 140. Garcia-Amador's proposal became Article 2, paragraph 9 of the 1954 draft Code. At the time, the Commission used the rules of procedure applicable to the General Assembly. Hersch Lauterpacht criticized these rules as "suited to a political rather than to a scientific body" after his proposal to reconsider Garcia-Amador's intervention article was rejected. *Id.* at 195.

73. *Id.* at 151.

that perfectly legitimate and normal manifestations of international political activity were to be regarded as offenses. International political activity consisted to a large extent of economic or political measures taken by one State to exert pressure on another so as to influence its will. International law should merely impose certain restrictions on these measures, or, in other words, prohibit the use of force.

If the Commission treated legitimate acts as crimes it would deprive its condemnation of real crimes of all meaning. Intervention — assuming that the meaning of the term was clear — was an unlawful act. It was an excess of zeal to render it criminal.⁷⁴

Lauterpacht used the *Corfu Channel*⁷⁵ case to illustrate his point. In that case, under the proposed crime of intervention, the British officers who ordered the destroyer into the Channel to do mine-sweeping would be subject to punishment for a criminal act.⁷⁶ Lauterpacht's proposal to reconsider the inclusion of intervention in the draft Code was narrowly defeated — it received a majority of votes but not a two-thirds vote as required under the Commission procedures at the time.⁷⁷ Apart from Lauterpacht's untimely objections to the intervention provision, there was relatively little discussion of the provision.⁷⁸

74. See *Summary Records 1954*, *supra* note 67, at 151.

75. *Corfu Channel* (United Kingdom v. Albania), 1949 I.C.J. 4 (1949). This case involved the passage of British warships through a channel in Albanian territorial sea used for international passage. The ships struck mines placed in the channel by Albania, which caused damage to the ship and death of crewmen. The International Court of Justice held Albania responsible, asserting, *inter alia*, that Albania had a duty to notify the shipping industry of the minefield and of warning the British warships. The Court based its decision, *inter alia*, on "elementary considerations of humanity." *Id.*

76. *Summary Records 1954*, *supra* note 67.

77. *Id.* at 152; see *supra* note 72 (discussing voting procedure in the International Law Commission).

78. Other members of the Commission articulated reasons for disagreement with the intervention provision. Spiropoulos continued his disapproval. He reiterated his position that intervention involving the use of force was covered in other parts of the draft Code, and that other forms of intervention should not be made to be crimes. "Not every violation of international law was necessarily a criminal action." Hsu found the provision to be too broad. Those expressing agreement with Garcia-Amador's proposal were Jaroslav Zourek of Czechoslovakia and Carlos Salamanca of Bolivia. Salamanca considered "use of the financial resources of the government of one State for the purpose of overthrowing the government of another State" as illegal intervention because it was not "peaceful." *Summary Records 1954*, *supra* note 67, at 139-40.

b. Specific Provisions

Like the prior list of crimes, the 1954 version of the draft Code also contained provisions concerning incursion of armed bands and fomenting of civil strife, in addition to some of the more standard provisions outlawing aggression.⁷⁹ Lauterpacht objected to the use of the phrase "civil strife" as unduly ambiguous and reminiscent of Hsu's proposal concerning subversion. He preferred the phrase "civil war."⁸⁰ The provisions were adopted without extensive debate absent Lauterpacht's recommended revision.⁸¹

Hsu continued his efforts to include a crime of subversion in the Code. His proposal was rejected.⁸² Once again, Lauterpacht provided the more cogent of the objections. Commission records provide the following summary of Lauterpacht's statements:

[T]he international community was no longer a society for the mutual protection of established governments. A revolution might be a crime against the State, but it was no longer a crime against the international community. So long as international society did not effectively guarantee the rights of man against arbitrariness and oppression by governments, it could not oblige States to treat subversive activities, when they did not amount to hostile expeditions, as a crime. He was in agreement with article 2(4) relating to incursions by armed bands, but it would be most regrettable if the Commission adopted a provision which might lead to the restriction of the freedom of speech and political opinion. States should not allow their territory to be used as a base for armed raids, but propaganda in favour of a political theory was a very different matter.⁸³

This signalled the end of the discussion of subversion as a potential crime in the draft Code until subsequent recommendations were made in the 1980's by a Commission member from Egypt, Boutros Boutros-Ghali ("Boutros- Ghali").⁸⁴

79. See *supra* note 69 (stating other offenses).

80. *Summary Records 1954*, *supra* note 67, at 151.

81. *Id.* at 129-30, 151.

82. *Id.* at 140-42.

83. *Id.* at 141.

84. Boutros-Ghali's recommendations, in some form, ultimately made it into the current draft of the Code. See *infra* notes 121, 123-24 and accompanying

c. *The Contentious Adoption of the 1954 Draft Code*

The 1954 version of the draft Code was adopted by the Commission by six votes to zero, with five abstentions.⁸⁵ Four of the five abstentions, were in substantial part, the result of the inclusion of the intervention article in the draft Code.⁸⁶ The draft Code was sent to the General Assembly in this condition, with members from several countries expressing serious misgivings about the intervention provision. The General Assembly decided to defer consideration of the draft Code until a definition of aggression was accomplished.⁸⁷

B. *The Successor Drafts Leading to the Current Draft*

Pursuant to General Assembly resolution, the International Law Commission resumed its work on the draft Code in 1982. At the thirty-fourth session of the International Law Commission in 1982, the Commission appointed Mr. Doudou Thiam ("Thiam"), of Senegal, as Special Rapporteur for the draft Code.⁸⁸

text (discussing subversion as proposed by Boutros-Ghali).

85. *Report of the International Law Commission to the General Assembly Covering the Work of its Sixth Session, June 3-July 28, 195* at 11 n.6, U.N. Doc. A/2693 (1954), reprinted in [1954] 2 Y.B. Int'l L. Comm'n 151 n.6, U.N. Doc. A/CN.4/SER.A/1954/Add.1 [hereinafter *Report of the International Law Commission to the General Assembly*].

86. Lauterpacht abstained because, *inter alia*, of the intervention and civil strife provisions in the draft Code. *Id.*; *Summary Records 1954*, *supra* note 67, at 195. Douglas L. Edmonds, of the United States, abstained for reasons similar to those of Lauterpacht. *Report of the International Law Commission to the General Assembly*, *supra* note 85, at 151 n.6. Faris Bey el-Khoury of Syria, abstained in part on the basis of the undue generality of the intervention provision. *Summary Records 1954*, *supra* note 67, at 195. Radhabinod Pal, from India, also abstained in part due to objections to the intervention provision. *Id.* at 139, 195. According to the Summary Records of the Commission, Sandstrom voted for the draft Code with a reservation as to the intervention provision, as it "condemned certain manifestations of international life which, in his opinion, were in no way illicit." *Report of the International Law Commission to the General Assembly*, *supra* note 85, at 151 n.6.

87. *See supra* notes 14-16, 68 and accompanying text (discussing adoption of definition of aggression by General Assembly).

88. *Report of the International Law Commission to the General Assembly on*

1. Consideration of the First List of Potential Offenses

Much like the first working paper of the first Special Rapporteur of the draft Code, the second Special Rapporteur prepared a working paper describing potential offenses to be included in the draft Code. The Commission studied this working paper in 1984, in its thirty-sixth session. Thiam considered intervention to be part of "aggression and its offshoots."⁸⁹ It was viewed as one of many offenses that was in the 1954 Code and that "cannot be called into question today, at least so far as the substance is concerned, while the question of the wording remains open."⁹⁰

Although some forms of aggression and armed intervention amounting to aggression could, without much dispute, be termed offenses against the peace and security of mankind, it is highly doubtful that there would be consensus that "intervention" in its general context could be such an offense. How did intervention, which was so hotly debated when it was first included in the draft Code, become an offense which was beyond dispute for inclusion in the Code in the 1980's? The Special Rapporteur's findings⁹¹ were based, *inter alia*, on Article 2, paragraph 4 of the United Nations Charter,⁹² paragraph 3 of General Assembly Resolution 290(IV)⁹³ and the Declaration on the Inadmissibility

the Work of the Thirty-Fourth Session, 37 U.N. GAOR Supp. (No. 10) at 121, U.N. Doc. A/37/10 (1982), reprinted in [1982] 2 Y.B. Int'l L. Comm'n 121, U.N. Doc. A/CN.4/SER.A/1982/Add. 1 (Part 2).

89. *Second Report on the Draft Code of Offenses Against the Peace and Security of Mankind*, by Mr. Doudou Thiam, Special Rapporteur, [1984] 2 Y.B. Int'l L. Comm'n 91, U.N. Doc. A/CN.4/377/1984 [hereinafter *Thiam Report*].

90. *Id.* at 91-92.

91. *Id.*

92. Article 2(4) of the United Nations Charter provides that "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." U.N. CHARTER art. 2, ¶ 4.

93. General Assembly Resolution 290(IV) of December 1, 1949 is entitled "Essentials of Peace." Paragraph 3 of the Resolution calls upon nations "[t]o refrain from any threats or acts, direct or indirect, aimed at impairing the freedom, independence or integrity of any State, or at fomenting civil strife and

of Intervention in the Domestic Affairs of States and Protection of Their Independence and Sovereignty.⁹⁴ Moreover, the Vienna Convention on the Law of Treaties and the draft article on State Responsibility were invoked in support for the principle that coercion of a state is unlawful.⁹⁵

The finding of a well-established offense of intervention also was based on a broadening of international law and an erosion of the concept of sovereignty since the 1954 Code was prepared.⁹⁶ The passage by the General Assembly of several resolutions and declarations after the preparation of the 1954 Code arguably reinforce the finding that international law on intervention had evolved.⁹⁷

In the deliberations in 1984 regarding the predicate list of offenses to be considered for inclusion in the Code, the following salient criticisms were levied by Commission members at the inclusion of intervention in the list and at attempting to identify offenses generally:

(1) The offenses derived from the 1954 draft Code dealing with armed bands and civil strife were too ambiguous for inclusion in the Code.⁹⁸ The provisions were too vague as to what constitutes toleration of an armed band, what is an armed band and what is the undertaking or en-

subverting the will of the people in any State." G.A. Res. 290(IV), ¶ 3, *reprinted in*, II United Nations Resolutions, 1948-49 (Susan J. Djonovich ed. 1973).

94. *See The Declaration on the Inadmissibility of Intervention into the Domestic Affairs of States and Protection of their Independence and Sovereignty*, G.A. Res. 2131, U.N. GAOR. 20th Sess., Supp. No. 14, U.N. Doc. A/6620 (1965).

95. *Thiam Report*, *supra* note 89, at 91-92.

96. *Id.*

97. *See Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty*, G.A. Res. 2131, U.N. GAOR. 20th Sess., Supp. No. 14, U.N. Doc. A/6620 (1965); *Declaration on Principles of International Law Concerning Friendly Relations, and Co-operation among States in accordance with the Charter of the United Nations*, G.A. Res. 2625 (XXXV), 25 GAOR, 21st Sess., Supp. No. 28, *reprinted in* 9 I.L.M. 1292 (1970); *Declaration on the Granting of Independence to Colonial Countries and Peoples*, G.A. Res. 1514(XV), U.N. GAOR, 15th Sess., Supp. No. 16, U.N. Doc. A/4684 (1960); *see also supra* notes 14-15 and accompanying text (providing definition of aggression).

98. *Summary Records of the Meetings of the 1817th Meeting*, [1984] 1 Y.B. Int'l L. Comm'n 15, U.N. Doc. A/CN.4/SER.A/1984.

couragement of civil strife.⁹⁹

(2) Some were skeptical as to the viability of the task of preparing a list of offenses without the prior establishment of criteria for identifying the offenses.¹⁰⁰

(3) Some of the offenses listed by the Special Rapporteur for possible inclusion in the Code were "political in tone and amounted essentially to labels" or "political slogans." This is an inherited problem that infected the work of the Commission in the 1950s.¹⁰¹ A "lawyer-like" approach was recommended.¹⁰²

(4) Any provision sought to be included in the Code on the basis of resolutions, declarations, or conventions would require a "thorough analysis of the position as to the voting and ratification of those instruments, as well as their historical background and current significance."¹⁰³

(5) The meaning of intervention in "external affairs" is unclear.¹⁰⁴

(6) The list of crimes cannot be analyzed separately from *ratione personae*.¹⁰⁵ Crimes involving armed band incursions and fomenting of civil strife raise this problem because they are committed by or on behalf of a State.¹⁰⁶

(7) The 1951 draft Code contained no general intervention article, "probably because the disastrous consequences of unlawful intervention had been covered by earlier paragraphs dealing with armed bands, civil strife and terrorist

99. *Id.* at 13.

100. *Id.* at 15.

101. *Id.* at 16.

102. *Id.* at 47. "In general, [McCaffrey] would enter a plea for a lawyer-like approach to the identification of offences and the use of terminology. Some of the items in the list proposed by the Special Rapporteur . . . were more political or emotional labels than legal terms." *Summary Records of the Meetings of the 1817th Meeting*, [1984] 1 Y.B. Int'l L. Comm'n 15, at 47, U.N. Doc. A/CN.4/SER.A/1984.

103. *Summary Records of the Meetings of the Thirty-Sixth Session, May 7-July 27, 1984*, [1984] 1 Y.B. Int'l L. Comm'n 17, U.N. Doc. A/CN.4/SER.A/1984 [hereinafter *Summary Records 1984*].

104. *Id.* at 17, 34.

105. *Ratione personae* means "[b]y reason of the person concerned; from the character of the person." BLACK'S LAW DICTIONARY 1136 (5th ed. 1979).

106. *Summary Records of the Meetings of the Thirty-Sixth Session*, *supra* note 103, at 26.

acts.”¹⁰⁷

(8) The language of the 1954 draft Code prohibiting the fomenting of civil strife was problematic in that it could lead to different interpretations based on the social and political systems of a state. State-controlled press could violate the provision by criticizing the policies of foreign governments. Precision in the codification is necessary.¹⁰⁸

(9) The language of the intervention article in the 1954 draft Code requires the use of “coercive measures of an economic or political character.” This language is undesirable because, among other things, it is unclear as to when measures become coercive.¹⁰⁹

A strong non-intervention principle was justified to protect developing countries, including the consideration of “economic aggression” as a separate crime.¹¹⁰ It was recognized that the expression “economic aggression” was

107. *Id.* at 29.

108. *Id.* at 33-34.

109. *Report of the International Law Commission to the General Assembly on the Work of the Thirty-Sixth Session*, 39 U.N. GAOR Supp. (No. 10) at 13, U.N. Doc. A/39/10 (1984), reprinted in [1984] 2 Y.B. Int'l L. Comm'n 13, U.N. Doc. A/CN.4/SER.A/1984/Add.1 (Part 2).

110. *Thiam Report*, *supra* note 89, at 100. The Commission deliberations attribute to Chief Akinjide the following:

38. From a realistic point of view, there were three interest groups. The first was the group of small nations, those which were economically, militarily and politically weak and which, of course, comprised the developing countries, including his own. With every passing year, the gap between developed and developing countries widened and the developing countries became economically and militarily weaker. The power they had was completely out of proportion with that of the United States of America, the Soviet Union and certain European countries. It was quite clear that those that stood to benefit most by the study of the topic under consideration were bound to be the small, weak developing nations

39. Secondly, account had to be taken of the possibility of a conflict between a great Power and a small nation. The great Powers were the ones that possessed all the technology and know-how and if one of them attacked a small country like his own, that country would be helpless. If, however, provisions of an international nature, such as those now under consideration, were adopted and generally accepted and ratified, smaller nations would be protected.

40. Thirdly, the most important and difficult problem was that of a conflict between two great Powers

Summary Records of the Meetings of the Thirty-Sixth Session, *supra* note 103, at 27.

more a political slogan than a legal term, and that improper activities would fall within Code articles dealing with intervention and aggression.¹¹¹

2. *The First Intervention Article Proposed in the 1980's*

In 1985, the International Law Commission considered the following article condemning intervention, for possible inclusion in the draft Code:

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

The following, *inter alia*, constitute interference in the internal or external affairs of a State:

(a) fomenting or tolerating the fomenting, in the territory of a State, of civil strife or any other form of internal disturbance or unrest in another State;

(b) exerting pressure, taking or threatening to take coercive measures of an economic or political nature against another State in order to obtain advantages of any kind.¹¹²

The support for the inclusion of an offense of intervention or interference in the Code in the mid-1980's was strong among representatives from the small and developing states. In addition to historical antecedents,¹¹³ the *Nicara-*

111. *Report of the International Law Commission to the General Assembly on the Work of the Thirty-Sixth Session*, *supra* note 109, at 16-17; *Summary Records 1984*, *supra* note 103, at 19, 20, 41, 53.

112. This was article 4, paragraph C of the draft Code proffered by the Special Rapporteur. *Third Report on the Draft Code of Offenses Against the Peace and Security of Mankind*, by Mr. Doudou Thiam, *Special Rapporteur* at 83, U.N. Doc. A/CN.4/387 (1985), *reprinted in* [1985] 2 Y.B. Int'l L. Comm'n at 75, U.N. Doc. A/CN.4/SER.A/1985/Add.1 (Part 1) [hereinafter *Third Report on the Draft Code by Mr. Doudou Thiam*]. Essentially the same wording was carried over in 1986, as Article 11, ¶ 3. The Commission, however, focused on crimes against humanity and other items in 1986. In 1987, intervention was not discussed, but self-defense was articulated only as a defense in the event of aggression, and not intervention.

113. *See Third Report on the Draft Code by Mr. Doudou Thiam*, *supra* note 112, at 65-66, subsection 12 (discussing historical antecedents and importance of protection of small states against intervention). In this report, the Special Rapporteur furnished additional authority for including intervention or interference in the draft Code. Paragraphs 108 and 109 of his report provide:

108. The Condemnation of interference by one State in the internal or external affairs of another had already been formulated by the Seventh International Conference of American States, in 1933, by

*gua*¹¹⁴ case was under consideration by the International Court of Justice, and apparently had some influence on the drafting of the Code. The Third Report of the Special Rapporteur provides:

Today, the problem of interference is of particular relevance. The emergence of a multitude of small States in the international scene, the fragility of many of them, and greed for their resources, sometimes tempt the powerful States to seek ways of challenging their independence — not at the formal level, of course, since colonialism has officially been buried, but by devious and insidious routes. Using mercenaries, fomenting civil strife and exerting pressure on States, for various reasons, especially political or economic pressure, are forms of interference sometimes aimed at destabilizing young States. Likewise, all practices that can be grouped under the general term “subversion” and that take various forms (financing of political parties and covert supply of arms or ammunition, trainers, instructors and the like), are well-known aspects of the phenomenon of interference.¹¹⁵

Commission discussion of the intervention provision in 1985, the last year in which the concept was debated extensively, divides into two schools of thought. Some mem-

the Inter-American Conference for the Maintenance of Peace, in 1936, by the Yalta Agreements, and by Article 18 of the Charter of the OAS, which provides:

Article 18

No State or group of States has the right to intervene, directly or indirectly, . . . in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic and cultural elements.

109. The affirmation of this principle constantly features in the work of the United Nations and its organs; witness the call in General Assembly resolution 290(IV) of December 1, 1949 to refrain from “fomenting civil strife and subverting the will of the people in any State,” or Article 4 of the draft declaration on Rights and Duties of States, which provides:

Every State has the duty to refrain from fomenting civil strife in the territory of another State, and to prevent the organization within its territory of activities calculated to foment such civil strife.

Id. (footnotes omitted).

114. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (merits judgment of June 27).

115. *Third Report on the Draft Code by Mr. Doudou Thiam*, *supra* note 112, at 12.

bers, particularly those from the developing countries, generally supported the inclusion of intervention in general terms as an offense in the Code. Andreas J. Jacovides, from Cyprus, who could be said to be one of the moderate voices in support of the provision, thought that the non-intervention principle "was well established in international law and, when properly delimited to take account of *jus cogen* and restrictions on sovereignty, it could even be regarded as a peremptory norm of international law."¹¹⁶ Frank X. Njenga of Kenya summed up the third world view as follows:

In an increasingly lawless world in which large States used the many and varied means at their disposal to impose their will on weak emerging States, the list of offenses must include the concept of interference by the authorities of a State in the internal or external affairs of another State. Acts aimed at the destabilization of other Governments, whether by fomenting civil war or any other form of internal disturbance or by economic blackmail and intimidation, must be included in the code.¹¹⁷

116. *Summary Records of the Meetings of the 1880th Meeting*, [1985] 1 Y.B. Int'l L. Comm'n 14, U.N. Doc. A/CN.4/SER.A/1985 [hereinafter *Summary Records 1985*].

117. *Id.* at 48. The summary records of statements by Mikuin Leliel Balanda of Zaire provide in pertinent part as follows:

31. Interference in the internal or external affairs of a State was another offence which should certainly be taken into consideration, if only because it concerned a concept which had been established by Article 2, paragraph 7, of the Charter of the United Nations, but which needed to be more precisely defined. That offence was so serious that it endangered the sovereignty of States and violated the principle of the sovereign equality of members of the international community. Rather than give a definition of the offence, which was not beyond common understanding, the Commission could confine itself to giving a few examples.

32. Subversion was also an offence that had its place in the draft code, despite the difficulties which characterization of the act might involve. In that connection he emphasized the special situation of the developing countries, which were more sensitive than others to certain realities by reason of their vulnerability. Thus the stability of a developing country and its institutions might be endangered by subversive statements broadcast by a neighboring radio station, whereas a great Power was not so vulnerable.

Id. at 34. The summary statements of Edilbert Razafindralambo of Madagascar provide in pertinent part as follows:

41. Intervention in a State's internal or external affairs was the

Christian Tomuschat ("Tomuschat"), of the Federal Republic of Germany, viewed intervention and subversion to be "burning issues" for third world countries, but did not agree that including these concepts as offenses in the draft Code would help these countries. His view was that strengthening the Security Council would be more beneficial, and that only the most serious offenses should be covered in the Code, those offenses which are "basic violations of the human right to life and dignity" and those which concern the "use of violent means."¹¹⁸ Tomuschat was among those members against any broad, ill-defined provisions criminalizing intervention. The various concerns of these Commission members included that: (1) intervention was not defined in the draft Code; (2) it could never be properly defined for inclusion in a criminal code; (3) a generalized offense of intervention was inappropriate and specific acts should be the subject of the Code; (4) certain conduct that would fall within the proscriptions of the Code as drafted were permissible forms of diplomacy; (5) only armed intervention should be covered in the Code; (6) the

subject of the same special provisions as in the 1954 draft code. Among the acts of "intervention," a term that was preferable to "interference," which had a more political connotation, it would be advisable to include acts of subversion, which were a masked form of intervention and were commonly practiced against countries of the third world. The decisions taken by OAU bodies could help in elaborating a provision on intervention that included the concept of subversion.

42. Economic aggression could also be taken as a form of intervention in a State's internal affairs. It was a common act and one that was suffered especially by developing countries. . . .

Summary Records 1985, supra note 116, at 46; see also statements of Sompong Sucharitkul of Thailand, *id.* at 39 ("interference in the internal or external affairs of States was another crime that had to be included in the draft Code"); Julio Barboza of Argentina, *id.* at 52 (use definition of interference found in the Charter of the Organization of American States which defined offenses in terms of attempted threats against the "personality" of a State or against its "political, economic or cultural elements"); Jiahua Huang of the People's Republic of China, *id.* at 64 ("interference in the internal or external affairs of a State was almost universally condemned. With a proper formulation, that offence should therefore find its due place in the draft code."); Satya Pal Jagota of India, *id.* at 77 (include interference and terrorism in the Code, Boutros-Ghali's subversion as either part of interference or separate provision).

118. *Summary Records 1986, supra* note 116, at 71.

Code failed to distinguish between "criminal" and "noncriminal" intervention; and (7) the provision was the subject of serious contention even in the drafting of the 1954 draft Code.¹¹⁹ The views of Stephen C. McCaffrey, of the United States, were summarized in Commission records as follows:

Interference in internal or external affairs should not be included, unless more precise wording could be found, which seemed doubtful. He agreed with the Special Rapporteur . . . that the distinction be-

119. See *infra* text accompanying note 120, (testimony of Stephen C. McCaffrey of the United States). Some acts, such as "sending of a diplomatic note, a speech by an ambassador, or the opening of a diplomatic bag," may constitute interference or intervention but are clearly not punishable acts. The Committee should not "consider intervention in general as an offense, but to break down the concept of intervention and list only the specific acts that constituted intervention." *Summary Records 1985, supra* note 116, at 17 (testimony of Brazilian Member Carlos Calero Rodrigues). Intervention that is deserving of criminal sanction may already be covered in the offense of aggression. *Summary Records 1985, supra* note 116, at 24 (testimony of Ian Sinclair of the United Kingdom). Economic or political coercion short of armed force is "unacceptably vague" to define as criminal. *Id.* Some unlawful intervention does not rise to the level of an offense against the peace and security of mankind. *Id.*; see also *id.* at 31 (commentary of Ahmed Mahiou of Algeria noting that precise definitions are required). Motoo Ogiso of Japan summed up the history of the consideration of intervention in the deliberations for the 1954 draft Code and concluded:

The scope of that offense had been so vague that even economic or political coercive measures not accompanied by the use of force against the potential aggressor could be construed as intervention; the new code should not be open to any such interpretation. However, as some members had pointed out, the wording used in the report was so vague that even legitimate and normal diplomatic activities could be regarded as interference. As Mr. Lauterpacht had remarked in 1954, international political activity consisted to a large extent of economic or political measures taken by one State to exert pressure on another so as to influence its will; if the Commission treated legitimate acts as crimes it would deprive its condemnation of real crimes of all meaning.

Id. at 43 (footnote omitted). The statements of Jose Manuel Lacleta Monoz of Spain included:

Interference in the internal or external affairs of a State could obviously be an offense against the peace and security of mankind, but that concept had to be further clarified. It was, however, difficult to define interference in external affairs: did diplomatic representations to obtain an advantage from a State qualify as interference in its external affairs, in the broad sense of the term? They undoubtedly did, just as negotiations, even the most friendly ones, did.

Id. at 74.

tween the internal and external affairs of a State was now antiquated. As to coercive measures of an economic or political nature, which apparently did not involve the use of force, they did not rise to the level of an offence against the peace and security of mankind. "Coercion" was a vague term, with implications ranging from subtle forms of non-violent influence to armed aggression. It could even be interpreted to outlaw diplomacy and *inter alia* the withholding of benefits, restrictions on exports of or access to natural resources, conditions imposed by international lending institutions, and import quotas. Such measures had always been regarded as legitimate means of diplomacy and should, if anything, be encouraged as non-violent means of making a political point or expressing displeasure *vis-a-vis* another State. Care should be taken not to do anything that would deprive States of the opportunity of having recourse to those peaceful measures.¹²⁰

Subversion as a potential offense was resuscitated in 1985, by Boutros-Ghali, then a member of the Commission from Egypt. Subversion fell somewhere between intervention and terrorism. Boutros-Ghali's proposal was based on the Charter of the Organization of African Unity and on a subsequent resolution by that Organization in 1965 providing details as to what would constitute impermissible subversion.¹²¹ Boutros-Ghali's proposal was different from that

120. *Id.* at 55.

121. *Summary Records 1985*, *supra* note 116, at 11. Boutros-Ghali's position was summarized as follows:

He himself believed that a new concept, developed by the Organization of African Unity [hereinafter OAU], could be included in that list, namely the concept of subversion, which was related to indirect aggression, terrorism and mercenarism, and which had been the subject of valuable work on doctrine, to which it would be useful to refer.

He pointed out, first, that the Charter of OAU, in article III, paragraph 5, stated the principle of "unreserved condemnation, in all its forms, of political assassination as well as of subversive activities on the part of neighboring States or any other State." He then recalled that the heads of State and Government of OAU had adopted, at their second ordinary session, held at Accra in October 1965, resolution 27, in which they had listed five possible forms of subversion: African subversive activity carried out from one African State against another; non-African subversive activity planned by non-African Powers and carried out from one African State against another; non-African subversive activity planned by non-African Powers and carried out directly against an African State; non-African subversive activity directed against the whole African continent; non-African

of Hsu's in the 1950's, in that it did not focus on subversive propaganda. Hsu's proposal was in the language of the early Cold War, when those in the non-communist world harbored grave perceptions and serious concerns about communist takeovers of non-communist nations through indirect means. Boutros-Ghali's proposal was a 1980's version of this concept, with its focus on developing nations. This subsequent proposal to include subversion in the Code, unlike its predecessor, did have some influence on the drafting of the intervention provision.¹²²

3. *The Second Intervention Article Proposed in the 1980's*

In 1988, the International Law Commission devoted itself, in its analysis of the draft Code, to the consideration of crimes against peace. In this session, the following two alternative provisions were considered, with neither being adopted:

FIRST ALTERNATIVE

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

subversive activity directed against OAU. They had also listed methods of subversion: launching or financing a press or radio campaign against any member State of OAU; causing dissension within a member State of OAU by fomenting racial, religious, linguistic or other types of disturbance; aggravating existing differences. That resolution had been discussed at length and had later been mentioned at various conferences of heads of State and Government of OAU.

He believed that subversion, together with State terrorism, would become a new form of aggression or threat of aggression, with which the Commission should attempt to deal. Insofar as small States and developing States did not have the means to wage conventional wars or to resort to aggression as defined in the Definition of Aggression, they would resort to precisely those indirect forms of aggression, which could lead to destabilization and external interference, and were a definite threat to peace and security.

Id. (footnotes and paragraph numbers omitted); see *Summary Records of the Meetings of the Thirty-Eighth Session*, May 5-July 11, 1986, [1986] 1 Y.B. Int'l L. Comm'n 116, U.N. Doc. A/CN.4/SER.A/1986 (summarizing Boutros-Ghali's discussion of subversion).

122. See *supra* notes 59-66 and accompanying text (discussing Hsu proposal).

SECOND ALTERNATIVE

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

(i) By fomenting, encouraging or tolerating the fomenting of civil strife or any other form of internal disturbance or unrest in another State;

(ii) by organizing, training, arming, assisting, financing or otherwise encouraging activities against another State, in particular terrorist activities.¹²³

These provisions became the basis for the current intervention article in the Code. The following year, they were redrafted. The Special Rapporteur found the 1954 Code to set forth a restrictive definition of intervention, referring only to "coercive measures of an economic or political

123. *Sixth Report on the Draft Code of Crimes Against the Peace and Security of Mankind*, by Mr. Doudou Thiam, Special Rapporteur, Draft Article 11, ¶ 3, U.N. Doc. A/CN.4/411 (1988), reprinted in *Documents of the Fortieth Session*, [1988] 2 Y.B. Int'l L. Comm'n 202, U.N. Doc. A/CN.4/SER.A/Add. 1 [hereinafter *Sixth Report on the Draft Code* by Mr. Doudou Thiam, Special Rapporteur]; *Summary Records of the Meetings of the Fortieth Session*, [1988] 1 Y.B. Int'l L. Comm'n 60, U.N. Doc. A/CN.4/SER.A/1988.

The second alternative contained the following definition of terrorist acts:

(a) *Definition of terrorist acts*

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

(b) *Terrorist acts*

The following constitute terrorist acts:

i. Any act causing death or grievous bodily harm or loss of liberty to a head of State, persons exercising the prerogatives of the head of State, their hereditary or designated successors, the spouses of such persons, or persons charged with public functions or holding public positions when the act is directed against them in their public capacity;

ii. acts calculated to destroy or damage public property or property devoted to a public purpose;

iii. any act likely to imperil human lives through the creation of a public danger, in particular the seizure of aircraft, the taking of hostages and any form of violence directed against persons who enjoy international protection or diplomatic immunity;

iv. the manufacture, obtaining, possession or supplying of arms, ammunition, explosives or harmful substances with a view to the commission of a terrorist act.

Sixth Report on the Draft Code of Crimes Against the Peace and Security of Mankind, by Mr. Doudou Thiam, Special Rapporteur, at Draft Article 11, ¶ 3, U.N. Doc. A/CN.4/411 (1988), reprinted in *Documents of the Fortieth Session*, [1988] 2 Y.B. Int'l L. Comm'n 202, U.N. Doc. A/CN.4/SER.A/Add.1.

character."¹²⁴ To allow the Commission to consider two courses, one for a broad content and another for a restrictive content, the above two alternatives were prepared.¹²⁵

In 1988 the Commission considered many of the findings of *Nicaragua*¹²⁶ in considering its study of intervention. The Sixth Report of the Special Rapporteur to the Commission, and the Commission Report to the General Assembly, relied heavily on the *Nicaragua* findings that the non-intervention principle is based on customary international law, and not merely on conventions and declarations.¹²⁷ The Special Rapporteur interpreted this customary law to be *jus cogens* prohibiting the threat or use of force, where "force must be understood here in the broad sense: the use not only of armed force but also of all forms of pressure of a coercive nature," and thus covering "all forms of intervention."¹²⁸ The Special Rapporteur interpreted authority for coercion as constituting the "dividing line" between "lawful" and "wrongful" intervention in the *Nicaragua* decision. The Special Rapporteur found *Nicaragua* to provide that intervention is wrongful when a state uses methods of coercion in matters in which another state is permitted to decide freely, on the basis of sovereignty, such as "choice of political, economic, social and cultural systems, and the formulation of foreign policy."¹²⁹

The 1988 intervention article was the first to explicitly

124. *Report of the International Law Commission to the General Assembly on the Work of its Fortieth Session*, U.N. GAOR, 43d Sess., Supp. (No. 10) at 60, U.N. Doc. A/43/10 (1988), reprinted in 2 Y.B. Int'l L. Comm'n 60, U.N. Doc. A/CN.4/SER.A/Add.1 [hereinafter *Report of the International Law Commission to the General Assembly*].

125. *Sixth Report on the Draft Code by Mr. Doudou Thiam, Special Rapporteur*, *supra* note 123, at ¶¶ 34-35.

126. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14 (merits judgment of June 27).

127. *Sixth Report on the Draft Code by Mr. Doudou Thiam, Special Rapporteur*, *supra* note 123, at ¶¶ 17-21; *Report of the International Law Commission to the General Assembly*, *supra* note 124, at 60-61; see *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14 (merits judgment of June 27).

128. *Sixth Report on the Draft Code, by Mr. Doudou Thiam, Special Rapporteur*, *supra* note 123, at 199, ¶ 20.

129. *Id.*

include terrorism as unlawful intervention. No doubt Boutros-Ghali was influential in including terrorism in the article. The text of the article was based on the Convention for the Prevention and Punishment of Terrorism, adopted in 1937 by the International Conference on the Repression of Terrorism, under the auspices of the League of Nations. Unlike contemporary conventions, which attempt to outlaw and punish specific terrorist acts, such as aircraft hijacking, attacks against diplomatic agents, and hostage-taking, the 1937 Convention took a comprehensive approach to the problem of terrorism.¹³⁰ It employed a circular definition of "terrorist acts" as criminal acts directed against a state and "calculated to create a state of terror."¹³¹ The 1937 Convention was idealistic and never entered into force.¹³²

The Commission in its discussions distinguished "internal terrorism" and "international terrorism."¹³³ The Commission did not intend internal terrorism, which is by individuals or local groups without foreign aid, to be covered by the intervention article.¹³⁴ The Commission did, however, intend that the intervention article cover international terrorism, which is state-sponsored terrorism, and other terrorism operating at an international level.¹³⁵ Moreover, in the Commission's view, terrorism could also constitute a sepa-

130. MALCOM N. SHAW, *INTERNATIONAL LAW* 574 (2d ed. 1986).

131. *Id.*

132. *See id.* (discussing recent approaches to adopt "functional" or "pragmatic" conventions outlawing terrorist acts can be contrasted with the "all embracing view of the League of Nations in its 1937 Convention").

133. The Commission drew the following distinction:

[A] distinction was drawn between internal terrorism, carried out by individuals or local groups without any foreign support, and two types of international terrorism, namely State terrorism (operations financed, organized, encouraged, directed or supported, either individually or collectively, from a material or logistic point of view by a State or a group of States for the purpose of intimidating another State, person or organization) and terrorism by groups or organizations operating at the international level.

Report of the International Law Commission to the General Assembly, supra note 124, at 61.

134. *Id.* at 61-62.

135. *Id.*

rate crime "against mankind."¹³⁶

In 1988, the Commission conducted its first serious consideration of exceptions making intervention lawful. Three were discussed: (1) the "colonialism exception," which is intervention to support colonial peoples in their struggle for independence; (2) intervention "on the basis of the attributes of the United Nations"; and (3) intervention by invitation or pursuant to treaty.¹³⁷ Nothing significant emanated from the discussion of these exceptions. Some members of the Commission expressed concern that these exceptions were abused and the Report to the General Assembly labelled intervention by invitation and intervention to support the independence of colonial peoples as "odious examples" of intervention.¹³⁸

4. *The Third Intervention Article Proposed in the 1980's*

In 1989, the International Law Commission provisionally adopted the following article on 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 as enshrined in the Charter of the United Nations.¹³⁹

As one can determine from a reading of this provision, it is comprised of two elements, and it is a combination of

136. *Id.*

137. *Sixth Report on the Draft Code by Mr. Doudou Thiam, Special Rapporteur*, *supra* note 123, at 200, ¶ 28. No definition was furnished for intervention "on the basis of the attributes of the United Nations." It is surmised that this refers to Chapter VII actions by the Security Council.

138. *Report of the International Law Commission to the General Assembly*, *supra* note 124, at 61, ¶ 242.

139. *Report of the International Law Commission to the General Assembly on the Work of its Forty-First Session*, May 2-July 21, 1989, 44 U.N. GAOR Supp. (No. 10) at 67, U.N. Doc. A/44/10/1989, reprinted in [1989] 2 Y.B. Int'l L. Comm'n 67, U.N. Doc. A/CN.4/SER.A/Add. 1 (Part 2)/1989. It is Article 14 of the 1989 draft Code.

the two alternatives discussed in the previous year. The first element is "[i]ntervention in the internal or external affairs of a State . . . thereby [seriously] undermining the free exercise by that State of its sovereign rights."¹⁴⁰ The second element is the identification of activities constituting intervention: "fomenting [armed] subversive or terrorist activities or by organizing, assisting or financing such activities, or supplying arms for the purpose of such activities."¹⁴¹

The first element is derived from the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States and the *Nicaragua* decision.¹⁴² The rationale for the first element is to impose a requirement of coercion derogating from the sovereignty of the state which is the subject of the activity in question.¹⁴³ "External affairs" in the first element refers to the right of states to freely determine their own foreign policy.¹⁴⁴ The term "seriously" is in brackets because of disagreement among Commission members — some thought it necessary in order to clarify that the article condemned only the most serious forms of intervention. Others viewed the term as superfluous, in that the activities outlined in the provision were sufficiently serious in themselves.¹⁴⁵ In the second element, the term "armed" is in brackets because Commission members disagreed as to whether coercion must be the result of armed force in order to be proscribed by the provision.¹⁴⁶

Paragraph 2 of the Article is an "escape clause" modeled after a similar clause in the aggression article and in the Definition of Aggression Resolution.¹⁴⁷ The paragraph may

140. *Id.* at 69.

141. *Id.*

142. *Id.*; Military and Paramilitary Activity (Nicar. v. U.S.), 1986 I.C.J. 14 (merits judgment of June 27).

143. *Report of the International Law Commission to the General Assembly, supra* note 139, at 67.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

be temporary to the extent that a general provision of the same type may be adopted in the future.¹⁴⁸

5. *The Current Proposed Intervention Article*

In 1991, the Commission concluded the first reading of the draft Code and provisionally adopted a complete set of draft articles.¹⁴⁹ The draft of the Code, adopted by the Commission in 1991, contains the following article on intervention:

1. An individual who as leader or organizer commits or orders the commission of an act of intervention in the internal or external affairs of a State shall, on conviction thereof, be sentenced [to . . .]
2. Intervention in the internal or external affairs of a State consists of 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.
3. Nothing in this article shall in any way prejudice the right of peoples to self-determination as enshrined in the Charter of the United Nations.¹⁵⁰

Very few changes were made to the intervention article in this session. The Commission decided that the intervention article and other articles contain an introductory provision specifying the persons who can violate the article. The remainder of the revisions were essentially grammatical.

The United States currently opposes the draft Code generally because of many "fundamental defects" and opposes the inclusion of the intervention article specifically in the Code. The United States views on the article are as follows:

this new crime not only is vague, but also apparently attempts to cover acts that would not otherwise fall within the already overbroad

148. *Report of the International Law Commission to the General Assembly*, *supra* note 139, at 67.

149. 1991 U.N.Y.B. 823, U.N. Sales No. E.92.I.1.

150. Article 17 of the draft Code, *Report of the International Law Commission to the General Assembly on the Work of its Forty-Third Session, April 29-July 19, 1991*, 46 U.N. GAOR Supp. No. 10, at 245, U.N. Doc. A/46/10 (1991).

and vague crime of "aggression." Moreover, although it provides an exception for acts undertaken pursuant to the "rights of peoples to self determination," it fails to create an exception for acts of collective self-defense, which are explicitly provided for in Article 51 of the United Nations Charter. As with the crime of aggression, this crime of intervention is based on a General Assembly resolution that was never intended to be the legal basis of imposing criminal liability on individual defendants.

The Article on intervention is based on *The Declaration of Principles of Friendly Relations* which elucidated the familiar principle that states should not intervene in matters exclusively within the domestic jurisdiction of any State. The Code's wholesale criminalization of the non-intervention principle is not only divorced from the practical relationship among nations, but also is an open invitation to criminalize disputes that should be more appropriately be resolved by the careful and prudent practice of diplomacy or, when necessary, by reference to the United Nations Security Council. It may also be noted that significant disputes still exist over the precise scope of this principle; some states, for example, still argue that international concern of human rights constitutes impermissible intervention in their internal affairs.¹⁵¹

II. THE JUSTICIABILITY OF INTERVENTION AS AN INTERNATIONAL CRIME¹⁵²

This section examines the role in the international legal order of intervention as a crime against the peace and security of mankind. The analysis starts at the narrowest level of considering the crime as it is defined in the current text of the draft Code. It then expands to cover what are deemed "international rule of law" considerations; an analysis of the issues in norm creation¹⁵³ in international

151. *Report of the United States on the Draft Code of Crime* at 3-4 (January 1993).

152. This title is suggested by Paul W. Khan, *From Nuremberg to Hague: The United States Position in Nicaragua v. United States and the Development of International Law*, 12 YALE J. INT'L L. 1, 5-17 (1987).

153. As explained by Hans Kelsen, "general international law is regarded as [a] set of objectively valid norms that regulate the mutual behavior of states. These norms are created by custom, constituted by the actual behavior of the 'states,' that is, of individuals who act as governments according to national legal orders." HANS KELSEN, *PURE THEORY OF LAW*, 215 (Knight trans. 1967), reprinted in LOUIS HENKIN *et al.*, *supra* note 5. There are other views on norm creation other than Professor Kelsen's, the discussion of which are beyond the

law that are implicated by the intervention article in the draft Code. This section then deals with how the intervention article is in tension with contemporary concepts of sovereignty. Lastly, the section contains an analysis of the article in conjunction with the United Nations Charter, to assess whether the Charter can provide defenses to the "crime" of intervention and to determine whether the intervention article can work within the Charter framework.

A. *Observations on the Texts of the Articles*

In the evolution of the article on intervention in the draft Code, the United Nations has in many respects narrowed its terms. The 1954 provision on intervention was designed to criminalize intervention by a state that was accomplished "by means of coercive measures of an economic or political character in order to force its will and obtain from it . . . advantage of any kind."¹⁵⁴ The 1991 provision, however, is limited to intervention by a state in the affairs of another state consisting of "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."¹⁵⁵ It could be said that the intervention article now encompasses specific acts. The article still is defective, however, in the lack of definition of key terms, such as "subversive," "terrorist," "organizing, assisting or financing such activities" and "undermining the free exercise . . . of sovereign rights."

It is unknown, based on publicly available documentation, whether this narrowing was an attempt to make the article more palatable to those nations that historically have op-

scope of this Article. Article 38(1)(b) of the Statute of the International Court of Justice declares "international custom, as evidence of a general practice accepted as law," as a source of international law. *See infra* note 165 (setting forth text of Article 38).

154. *See supra* note 67, and text accompanying note 151 (discussing 1954 draft Code provision on intervention).

155. *See supra* note 150 and accompanying text (discussing 1991 draft Code provision on intervention).

posed the Code, such as the United States. Whatever the motivation, the narrowing has not alleviated the concerns of the United States.¹⁵⁶ Intervention, moreover, except in narrow circumstances such as those indisputably involving armed aggression, does not appear to be the subject of universal condemnation.

In the above analysis of the history of the draft Code deliberations, the efforts by the Commission to give normative dimensions to "criminal intervention" are evident.¹⁵⁷ Such efforts would be difficult even outside of the criminal context; there is no agreed-upon definition of intervention as it exists or should exist in customary international law. In the criminal context, efforts at definition are even more difficult. In the preparation of the draft Code, the United Nations, however, apparently sought no assistance from lawyers who concentrate in criminal law.¹⁵⁸ A review of the deliberations and documents relating to the draft Code indicate an emphasis on politics, at least in the area of intervention, rather than on legal principles relating to the codification of crimes.¹⁵⁹

Throughout the deliberations on the draft Code provisions on intervention, there have been attempts to distinguish between "wrongful" intervention, or that intervention which

156. See *supra* note 151 and accompanying text (describing United States concerns relating to the intervention article).

157. A comparison of the current intervention article, Article 17 of the 1991 draft Code, with paragraph 2 of the *Declaration on the Inadmissibility of Intervention into the Domestic Affairs of State*, *supra* note 3, reveals some influence of the Declaration on the drafting of Article 17. Paragraph 2 of the Declaration provides:

No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights or to secure from it advantages of any kind. Also, no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State.

Id.

158. See INTERNATIONAL CRIMINAL LAW, Vol. I at 4 (M. Cherif Bassiouni ed., 1986) (commenting on lack of criminal law expertise); INTERNATIONAL CRIMINAL LAW 616 (Gerhard O.W. Mueller & Edward M. Wise eds., 1965).

159. Bassiouni, *supra* note 158, at 4-5.

can be characterized as a crime against the peace and security of mankind, and intervention which is not wrongful. No real progress has been made in this area. There was no meaningful attempt to distinguish criminal from "noncriminal" intervention, intervention that gives rise only to reparations and intervention that is acceptable or excusable. The operative distinction making intervention a criminal activity, which is by no means apparent, may be in the attempted delimitation of the current article to subversive and terrorist activities. These terms, however, are ambiguous.

A common criticism of the provisions of the draft Code is that they violate the principle of *nullum crimen sine lege*. This defect in the draft Code reinforces the notion that the Code is political in nature. In *Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City*, the Permanent Court of International Justice explained the problem as follows:

Instead of applying a penal law equally clear to both the judge and the party accused . . . there is the possibility under the new decrees that a man may find himself placed on trial and punished for an act which the law did not enable him to know was an offence, because its criminality depends entirely on the appreciation of the situation by the Public Prosecutor and by the judge. Accordingly, a system in which the criminal character of an act and the penalty attached to it will be known to the judge alone replaces a system in which this knowledge was equally open to both the judge and the accused.¹⁶⁰

This defect is apparent in Article 17 and in the previous versions of the intervention article. If Article 17 becomes the final Code article on intervention, what constitutes "criminal intervention" will in large part depend on the inclinations and motivations of those who seek prosecutions, the office of the prosecutor and the judge or judges hearing the cases — in the words of Jesus Yepes and Geoff Gilbert, the "international community."¹⁶¹

160. Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City, (ser.A/B) No. 65, quoted in Geoff Gilbert, *The Criminal Responsibility of States*, 39 INT'L & COMP. L.Q. 345, 358 (1990).

161. See *supra* note 36 (discussing Yepes's proposal for 1954 draft Code); Gilbert, *supra* note 160, at 358 (analogous discussion on Article 19 of the

B. International Rule of Law Considerations

The Commission relied substantially on the *Nicaragua* decision as support for an intervention article in the draft Code.¹⁶² This reliance is misplaced. *Nicaragua* does not have *stare decisis* effect.¹⁶³ The Commission deliberations indicate that somehow the *Nicaragua* decision solidified a broad non-intervention principle as part of customary international law.¹⁶⁴ The *Nicaragua* decision instead may reflect a principle in formation based on treaties, United Nations resolutions, and United Nations declarations. The International Court of Justice is not a criminal court and was not making rulings in a criminal case in *Nicaragua*. The sources of law specified in the Statute of the International Court of Justice would, in most major legal systems, be unsuitable for sources of criminal law principles.¹⁶⁵ The

Draft Articles on State Responsibility).

162. See *supra* notes 115, 128-130 and accompanying text (Commission reliance on *Nicaragua*); Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (merits judgment of June 27).

163. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (merits judgment of June 27). Article 38 of the Statute of the International Court of Justice provides that the Court shall apply as one source of international law, "subject to the provisions of Article 59, judicial decisions . . . as subsidiary means for the determination of rules of law." Statute of the International Court of Justice, 194 I.C.J. art. 38, ¶ 1(d), 59 Stat. 1055, 1066 (1945) [hereinafter 59 Stat. 1055]; see also *infra* note 165 (discussing sources of international law). Article 59 provides that "[t]he decision of the Court has no binding force except between the parties and in respect of that particular case." Art. 59, 59 Stat. 1055, 1062.

164. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (merits judgment of June 27).

165. Article 38 of the Statute of the International Court of Justice provides as follows with respect to sources of international law:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
 - a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
 - b. international custom, as evidence of general practice accepted as law;
 - c. the general principles of law recognized by civilized nations;
 - d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
2. This provision shall not prejudice the power of the Court to de-

United States position on *Nicaragua*, that its actions were legitimate exercises of collective self-defense under Article 51 of the United Nations Charter, ultimately may have more significance than the decision itself.¹⁶⁶

Undue reliance on disputed principles and premature codification may indeed destabilize the evolution of customary law on intervention. As explained by Chusei Yamada of Japan in the Sixth Committee deliberations on the Code:

An excessively hasty and overly ambitious attempt at drafting would not only be in vain but would also destabilize existing customary international law and could even jeopardize the existing legal structure. The Commission should therefore avoid engaging in the hasty drafting of an international code for the punishment of offenders. The Commission, in the process of codifying the topic, should bear in mind the need to prepare rules that were truly meaningful and would function effectively in the contemporary world, which had seen tremendous changes since the immediate post-war era when the topic had first been considered. It should also bear in mind that the topic had political implications for each country.¹⁶⁷

The codification of uncertain principles into an international criminal code could result in a code that is neither enforced nor enforceable. The ultimate criticism of international law is that it lacks efficacy and effective vertical enforcement institutions.¹⁶⁸

The codification of uncertain principles also could have an undesirable "norm blocking" effect.¹⁶⁹ This could result

cide a case *ex aequo et bono*, if the parties agree thereto. STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, art. 38.

166. Kahn, *supra* note 152, at 2; Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (merits judgment of June 27).

167. U.N. GAOR 6th Comm., 46th Sess., 30th mtg., at 6, U.N. Doc. A/C.6/46/SR.30 (1991).

168. See INTERNATIONAL CRIMINAL LAW 611, 620 (Gerhard O.W. Mueller & Edward M. Wise eds., 1965) (explaining no means of objective coercion on international level); Richard A. Falk, *The Adequacy of Contemporary Theories of International Law — Gaps in Legal Thinking*, 50 VA. L. REV. 231, 249-50 (1964), quoted in HENKIN ET AL., *supra* note 5, at 13-14.

169. "Norm blocking" is meant to convey the problem of cutting off the development of customary norms in international law on intervention. The norms are developed on the basis of state conduct and consensus among nations as to what should and should not be prohibited. Premature codification of unrealistic principles in a criminal code may result in prohibitions that do not reflect the reality of international relations and which may preclude the evolution

in excessive rigidity where diplomacy and its instrumentalities, such as security assistance, play important roles in international relations and in the development of international law.¹⁷⁰ Actions by a country can both violate international law and constitute state practice amounting to "law-creating precedent."¹⁷¹ The criminalization of such amorphous concepts as intervention is unworkable in a system in which "deviant practice" results in the creation of law.¹⁷² There has been much recent discussion on the desirability and legality of intervention in support of freely elected governments, intervention on behalf of "legitimate" regimes and intervention against "illegitimate" regimes.¹⁷³ There are as yet no agreed-upon norms in this area. Norm-creating behavior will be stultified by an overly broad and unduly vague intervention article in the Code. Strong arguments have been made that unilateral intervention in some cases may be preferable to non-intervention.¹⁷⁴ Before making sweeping promulgations on this controversial subject, the United Nations should thoroughly analyze the ramifications of the intervention article and make normative

of communitarian behavior by governments.

170. See *supra* note 151 and accompanying text (discussing U.S. view that "wholesale criminalization of the non-intervention principle . . . is an open invitation to criminalize disputes that should be more appropriately resolved by the careful and prudent practice of diplomacy or, when necessary, by reference to the United Nations Security Council."); see also *supra* note 119 and accompanying text (setting forth criticism of some International Law Commission members that the intervention article may criminalize permissible forms of diplomacy).

171. Khan, *supra* note 152, at 3-4, n.6, quoting Richard Falk, *International Law and the United States Role in Vietnam: A Response to Professor Moore*, 76 YALE L.J. 1095, 1126-27 (1967).

172. *Id.* at 4.

173. See generally Halberstam, *supra* note 8 (analysis of Copenhagen document); Igor I. Lukashuk, *The United Nations and Illegitimate Regimes: When to Intervene to Protect Human Rights in LAW AND FORCE IN THE NEW INTERNATIONAL ORDER* 143 (Lori Fisler Damrosch & David J. Scheffer eds., 1991); Thomas M. Franck, *Intervention Against Illegitimate Regime in LAW AND FORCE IN THE NEW INTERNATIONAL ORDER*, *supra*, at 159; Anne-Marie Burley, *Commentary on Intervention Against Illegitimate Regime, in LAW AND FORCE IN THE NEW INTERNATIONAL ORDER*, *supra*, at 177.

174. Compare Uganda, Grenada and Panama with Biafra, Czechoslovakia and Hungary. Halberstam, *supra* note 8, at 173.

assessments as to how it wants to affect customary law.

If one assumes a lack of, or a *de minimis* political influence in the draft Code, two paradigms emerge from the historical analysis of the intervention articles. Supporters of both paradigms assert that they seek to uphold the principle of international order through law. The "rule of law" school, whose notable advocates are the United States' and the United Kingdom's representatives on the Commission, focus on what is possible through law, and seek to enact principles that actually can be enforced through law. The "ideal of law" school, principally comprised today of representatives from developing nations but which formerly also included representatives from some then Soviet bloc nations, attempt to define virtually everything on the basis of "law." These two paradigms are in tension in the deliberations concerning the intervention article and concerning the draft Code generally. The "rule of law" school does not view intervention as a proper subject for the Code unless specific wrongful acts can be adequately defined and meet standards of specificity which they view as applicable to criminal codes. The "ideal of law" school, on the other hand, supports the inclusion of a broad intervention article in the Code.

C. Inconsistency with Evolving Notions of Sovereignty

Another tension in the intervention article arises from its essential foundation, the principle of sovereignty. The intervention articles drafted by the Commission are premised on strong notions of the sovereignty of states and on the established international law precept that states are the primary actors in international law. The current article proscribes incidents of intervention that undermine the free exercise by a state of its "sovereign rights," with the only exception being the vague right of self-determination set forth in the article.¹⁷⁵ The article poses a conceptual problem, in that

175. See *supra* note 150 and accompanying text (setting forth Article 17 of the current draft Code).

it both denies and admits to sovereignty; it says that powerful states cannot use their sovereignty to encroach upon the sovereignty of weaker states.¹⁷⁶ Further, the Code will require a vertical enforcement mechanism, such as an international criminal court, which lies outside the realm of an international system based on horizontal enforcement among sovereign states, and which belies the very notion of sovereignty upon which the article is based. Such an international criminal court will have the difficult task of maintaining political neutrality in order to maintain credibility. Claims of intervention could themselves arise against those who seek enforcement or prosecution under the intervention article. As explained by Judge Jimenez de Arechaga in connection with the concept of state responsibility under the draft Articles on State Responsibility:

The legal interest which every member of the international community is recognized as possessing if an international crime is committed cannot be permitted to entitle any State to take individual action when it believes that an international crime has been committed. Such an anarchical system would lead to the repetition of the worst forms of intervention which occurred in international relations in the nineteenth century. It is significant that some of the earlier advocates of the distinction were at the same time those who defended a poli-

176. See Kahn, *supra* note 152, at 35. In applying a "domestic analogy" of hierarchical enforcement structures to Article 51 of the United Nations Charter, Professor Khan comments:

The state sovereignty argument runs as follows: individuals only have rights within a political/legal community, but states have rights wholly apart from, and prior to, any legally ordered international community. Domestic law is essentially tied to a hierarchical structure that gives meaning to legal rights through the power of enforcement. But there can be no such hierarchy in the international context, because to admit hierarchy is to deny sovereignty. International society is essentially a horizontal relationship of independent state actors making independent evaluations of their own vital, national interests.

I am not concerned with the argument that this simply reflects the inadequate development of multinational institutions with enforcement authority under international law. Rather, the challenge is more basic. Any such hierarchical, international institution would, on this view, be incompatible with the very nature of the state. State sovereignty is an irreducible first principle that cannot permit the development of a supervening legal authority.

Id.

cy of intervention by individual States as self-appointed policemen of the world or continent. It is essential therefore that the distinction is only implemented within the framework of the competent organs of the institutionalized international community.¹⁷⁷

This tension could be mitigated by the drafting of an intervention article that includes exceptions for self-defense, humanitarian intervention, human rights enforcement and other principles that reflect exceptions to and restrictions on sovereignty. Defining intervention is an exercise in determining the benefits of and restrictions on sovereignty.¹⁷⁸ An overly broad intervention article can be viewed as based on outmoded principles of sovereignty. From a normative standpoint, is a powerful criminal intervention article really necessary? It would seem to function in some cases to cause substantial injustice. The intervention article as currently drafted may serve to immunize internal elites in a repressive regime from enforcement of emerging human rights law. The Commission may be codifying principles that no longer reflect customary international law, and which will upset the delicate balance between the rights of sovereigns and the rights of individuals. The "fomenting of subversive activities," for example, would seem to go too far in the absence of further definition and qualifying terms.¹⁷⁹ Assistant Secretary of State John Shattuck's meeting with Chinese dissident Wei Jingsheng in a Beijing hotel on February 27, 1994 could, under the current intervention article, amount to subversive activity. Indeed, the Chinese government has said that the meeting "interfered in the internal affairs of China" and violated Chinese law.¹⁸⁰

177. Gilbert, *supra* note 160, at 351 (quoting Jiminez de Arechaga, *International Law in the Past Third of a Century* (1978-I) 159 HAG. REC. 1,275).

178. Kahn, *supra* note 152, at 39; Henkin *et al.*, *supra* note 5, at 700-01, (quoting W. Michael Reisman, *Coercion and Self-Determination: Construing Charter Article 2(4)*, 78 AM. J. INT'L L. 642, 643-44 (1984)).

179. See *supra* note 150 and accompanying text (setting forth Article 17 of the current draft Code).

180. Rone Tempest, *Chinese Dissident is Back in Custody After "New Crimes" Rights: Wei Jingsheng's Most Grievous Affront May Have Been His Feb. 27 Meeting with a Clinton Envoy*, L.A. TIMES, Apr. 6, 1994, at A7; Patrick Tyler, *China Says It Holds Dissident to Check "New Crimes"*, N.Y. TIMES, Apr. 5, 1994, at A6.

D. An Analysis Under the United Nations Charter

The intervention article does not identify any potential defenses other than a vague self-determination exception. This lack of articulated defenses exacerbates the concerns as to the vagueness and legality of the provision and calls into question the practicability of the provision. In defense of the Code, one could analogize the United Nations Charter to a domestic constitution.¹⁸¹ Domestic constitutions can be the source of defenses in domestic criminal law systems. The analogy is problematic, however, in that the international legal system does not function as a domestic constitutional system characterized by vertical enforcement and hierarchy of laws. The United Nations is not a government and the Charter does not function like a constitution.

The Charter, moreover, does not fit neatly into the framework of the intervention article. The Charter is ambiguous on how to deal with intervention. The Charter is the product of the immediate post-World War II period, when the overriding concerns were aggression and the need for collective self-defense.¹⁸² Norms on intervention have developed to fill the gaps.¹⁸³ The draft Code, however, makes it difficult to apply these norms.

The intervention article lacks an exception for self-defense as articulated under Article 51 of the United Nations Charter. Article 51 of the Charter provides in pertinent part that "[n]othing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a member of the United Nations, until the Security Council has taken the measures

181. See Fred L. Morrison, *The Jurisprudence of the Court in the Nicaragua Decision*, 82 PROC. AM. SOC'Y INT'L L. 258, 260 (1987) (suggesting analysis of International Court of Justice decisions for "constitutional significance" to world order in a manner analogous to domestic constitutional analysis); Kahn, *supra* note 152, at 30-44 (analyzing Article 51 of the United Nations Charter under a domestic law model).

182. Moore, *supra* note 5, at 194.

183. *Id.*

necessary to maintain international peace and security.”¹⁸⁴ The key to legitimate self defense under Article 51 is an “armed attack.” In defense of the current draft Code, the armed attack requirement may limit the utility of the exception in the intervention context.¹⁸⁵ Other defenses exist in customary international law, however, such as anticipatory self-defense and possibly counter-intervention as self defense, that may not rely principally on an armed attack for their legitimacy.¹⁸⁶ The self-defense exception should be made available in order to maintain flexibility in the Code — the right of self-defense is based on notions of sovereignty as is the norm of non-intervention.¹⁸⁷

The essence of the contemporary non-intervention principle in the United Nations Charter is Article 2(4), which provides that “[a]ll members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”¹⁸⁸ The current intervention article in the draft Code is both more and less restrictive than Article 2(4). It is more restrictive in that it attempts to identify specific instances of intervention, such as subversive and terrorist activities. It is less restrictive because it does not deal with a “threat or use of force,” unless perhaps the word “armed” is included in the final article.

On a fundamental level beyond comparing the texts of

184. U.N. CHARTER art. 51.

185. See Kahn, *supra* note 152, at 20-21 (explaining that there are unknown or unclear international norms on intervention).

186. See *The Caroline*, 2 Moore, Digest of Int'l L. 412 (1906) (anticipatory self-defense proper where the “necessity . . . is instant, overwhelming, and leaving no choice of means, and no moment of deliberation”); HENKIN ET AL., *supra* note 5 at 662-64. Counter-intervention is a controversial subject. See Louis B. Sohn, *Gradations of Intervention in Internal Conflict*, 13 GA. J. INT'L & COMP. L. 225, 229-30; Christopher C. Joyner & Michael A. Grimaldi, *The United States and Nicaragua: Reflections on the Lawfulness of Contemporary Intervention*, 25 VA. J. INT'L L. 621, 642-51. Its legitimacy may have been severely restricted by Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (merits judgment of June 27), although the decision is of uncertain significance.

187. Kahn, *supra* note 152, at 12-13.

188. U.N. CHARTER art. 2 ¶ 4.

the articles, the draft Code avoids dealing with Article 2(4). The work of the Commission on any final provision on intervention will have to confront Article 2(4) directly, in order to adequately distinguish permissible from impermissible intervention. The third paragraph of the current Article 17 on intervention, which provides that the article shall not prejudice the right of self-determination,¹⁸⁹ does not facilitate a clear demarcation. Differing views exist on the meaning of Article 2(4) in the context of the principle of self-determination. Certain scholars adopt a "Wilsonian" view of Article 2(4). They assert that intervention is permissible under Article 2(4) in order to assist populaces in freely choosing their governments.¹⁹⁰ Others disagree with this interpretation of Article 2(4) as destabilizing and inconsistent with the text of the Charter and with the interpretations by governments of Article 2(4).¹⁹¹ The Commission eventually will have to address these issues. The "bottom line" is that defining what constitutes criminal intervention is a norm-prescribing or norm-creating effort.¹⁹²

The intervention article does not contain any exceptions for enforcement actions under Chapter VII of the Charter or for regional arrangements under Chapter VIII of the Charter.¹⁹³ Article 2(7) of the Charter provides that

[n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the members to submit such matters to settlement under the present Charter; but this

189. See *supra* note 150 and accompanying text (setting forth Article 17 of the current draft Code).

190. Halberstam, *supra* note 8, at 166-67; Reisman, *supra* note 178, at 643-44. This view is termed "Wilsonian" after Woodrow Wilson who defined self-determination as implicating the principle that "governments derive all their just powers from the consent of the governed." Halberstam, *supra* note 8, at 167-68 (quoting Woodrow Wilson, Address to the Senate (Jan. 22, 1917)), reprinted in 40 THE PAPERS OF WOODROW WILSON 533, 537 (Arthur S. Link ed. 1982).

191. Oscar Schachter, *The Legality of Pro-Democratic Invasion*, 78 AM. J. INT'L L. 645-47 (1984), quoted in HENKIN ET AL., *supra* note 5, at 701-02.

192. See *supra* note 169 (discussing "norm blocking").

193. See Moore, *supra* note 5, at 197 (discussing United Nations actions under Chapters VII and VIII of the United Nations Charter in the context of intervention).

principle shall not prejudice the application of enforcement measures under Chapter VII.¹⁹⁴

Why this provision was not addressed in the drafting of the intervention article is unknown.

The intervention article is problematic in the context of regional organizations, such as the Organization for African Unity and the Organization of American States, although such regional arrangements may be characterized as extensions of the principle of self-determination.¹⁹⁵ This is yet another instance in which the intervention article could cause unnecessary rigidity in international relations.

Indeed, there is nothing explicit in the deliberations on the draft Code as to whether the actions of the United Nations itself could give rise to individual liability under the Code. The intervention article by its terms proscribes conduct of "leaders and organizers," but does not delimit these terms to actions by such leaders and organizers outside of United Nations' efforts. There is no doctrinal reason why a leader or organizer implementing the decisions of the United Nations, for example in Bosnia-Herzegovina or in Somalia, could not violate the intervention provision. An exception should be made explicit in the Code for United Nations' actions.

II. CONCLUSION

The International Law Commission should be commended for its considerable efforts in attempting to define intervention which rises to the level of a crime against the peace and security of mankind. The task is very difficult. In any future efforts to revise Article 17 of the draft Code, it is this author's view that the United Nations must grapple with at least two issues.

First, is an article in the Code proscribing intervention as a crime against the peace and security of mankind really necessary? A positive decision appears to have been made

194. U.N. CHARTER art. 2, ¶ 7.

195. See Moore, *supra* note 5, at 197 (discussing lawful regional action under Chapter VIII of the United Nations Charter).

many years ago. A reassessment is recommended, based in part on the questionable history of the inclusion of the article in the 1954 draft Code. A utilitarian approach is recommended — it may not be possible to reach consensus on an article, and aggression and other, more readily definable crimes may serve to proscribe some forms of wrongful intervention.

Second, if the decision is made to retain the provision, considerable work would seem to be necessary. The article should meet rigorous standards of specificity typically required in the principal domestic legal systems of the world. This would help to alleviate concerns as to the legality of the draft Code. The Commission should strive to identify and use politically neutral principles in its work to promulgate a crime of intervention.

If the intervention article in the draft Code is to constitute a realistically enforceable provision of the Code, it is this author's view that a consensus must be reached as to the drafting of the intervention article, and other articles in the Code, in a manner compatible with accepted standards of promulgating criminal codes. Extensive use of comparative methodologies may be in order. Emphasis on comparative jurisprudence will not assist the Commission in determining the substantive international law principles of non-intervention. It should, however, provide a procedural and analytical framework for the Commission. This will give the Commission the ability to avoid having its work devolve into a political exercise, where consensus is unlikely.

In the post Cold War era, the developing countries may be less concerned with superpower intervention in their internal affairs and more with the ability to engage the developed countries^o in economic matters. Of course, they may still have some concern with potential interventions, including those by their neighbors. The Code cannot be developed in a vacuum from these contemporary concerns, nor can it be based solely on them. Any acts that are to be prohibited should be narrowly defined and in addition, should be the core bad acts that require prohibition in order to maintain world peace through law.

