

Document:-
A/CN.4/SR.2054

Summary record of the 2054th meeting

Topic:
**Draft code of crimes against the peace and security of mankind (Part II)- including the
draft statute for an international criminal court**

Extract from the Yearbook of the International Law Commission:-
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referring to the use of mercenaries in paragraph 3, while preserving the economy of the draft and avoiding points of friction.

32. The Special Rapporteur provided a definition and a list of terrorist acts and, there again, a definition was, strictly speaking, unnecessary, although a general definition, like the one proposed, might be useful. Unlike intervention, the concept of terrorism was relatively easy to understand.

33. In paragraphs 4 and 5, both of which dealt with a breach of the obligations of a State, there was the recurring problem of the relationship between the responsibility of the individual and the nature of the act for which that responsibility was incurred and for which the individual would be liable to punishment. In the cases covered, a breach of the treaty obligations in question could only be an act of a State, and the individual could only be part of the mechanism of the State that had caused the breach. The proposed wording was certainly not judicious. On a point of form, since the nature of the obligations was the same in both cases, namely treaty obligations of a military nature, the two provisions could easily be combined.

34. As to paragraph 6, on colonial domination, it would be noted that neither alternative referred to an act of a State, yet only an act of a State could be involved. The proposed wording, at least in the first alternative, was similar to that used in paragraph 3 (b) of article 19 of part 1 of the draft articles on State responsibility, and an act of State was common to all other crimes covered by draft article 11, including aggression, intervention and a breach of the obligations of States. One solution might be to invert the proposition in paragraph 2 of article 3 (Responsibility and punishment), provisionally adopted by the Commission at the previous session,²⁰ so as to provide in chapter 1 of the draft that the responsibility of the individual was subordinate to the establishment of the responsibility of the State. How, for instance, could an individual who had taken part in an act of aggression be punished if the State concerned was not considered to have committed the act in question? That comment applied equally to intervention and colonial domination. It would perhaps be advisable, therefore, to provide expressly in the draft code for a connection between the act giving rise to the responsibility of the individual and the fact that such an act was ultimately an act of a State.

35. With regard to paragraph 7, he would refer members to his earlier comments on mercenarism (para. 31 above).

36. In conclusion, he considered that there should be one article for each crime; that the threat of aggression and mercenarism should be excluded from the list of acts constituting crimes; and that paragraphs 4 and 5 of article 11 should be combined. In particular, the Commission should, in the light of members' comments, take a decision on the text to be referred to the Drafting Committee, in other words on the content of the list of criminal acts proposed by the Special Rapporteur, and indicate whether the list was to be retained in its present form, expanded or reduced. He trusted that the Com-

mission would be able to do so at the present session. The Commission was not required to draft a general code of international criminal law, and the draft code dealt not with the responsibility of States, but with that of individuals for certain specific acts. For that reason, the code must be specific and precise; otherwise it would be unrealistic and could not be applied.

37. Mr. FRANCIS said that, having listened to the Special Rapporteur, he wished to make a few preliminary comments on preparation of aggression, and to respond to Mr. Calero Rodrigues on one point.

38. Since he understood that the Special Rapporteur did not intend to include preparation of aggression in the draft code, he wished, bearing in mind recent history and particularly the Second World War, to point out that some aggression was inevitably preceded by preparations. He therefore believed that preparation of aggression should be covered by the draft, but it should not affect the legitimacy of activities related to a State's right to self-defence. Indeed, the threat of aggression should also be included.

39. As to Mr. Calero Rodrigues's remarks on mercenarism, no matter what interpretation was given to mercenarism in the Definition of Aggression, it should also be possible to apply the code to cases in which an individual committed a crime against the peace and security of mankind independently of any underlying act of State.

40. He reserved the right to speak on the Special Rapporteur's sixth report (A/CN.4/411) at a later date.

41. Mr. KOROMA pointed out that the Helsinki Final Act was not the only instrument that recognized the right to self-determination at the internal level.

The meeting rose at 11.35 a.m.

2054th MEETING

Wednesday, 1 June 1988, at 10 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Reuter, Mr. Roucouas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

1. The CHAIRMAN said members would surely be pleased to hear that, during the week of 23 to 27 May, the Commission had used 100 per cent of the time and conference service facilities allocated to it.

²⁰ *Yearbook* . . . 1987, vol. II (Part Two), p. 14.

Draft Code of Crimes against the Peace and Security of Mankind' (continued) (A/CN.4/404,² A/CN.4/411,³ A/CN.4/L.420, sect. B, ILC(XL)/Conf.Room Doc.3 and Corr.1)

[Agenda item 5]

SIXTH REPORT OF THE SPECIAL RAPPORTEUR
(continued)

ARTICLE 11 (Acts constituting crimes against peace)⁴
(continued)

2. Mr. BARSEGOV thanked the Special Rapporteur for his punctual submission of material which fully and objectively reflected the views expressed by States so far and thereby facilitated the Commission's task.
3. He had intended to speak on specific provisions of draft article 11, but a number of conceptual issues had resurfaced during the discussion at the previous meeting and he wished to address them. His main concern was that solutions were being proposed which, by their very nature, could lead the Commission into an impasse. Without casting doubt upon the premise that the code must cover the crimes of individuals, he could not agree with conclusions being drawn with regard to the definition of acts constituting a crime. In particular, the view had been expressed that, since the code was to cover crimes committed by individuals, what was to be regarded as constituting a crime should be separate facts divorced from the crime as a whole—aggression, interference in the internal affairs of States, colonialism, etc. Criminal law, it was said, was specific in nature and required only the establishment of the facts of the case and appropriate measures of punishment. On that basis it was proposed that no definition of an international crime should be included in the code.
4. At first glance that position would seem to be legally justified: clearly an individual could not be held responsible for crimes committed by a State, such as aggression or colonialism. But, on close examination, the deficiencies of such an approach became clearly apparent: it could imperceptibly lead to the destruction of the whole edifice of the code. International crimes against the peace and security of mankind, which were characterized by their scale, their mass nature and their gravity, were to be split up into discrete, isolated acts that constituted nothing more than ordinary criminal offences. Aggression would be reduced to a series of individual killings, violations of national frontiers, etc. The code's universal import as a means of preventing crimes perpetrated by a State through the criminal acts of its agents—individual persons, members of the police or of the armed forces—would inevitably be undermined.
5. Such fragmentation was wrong not only in the case of crimes committed by individuals as part of crimes committed by a State (e.g. aggression), but also in that

of crimes which could be committed directly by individuals (e.g. mercenarism). The code must provide a general definition of acts constituting crimes against the peace and security of mankind, which would not only reveal those crimes to be phenomena of international life, but also expose the pandemic threat to mankind posed by the criminal acts of individuals.

6. Mr. FRANCIS said that the Special Rapporteur had produced an interesting and well-written sixth report (A/CN.4/411). He could not, however, agree with the view (*ibid.*, para. 9) that, since annexation was mentioned in the 1974 Definition of Aggression,⁵ there was no need for it to appear in the code. The Definition of Aggression referred to "annexation by the use of force of the territory of another State or part thereof" (art. 3 (a)). But annexation could be effected by means other than the use of force. He cited the example of an indigenous people aspiring to independence, which was finally granted by the metropolitan Government. That Government was then ousted in legislative elections by a party opposed to liberation of the territory, and like-minded groups in the territory were encouraged to stage a *coup*, declaring it to be part of the metropolitan country again. In such a case, the new Government of the metropolitan country would not have to send armed forces into the territory to regain it: it could accomplish that purpose by legislation, backed by the will of the new "majority".

7. The Definition of Aggression would clearly not apply in such a situation. He drew attention to the broader, more flexible formulation contained in article 2 (8) of the 1954 draft code: "annexation . . . by means of acts contrary to international law". The Commission should remember that the purposes served by the Definition of Aggression and by the draft code were not always identical.

8. He was inclined to agree with the Special Rapporteur (*ibid.*, para. 10) that the sending of armed bands into the territory of another State was already covered in the Definition of Aggression. Perhaps the Commission had no need to take the matter further, but he would reserve his judgment until the provision on terrorism had been finalized.

9. The Special Rapporteur was quite right to refer, in his discussion of intervention in the internal or external affairs of a State (*ibid.*, paras. 12 *et seq.*), to the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States,⁶ to resolution 78 of 21 April 1972 of the General Assembly of OAS (*ibid.*, para. 25) and to the judgment of the ICJ in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (*ibid.*, para. 17). He fully endorsed the Special Rapporteur's conclusion (*ibid.*, para. 27) that the element of coercion established the point at which interference or intervention became unlawful. The Special Rapporteur suggested either of two courses of action for determining whether intervention had occurred (*ibid.*, para. 34). He

¹ The draft code adopted by the Commission at its sixth session, in 1954 (*Yearbook . . . 1954*, vol. II, pp. 151-152, document A/2693, para. 54), is reproduced in *Yearbook . . . 1985*, vol. II (Part Two), p. 8, para. 18.

² Reproduced in *Yearbook . . . 1987*, vol. II (Part One).

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

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

⁵ General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

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

himself would favour the adoption of both courses in the draft code, rather than the selection of one of them.

10. The Special Rapporteur explained (*ibid.*, paras. 41-42) that, in deference to members of the Commission who had argued that the phrase "colonial domination" was an anachronism, he proposed that it be replaced by "alien subjugation, domination and exploitation". He himself strongly favoured the original formulation. In the wake of the decolonization process, the draft code was intended to cope with the last remaining cases of deeply entrenched colonial domination and to guard against the resurgence of such situations in the future. Colonial domination was an unpalatable notion but it was still a reality in today's world and some situations in which it was still sustained involved crimes against international peace and security and against humanity. The purpose of the draft code was not to condemn States that had formerly possessed colonies, or to censure territories that had elected to remain under the umbrella of a metropolitan power, but essentially to rectify the injustice inherent in the remaining cases in which indigenous peoples were so committed to gaining independence that they were prepared to stake their lives on attaining it.

11. As to the text of draft article 11, he agreed with the proposed format. In paragraph 1, dealing with aggression, it might be advisable to include a rider or saving clause similar to the one in article 4 of the Definition of Aggression, stipulating that the list of acts constituting aggression was not exhaustive, thus preserving the authority of the Security Council to determine other acts of aggression.

12. With regard to paragraph 3, on intervention/interference, his expressed preference for a combination of the two alternatives suggested by the Special Rapporteur could be achieved by making the first alternative part of a *chapeau*, ending with the expression "and includes", so as to allow for cases not specified in subparagraphs (i) and (ii) of the second alternative.

13. In the definition of terrorist acts, the Special Rapporteur relied rather too heavily on the 1937 Convention for the Prevention and Punishment of Terrorism.⁷ He would prefer the emphasis to be shifted away from the head of State and public property, and the scope extended to all individuals and to property in general. Paragraph 3 (a) might be broadened to embrace passive coercion, but must in any event remain an extremely general formulation, in order to allow for the more classical enumeration of acts of terrorism, some of which were mentioned in paragraph 3 (b).

14. On the matter of colonial domination, he preferred the first alternative of paragraph 6, which was consistent with article 19 of part 1 of the draft articles on State responsibility.⁸ He believed that the second alternative was a compromise intended to cover the situation in the Middle East. The Commission should retain the reference to colonial domination, without prejudice to the Palestinian cause.

15. Although the definition of a mercenary in paragraph 7 was taken from article 47 of Additional

Protocol I⁹ to the 1949 Geneva Conventions, the General Assembly had recently shown unease about certain aspects of the 1949 solution and had revised the text of the negotiating document at its forty-second session, in 1987. It would therefore be inappropriate for the Commission to make a positive recommendation on that point at the present stage.

16. Mr. REUTER said that, when dealing with a topic such as the present one, there was always a temptation to depart from the specific framework of the topic and deal with general questions. The only possible way to attenuate that tendency, which was certainly necessary, was to try to link the general problems to the text as and when it justified such linkage.

17. The subject of aggression was not an undeveloped one, and the Special Rapporteur had cited treaties, the Charter of the United Nations and legal texts of lesser importance, such as the 1974 Definition of Aggression¹⁰ and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States.¹¹ Other data were more relative, such as the consistent jurisprudence of the ICJ.

18. In view of such a large body of material, it was difficult to know whether the Commission should organize those texts and add its own development, or classify the material to produce a compendium of principles. The question was not simple; and it was more complicated in the case of aggression than in that of the other problems the Commission would meet with later on. For besides the normative aspect, there was an institutional aspect to the matter, since there were, or might be, concrete decisions on cases of aggression. That had not escaped the attention of the Special Rapporteur, who, in his comments on draft article 11, paragraph 1, noted that interpretation and evidence were "matters within the competence of the judge". By way of illustration, he (Mr. Reuter) pointed out that the Security Council had decision-making powers with respect to aggression, but did not have judicial powers, in that its primary concern was peace. If there was a decision by the Security Council recognizing aggression, States were not free to say that there had been no aggression. If the Security Council decided there had been no aggression, he did not see how a national judge could make a different ruling.

19. The foregoing considerations illustrated some of the difficulties in the relationship between the text before the Commission, treaty law and customary international law. He did not believe that the ICJ, in its judgment in the case concerning *Military and Paramilitary Activities in and against Nicaragua* (A/CN.4/411, para. 17), had really sought to establish a parallel between treaty and custom, although it had been obliged to do so for jurisdictional reasons. What the Court was saying essentially was that treaty law, like custom, derived from principles.

20. The Special Rapporteur had shown extreme care in drafting article 11, but perhaps something clearer could be proposed. The article contained, first, a general

⁷ Protocol I relating to the protection of victims of international armed conflicts, adopted at Geneva on 8 June 1977 (United Nations, *Treaty Series*, vol. 1125, p. 3).

¹⁰ See footnote 5 above.

¹¹ See footnote 6 above.

⁷ League of Nations, document C.546.M.383.1937.V.

⁸ See 2053rd meeting, footnote 17.

definition of aggression and an explanatory note, which was both an element of the text of the article and an element that might be included in the commentary. The Special Rapporteur appeared to be asking for members' comments on that point.

21. With regard to paragraph 1 (b), he shared Mr. Calero Rodrigues's concern (2053rd meeting) that the Commission should try to produce more precise drafting for the complex group of acts constituting aggression. Paragraph 1 (c), on the scope of the definition, called for the same comment as did the explanatory note in paragraph 1 (a) (ii).

22. In making its choice, the Commission should not attempt to quote all the relevant passages of the Charter, the Definition of Aggression and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, but should refer to each in turn, adding judgments of the ICJ and other concrete cases as illustrations. Perhaps the seven points proposed by the Special Rapporteur in paragraph 1 (b) might be used: that would show that the Commission respected that customary procedure of elaboration and had no intention of replacing it, but had simply mentioned the most pertinent cases. An escape clause would also be needed, relating to all the reservations concerning grounds for exoneration under general international law, but not mentioning those grounds. The Commission would thus show respect for higher authorities, while providing something concrete and noting the relative character of the practical application of the definition. Those general remarks would have a specific application later on; for example, when dealing with a convention on *apartheid*, the Commission would have to decide whether to improve the text, add to it, attenuate it, or choose an intermediate solution.

23. Referring to a point raised by Mr. Calero Rodrigues, he said he wondered whether the Commission should provide that the individual crimes to which the text referred would come under the code only if there were a parallel crime by the State as such. On that point he preferred not to give a general reply, since unfortunately the idea of an international crime by a State was not yet very clear, although the Commission had established some facts about it. For example, he could imagine a situation in which a State was responsible internationally, although not for a crime. Some of its agents could conceivably be held responsible, while the State itself could not be punished; and the Commission had carefully avoided the question of penalties for crimes by States. He would not take a position on the matter, but on the general principle he believed that flexibility was in order.

24. As to the exact meaning of "preparation of aggression", in his view that expression did not apply to military exercises intended to provide for all eventualities. An example of such preparation was provided by the 1938 Munich Agreement, involving Hitler's coldly thought-out decision to carry out aggression and use the entire State apparatus to prepare for it. France had always held that the plan to annex Czechoslovakia had been decided before the Munich Agreement, so that the French signature had been obtained by fraud.

A precise definition should be drafted to cover that possibility.

25. On the question of threat, Mr. Calero Rodrigues's concern was shared by all. But whereas Mr. Calero Rodrigues was not in favour of making threat an individual crime, his own reaction was the opposite. It was unlikely that threats of aggression would be made in the future, since they would have to be made in a form that could not be qualified as aggression. And it would not be the State, but an agent of the State, who would threaten, in a secret and discreet way. Furthermore, it was doubtful whether a threat not followed by incipient action of some kind constituted a crime. Hence, if the concept of "threat" were retained, it would have to be made more explicit. He was open to any proposals if members of the Commission wished to develop that idea.

26. With regard to paragraph 7 of article 11, it was difficult to imagine a situation involving mercenaries that did not have a State or States behind it. That was a form of aggression by the State and reference should be made to it in the definitions relating to armed bands. One aspect of the question that escaped Western scholars was the extreme fragility of certain States which, because of their colonization, had structures that placed them at the mercy of a gang of criminals. His own experience working with international bodies on the traffic in drugs had shown the enormous means available to organized crime, against which a defence was needed. Since it was very difficult to obtain evidence in such cases, he saw no reason not to include, as an international crime, mercenarism in which there was no concrete proof of a State's involvement.

27. Mr. McCAFFREY congratulated the Special Rapporteur on his lucid and precise sixth report (A/CN.4/411), which dealt with matters that the Commission had been discussing since 1985. He had thus had an opportunity of expressing his views on many points and could at the present stage be brief.

28. At the outset, he wished to express his continuing and serious doubts about the appropriateness of the topic. Those doubts did not, of course, detract in any way from his admiration of the Special Rapporteur's work. The fact was, however, that the topic was a highly political one, which was not appropriate for treatment by the Commission.

29. There was a clear lack of political will on the part of States to implement a code of the type being discussed. It was significant that, since the end of the trials of the major war criminals, no individual officially connected with a State had been prosecuted for crimes such as those mentioned in the draft code. Cases such as that of Klaus Barbie did not involve a State, but only an individual. There was no evidence of any willingness on the part of States to prosecute officials for the crimes under consideration, and still less to extradite any of their own officials for such crimes and allow another State to try them. In fact, he would venture to say that any attempt to introduce rules of that kind was more likely to endanger international peace and security than to safeguard them.

30. In recent years, there had been many flagrant acts on the part of States which constituted aggression, in-

tervention in the affairs of other States or even genocide: there was at present an example of a State starving part of its own population. All those acts had been ignored by the international community.

31. Those facts showed the sensitive nature of the present topic and the absence of any will to implement a code of the type under consideration. Yet the question of implementation was a vital one; the Commission had on more than one occasion requested instructions from the General Assembly on the formulation of the statute of an international criminal jurisdiction, but it had received no answer. The only way in which the proposed code could be implemented was with the aid of an international criminal tribunal having compulsory jurisdiction.

32. Mr. Calero Rodrigues (2053rd meeting) had raised the question as to how to determine whether an individual could be held responsible for the crimes identified in the draft code, considering that those crimes had traditionally been regarded as acts of a State. The solution would be for the relevant article to specify that those responsible were the persons who had ordered the act, planned it or been guilty of complicity in its perpetration. The individuals responsible would hold very high positions.

33. With regard to aggression in general, he noted the Special Rapporteur's discussion (A/CN.4/411, paras. 6-10) of the question whether preparation of aggression, annexation and the sending of armed bands into the territory of another State should be retained as crimes distinct from aggression. From the outset, he had inclined to the view that those acts should not be treated as separate crimes. During the present discussion, however, Mr. Reuter and Mr. Francis (2053rd meeting) had made a strong case for treating preparation of aggression as a separate crime. Careful consideration should therefore be given to that suggestion, provided always that a sufficiently precise definition of preparation of aggression could be formulated; specificity should be the watchword in all the provisions of a draft code.

34. Referring to the subject of intervention in the internal or external affairs of a State, he stressed his preference for the term "intervention", rather than the more general term "interference". The crux of the difficulty regarding intervention was stated very clearly by the Special Rapporteur in his report thus: "It is, of course, difficult to exclude from international relations the influence which certain States exert on other States and which is sometimes mutual." (A/CN.4/411, para. 13.) The Special Rapporteur very rightly added that that type of intervention was "not at issue here". The problem was how to draw the line between permissible intervention and non-permissible intervention. At the thirty-seventh session, in 1985, he had stressed the drawbacks of adopting too general a definition of coercion, which would have the effect of outlawing diplomacy and such frequent acts in international relations as the withholding of benefits, the withholding of a vote on a loan in an international financial institution and the use of import quotas to exercise pressure.¹² Everyone recognized those acts as permissible, but the

use of vague and general terms would bring them within the scope of "coercion".

35. The Special Rapporteur cited the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States¹³ as among the legal bases for the principle of non-intervention (*ibid.*, para. 16). It was worth noting that the relevant part of that Declaration was quite specific. It read: "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 . . ." (third principle, second paragraph). The reference was clearly to a specific criminal intent on the part of the coercing State to obtain such subordination. For any provision on the subject of intervention, it would be desirable to draw on the language of that Declaration, adjusting it to make it applicable to individuals.

36. He then drew attention to Principle VI of the Declaration contained in the Helsinki Final Act,¹⁴ which dealt with non-intervention in internal affairs. That provision specifically referred to "armed" intervention and to coercion designed to subordinate the sovereign rights of another State. The emphasis was thus clearly placed on intervention which involved the use of force. Hence he could not agree with the Special Rapporteur's suggestion that "the term '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", or with his conclusion that the term "therefore covers all forms of intervention" (A/CN.4/411, para. 20).

37. Precision was essential in a code of crimes that was to be applicable to individuals, and observance of the rule *nullum crimen sine lege* required specificity. In that regard, the Special Rapporteur's general statement that "it is thus the element of coercion which constitutes the dividing line between lawful intervention and wrongful intervention" (*ibid.*, para. 27) was of little assistance. The use of such a general term would be acceptable only if there were an international court to determine what constituted "coercion". In the absence of such a court, he would much prefer the second alternative proposed by the Special Rapporteur for paragraph 3 of draft article 11, on intervention. Because of the vagueness of the notion of coercion, it was essential to confine it to acts involving the use of force. That approach would be consistent with the Commission's decision that the draft code would cover only the most serious crimes, and there was also the practical consideration that coercion involving the use of force was easier to establish. Other forms of persuasion were much more difficult to prove.

38. He endorsed Mr. Calero Rodrigues's suggestion that article 11 should be drafted in terms of individual criminal responsibility, which should be dependent on State responsibility. As he understood it, Mr. Calero Rodrigues was not suggesting that the criminal responsibility of the State should necessarily be engaged. Nevertheless, practical difficulties would arise if, in order to bring a charge against an individual under the code, it was necessary to wait for the State concerned to

¹² See *Yearbook . . . 1985*, vol. I, p. 55, 1885th meeting, para. 51.

¹³ See footnote 6 above.

¹⁴ See 2053rd meeting, footnote 16.

be declared responsible. Great delay would result, and State responsibility might never be established.

39. The acts of aggression dealt with in paragraph 1 of article 11 involved grave difficulties. The General Assembly had worked for more than 20 years on the elaboration of the Definition of Aggression,¹⁵ and had ultimately adopted a text which, after listing a series of acts that constituted aggression, went on to state (art. 4): "The acts enumerated above are not exhaustive and the Security Council may determine that other acts constitute aggression under the provisions of the Charter."

40. It was now proposed that, under the code, it would be possible to convict individuals of the crime of aggression. In the absence of an international criminal jurisdiction it would be necessary to rely on universal jurisdiction for such convictions. It would thus be left to national courts to apply the provision on the crime of aggression, and the result would inevitably be a wide variety of different interpretations.

41. As to the threat of aggression, he had initially been opposed to the inclusion of that concept. On reflection, however, he was prepared to consider it, provided the threat was tied to the specific intent and purpose of subordinating the exercise of the sovereign rights of the threatened State.

42. On the question of intervention, he proposed the inclusion in the second alternative of paragraph 3 of article 11, which he preferred, of a reference to acts which "disturbed or threatened the national sovereignty or security of another State".

43. He welcomed the Special Rapporteur's definition of "terrorist acts" (para. 3 (a)), but wondered whether the word "criminal" might not cause difficulties, since it would be necessary to decide under which law such acts were deemed to be criminal. Usually, of course, the acts would be so heinous that they would be criminal under the law of any State, but situations might conceivably arise that did not satisfy the requirement of dual criminality included in most extradition treaties. He did not think that the question of terrorism should necessarily be dealt with under the heading of intervention, though he had an open mind on the matter.

44. The list of terrorist acts was helpful. He doubted, however, whether damage to public property or property devoted to a public purpose (para. 3 (b) ii.) would normally be serious enough to warrant inclusion in the code.

45. Paragraphs 4 and 5 both dealt with breaches of treaty obligations of certain kinds and should, in his view, be far more specific regarding the kind of breach and the treaties involved. A breach of certain treaties, which could be regarded as covered by the provisions of those two paragraphs, might not rise to the level of a crime against the peace and security of mankind; only the most extreme breach of a treaty should qualify as such.

46. Of the two alternatives proposed for paragraph 6, on colonialism, he had a strong preference, for the reasons he had explained at the thirty-seventh session,¹⁶

for the second, which drew on the language of the Declaration on the Granting of Independence to Colonial Countries and Peoples.¹⁷ The Commission might, however, wish to consider amplifying the provision by including a clause to the effect that subjugation was a violation of the right of peoples to self-determination, or a reference to denial of fundamental human rights along the lines of that contained in the Declaration (para. 1).

47. The issue of mercenarism, which was an extremely sensitive one, might well be deferred until the completion of the work of the *Ad Hoc* Committee on that question.

48. Mr. CALERO RODRIGUES said that Mr. Francis (2053rd meeting) had raised a valid point in observing that, if the question of mercenarism were dealt with under the heading of aggression or intervention, or both, activities connected with mercenaries and undertaken not by States but by individuals or groups of individuals would not be covered. He agreed that the Commission should bear that point in mind. True, there were mercenaries other than those who acted on behalf of a State and were thus covered by the provisions on aggression or intervention, but did the Commission really believe that those cases should be elevated to the level of the code? Moreover, if the Commission decided to follow up that question, it would have to face the problems encountered by the *Ad Hoc* Committee, which was currently preparing a convention on the matter. The code should be directed not at mercenaries as such but, in the words of draft article 11, paragraph 7, at the "recruitment, organization, equipment and training" and, indeed, at the financing of mercenaries.

49. The difficulty stemmed from the fact that the Commission, the General Assembly and the *Ad Hoc* Committee had all been relying on the text of Additional Protocol I¹⁸ to the 1949 Geneva Conventions, which had been drafted for a very different purpose, namely to deal with the status of mercenaries in war, whereas the code should be concerned with those who organized and trained mercenaries. Furthermore, under the definition of mercenaries in that Protocol, a mercenary was any person who took part in hostilities (art. 47, para. 2 (b)). Accordingly, if a person was trained to act as a mercenary, but did not actually engage in combat, the recruitment, organization, equipment, training and financing could not be said to be of a mercenary. That flaw, which had already been noted by the General Assembly, had yet to be eliminated.

50. The definition of a mercenary had other flaws, one of which was the requirement in paragraph 7 (c) of draft article 11 that a mercenary be promised "material compensation substantially in excess of that promised or paid to combatants of similar rank and functions in the armed forces". Consequently, all a State had to do to prevent a mercenary from being regarded as such was not openly give a substantial amount of official pay. But pay could be called by some other name, or be given secretly.

51. The main flaw for the purposes of the code, however, was that, if a person must have taken part in

¹⁵ See footnote 5 above.

¹⁶ *Yearbook* . . . 1985, vol. 1, p. 55, 1885th meeting, para. 55.

¹⁷ General Assembly resolution 1514 (XV) of 14 December 1960.

¹⁸ See footnote 9 above.

hostilities to be regarded as a mercenary, the whole endeavour to define who prepared a mercenary, by recruitment, organization, equipment or financing, failed; for if there was no mercenary, the definition could not be applied.

52. He tended to agree that the question of mercenarism should perhaps be left open, at least until the General Assembly had concluded its work on a convention on the subject, at which time the Commission could revert to the matter if need be. He continued to believe, however, that the action of a State which made use of mercenaries for certain purposes prohibited by the code could be dealt with under the heading of aggression or intervention, and he very much doubted that the preparation of mercenaries by private persons was of such importance that it should be covered by the code. The code should not seek to be all-embracing. It would be an important instrument, and something new in terms of the international criminal responsibility of individuals, but the Commission should try to be as modest as possible, especially as the persons concerned might be responsible and punishable under other instruments, including the future convention on mercenaries, and under internal systems of law.

53. Mr. FRANCIS said that he was gratified by Mr. Calero Rodrigues's comments. He wished, however, to reserve his position on the matter, as he would like to read the records of the relevant discussions in the United Nations before arriving at a conclusion.

54. The main issue was quite straightforward. Paragraph 1 of article 47 of Additional Protocol I¹⁹ to the 1949 Geneva Conventions dealt with a very important aspect of the topic. It read: "A mercenary shall not have the right to be a combatant or a prisoner of war." Paragraph 2 of that article contained the definition reproduced in draft article 11, paragraph 7. It was thus clear that the draft code did not cover the case of a person recruited locally or abroad other than through the instrumentality of a State, and therefore did not cover cases in which such a person participated as a mercenary in a war and committed some serious crime, such as murder or setting fire to public or private property. That gap in the code could not be allowed to remain, and there was a strong case for introducing some hybrid provision to take account of mercenarism not covered by other provisions, so as to ensure that it would not go unpunished.

55. Mr. KOROMA said that mercenarism, which affected weak and fragile States in particular, was a very real problem and should have its place in the code. It involved not only an attack on the territorial integrity of a State, but also the infliction of serious harm on the indigenous population, and met all the criteria submitted to the Commission for determining whether an offence should be classified as a crime against the peace and security of mankind. Moreover, mercenarism involved utter contempt for the population. In Mozambique, for example, mercenaries with no political purpose had caused devastation and perpetrated the most inhuman acts, which certainly qualified as crimes against the peace and security of mankind.

56. Although mercenarism was not so effective against stronger States, mercenaries could none the less attack a central Government and could even affect the destiny of a people. Mention had been made of recruitment and training, but some mercenaries were former army officers who needed no training. Unable to settle back into civilian life, they sought further adventure at the cost of many innocent victims. The crime of mercenarism should not be omitted from the draft code because of difficulties concerning recruitment and training.

57. As to whether it was appropriate for the Commission to consider the topic, his answer would be in the affirmative, provided the code was seen not as an attempt to legislate between victor and vanquished, but as a politically neutral instrument intended to benefit mankind. One reason for having a code was to prevent any recurrence of past atrocities. With the approach he had advocated, there was no reason why some of those responsible for wholesale and massive crimes in the past and who had still not been prosecuted should not be brought to book for their misdeeds in the future.

58. Mr. BENNOUNA said that he, too, had certain doubts about the Commission's approach, although he was convinced of the importance of its work and of the contribution made by the Special Rapporteur. Highly political and sensitive questions were at issue, in the face of which lawyers had some difficulty, since they liked precise definitions and wished to avoid the vagueness that sometimes surrounded political debate. Above all, when it came to a draft criminal code, they wished to provide the individual charged under that code with the maximum protection by means of tightly drawn definitions.

59. As he had already stated (2053rd meeting), intervention involved various interlocking concepts which it was difficult to isolate completely. The use of the words "of such gravity" in article 3 (g) of the 1974 Definition of Aggression²⁰ denoted that the General Assembly, in keeping with the spirit of the Charter, had wished to emphasize the gravity of aggression as a way of using force. From the legal standpoint, therefore, a distinction had to be drawn between Article 2, paragraph 4, of the Charter of the United Nations, which prohibited the use of force in general terms, and aggression of the kind that had to be recognized by the Security Council under Article 37 of the Charter, which was a manifestation of the most serious use of force. In other words, a minor use of force not amounting to aggression was allowable.

60. That raised the problem of intervention involving a less serious use of force than aggression. The Special Rapporteur stated in his sixth report that "military intervention, which is covered in the definition of aggression, will not be dealt with here" (A/CN.4/411, para. 12). Did that mean an entire military operation, or a military operation of a certain gravity? It had been said that indirect, as opposed to direct, aggression consisted of a few incursions or of more limited military measures not amounting to a full frontal attack on a State. Thus the concept of intervention could perhaps be confined to military acts that were not of sufficient gravity to

¹⁹ *Ibid.*

²⁰ See footnote 5 above.

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

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

The meeting rose at 1 p.m.

2055th MEETING

Thursday, 2 June 1988, at 10 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucouñas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

Draft Code of Crimes against the Peace and Security of Mankind¹ (continued) (A/CN.4/404,² A/CN.4/411,³ A/CN.4/L.420, sect. B, ILC(XL)/Conf.Room Doc.3 and Corr.1)

[Agenda item 5]

SIXTH REPORT OF THE SPECIAL RAPPORTEUR
(continued)

ARTICLE 11 (Acts constituting crimes against peace)⁴
(continued)

1. Mr. PAWLAK recalled that it was in 1947 that the General Assembly had referred the present topic to the

¹ The draft code adopted by the Commission at its sixth session, in 1954 (*Yearbook* . . . 1954, vol. II, pp. 151-152, document A/2693, para. 54), is reproduced in *Yearbook* . . . 1985, vol. II (Part Two), p. 8, para. 18.

² Reproduced in *Yearbook* . . . 1987, vol. II (Part One).

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

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

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

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

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

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

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

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

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