

Document:-
A/CN.4/SR.2059

Summary record of the 2059th 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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with the most serious crimes of all, namely crimes against the peace and security of mankind, intervention had to be characterized by its gravity as a crime against peace. Of the two alternatives of paragraph 3 of draft article 11, he preferred the second, which provided more substantial grounds for qualifying intervention as a crime against peace and stressed the threat or use of force. It should be remembered that article 2, paragraph (9), of the 1954 draft code contained a definition of intervention in which the use of force or of coercive measures was emphasized.

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

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

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

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

The meeting rose at 11.40 a.m.

²² See footnote 7 above.

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

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

2059th MEETING

Thursday, 9 June 1988, at 10 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

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

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

[Agenda item 5]

SIXTH REPORT OF THE SPECIAL RAPPORTEUR
(continued)

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

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

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

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

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

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

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

again, therefore, it was no mere chance that, from the moment of independence, the American States, being resolutely opposed to intervention, had framed the concept of non-intervention, which had turned into doctrine and had then become a legal norm formally recognized by American international law. Intervention, as an instrument in the policy of the major Powers which had reached its peak with colonial imperialism and as a weapon of aggression which only the powerful could brandish, was a crime that should be covered by the draft code, as, indeed, the Commission had already decided.

3. He emphasized the point because of the turn the discussion was taking. It sometimes seemed that, instead of trying to define the crimes in question as precisely as possible, the Commission was endeavouring to find formulae that lessened their gravity or even to commit them to the realm of historical fable. Yet, in the more than 40 years since the end of the Second World War, the world had seen a recurrence of the same crimes as those that had been committed during the war and that had been punished by the Nürnberg Tribunal. Those crimes were, moreover, being committed with explicit or tacit consent and, indeed, with the overt assistance of States which, given their responsibilities, should be the first to prevent such crimes. What was the reason for the international community's failure to act in the face of such a state of affairs? Must it resign itself to the fact that, even when it came to typically legal issues—the case in point being the definition of the crimes to be prevented and punished—politics would prevail? Must memory yield to oblivion? One of the reasons for the failure of the League of Nations was that it had been powerless to prevent the perpetration of the self-same crimes. He hoped the United Nations would not meet with the same fate.

4. The work done on the 1954 draft code had served little purpose from the standpoint of defining crimes against peace and mankind in a legally binding instrument, and he could not be optimistic about the present efforts so long as the code was not accompanied by peremptory norms providing for appropriate penalties and the establishment of a court empowered to apply those norms and ensure that they were respected.

5. It had been suggested that a distinction should be made between "lawful" intervention and "wrongful" intervention and the question had arisen as to the point at which "lawful" intervention became wrongful. In his view, there could be no such thing as "lawful" intervention, of any kind whatsoever. No expert in international law had managed to adduce any irrebuttable argument in support of the lawfulness of intervention, for intervention was always a violation of the right to independence or, in other words, of the sovereignty of a State. If there were certain cases when intervention had been accepted by international custom, it was because only acts of a political nature, not acts of a legal nature, had been taken into account on those occasions. Sovereignty, however, was the corner-stone of international law: how then was it possible to accept the existence of a right that would violate another right? That was precisely what a French author, Pradier-Fodéré, one of the rare experts in traditional international law

not to defend intervention in his time, had stated: there was no right of intervention, since there could not be a right that conflicted with another right. That principle was so absolute that, even where there was consent on the part of the injured State, it was possible to speak of intervention, since the essence of intervention was unrelated to the attitude of the victim State and stemmed from the will of the intervening State to impose its authority by coercion.

6. Reference had also been made to collective intervention, as provided for in the Charter of the United Nations and the Charter of OAS (see A/CN.4/411, para. 24). The condemnation of intervention as a crime against the peace and security of mankind was, however, directed at unilateral action by a State or a group of States that wanted to intervene in the internal or foreign policy of another State, and certainly not at collective action by the international community as a sanction for an act of rebellion against international law. Such collective action was not incompatible either with the principle of the legal equality of States or with that of their sovereignty. That was why article 22 of the OAS Charter did not condemn collective action carried out with a view to "the maintenance of peace and security". On the other hand, international law did condemn intervention aimed at replacing national sovereignty by an alien sovereignty.

7. He noted that Article 2, paragraph 7, of the Charter of the United Nations, which set certain limits to the prerogatives, authority and powers conferred on the United Nations *vis-à-vis* the States of which it was composed, stipulated that the Organization could not "intervene in matters which are essentially within the domestic jurisdiction of any State" and that nothing contained in the Charter could "require the Members to submit such matters to settlement under the present Charter". Accordingly, intervention in internal affairs was authorized only where those affairs did not fall exclusively within domestic jurisdiction and, in external affairs, only as expressly provided for in the Charter. The provisions in question did not mean that collective intervention was lawful in every case.

8. The Seventh International Conference of American States, held at Montevideo in 1933, had marked an historic point in relations between the States of America, for it was from the time of that Conference that the Government of the United States of America had endeavoured to change its policy towards Latin America, under the guidance of President Roosevelt. Not only had United States jurists not opposed the idea of embodying the principle of non-intervention as a binding rule of law in a legal instrument—as they had done at the Sixth International Conference of American States, held at Havana in 1928—but the Secretary of State himself, Cordell Hull, had said that no country had cause to fear intervention by the United States during President Roosevelt's term of office. That had been the start of the policy of good-neighbourliness, the principle of which was to be embodied in the Charter of the United Nations. The Conference had thus been able to adopt the Convention on Rights and Duties of States,⁵

⁵ League of Nations, *Treaty Series*, vol. CLXV, p. 19.

article 8 of which provided that no State had the right to intervene in the internal or external affairs of another State. The Conference had approved the following wording defining intervention: "Any act committed by a State by means of comminatory diplomatic representations, armed force or any other means of coercion with the object of asserting its will over that of another State and, in general, any direct or indirect interference in the affairs of another State, for whatever reason, shall constitute intervention and, consequently, a breach of international law." In a clear and forthright statement, Cordell Hull, upholding the new policy of good-neighbourliness, had stated that one of the principles to be followed by the United States in its relations with Latin America should be strict adherence to the principle of non-intervention.

9. In the interests of the further strengthening of that principle, the Inter-American Conference for the Maintenance of Peace, held at Buenos Aires in 1936, had adopted the Additional Protocol relative to Non-Intervention.⁶ In article I of the Protocol, the States parties had declared inadmissible any intervention, direct or indirect, by any of them and for whatever reason, in the internal or external affairs of the others: any violation of the provisions of that article would give rise to mutual consultations with a view to finding means of peaceful settlement. Under the terms of that Protocol, the American international community had thus proclaimed, among other principles, the condemnation of intervention by any State in the internal or external affairs of another. Also, under article II of the Protocol, any disagreement as to interpretation which it had not been possible to settle through diplomatic channels would be submitted to a conciliation procedure, or to arbitration or judicial settlement.

10. That trend, which had begun in 1826 with the Congress convened by Bolívar in Panama, had culminated in the Ninth International Conference of American States, held at Bogotá in 1948, at which the principle of non-intervention had been definitively laid down as a rule of American international law in the Charter of OAS adopted on that occasion (arts. 18-22). As defined in that Charter, the principle of non-intervention prohibited not only the use of armed force, but also any other form of interference or attempted threat against the personality of a State (art. 18). It further prohibited the use of coercive measures of an economic or political character to obtain advantages of any kind from a State (art. 19). The OAS Charter also referred directly or indirectly to non-intervention both in its preamble and in chapters I to III on the nature and purposes of the Organization, on principles and above all on the fundamental rights and duties of States. The principle of non-intervention and the condemnation of intervention therefore had to be regarded as rules of international law on the American continent.

11. Moreover, in a resolution adopted on 10 September 1959, the OAS Council had requested the Inter-American Juridical Committee to prepare an instrument listing cases of intervention. The Commission

should take account of that work in preparing the relevant provisions of the draft code.

12. He had dwelt at length on the subject of intervention not only because it was of great importance for the American countries, but also because it would be difficult to accept a universal instrument that was less comprehensive than the instruments which had already been adopted by the American States and whose provisions were now in force on the America continent.

13. Turning to the text of draft article 11 submitted by the Special Rapporteur in his sixth report (A/CN.4/411), he said that he, too, would prefer a separate article to be devoted to each of the crimes, or at least to the most serious of them.

14. Aggression (para. 1), like intervention, was of capital importance and those two concepts had to be defined exactly. In the case of aggression, the parallel with the 1974 Definition of Aggression⁷ had to be maintained. In the light of that Definition, it might be enough to indicate in the draft code that the commission by the authorities of a State of an act of aggression constituted a crime. At the same time, however, the Commission must remember that its objective was to draft a code that was applicable to individuals, not to States, even though the acts in question could normally not be committed without the support of a State. He was not certain that acts constituting aggression had to be spelled out: as he had just explained, the Latin-American countries had decided to do so in a separate legal instrument. In any event, a list of such acts could by no means be exhaustive.

15. In paragraph 1 (b), the words "regardless of a declaration of war" were superfluous and should be deleted, since war had been outlawed by the Charter of the United Nations.

16. Intervention (para. 3) should be more fully defined, as in the OAS Charter, which characterized certain acts that did not involve the use of armed force as intervention.

17. With regard to terrorism, it must be borne in mind that the draft code was meant to deal with State terrorism: acts of terrorism committed by individuals who had no link with a State were already punishable under ordinary law. But defining the crime of terrorism was a sensitive matter and agreement had to be reached on acts which were deemed criminal by all. The Commission must demonstrate great restraint and settle on a very general definition, drawing as much as possible from the work on terrorism being done by the United Nations, which was designed to identify the root causes of the phenomenon. As Mr. Reuter (2055th meeting) had pointed out, terrorism was often merely the last resort of persons who had been denied the most fundamental rights. In the colonial countries, however, the entire State apparatus was involved in the struggle against those who were branded as terrorists, but who were in fact victims fighting to achieve their country's independence and to rout those who occupied it: in such

⁶ *Ibid.*, vol. CLXXXVIII, p. 31.

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

cases, it was the State itself which committed the crime of terrorism.

18. Some held that colonialism was a thing of the past and that the forms of alien domination referred to in paragraph 1 of the Declaration on the Granting of Independence to Colonial Countries and Peoples⁸ had nothing to do with colonialism, which no longer existed. The truth was that the major colonial Powers had always managed to disguise situations which were actually colonial ones under other names. In 1923, one Asian Power had passed off what was really a colony as an independent empire. Even now, there was a State that was nothing more than a colony on the American continent—the “continent of liberty”. The two alternatives of paragraph 6 of article 11 proposed by the Special Rapporteur should be combined and efforts should be made to use the definition of colonialism contained in article 19 of part 1 of the draft articles on State responsibility⁹ and the one set out in the aforementioned Declaration, in order to show clearly that what was being condemned was colonialism and all the elements of subjugation, domination and exploitation implicit in it.

19. The concept of mercenarism was also extremely ambiguous. In paragraph 7 (c), for example, a mercenary was defined as any person who “is promised, by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar rank and functions in the armed forces of that party”. There could, however, be mercenaries who were members of the armed forces of one State, although they were fighting in the territory of another. It was therefore necessary to specify what was meant by such compensation, or rather what criteria should be used to decide whether such compensation constituted a crime. Paragraph 7 (d) was equally ambiguous: were persons who had not so long ago euphemistically been called “advisers” and who were armed, paid and maintained by States not parties to a conflict mercenaries? The same was true of paragraph 7 (e): were persons who were members not of the armed forces of a party to a conflict, but of those of another country, and who were made available to an invasion army, mercenaries? As Mr. Njenga (2057th meeting) had pointed out, a great deal of caution had to be exercised in that regard, but there was no doubt that mercenarism should be referred to as a crime in the draft code. It could be left to the Special Rapporteur and the Drafting Committee to find wording that would take account of all the concerns expressed.

20. The rich discussion over the past few days had revealed the importance of the Commission’s study of the present topic, which was, as Mr. Reuter had said, more political than legal. For all that, the Commission could not evade the responsibility entrusted to it by the General Assembly. It should, rather, take advantage of the opportunity to carry out a considered, in-depth study of the question, in line with the example set by the Special Rapporteur, for the purpose of submitting to the General Assembly a draft legal instrument, which might or might not be a code and which would help to

prevent and punish crimes that now went unpunished for lack of political will on the part of States, particularly those which bore the main responsibility for maintaining peace.

21. Mr. BEESLEY said that he would consider draft article 11 in the light of the four criteria he had listed in his earlier statement (2055th meeting): (a) would the text serve the purpose of the draft code, which was, as he saw it, to make a constructive contribution to the system of collective security under the Charter of the United Nations? (b) must there have been an act of State in order for the provisions of the code to be applicable? (c) must there have been an actual breach of the peace or use of force for an offence to be deemed a crime against peace? (d) in the case of aggression, must there have been a prior finding by the Security Council that an act of aggression had been committed in order for the code to apply?

22. The Special Rapporteur had given pride of place in article 11 to the crime of aggression and he personally fully endorsed that decision, because, on the basis of the first of the above-mentioned criteria, namely a constructive contribution to the Charter system of collective security, it was obvious that a draft code of crimes against peace had to cover the gravest of all crimes, which was the act of aggression. Moreover, if the code was to have the desired deterrent effect, it had to identify as precisely as possible both punishable acts and punishable persons and it had to provide for determination by a forum that was accepted by the international community as legitimate—in other words, as lawful and authoritative.

23. While it was true that the need to include a definition of aggression in the draft code had not been disputed during the discussion, views differed with regard to methodology. Would it be enough, as Mr. Calero Rodrigues (2053rd meeting) had suggested, to list the acts of aggression and leave it to the judge to determine whether or not to take account, either in whole or in part, of the 1974 Definition of Aggression?¹⁰ Or should there be an abridged definition—a *chapeau*—that would repeat part of the 1974 Definition? The second of those methods could give rise to problems of interpretation and, in particular, the problem of the weight to be given to the elements of the 1974 Definition which would not be repeated in the definition given in the code. The method proposed by the Special Rapporteur, namely to repeat part of the 1974 Definition and to add the words “as set out in this definition” (para. 1 (a) (i)), was juridically sound, but it had the drawback of being selective.

24. Theoretically, another method would be to incorporate the 1974 Definition by reference; but that did not seem advisable. Since that Definition had been the outcome of nearly 50 years of discussions and efforts to achieve a balanced formulation and since the topic was a politically sensitive one, he believed that it would be preferable to reproduce that Definition in its entirety: that course would offer the advantage of avoiding the problems of interpretation that would result from poss-

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

⁹ See 2053rd meeting, footnote 17.

¹⁰ See footnote 7 above.

ible differences between the 1974 Definition and the one included in the code. He nevertheless appreciated the arguments put forward during the debate, particularly by Mr. Calero Rodrigues, and he might be able to accept some other solution. The most important point to bear in mind was that both the 1974 Definition and the one now proposed by the Special Rapporteur made it clear that the list of acts of aggression was not exhaustive: the Commission was therefore completely free to add other acts to the list.

25. The second question, namely the existence of an act of State, was a very sensitive one. The 1974 Definition of Aggression obviously applied to relations between States. Similarly, the reference in the Charter to the suppression of "acts of aggression" (Art. 1, para. 1) meant acts of States. As Mr. Graefrath and Mr. Reuter (2055th meeting) had pointed out, however, the Nürnberg Tribunal had found individuals guilty and there were, moreover, offences of a new kind that were committed by individuals acting independently of any State. The possibility that an act of aggression might be committed by individuals in the absence of any act of State should therefore not be ruled out. Yet it was ruled out in paragraph 1 (a) (i) of draft article 11. If the Commission decided that aggression could take place independently of an act of State, one alternative would be to amend the 1974 Definition by deleting the words "by a State" wherever they occurred, or by adding to the list of acts of aggression some acts that were not acts of State.

26. A second, and preferable, alternative would be simply to delete the words "by the authorities of a State" in the introductory clause of paragraph 1 of draft article 11, which tended to prejudge the issue. The retention of the many references to acts of State and the fact that the code obviously applied to individuals would suffice to ensure that individuals who were "authorities of a State" would be covered by the code. The deletion of the words "by the authorities of a State" would also ensure that the code applied to other individuals, such as Krupp—a case referred to by other members—or arms merchants and drug traffickers, if it was established that they had committed acts of aggression. Admittedly, those were questions of legal policy, which Governments would have to decide in due course. It was, however, important that they should be fully aware of the consequences of the choices they made.

27. The third question was whether an actual breach of the peace or use of force had to have occurred in order for the code to be applicable. In that connection, it should be noted that all the examples of acts of aggression listed in article 3 of the 1974 Definition did entail the use of armed forces or, in one case, of armed bands or groups. Since it was reasonable to consider that the use of armed forces was the same as the use of force, that third question had to be answered in the affirmative.

28. His view was that, even though preparation of aggression might be difficult to prove, it should be included in the draft code, first, because it had been explicitly referred to in the Charter of the Nürnberg Tribunal¹¹ (art. 6 (a)), and secondly—and perhaps most

importantly—because it would, if accompanied by sufficiently credible threats, serve the same purpose as the use of force. According to Article 1 of the Charter of the United Nations, the "removal of threats to the peace" was, like "the suppression of acts of aggression or other breaches of the peace", one of the main purposes of the United Nations, and that alone was enough to warrant including threats of aggression in the draft code. Even if the Commission did not take a decision on that important matter of principle, the draft code should offer States a clear choice.

29. The fourth question was whether there had to be a prior finding of aggression by the Security Council before the code could be invoked against an individual for an alleged act of aggression. The 1974 Definition of Aggression (art. 4) recognized the authority of the Security Council to determine the existence of an act of aggression and, for some members of the Commission, that seemed to dispose of the matter. He nevertheless wondered whether it might not be possible to prosecute an individual under the code even if the Security Council had not found that an act of aggression had been committed by a State or if the Council had been prevented from doing so by the veto of a permanent member. Since the Commission's aim was to draft a code that would be applicable to all, the guiding principle on that particular point had to be the sovereign equality of States. If the code were to allow an individual to be prosecuted even in the absence of a prior finding by the Security Council of an act of aggression by the State on whose behalf that individual had acted, it would fill a gap in the system of collective security and have a deterrent effect. The Commission should therefore not rule out that possibility, on which States would have to decide.

30. Of course, if States agreed to take that possibility into account, it would then be necessary to determine which forum would have jurisdiction to prosecute individuals under the code. Since it was unlikely that States would agree to recognize the jurisdiction of national courts—a solution that would appear to derive from the concept of "universal jurisdiction"—there would have to be an international criminal court offering the necessary guarantees of authority, independence and impartiality. In that connection, he recalled that, at its second session, in 1950, the Commission had, in response to General Assembly resolution 260 B (III) of 9 December 1948, arrived at the conclusion that the establishment of an international judicial organ for the trial of persons charged with genocide or other crimes was both desirable and possible.¹² At the thirty-ninth session, he had made a proposal which had attracted some support and had related to the idea of mixed jurisdiction consisting of judges not only from the interested State, but also from the State of which the accused was a national and from third States.¹³ The Commission would have to consider that proposal, and although there would perhaps be legal and jurisdictional problems to overcome, it was encouraging to note that the proposal had received support in the Sixth Commit-

¹² *Yearbook . . . 1950*, vol. II, p. 379, document A/1316, para. 140.

¹³ See *Yearbook . . . 1987*, vol. I, p. 19, 1994th meeting, para. 49, and p. 57, 2000th meeting, paras. 53-54.

¹¹ See 2053rd meeting, footnote 6.

tee of the General Assembly and in the Commission during the present debate.

31. With regard to a question of methodology raised by several members and by the Special Rapporteur, he said that he would prefer each act of aggression covered by the draft code to be dealt with in a separate article. If the Commission adopted that approach, however, it would be departing from the 1974 Definition of Aggression, which listed the various acts of aggression in separate subparagraphs of article 3; that might give rise to some problems of interpretation. He would also like the explanatory note in paragraph 1 (a) (ii) of draft article 11 to be included in the commentary rather than in the text; the same comment would apply to paragraph 1 (c) if the 1974 Definition was reproduced in full in the draft code.

32. He had already expressed reservations with regard to the distinction the Commission was trying to draw between lawful intervention and wrongful intervention. As he saw it, the term "intervention" should be used in the draft code as a "term of art", applying only to wrongful acts and not to various legitimate actions between States. A protest note, for example, was not wrongful intervention, even if it was designed to exert pressure. The reply was not so clear-cut in the case of measures relating to trade, but it would be noted that, in the case concerning *Military and Paramilitary Activities in and against Nicaragua* (see A/CN.4/411, para. 17), the ICJ had found that economic pressure did not constitute intervention. With regard to aid or the cessation of aid, a question which had been raised by some members of the Commission, the ICJ had also decided in the same case that humanitarian aid was not intervention. The Commission should therefore focus on acts of some gravity or, in other words, primarily on acts intended to affect adversely the political independence or territorial integrity of a State, whether by destabilizing its Government or by some other means. Although the Special Rapporteur had been right to refer to "all forms of pressure of a coercive nature" (*ibid.*, para. 20), he might be going too far, especially in the light of the recent judgment of the ICJ, in suggesting that all forms of "intervention" would be covered, unless, of course, that term were defined very strictly. That was why he himself preferred the term "intervention" to "interference" and why he was in favour of the second alternative proposed by the Special Rapporteur for paragraph 3 of article 11. The word "tolerating" in subparagraph (i) of that second alternative would require further consideration and, in the introductory clause, the words "by the authorities of a State" should be deleted so that the paragraph would take account of the increasing incidence of modern forms of intervention committed by individuals, not by States.

33. Referring to the definition of "terrorist acts" in the second alternative of paragraph 3 (subpara. (a)), he said that, in English, the use of the term "state" in two entirely different senses was unfortunate, even if it was only a matter of form. The words "a state of terror" might therefore be replaced by "a condition of terror" or some similar expression. The references to a "head of State" and to "public property" in the list of terrorist acts (subpara. (b)) also had an oddly old-fashioned ring,

since, at present, terrorist acts were more often directed against ordinary citizens and private property. Some additional wording along those lines would be necessary.

34. The problem of international terrorism was as old as international law itself and, in that connection, he read out several passages from the first three sections of chapter III of book III of Grotius's *De Jure Belli ac Pacis*,* which might not provide any answers but could shed some light on the problems the Commission was discussing, since those passages were still entirely relevant. Those passages described how, even in antiquity, States had found the distinction between "pirates and brigands" and other States to be a difficult one. The distinction was in part subjective, so that Pomponius had said: "Enemies are those who in the name of the State declare war upon us, or upon whom we in the name of the State declare war; others are brigands and robbers." It was also in part moral, for, according to Grotius, "a gathering of pirates and brigands is not a State", because "pirates and brigands are banded together for wrongdoing". Yet States, too, could act wrongfully. Thus: "The Illyrians without distinction were accustomed to plunder on the sea, yet a triumph was celebrated over them; Pompey celebrated no triumph over the pirates." Most relevant of all to the Commission's work, Grotius had explained that a group of pirates and brigands could be transformed into a State. In the twentieth century, as in the seventeenth, today's terrorist might be tomorrow's statesman, or vice versa.

35. The definition of terrorism gave rise to some of the most complex political, moral and legal problems with which the Commission had to deal. The wisest course might be to leave it to the competent court to determine which acts of terrorism were covered by the code, instead of providing for exceptions whose formulation would be extremely difficult if they were to stand the test of time. How could a distinction be made between individuals and groups, however noble their motives might be, while some acts were legitimated and others were condemned? It would be better simply to formulate an objective and legally sound definition of terrorism. The judge would then rule on the basis of the facts during a fair trial and in the light of any mitigating circumstances or grounds of exoneration that might exist in each particular case.

36. The members of the Commission appeared to approach the question of colonialism from different points of view according to whether or not they came from countries that had a colonial past. He tended to favour the second alternative of paragraph 6 of draft article 11. He also supported Mr. Hayes's suggestion (2058th meeting) that the word "colonial" should be added to that provision.

37. Although an *Ad Hoc* Committee of the General Assembly was working on the question of mercenarism, the Commission could neither abdicate nor delegate its responsibilities. According to its mandate, it had to continue its consideration of that question, but wait until

* English translation by F. W. Kelsey (Oxford, Clarendon Press, 1925).

the *Ad Hoc* Committee had completed its work, the results of which it might have to take into account. He noted that, in the 1974 Definition of Aggression, "the sending by or on behalf of a State of . . . mercenaries, [who] carry out acts of armed force against another State" (art. 3 (g)) was only one form of aggression; but the Commission now intended to make it a separate crime, something that was not necessarily justified. In the modern world, there were several forms of mercenarism, some of which had become a real scourge for young and fragile States. In addition, the wording proposed by the Special Rapporteur in paragraph 7 of article 11 seemed to focus on the motivation of mercenaries and not on the acts they committed; that was a departure from the rest of the draft. Lastly, paragraph 7 (b) stated that a mercenary was any person who "does, in fact, take a direct part in the hostilities". That raised the question whether within the definition there would have to be a pre-existing conflict; for example, would it cover the case of a drug baron or politically motivated billionaire ordering the mining of the port installations of a State?

38. Mr. SEPÚLVEDA GUTIÉRREZ congratulated the Special Rapporteur on his thorough analysis and on the exactitude of his sixth report (A/CN.4/411). The material the report contained would provide guidelines for the Commission's consideration of a changing topic that was difficult to grasp.

39. The first major problem raised by the report was one of methodology. In his view, the Commission had to follow the technique used in the penal codes of most States, first characterizing each of the acts to be covered and then giving a precise definition of their perpetrators. That would mean that the Commission had to set forth the material or substantive elements of the wrongful act—in other words, the *corpus delicti*—define the criteria for the attribution of responsibility, and then, where feasible, provide for possible exceptions. From that point of view, it might be asked whether a framework article on aggression and its variants was necessary or whether it might not be better to divide it up and have a separate provision for each type of crime, it being understood that the acts to be covered would be linked together by a *chapeau*. There was, however, no denying the fact that the solution proposed by the Special Rapporteur had its appeal.

40. Once the offence had been established, it was necessary to designate the persons, groups or State agents to whom it could be attributed. It was at that stage that the extent of the responsibility of the State came into the picture, either because the State had directly committed the crime or because it had done nothing to prevent it. The problem was not an easy one, but several definitions adopted by various bodies were already available and the Special Rapporteur had explicitly referred to them.

41. Turning specifically to the sixth report, he said that, although a time-honoured definition of aggression did exist, it could not be used for the purpose of attributing individual responsibility. Moreover, as the report clearly indicated, some forms of aggression should be given special treatment: that was the case of terrorism, preparation of aggression, and possibly com-

plicity in aggression, a delicate concept to which the Commission would have to give further consideration. The Special Rapporteur was proposing a definition of aggression similar to the 1974 Definition of Aggression¹⁴ and it was the latter Definition that should be taken as a basis for that part of the draft code, although it might have to be adapted to the acts of the individuals or groups that were ultimately responsible for acts of aggression.

42. Threat of aggression should be defined more precisely, in order to determine the scope of the criminal responsibility of the individuals or groups that initiated and carried out the preparations, but it must not be forgotten that there were many different forms of aggression, some of which were hidden or disguised: a veiled threat might be as decisive as an act of force. The closest attention thus had to be given to the subtle forms that aggression and preparation of aggression could take.

43. The second alternative proposed by the Special Rapporteur for paragraph 3 of draft article 11, on intervention, seemed to be the better one, although the subject was extremely difficult to grasp. Latin-American jurists had endeavoured to work out a precise definition of that type of act in the light of the continent's particular circumstances and the eminent Argentine author, Carlos Calvo, had produced the first definition of intervention, which he had approached from the viewpoint of the principle of non-intervention. In 1928, the Latin-American countries had attempted to develop that concept and those efforts had led to the definition contained in the Charter of OAS (art. 18). Since that text still had not covered all cases, those jurists had subsequently sought, first in the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty¹⁵ and then in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States,¹⁶ to obtain recognition for the universality of the principle of non-intervention, which lay at the heart of the inter-American regional system. It was, however, not enough simply to cite legal writings, even if they had become universally accepted. There were hidden forms of intervention in the modern world that made it extremely difficult to attribute responsibility to State agents, individuals or groups. In his view, the concept of intervention therefore had to be developed further by the Commission.

44. The Special Rapporteur had made terrorism one of the forms of intervention. That was another phenomenon that was difficult to grasp and one concerning which it was not enough simply to refer to legal writings.

45. As to paragraphs 4 and 5 of article 11, which dealt with breaches of States' treaty obligations, he had nothing to add to the thorough statement made by Mr. Reuter (2056th meeting).

¹⁴ See footnote 7 above.

¹⁵ General Assembly resolution 2131 (XX) of 21 December 1965.

¹⁶ General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

46. With regard to colonial domination, the second alternative of paragraph 6 appeared, for the time being, to be the more interesting one, but it was obvious that the Commission had not exhausted the subject and that it would have to continue its discussion before taking a decision.

47. Mercenarism (para. 7) now seemed to have a kind of romantic quality about it: mercenaries took care of their own publicity and did not seem to have any trouble finding a steady supply of new recruits. An *Ad Hoc* Committee of the General Assembly was currently looking into the problem, but that did not mean that the Commission should interrupt its work, even if there was a risk that the two bodies might not reach the same conclusions.

48. Finally, he believed that the topic had been discussed sufficiently and that draft article 11 could be referred to the Drafting Committee, subject to further consideration in plenary.

49. Mr. FRANCIS said that the problem of the drafting of the code was primarily one of distinguishing between the responsibility of individuals and that of States. The judgment of the Nürnberg Tribunal¹⁷ had laid down two basic principles: first, that a crime under international law could not be committed by an abstract entity, such as a State, and that it was always attributable to an individual; and secondly, that it was by punishing the individual that international law should be applied. The Commission had taken those basic principles even further, particularly in part 1 of the draft articles on State responsibility,¹⁸ article 19 of which made it possible to hold a State responsible. It would, however, be an illusion to try to punish States and, in any case, that task was not part of the Commission's current mandate. The problem was thus that of the link between individual responsibility and State responsibility.

50. In that connection, two related steps had to be taken by the Commission. The first was to include in part II (General principles) of chapter I of the draft a new principle derived from article 19 of the draft articles on State responsibility, which now overrode the first principle he had referred to as being laid down by the Nürnberg judgment. The second step was to provide a related, substantive provision in the draft articles, indicating that wherever in the code criminal responsibility was, or could be, attributed to a State, such responsibility was, for the purposes of the code, attributable to the appropriate individuals in that State.

51. Mr. BEESLEY recalled that he had suggested the deletion of the words "by the authorities of a State" in the introductory clause of paragraph 1 of draft article 11 on the understanding that they would continue to appear in the rest of the text. The wording he was proposing, namely "the commission of an act of aggression", did not indicate the perpetrator of the act and would offer the advantage of applying both to individuals and to States.

The meeting rose at 1 p.m.

¹⁷ See 2056th meeting, footnote 22.

¹⁸ See 2053rd meeting, footnote 17.

2060th MEETING

Friday, 10 June 1988, at 10 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

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

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

[Agenda item 5]

SIXTH REPORT OF THE SPECIAL RAPPORTEUR
(continued)

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

1. Mr. BARBOZA, referring to annexation as a crime of aggression, noted that the 1954 draft code made annexation a separate crime when it was committed by means of acts contrary to international law (art. 2 (8)). Perhaps finding that definition too broad, the Special Rapporteur had limited the reference in paragraph 1 (b) (i) of draft article 11 to annexation by the use of force, as in the 1974 Definition of Aggression⁵ (art. 3 (a)). But as Mr. Roucounas (2057th meeting) had indicated, another possibility should be provided for, namely annexation by threat of the use of force, which had occurred throughout history. For example, if the governor of a small island, badly protected by a handful of soldiers, yielded his territory in the presence of a warship of a major Power, and even if there had been no gun-fire, it could hardly be said that there had been no use of force. If annexation in such a case was not considered to be a crime, the definition in paragraph 1 (b) (i) of draft article 11 was too narrow.

2. Another point raised by Mr. Roucounas concerned the establishment of foreign settlements in a territory, resulting in its domination. He agreed that, because of the very harmful consequences for the life of such a territory, such cases should be included in the draft code. Most of the conflicts in the world were the result of foreign settlements established by force; although a few

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.