

Document:-
A/CN.4/SR.2060

Summary record of the 2060th 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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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.

such cases had occurred in Europe, most of them related to colonial territories.

3. Regarding intervention, he agreed with Mr. Díaz González (2059th meeting) that the principle of non-intervention had originated and evolved in South America. The use of a general definition in the code, however, even that of the Charter of OAS (see A/CN.4/411, para. 24), might lead to the characterization of intervention as a crime, rather than simply as an internationally wrongful act. It should also be borne in mind that many cases of intervention, throughout the history of international relations in Latin America, would be considered as cases of aggression under the draft code, since they had involved the use of armed force.

4. Referring to the two alternatives of paragraph 3 of draft article 11, he noted that the second was rather vague, in that it did not indicate exactly which acts were included. Furthermore, there were other forms of intervention: in particular, for reasons of methodology, the sending of armed bands, dealt with in paragraph 1 (b) (vii), should be included under intervention rather than under aggression. All the other cases mentioned in paragraph 1 (b) involved the use of the regular armed forces of a State. He would not press the point, however, for he did not wish to lead the Commission away from the 1974 Definition of Aggression, which all members agreed should be the basis for paragraph 1.

5. For terrorism, the technique of providing a general definition followed by concrete cases was correct. He agreed that the code should cover only State terrorism, since the purpose of the code was the protection of international, not internal, peace. Terrorism by private individuals or non-State entities should also be condemned, but perhaps in another chapter of the code or another international instrument. The same applied to mercenarism, which was also being dealt with by an *Ad Hoc* Committee of the General Assembly.

6. Paragraph 4 of article 11 provided an additional protection against aggression, and should be maintained in its existing form.

7. The two alternatives of paragraph 6 were not incompatible and could form a single provision, which might include other cases of the subjugation or exploitation of a people by force. He would be inclined to retain the expression "colonial domination", as being the most descriptive of such a situation.

8. Mr. MAHIU thanked the Special Rapporteur for his concise and dense sixth report (A/CN.4/411), which had been enriched by discussions in the Commission and in the Sixth Committee of the General Assembly. At the present stage of identification and enumeration of crimes against peace, he supported the Special Rapporteur's approach, which was to rely on existing texts that the Commission could use or adapt in drafting the articles. It should be borne in mind, however, that some existing texts needed to be updated and reviewed—which could be a task more delicate than their original elaboration—and that the goals of the code often differed from those of existing instruments. He would provide specific examples later.

9. As to the crimes themselves, he would like first to respond to the Special Rapporteur's invitation in paragraph 6 of his report. The offence of preparation of aggression raised certain doubts, because the code should be concerned with acts already committed; yet aggression should be discouraged before the fact. The difficulty lay in identifying the preparation of aggression. Thus, if preparation of aggression was to be retained as a crime, additional elements, such as the notion of "imminence", should be found to qualify it. If the definition was too flexible, it might lead to the exact opposite of what the Commission desired: a State might accuse another State of preparation of aggression simply to justify its own measures of aggression against that State. There had been examples of such conduct recently.

10. Annexation, as the Special Rapporteur pointed out (*ibid.*, para. 9), was mentioned in both the 1954 draft code and the 1974 Definition of Aggression.⁶ There was a difference, however, in that the Definition of Aggression (art. 3 (a)) referred to annexation by the use of force, while the 1954 draft code (art. 2 (8)) referred to annexation by means of acts contrary to international law. The 1954 formulation was thus much broader, and brought annexation quite close to intervention. It must therefore be determined whether all types of annexation were to be treated as crimes against peace, or only annexation by the use of force, and whether annexation should be treated as a crime separate from aggression or linked to it. He believed that any annexation, whatever its modalities, should be treated as a crime against peace distinct from the other crimes; he was therefore in favour of distinguishing annexation from aggression, although they did sometimes coincide. The sending of armed bands was a form of aggression and should not be separated from it.

11. Turning to the text of draft article 11, he supported the Special Rapporteur's decision not to include a general definition of the crimes in question, as he had done in his third report.⁷ The Commission should avoid excessively general definitions in the area of criminal law.

12. Paragraph 1 of draft article 11 was based on the 1974 Definition of Aggression, omitting certain elements which the Special Rapporteur considered to be outside the purview of the draft code, in particular those relating to the intervention of the Security Council. That raised a problem going beyond the simple matter of definition, namely the relationship between the Security Council and any international criminal court that might be established. A similar issue had already arisen in connection with the relationship between the ICJ and the Security Council. The fact that a matter fell within the purview of two organs at the same time did not, in principle, prevent each one from exercising its function. The international criminal court would have an exclusively juridical function, which the Security Council did not have. The juridical function of the ICJ was recognized in Article 36, paragraph 3, of the

⁶ See footnote 5 above.

⁷ See *Yearbook* . . . 1985, vol. II (Part One), p. 81, document A/CN.4/387 (art. 3).

Charter of the United Nations and in the case-law of the Court itself, in particular in its important judgment of 26 November 1984 in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Jurisdiction and Admissibility)*, in which the Court had stated:

... The Council has functions of a political nature assigned to it, whereas the Court exercises purely juridical functions. Both organs can therefore perform their separate but complementary functions with respect to the same events.⁸

That dictum might apply to a future international criminal court. In any event, paragraph 1 of article 11 could be satisfactorily drafted only if the role of each organ empowered to deal with the crime of aggression was clearly defined.

13. The link between draft article 11 and draft article 4 (*Aut dedere aut punire*), as submitted by the Special Rapporteur in his fifth report (A/CN.4/404, sect. II), was obvious. He did not believe that the crime of aggression could be left to the jurisdiction of a national court. Whatever members' doubts might be, the establishment of an international criminal court was indispensable. Perhaps the code should make a distinction between crimes that could be tried by national courts and those that could be dealt with only by an international organ. As to the relationship between the international criminal court and the Security Council, it was true that, if a matter was referred to the court after the Security Council had reached a decision on it, the position of the court would be difficult to determine. That was a problem the Commission would have to solve at a later stage. He agreed with other speakers that only those elements of the Definition of Aggression that related to the strict definition of the crime should be retained in paragraph 1 of article 11. Other elements, such as the relationship with the Security Council, should be dealt with at a later stage.

14. Paragraph 2 of article 11 dealt with the threat of aggression, a subject on which he had already expressed his views at the Commission's thirty-seventh session, in 1985.⁹ He found the text proposed by the Special Rapporteur acceptable, subject to some clarifications; in particular, it was important not to allow any confusion between an actual threat of aggression and mere verbal excesses. There was also the delicate problem of proof, as in the case of preparation of aggression. It was essential to avoid a loosely drafted definition which could serve to justify aggression in the guise of counter-measures against an alleged threat. Some useful guidance could be derived from the ICJ's judgment of 27 June 1986 in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Merits)*, in which the Court had dwelt on the distinction between aggression and the threat of aggression, and between the latter and intervention.¹⁰

15. For paragraph 3 of article 11, dealing with intervention, the Special Rapporteur had proposed two alternative texts. The first was much too general and

vague to serve as a basis for the Commission's work. The second sentence of that alternative, which defined the unduly broad term "interference", did not establish the principle with sufficient precision. The proposed wording would make for uncertainty in interpretation. He therefore preferred the second alternative, but suggested that its wording should be tightened. The Commission should be guided by the eighth and ninth paragraphs of the first principle of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States,¹¹ which read:

Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State.

Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.

He was not, of course, suggesting that the whole of that passage be used, merely that it would provide useful elements for clarifying the notion of intervention, as would the 1986 judgment of the ICJ to which he had already referred.

16. On the subject of terrorism, the Special Rapporteur had relied for his definition on the 1937 Convention for the Prevention and Punishment of Terrorism.¹² The purpose of that Convention, however, was not the same as that of the draft code. The 1937 Convention was directed at all acts of terrorism committed by individuals, whether politically motivated or not and irrespective of the involvement of States. The draft code was intended to deal only with acts of terrorism which constituted crimes against the peace and security of mankind. Since the 1937 Convention was intended to cover a much wider field, the provisions derived from it were inadequate. Thus, in the second alternative of paragraph 3 of draft article 11, subparagraph (b) ii referred to "acts calculated to destroy or damage public property". It would be going too far to treat damage to public property caused within the offender's own country as a crime against the peace and security of mankind. Clearly, an international aspect was essential for an act to constitute a crime under the draft code.

17. There was some duplication between subparagraphs (b) i and (b) iii. The persons mentioned in subparagraph (b) iii were also "charged with public functions", and hence were covered by subparagraph (b) i. The unlawful seizure of aircraft and the taking of hostages were dealt with in specific international instruments and did not always affect international peace and security.

18. On paragraphs 4 and 5, dealing with breaches of States' treaty obligations, he supported the Special Rapporteur's proposed text, subject to drafting improvements.

19. With regard to paragraph 6, on colonialism, for which the Special Rapporteur had submitted two alter-

⁸ *I.C.J. Reports 1984*, p. 435, para. 95.

⁹ *Yearbook . . . 1985*, vol. I, p. 31, 1882nd meeting, para. 14.

¹⁰ *I.C.J. Reports 1986*, pp. 103-104, para. 195, and pp. 125-126, paras. 244-245.

¹¹ General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

¹² See 2054th meeting, footnote 7.

natives, he supported the suggestion by Mr. Hayes (2058th meeting), Mr. Beesley (2059th meeting) and other members that those texts should be merged. The combined text could read: "The subjection of a people to colonial domination or to alien subjugation, domination or exploitation."

20. The provision on mercenarism in paragraph 7 would be affected by the treatment of aggression in paragraph 1. If paragraph 1 referred to mercenarism, it would be included under the crime of aggression. He himself would prefer mercenarism to be treated as a separate crime. There was a marked difference between aggression and mercenarism, in that aggression was always committed by a State, whereas mercenarism could be an activity of private individuals.

21. For the wording of paragraph 7, the Special Rapporteur had drawn on article 47 of Additional Protocol I¹³ to the 1949 Geneva Conventions. There were two arguments in favour of that approach. The first was that the definition of mercenarism in that Protocol had been the result of long debates and compromises, so that it would not be advisable to reopen discussion on the matter. The second was that it was not desirable to have two different definitions of mercenarism in two international instruments. At the same time, it had to be remembered that the Protocol was intended for application in war, while the problem of mercenarism had arisen with unusual gravity, particularly in Africa, in time of peace. The terms of the definition in the Protocol would therefore have to be adjusted so as to be applicable in both cases.

22. In conclusion, he proposed the addition to draft article 11 of a further crime against the peace and security of mankind, namely the massive expulsion by force of the population of a territory. Such acts invariably affected the peace and security of mankind and should be identified as a crime under the code.

23. Mr. ARANGIO-RUIZ commended the Special Rapporteur for the very clear and precise terms in which his sixth report (A/CN.4/411) placed before the Commission the possible choices for the draft articles.

24. The Commission had moved away from general principles and was now faced with the most difficult part of its task. In their discussion of the general principles and scope of the draft code, members had been able to rely on concepts taken from the criminal law of their respective countries; but at the present stage they had to face the difficult task of defining, one by one, the individual crimes to be included. In that task, models taken from internal law were not helpful, since the crimes to be included in the code were not comparable, in their essential features, to the crimes covered by national criminal law.

25. The only international precedents available were those of the trials held in Europe and the Far East at the end of the Second World War. The rules applied in those cases, however, were *ad hoc* rules adopted *ex post facto*. They had been made, albeit quite felicitously, for certain categories of individuals and had served to

punish acts which those individuals had already committed. It had been technically as easy for lawyers to adapt those rules to the only cases for which they had been intended as for a good tailor to adapt a custom-made suit to the figure of a client.

26. The fact, to which some members had drawn attention, that for the past 40 years no individual had been charged with the commission of any of the acts now being discussed—namely crimes against peace—was, of course, not a good reason for excluding those acts from the draft code. On the contrary, the condemnation of those acts in the code would have the advantage of defining the crimes before, not after, they were committed. There remained, however, apart from the enormous difficulties that would be involved in any case in the implementation of the condemnation of individual crimes against peace, the great difficulty of defining such crimes in concrete terms without the benefit—available to national criminal legislators—of pre-existing criminal-law provisions and the innumerable precedents offered by the jurisprudence of criminal courts.

27. The Commission would find it difficult to remedy the absence of genuine international legal precedents for two reasons. One was the atypical nature of the crimes to be included in the code, which were connected with political relations between States, as compared with the typical criminal offences covered by national criminal law. The other reason was the natural reluctance of members to cite examples from recent or relatively recent events and to point to the transgressions of present or past leaders of a country—whether it was the speaker's own country or not.

28. The Commission's debates on the crimes to be included in the code were thus fated to be conducted in a foggy atmosphere, in which the only criminals dimly visible were the ghosts of Italian Fascists, German Nazis and Japanese militarists of the 1920s, 1930s and 1940s, who had long since paid their debt to humanity. It would now be useful if members could give some thought to examples from more recent history, and reflect on what their reactions would be if the code were to be applied to the leaders—past, present or future—of their own countries. He would stress the word "own".

29. A further difficulty was that not all members of the Commission had specialized knowledge of criminal law. Furthermore, the crimes under discussion were so closely connected with inter-State relations that ordinary specialists in criminal law would not be able to deal with them alone. Some consultation between international-law and criminal-law specialists would be needed, both before and after the Drafting Committee reported back to the Commission.

30. He was inclined to favour most of the choices made by the Special Rapporteur for paragraph 1 of draft article 11, on aggression, and agreed that there should be a general definition followed, in a separate subparagraph, by an enumeration of the various forms of aggression. The explanatory note in paragraph 1 (a) (ii) should be deleted or perhaps be incorporated in the commentary. The various forms of aggression should be analysed to determine whether they all qualified equally

¹³ *Ibid.*, footnote 9.

as crimes against peace. Some of them should perhaps not be regarded as criminal, or should not be subject to the same sanctions as other forms of aggression. For instance, could a partial blockade of part or all of the coast of another State, or a very limited attack on one of a State's naval vessels or military aircraft, be regarded as a crime against peace as serious as an all-out attack against, or invasion of, a country? He questioned neither the gravity of such acts or of any other acts included in the list, nor their characterization as attacks for the purpose of justifying self-defence under Article 51 of the Charter of the United Nations or any equivalent rule of general international law. He doubted, however, whether it would be correct to impose the same penalty for all those acts as for outright aggression.

31. Similar doubts were prompted by a comparison of subparagraphs (v) and (vi) of paragraph 1 (b) with subparagraphs (i) and (ii). He wondered whether the words "the use of any weapons", in subparagraph (ii), should not be qualified in some way, perhaps by specifying what effect those weapons must have had on the territory of the other State. Mr. Barboza (2056th meeting) had drawn an analogy between the forms of aggression enumerated in paragraph 1 (b) and the various acts classified under a national penal code as murder or manslaughter. He was not sure that the analogy was valid, because not all the forms of aggression listed would result in the annexation, dismemberment or other kind of destruction of the State in question. A distinction should perhaps be drawn between the purposes for which the various acts were qualified as acts of aggression under the 1974 Definition of Aggression¹⁴ and the purposes of prevention and punishment of the corresponding individual acts.

32. As far as the 1974 Definition of Aggression was concerned, it seemed to him that those purposes were probably connected with the need to identify the State that had started the aggression and the existence of an armed attack within the meaning of Article 51 of the Charter, and with the need for the Security Council to decide on or recommend the necessary measures. In both cases, either the rule of proportionality—which was a condition of lawful self-defence—or the exercise of some discretionary power to evaluate the nature of the collective measures envisaged by the Security Council would come into play. Criminal responsibility, however, and in particular that of individuals, was a different matter, and a monolithic, all-embracing approach to such a very sensitive area as an "international criminal law" seemed to be unwarranted.

33. Another problem was the question whether the possibility of an individual being charged with the international (individual) crime of aggression was or was not subject to a finding of aggression on the part of its State. There were not many institutions that could make a valid and binding determination that an act of aggression had been committed by a State. The ICJ did, of course, have compulsory jurisdiction, but only in exceptional cases. Hopes had recently been raised, for a more or less distant and problematic future, by the statements

of the leader of a major Power; but unfortunately the mere expression of a wish or vow by a single State surely did not suffice to bring about a real change in what seemed to be the unsatisfactory settled attitude of States towards the Court. His own country, Italy, which had accepted the compulsory jurisdiction of the PCIJ between the two world wars, had not decided to accept the compulsory jurisdiction of the ICJ, for reasons of which he did not approve. The position with regard to the compulsory jurisdiction of the ICJ was further complicated by the reservations that usually accompanied any acceptance of that jurisdiction.

34. The Security Council, which under the terms of the Charter had the equivalent of a compulsory "jurisdiction", was hampered not so much by the veto as by its tendency to act as fireman rather than judge. Indeed, reluctance to take a definite stand on a specific act of aggression and on the identity of the aggressor was manifest throughout United Nations practice and evident from the tendency to classify as intervention what were often acts of outright aggression. In that respect, the United Nations was perhaps less effective than the League of Nations, which had not hesitated to name a Power as an aggressor on at least three occasions. So long as that deficiency remained, it would be very difficult to implement the code properly. Even if an international criminal court were established—and he was very much in favour of such a court as an indispensable instrument for the implementation of any piece of international criminal law—it should not be burdened with tasks that more properly fell to the legislator or to a political body such as the Security Council.

35. Two further points, both arising out of the relationship between draft article 11 and the 1974 Definition of Aggression, required study. First, the phrase in the last preambular paragraph of the Definition of Aggression reading "it is nevertheless desirable to formulate basic principles as guidance for such determination" raised serious doubts in his mind as to whether draft article 11, and in particular the list of acts in paragraph 1 (b), was sufficiently precise for the definition of a crime. In particular, the words "basic principles as guidance for such determination" seemed to refer to a finding by a political body rather than by a court of law. The only way to overcome the difficulty would be to provide expressly that no individual would be subject to prosecution for the crime of aggression unless a positive finding of aggression had been made by the Security Council against the State on behalf of which he was alleged to have acted.

36. Secondly, article 2 of the Definition of Aggression stipulated that "The first use of armed force by a State . . . shall constitute *prima facie* evidence of an act of aggression". The introductory clause of article 3 then provided that any of the acts listed would qualify as an act of aggression "subject to and in accordance with the provisions of article 2". It would therefore seem logical to include a reference to "first use" in the definition of each of the acts listed in paragraph 1 (b) of draft article 11, since that list corresponded to the list in article 3 of the Definition of Aggression. He would welcome the Special Rapporteur's comments on that point.

¹⁴ See footnote 5 above.

37. While he agreed that preparation of aggression and threat of aggression should be covered in the draft code, and also that paragraphs 4 and 5 of draft article 11 should be combined, he had some difficulties with intervention, and they had been increased by Mr. Díaz González's thought-provoking statement (2059th meeting). The Special Rapporteur had observed (A/CN.4/411, para. 12) that the concept of intervention was an elusive one: that was an understatement. As Wolfgang Friedmann had written, virtually the only point of agreement among writers was that the term "intervention" covered an area of great confusion.¹⁵ The picture with regard to practice was no brighter, for the term was widely used to cover not only innocent diplomatic transactions, but also acts of wholesale aggression. At a time when attempts to define the unlawful forms of intervention had not yet been made at the official, inter-State level, P. H. Winfield had observed that a reader of Phillimore's chapter on the subject might close the book with the impression that intervention could be anything from a speech by Lord Palmerston in the House of Commons to the partition of Poland.¹⁶

38. A number of definitions of the term were, however, available. They included several to be found in courses he himself had given at The Hague Academy of International Law;¹⁷ the definition incorporated in article 18 of the Charter of OAS (*ibid.*, para. 24), following a series of conferences in Latin America at which definitions had also been drafted; and the definitions laid down in a number of United Nations resolutions, in article 3 of the draft Declaration on Rights and Duties of States,¹⁸ in article 2 (9) of the 1954 draft code, and in Principle VI of the Declaration contained in the Helsinki Final Act.¹⁹ Since those definitions varied widely, the best course might be for the Commission to consider two of them, in conjunction with the second alternative of paragraph 3 of draft article 11 proposed by the Special Rapporteur, with a view to arriving at a precise form of wording. He suggested in particular that the Commission should take as the basis for consideration of its definition the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States,²⁰ and specifically the third of those principles, concerning "the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter", as well as the above-mentioned Principle VI of the Helsinki Final Act. The former was perhaps closest to the definitions

adopted in Latin America, while the latter, adopted by the States of the Euro-Atlantic area, was in his view a more accurate reflection of the principles of the Charter of the United Nations.

39. In considering those two definitions, four elements had to be taken into account. First, the opening sentence of the third principle of the General Assembly's 1970 Declaration, reading "No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State", though close to the first paragraph of Helsinki Principle VI, differed from it in that it did not include the phrase "falling within the domestic jurisdiction of another . . . State". That was not a felicitous phrase, in his view, and it should not be incorporated in the draft code: it would be strange indeed if armed intervention were permitted simply because its purpose related to a matter that did not fall within the domestic jurisdiction of the victim State. Another difference concerned the words "regardless of their mutual relations", which again appeared in Principle VI but not in the 1970 Declaration. There were sound arguments for retaining those words, however, since they would mean that the prohibition of intervention would apply also as between two member States of the same regional organization, geographical area or even alliance, and would thus enhance the universality and cogency of the principle of non-intervention.

40. The second element he wished to compare in the two texts was their specific mention of armed force. In his view, the Helsinki formulation was the better of the two, since it was clearer and more concise. The 1970 Declaration spoke of "armed intervention" and "attempted threats"; he had always wondered what an "attempted threat" might be. Helsinki Principle VI, on the other hand, referred to "armed intervention or threat of such intervention", thus extending the condemnation to coercion by threat of armed force.

41. The third element to be compared was the condemnation of economic and political forms of coercion. There was a high degree of coincidence between the two texts and between them and the provisions in the 1954 draft code relating to intervention. The choice not to refer to armed force would, in his view, be a felicitous one, in that the prohibition of force and the prohibition of intervention were better dealt with separately. The use of armed force went beyond the crime of intervention to form a case of aggression, which was undoubtedly a more serious unlawful act than intervention. One point on which the wording of the two texts should be improved was their reference to the use of economic or political coercion for the purpose of "securing advantages". Economic and political forms of coercion might actually be used by a State for legitimate purposes, for example to induce another State to comply with an international obligation. He would therefore suggest, for the Drafting Committee's consideration, that if it adopted wording similar to that of Helsinki Principle VI (third paragraph) and of the third principle (second paragraph) of the 1970 Declaration, the word "undue" should be inserted before "advantages". Such wording would ensure that political and economic forms of co-

¹⁵ W. G. Friedmann, *The Changing Structure of International Law* (London, Stevens, 1964), p. 267, footnote 24.

¹⁶ P. H. Winfield, "The history of intervention in international law", *The British Year Book of International Law, 1922-1923* (London), vol. 3, p. 130.

¹⁷ G. Arangio-Ruiz, "The normative role of the General Assembly of the United Nations and the Declaration of principles of friendly relations", *Collected Courses of the Hague Academy of International Law, 1972-III* (Leyden, Sijthoff, 1974), vol. 137, pp. 547 *et seq.*; and, "Human rights and non-intervention in the Helsinki Final Act", *Collected Courses . . . , 1977-IV* (Alphen aan den Rijn, Sijthoff & Noordhoff, 1980), vol. 157, pp. 252 *et seq.*, and p. 325, footnote 130.

¹⁸ Adopted by the Commission at its first session, in 1949; see *Yearbook . . . 1949*, pp. 286 *et seq.*

¹⁹ See 2053rd meeting, footnote 16.

²⁰ See footnote 11 above.

ercion would be condemned only when used for illegitimate purposes.

42. The final element of comparison was the condemnation of subversive and terrorist activities directed towards the violent overthrow of the régime of another State. He would suggest that, if the relevant provisions of the two texts were incorporated in the draft code, it should be made clear that it was unarmed intervention—meaning the use of political or economic pressure or coercion, or subversive activities not involving armed force—that was being condemned. Once again, he believed the Commission should avoid blurring the distinction between aggression and intervention.

43. Finally, he would commend to the Commission's attention, as containing important elements that should be incorporated in the draft code, the third and fourth paragraphs of the third principle of the 1970 Declaration, which condemned external interference in the life of a nation.

44. On terrorism and mercenarism, he endorsed the comments made by other speakers. With regard to colonialism, he agreed that the two alternatives of paragraph 6 of draft article 11 should be combined. In his opinion, the reference to subjugation should be given precedence over colonialism. His reasoning was that a general rule of international law could be strong only if it could be uniformly and impartially applied. The principle of self-determination, proclaimed as a universal principle in the Charter of the United Nations, had been applied mainly in eradicating colonialism, but there were other cases in which it could and should be used. By not tying it exclusively to colonial contexts, the strength of its general character would be greatly enhanced. He was sure that that legal point could be taken into account by the Drafting Committee.

45. Mr. EIRIKSSON said that the area covered by draft article 11 should be confined to the acts of States rather than of private individuals, since those were the acts most likely to cause breaches of the peace. True, the acts of individuals could have serious consequences for the territorial integrity of a State: billionaire fanatics, narcotics barons and terrorists had been mentioned, but such cases could be dealt with in other ways, and the draft code should not be made to depart from the purpose for which it was intended.

46. It must be recognized, however, that the scope of the draft code was limited to individuals: those responsible for the State acts identified as crimes against peace had to be brought to justice. Whatever the deterrent value of the future code, there must in any case be no doubt *ex post facto* that a given act was a crime covered by the code. Hence political positions must be eschewed, even if that meant that the Commission's objectives would have to be less ambitious. He would favour the establishment of an international tribunal to operate at least on an optional basis.

47. He was by no means convinced that the code should follow the 1974 Definition of Aggression²¹ as closely as it did. That Definition had been developed for

an entirely different purpose, namely to facilitate action by the Security Council under Articles 39, 41 and 42 of the Charter of the United Nations. It was accordingly imbued with political concerns and, for the Commission's purposes, was both incomplete and dependent on a system which might or might not be applicable when the code came to be implemented. He would therefore prefer a general definition of aggression based only on article 1 of the 1974 Definition.

48. Paragraph 1 (c) (ii) of draft article 11, which was based on article 7 of the Definition of Aggression, was not appropriate as it stood. It should either be deleted or be incorporated in the general definition itself. It should be recalled that the list of acts in article 3 of the Definition of Aggression was not exhaustive and could be supplemented by the Security Council. The Commission only had to ask itself whether there could be any doubt that the acts listed in paragraph 1 (b) of draft article 11 constituted aggression.

49. He would suggest that the Commission's purposes would best be served by a general paragraph, which could read:

“1. The commission of aggression, that is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.”

The same approach had been used for the definition of innocent passage in the 1982 United Nations Convention on the Law of the Sea (art. 19, para. 2 (a)).

50. He endorsed the formulation regarding the threat of aggression in paragraph 2 of draft article 11, and supported the inclusion of preparation of aggression as a crime against peace. The objections raised, which were based on analysis of the Nürnberg and Tokyo trials, would be rendered groundless if preparation of aggression were characterized as a crime before the fact. He acknowledged the difficulties identified by the Special Rapporteur in his sixth report (A/CN.4/411, para. 8) and believed that the burden of proof must be heavy. On a specific point raised by the Special Rapporteur, he saw no reason why a perpetrator could not be prosecuted for both preparation of aggression and aggression itself. It was possible to be guilty of preparation but not aggression, and vice versa.

51. For the provision on intervention, he would suggest that the Commission return to the wording of article 2 (9) of the 1954 draft code. The most important element should be coercion, but it must be clearly distinguished from aggression. In his view, the second alternative of paragraph 3 of draft article 11 was mainly about aggression.

52. He agreed that paragraphs 4 and 5 of article 11, dealing with breaches of treaty obligations, should be combined. As to paragraph 6, he agreed that colonial domination should be included in the draft and endorsed Mr. Hayes's comments (2058th meeting) on that point.

53. With regard to paragraph 7, he had some doubts as to whether mercenarism should be included in the draft code as a crime against peace. Mercenaries were an

²¹ See footnote 5 above.

instrument used to commit a crime, and their acts, if sponsored by another State, constituted aggression. He looked forward to the results of the work being done by the *Ad Hoc* Committee on the subject, but did not think the Commission need await those results before taking a position.

54. Finally, he thanked the Special Rapporteur for once again providing a firm basis on which the Commission could take action on the matters before it.

55. Mr. TOMUSCHAT said he wished to make a short statement with specific reference to the crimes referred to in paragraph 6 of draft article 11.

56. He did not wish to enter into a discussion on the difficult question whether, under international law, self-determination could also operate internally—in other words, between a people and its Government. The International Covenant on Civil and Political Rights would not appear to support such internal operation, since, in article 25, it specifically referred to the democratic rights of citizens. The question that really deserved the Commission's attention was whether the right to self-determination was a perpetual right or might be considered as consummated once a people had attained statehood. He believed that every people enjoyed a perpetual right of self-determination. The relevant international instruments consistently assigned that right to "all peoples", without any temporal conditions or requirements. In fact, a people might need the right of self-determination in many instances over the course of its history. Normally, the holder of the right to self-determination would be a people which had created its own State; in fact, it was through State-building that a people usually exercised its right to self-determination. Inasmuch as it provided protection against outside interference, self-determination could not disappear as soon as a people had finally been able to establish a State.

57. That was why he thought that the first alternative proposed by the Special Rapporteur for paragraph 6 was too narrow. The right of all peoples to self-determination must be protected. He had not meant to suggest, in his earlier statement (2056th meeting), that the last vestiges of colonialism had disappeared altogether: remnants of the colonial past still clung stubbornly to existence and should be eliminated as quickly as possible by peaceful means. But present-day realities must not be overlooked: self-determination was a fragile good. Accordingly, the draft code could mention colonialism, but that was not the only form of violation of the right to self-determination that should be taken into account.

58. One might ask whether it was necessary to refer to self-determination in a separate article when, in the same code, aggression would be qualified as a crime against the peace and security of mankind. Yet that description of aggression, drawn from the 1974 Definition of Aggression,²² did not cover all the facets of violations of the right to self-determination which, because of their gravity, deserved the Commission's attention. The 1974 Definition was more concerned with

the actual process of aggression—its modalities—than with its consequences. As other members had pointed out, annexation could also be brought about by covert means, and it might therefore be useful to mention it in a separate article.

59. Another plague of the twentieth century was the forcible transfer of populations. No just world order could tolerate such grave abuses of political and military power. The forcible expulsion of a people from its traditional area of settlement amounted to a clear violation of the right to self-determination. The elaboration of the possible forms of violation of that right might be all the more necessary because many problems could not be solved by a criminal code, but required a negotiated solution. Conflicts such as those over the Falkland Islands (Malvinas) and Gibraltar were not suitable for treatment under the code: only what was clearly identified as a violation of the right to self-determination could be considered. He fully agreed with Mr. Mahiou on that point.

60. To sum up, a general provision concerning grave violations of the right to self-determination should be incorporated in the draft code. Colonialism, which had been the most prominent form of violation of that right in the past and still persisted in the present, could be mentioned as a specific example. It might be advisable to highlight or identify the most abhorrent forms of violation of the right to self-determination, namely annexation and the forcible expulsion of a people from its traditional area of settlement.

61. Another important issue was attacks on the integrity of the environment. He would not dwell on that matter, but took it that, within the framework of crimes against humanity, the Commission would draw up a provision on deliberate and grave forms of such infringements, parallel with what had been stipulated in article 19, paragraph 3 (d), of part 1 of the draft articles on State responsibility.²³

62. Mr. KOROMA said it was clear that, in its internal aspect, the act of self-determination could be continuous, but it could not be a continuum in its external manifestation. In a young State, for example, continuation of the act of self-determination could lead to disintegration or secession.

63. He agreed with Mr. Mahiou and Mr. Tomuschat that the mass expulsion of a population threatened international peace and was a massive violation of human rights. It was therefore a good candidate for inclusion in the draft code.

64. Mr. Sreenivasa RAO endorsed the comments made by Mr. Koroma.

The meeting rose at 1.05 p.m.

²² *Ibid.*

²³ See 2053rd meeting, footnote 17.