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Chairman: Mr. AZZAROUK (Libyan Arab Jamahiriya)

later: Mr. MIKULKA (Czechoslovakia)

CONTENTS

AGENDA ITEM 134: REPORT OF THE AD HOC COMMITTEE ON THE DRAFTING OF AN INTERNATIONAL CONVENTION AGAINST THE RECRUITMENT, USE, FINANCING AND TRAINING OF MERCENARIES
(continued)

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The meeting was called to order at 10.10 a.m.

AGENDA ITEM 134: REPORT OF THE AD HOC COMMITTEE ON THE DRAFTING OF AN INTERNATIONAL CONVENTION AGAINST THE RECRUITMENT, USE, FINANCING AND TRAINING OF MERCENARIES (continued) (A/42/43; see also A/C.6/42/L.1)

1. Mr. PHAN VAN THANG (Viet Nam) said that the Ad Hoc Committee's report (A/42/43) marked tangible progress in the Committee's elaboration of the convention, although some obstacles had still been encountered at the latest session. His delegation attached great importance to the item; from the experience of Viet Nam and other developing countries, it was clear that the use of mercenaries constituted a serious offence against international peace, security and stability. It was indispensable that the future convention should anticipate all situations in which mercenary activities might be carried out and cover not only the activities of mercenaries themselves, but also those of their employers. The convention should therefore concentrate on the prevention and suppression of activities of mercenaries, particularly in peacetime, and on the specific obligations of States, which would incur international responsibility if they failed to comply with them.

2. Article 1 of the Second Revised Consolidated Negotiating Basis had posed the most difficult problem in the discussions over the past seven years. His delegation considered that the nationality criterion should be excluded from the definition of mercenaries. It was clear that the nationality criterion in article 47 of Additional Protocol I to the Geneva Conventions of 12 August 1949 referred only to the status of a combatant or prisoner of war in an international armed conflict. However, in peacetime such a criterion became irrelevant. On the other hand, there were no grounds for presupposing that mercenaries would always be foreigners.

3. In brief, his delegation believed that the future convention should cover international armed conflicts, non-international armed conflicts and situations outside armed conflict. The provisions of the convention should be applied in both wartime and peacetime. All mercenary activities should be punished by international law.

4. Mr. YIMER (Ethiopia) said that the Ad Hoc Committee had done a good deal of substantive work at its 1987 session. Its report (A/42/43) showed that the issues over which divergent views had been expressed in the past remained the key issues. His delegation shared the view that a precise definition of the term "mercenary" was of paramount importance. The main purpose of the proposed convention was not merely to punish mercenaries but, more importantly, to prevent the recruitment, use, financing and training of mercenaries. It should cover not only international armed conflicts, but also non-international armed conflicts and situations outside armed conflict; mercenary activity had been most prevalent in the third type of situation. Article 1, paragraph 2 (a), of the Consolidated Negotiating Basis should be clarified by adding a reference to armed force. His delegation endorsed the inclusion of the concepts of interference in the internal affairs of States,

(Mr. Yimer, Ethiopia)

the undermining of their territorial integrity and independence, and the impeding of the process of self-determination of peoples struggling against colonialism. The nationality criterion was irrelevant. The exclusion of nationals would have the effect of opening the way for interference in the internal affairs of States by allowing and encouraging nationals of a State to resort to mercenary activities against their own country and of giving a free hand to those who used and recruited them.

5. With regard to article 3, his delegation believed that those who used, trained or financed mercenaries should be treated as principal offenders and not as mere accomplices. The inclusion of the term "knowingly" would create a loophole, since no one could conceivably recruit, use, finance or train mercenaries unconsciously. The determination of the intentional element should be left to the courts.

6. As for article 4, his delegation felt that the first variant was more in line with the Ad Hoc Committee's mandate. Article 5 could serve a useful purpose by setting the convention in motion only when a mercenary committed the gravest offences. Article 5 should not, however, weaken articles 1 and 4.

7. In article 6, the concept of attempt could be clarified by adding the proviso "manifested by a commencement of the act". His delegation did not see the need for article 9. Article 10 was a key provision of the proposed convention and should appear at the beginning, inasmuch as it set forth the basic obligation of States parties to the convention.

8. With regard to inter-State co-operation to achieve the objectives of the convention, his delegation found merit in the proposal contained in paragraph 44 of the report (A/42/43) that articles 10, 11 and 12 should be regrouped into a single article.

9. In connection with article 16, his delegation did not see the need for a provision differing from article 8, paragraph 2, of the International Convention against the Taking of Hostages. His delegation could, if necessary, accept the proposal set forth in paragraph 63 of the report. In respect of article 17, he saw no need to notify international organizations of the outcome of proceedings against mercenaries. Articles 21 and 22 on State responsibility and reparation for damages should be retained.

10. It was his delegation's firmly held position, with regard to article 2, that a mercenary should not be considered a combatant or a prisoner of war. As far as article 7 was concerned, Ethiopia believed that the provision that the recruitment, use, financing or training of mercenaries constituted a crime against the peace and security of mankind was not a political statement but a legal norm. Inclusion of that provision in the convention would by no means pre-empt the work of the International Law Commission.

11. His delegation urged once again that the Ad Hoc Committee's mandate should be completed as expeditiously as possible.

12. Mr. SOKOLOVSKIY (Byelorussian Soviet Socialist Republic) said that the use of mercenaries was a threat to individual countries and regions and to international peace and security; it had now become a matter of urgency to draft an international instrument prohibiting mercenarism.

13. His delegation agreed that useful work had been done on the draft convention at the 1987 session of the Ad Hoc Committee. It had been generally agreed that the convention should cover all situations in which mercenaries were employed. However, the most important provisions of the text remained in square brackets.

14. Commenting in general on the draft convention, he said the idea that mercenaries could only be foreign nationals was now hopelessly out of date. The proposed convention should recognize that reality.

15. Commenting on some of the articles, he said that, in practice, adoption of the approach embodied in articles 5 and 6 would limit the ability of States to suppress mercenary activity. It was therefore important to retain article 7, and to include in article 10 a clear prohibition against the support by States of mercenaries through propaganda.

16. His delegation advocated the conclusion of the Ad Hoc Committee's work in 1988 and felt that the Sixth Committee should make a recommendation to that effect.

17. Mr. Mikulka (Czechoslovakia) took the Chair.

18. Mr. FRANCIS (Jamaica) agreed that the progress made on the draft convention justified a recommendation that the Ad Hoc Committee should continue its work in 1988.

19. It should be borne in mind that on certain aspects of the subject, there was a convergence between the Ad Hoc Committee's report (A/42/43) and the chapter of the report of the International Law Commission concerning the draft Code of Offences against the Peace and Security of Mankind.

20. The time had come to consider preparing commentaries on some of the draft articles of the convention. It might well further the process of reaching consensus if some of the material intended to clarify the meaning of the articles and now embodied in the text were covered instead in such commentaries.

21. With respect to article 1, his delegation supported the need for a definition of the topic. It was essential that the core notion to which recruitment, use, financing and training related should be identified. He suggested, however, that the text of article 1 might be improved if the beginning of subparagraph (a) of paragraph 2 were amended and included at the end of paragraph 1. The definition in paragraph 1 would thus include "any person who, in the absence of armed conflict is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed against a State or any other act which is calculated adversely to affect the security of that State".

(Mr. Francis, Jamaica)

22. He agreed with the four notions listed under subparagraph (a) of paragraph 2, but thought that, in the interest of achieving consensus, they might be included in the explanatory commentary that he had already mentioned rather than in the text. As for subparagraph (b), he was not sure that it should remain as it stood without interpolation of the notion of attempting to commit an act of violence, a notion contained in article 6. He questioned the need for the reference to the armed forces of the State in subparagraph (c). And while he understood the implications of nationality, he believed that the Sixth Committee should reserve its position because the considerations underlying the various elements could be explained more fully in a commentary. He therefore suggested that subparagraphs (b) to (f) should be reviewed and commented on further in order to achieve consensus.

23. Article 2 was a provision which had to be included because not every State party to the future convention would already be a party to Additional Protocol I to the Geneva Conventions, from which it was taken. It had to be made clear that mercenaries were not combatants. On the other hand, while he considered the text of article 3 to be appropriate, he would not insist on the inclusion of the word "knowingly". It should be left to States to determine whether the notion of intent should be included in their legislation. As for article 4, which went hand in hand with article 3, he favoured the first alternative proposed; the second omitted the element of recruitment and training.

24. He believed that article 5 should be re-examined to determine whether it would be better to omit any enumeration of offences, which might prove not to be comprehensive. He agreed entirely with the content of article 7, and considered that article 9 flowed logically from what had gone before. Finally, in article 20, he believed that it would be more in line with previous practice to speak of an international wrongful act "engaging" rather than "engendering" the international responsibility of a State.

25. Ms. WILLSON (United States of America) said that the international community regarded the use of mercenaries by any State for incursion into the territory of another as a violation of the United Nations Charter. The Security Council had called upon States to ensure that their territories were not used to prepare such activities. Her country had consistently supported that attitude, and participated in the Ad Hoc Committee in the same spirit. However, it still viewed the question of mercenaries as a peripheral aspect of the problem of violence in the world.

26. The sixth session of the Ad Hoc Committee had been a useful one, in particular with the much increased participation, especially by the non-aligned countries. The constructive dialogue in which the Ad Hoc Committee was engaged would greatly facilitate the resolution of outstanding issues.

27. The definition of a mercenary was the key issue to be resolved before the Ad Hoc Committee focused on offences. Although her country was not a party to Additional Protocol I to the Geneva Conventions, it regarded the definition in article 47 of that Protocol as an appropriate basis for the Ad Hoc Committee's work. The criteria in that definition were cumulative, and it was important to

(Ms. Willson, United States)

note that identification of a mercenary would become impossible if any one of them was eliminated. The nationality criterion was of particular importance since, to be properly described as a mercenary, a person had to be a non-national of the victim State. Similarly, the person had to be motivated by the money, and the remuneration that he received had to exceed substantially that of the regular army. Such objective standards, modelled on the definition in the Protocol, had to underlie any legal régime designed to respond to the problem. The issues were not easy, but were central to the completion of the convention.

28. Once the definition had been determined, the Ad Hoc Committee could deal more effectively with the subject of offences. Her delegation rejected any notion of a crime of "mercenarism"; it was not an international crime to be a mercenary. The idea that the prohibited acts constituted a crime against the peace and security of mankind was also unacceptable, since it would equate them with the crimes of major war criminals and imply the existence of universal jurisdiction. While a mercenary could commit such crimes, it would be unduly restrictive to limit the scope of the convention to acts of such magnitude. The convention should focus on specific criminal offences over which States parties would agree to assume jurisdiction. It should emphasize the harmonization of domestic criminal laws as the primary instrument for controlling unlawful activities, and incorporate the "prosecute or extradite" mechanism accepted in other conventions.

29. Article 15 recognized the right of the accused to fair treatment. Her delegation believed that it should also set forth specific standards for humane treatment, in view of the human-rights issues involved.

30. The Ad Hoc Committee's work was at a critical stage. It was also in danger of being subverted by attempts in another forum to have the General Assembly politicize the subject. The Assembly must not speak with two disparate voices on one issue. The United States had therefore voted against Economic and Social Council resolution 1987/61 because it was polemical, unbalanced, without foundation in law, and likely to cause overlapping with the work of the Sixth Committee. Nevertheless, the resolution had passed and a Special Rapporteur had been appointed. Her delegation would watch the Third Committee's actions closely, in the hope that they would not impair its ability to support the Ad Hoc Committee's work.

31. Ms. XUE Hanqin (China) said that, since the purpose of the future convention should be to combat the recruitment, use, financing and training of mercenaries, emphasis should be placed on the obligations, responsibility and jurisdiction of States when mercenaries and offences were being defined. The definition of offences and the provisions relating to State responsibility should be different from those contained in such conventions as the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, and the International Convention against the Taking of Hostages. The present text of the Second Revised Consolidated Negotiating Basis took that into account.

(Ms. Xue Hanqin, China)

32. With regard to the definition of a mercenary, her delegation had no objection in principle to the structure of the Consolidated Negotiating Basis, which expanded the scope of the definition in article 47, paragraph 2, of Additional Protocol I to the Geneva Conventions to cover mercenary activities in situations outside armed conflict. The phrase "for the purposes of the present Convention" in the chapeau of article 1 could serve to widen the scope of the definition while upholding the validity of article 47, paragraph 2, of Additional Protocol I. In the drafting of article 1, paragraph 2, it was important to take into consideration the nature and purpose of mercenaries in a situation outside armed conflict, since mercenaries were often used to suppress the struggle for self-determination.

33. In article 1, paragraph 2 (a), her delegation favoured the deletion of the square brackets. If not properly drafted, the text might be used as a "legal excuse" for suppressing the just struggles of peoples and their liberation movements.

34. Her delegation tended to favour a general provision on offences of mercenaries so that any person who recruited, used, financed or trained mercenaries, or any person who was recruited, used, financed or trained as a mercenary, was deemed to be committing an offence. Such a provision was important in that it constituted a development of international law. The view of the International Law Commission that mercenarism fell within the scope of the draft Code of Offences against the Peace and Security of Mankind deserved serious consideration by the Ad Hoc Committee.

35. Her delegation was in favour of keeping articles 20 and 21 and removing the square brackets, because of the significance of a strict provision on State responsibility.

36. In order to ensure the widest possible acceptance of the future convention, article 23, concerning reservations, was necessary.

37. Mr. DA COSTA (Angola) said that the victims of mercenary activities were not trying to protect their own political interests, but to induce others to show themselves willing to eradicate a phenomenon which was a crime against mankind because it caused immense political and economic damage to developing countries, and pain and suffering to innocent people. Mercenary activities were contrary to fundamental principles of international law, and seriously impeded the process of self-determination. Such activities included the killing of innocent civilians, genocide and the destabilization of independent States. Both the General Assembly and the Security Council had denounced the use of mercenaries, particularly against developing countries and national liberation movements. Cuba, Nicaragua and the front-line States in southern Africa were among the countries currently threatened by mercenaries trained and organized in neighbouring States. There was no doubt that people in Africa had suffered from such activities more than people in other parts of the world.

(Mr. Da Costa, Angola)

38. Three points deserved special mention. On the important issue of defining a mercenary, there was legal merit in the definition borrowed from Additional Protocol I to the Geneva Conventions. The importance of the nationality criterion should not be overlooked, and due consideration should be given to those liberation movements that resorted to military operations to liberate their occupied motherlands. His delegation was open to any proposal that might lead to agreement on the definition of a mercenary.

39. The crimes committed by mercenaries should be regarded as crimes against the peace and security of mankind, especially if they involved a State in an act of armed aggression.

40. Great importance should be attached to the obligation of States not to embark on mercenary activities. Such an obligation should be spelt out clearly, and the right of victim States to compensation underlined. The success of the future convention would depend on States assuming such an obligation in practice.

41. An international convention prohibiting the activities of mercenaries would complement existing conventions against terrorism, and it was the Ad Hoc Committee's duty to elaborate a legal instrument as soon as possible, as part of the codification and progressive development of international law.

42. Mr. DJORDJEVIC (Yugoslavia) said that his delegation was in favour of a definition of the term "mercenary" which would extend the definition contained in article 47 of Additional Protocol I to the Geneva Conventions to include situations of internal and international armed conflicts. Particular attention should be devoted to the definition of mercenaries in situations outside armed conflict and, in that connection, to the questions of the nationality criterion and material compensation. There should be no hurry to lay down provisions concerning the qualification of criminal offences committed by mercenaries: that might hamper the implementation of the future convention.

43. The convention should retain appropriate provisions on the responsibility of States and reparation for damages. The remaining provisions, which were primarily of a legal and technical nature, should not cause major difficulties.

44. The results of the 1987 session of the Ad Hoc Committee provided a solid basis for the completion of the work in 1988. Its completion would be of great importance to all countries, especially those whose sovereignty, territorial integrity and legitimate Governments were often threatened by mercenaries. The United Nations would thus strengthen its credibility and demonstrate that it could play an effective role in extending the rules of international law into yet another area of international relations. With that aim in mind, his delegation expected that consensus would be reached on the renewal of the Ad Hoc Committee's mandate.

45. Mr. TREVES (Italy), after associating himself with the statement made at the previous meeting by the representative of Denmark on behalf of the European Community, said that it was important neither to deny the progress made in the

(Mr. Treves, Italy)

Ad Hoc Committee nor to exaggerate the difficulties still remaining. The most important of those difficulties related to the question of the definition of the mercenary and that of the definition of offences. The main purpose of the future convention was to provide for certain consequences (with regard to jurisdiction, prosecution and extradition) which offences committed by mercenaries or by persons who recruited, used, financed or trained them would entail. Such persons should therefore, in his view, be expressly listed in article 3. While direct participation by the mercenary in concerted acts of violence as listed in article 1, paragraph 2 (a), could be seen as an aggravating circumstance, it should not constitute a necessary pre-condition for defining as offences the actions committed by the persons referred to in article 3. Participation should, however, be a criterion for the definition of an offence, since in the absence of participation there would seem to be no justification for setting in motion the international mechanisms to be established under the convention. For the purposes of domestic legislation, States parties could, of course, define as an offence the mere fact of being recruited to act as a mercenary.

46. The commission of a further specific crime of a grave nature, as listed in article 5, should be relevant as an aggravating circumstance and should, in particular, disqualify the offence from being regarded as political. In conclusion, he expressed concern at recent developments affecting the Ad Hoc Committee in the Economic and Social Council and the Third Committee, which signalled a threat to hopes of reaching satisfactory solutions by consensus.

47. Mrs. AGUIRRÉ (Argentina) said her delegation trusted that the Second Revised Consolidated Negotiating Basis would lead to the speedy completion of the convention. It was widely recognized that mercenary activities were contrary to international law and were a threat to international peace and security, and as such should be eliminated. Her delegation therefore believed that the convention should cover all situations in which mercenaries might be involved: international armed conflicts, non-international armed conflicts and situations outside armed conflict. A broad definition of the term "mercenary" should be adopted in accordance with the purpose of the convention. However, the quest for a definition should not unnecessarily delay the drafting of the convention. With regard to the various elements of a definition, her delegation felt that the adoption of the criteria of private gain and direct participation might limit the scope of the future convention.

48. Mr. KASSE (Mali) said that the drafting of an international convention against the recruitment, use, financing and training of mercenaries was more necessary than ever. The activities of mercenaries were contrary to the fundamental principles of international law, such as non-interference in the internal affairs of States, territorial integrity and independence, and they seriously impeded the process of self-determination of peoples.

49. His delegation felt that it was necessary to include a provision in the future convention on the status of mercenaries. Such a provision would serve as a legal basis for States to deny prisoner-of-war or combatant status to any category of

(Mr. Kasse, Mali)

mercenary. His delegation was also in favour of the nationality criterion, in accordance with the provisions of the Organization of African Unity Convention on the Elimination of Mercenarism in Africa and Additional Protocol I to the Geneva Conventions, to which Mali was a party.

50. In view of his delegation's firm support for the work of the Ad Hoc Committee, he expressed the hope that its activities would continue to be carried out in accordance with its programme of work, and that its sessions would be neither shortened nor postponed.

51. Mr. MANSA (Burkina Faso) said that the continuing lack of consensus on important issues in the Ad Hoc Committee was deplorable. His delegation was among those which considered that the future convention should cover all situations in which mercenaries could be involved: international armed conflicts, non-international armed conflicts and situations outside armed conflict. Limiting the definition of a mercenary to that contained in article 47, paragraph 2, of Additional Protocol I to the Geneva Conventions would render the convention virtually useless. His delegation could not agree to the introduction of the concepts of material compensation and direct participation, which merely provided loopholes for mercenaries and those controlling them. The prohibition set forth in the convention should apply both to individuals who agreed to serve as mercenaries and to all those who recruited and supported them. As for individuals who took up arms against their own country, their treatment should be left to the Governments concerned.

52. His delegation was astonished by the attempts being made to protect the activities of mercenaries and their backers. Such attempts were essentially directed against the sovereignty and territorial integrity of developing countries, and impeded their struggles against colonialism and neo-colonialism and for self-determination. His country, which was engaged in a permanent struggle against mercenarism, remained convinced that given the necessary political will, an international convention prohibiting mercenarism in all its forms and manifestations could be completed in the near future.

53. Mr. SUKHBAATAR (Mongolia) said that statements made in the debate thus far, most of which stressed the need for the early completion of work on the future convention, gave grounds for the hope that outstanding differences of opinion could be resolved. His delegation welcomed the general agreement reached in the Ad Hoc Committee that the convention should cover all situations in which mercenaries could be involved: international armed conflicts, non-international armed conflicts and situations outside armed conflict. As for the definition of the term "mercenary", his delegation took the view that the nationality criterion did not correspond to present-day realities. He did not believe that the mercenary had any right to be considered a combatant or a prisoner of war, and therefore was in favour of removing the square brackets from article 2. The provision which defined as an offence the recruitment, use, financing and training of mercenaries should be retained so as to enhance the future convention's preventive role. A clear provision setting forth the obligation of States to prohibit all forms of mercenarism would facilitate the definitive eradication of that pernicious practice.

(Mr. Sukhbaatar, Mongolia)

54. He appealed to all States to work in a constructive spirit towards the early completion of the convention, which not only would put an end to a form of criminal activity encouraged by forces of reaction fighting national liberation movements, but also would significantly strengthen the foundations of international peace and security.

55. Mr. GÜNEY (Turkey) said that the distinction between paragraph 1 of article 1, which referred to armed conflicts, and paragraph 2 of that article, which related to other situations not covered by paragraph 1, should be maintained. The future convention should cover all situations in which mercenaries might be used to commit acts of violence threatening the internal peace and stability of States. The nationality criterion was, in his delegation's view, a useful one and should be retained.

56. The Ad Hoc Committee's work had been adversely affected from the outset by an imbalance in the level of participation of its members. The Sixth Committee should urge all members of the Ad Hoc Committee to take an active part in the latter's work and to show greater flexibility in order to facilitate the early completion of the convention. In conclusion, he expressed his delegation's support for the recommendation that the Ad Hoc Committee should be invited to continue its work in 1988.

The meeting rose at 12.20 p.m.