REPORT
OF THE *AD HOC* COMMITTEE ON THE DRAFTING OF AN INTERNATIONAL CONVENTION AGAINST THE RECRUITMENT, USE, FINANCING AND TRAINING OF MERCENARIES

GENERAL ASSEMBLY

OFFICIAL RECORDS: THIRTY-SIXTH SESSION

SUPPLEMENT No. 43 (A/36/43)

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I. INTRODUCTION

1. At its 81st plenary meeting, on 4 December 1980, the General Assembly, on the recommendation of the Sixth Committee, 1/ adopted resolution 35/48 entitled "Drafting of an international convention against the recruitment, use, financing and training of mercenaries", which reads as follows:

"*The General Assembly*,

"*Bearing in mind* the need for strict observance of the principles of sovereign equality, political independence, territorial integrity of States and self-determination of peoples, as enshrined in the Charter of the United Nations and developed in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, 2/

"*Recalling*, in particular, its resolutions 2395 (XXIII) of 29 November 1968, 2465 (XXIII) of 20 December 1968, 2548 (XXIV) of 11 December 1969, 2708 (XXV) of 14 December 1970 and 3103 (XXVIII) of 12 December 1973, as well as its resolution 1514 (XV) of 14 December 1960, and also Security Council resolutions 405 (1977) of 14 April 1977 and 419 (1977) of 24 November 1977, in which the Council denounced the practice of using mercenaries against developing countries and national liberation movements,

"*Recalling also* its resolution 34/140 of 14 December 1979, in which it urged States to consider effective measures to prohibit the recruitment, training, assembly, transit and use of mercenaries,

"*Recognizing* that the activities of mercenaries are contrary to fundamental principles of international law, such as non-interference in the internal affairs of States, territorial integrity and independence, and seriously impede the process of self-determination of peoples struggling against colonialism, racism and *apartheid* and all forms of foreign domination,

"*Bearing in mind* the pernicious impact that the activities of mercenaries have on international peace and security,

"*Considering* that the progressive development and codification of the rules of international law on mercenaries would contribute immensely to the implementation of the purposes and principles of the Charter,

"*Having taken note* of the views and comments expressed by Member States on the item,

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1/ *Official Records of the General Assembly, Thirty-fifth Session, Annexes*, agenda item 29, document A/35/655.

2/ General Assembly resolution 2625 (XXV), annex.

"1. Decides to establish an Ad Hoc Committee on the Drafting of an International Convention against the Recruitment, Use, Financing and Training of Mercenaries, composed of thirty-five Member States;

"2. Requests the President of the General Assembly, after due consultation with the chairmen of the regional groups, to appoint the members of the Committee on the basis of equitable geographical distribution and representing the principal legal systems of the world;

"3. Requests the Committee to elaborate at the earliest possible date an international convention to prohibit the recruitment, use, financing and training of mercenaries;

"4. Authorizes the Committee in the fulfilment of its mandate to take into account suggestions and proposals from any States, bearing in mind the views and comments communicated to the Secretary-General 3/ and those expressed during the debate on this item at the thirty-fifth session of the General Assembly;

"5. Requests the Secretary-General to compile a list of all relevant legislation of Member States and any other conventions and protocols additional thereto of international and regional organizations on mercenaries and to place such materials at the disposal of the Committee;

"6. Requests the Secretary-General to provide the Committee with any assistance and facilities it may require for the performance of its work;

"7. Requests the Committee to present its report to the General Assembly at its thirty-sixth session;

"8. Decides to include in the provisional agenda of its thirty-sixth session an item entitled 'Report of the Ad Hoc Committee on the Drafting of an International Convention against the Recruitment, Use, Financing and Training of Mercenaries'."

2. On 15 January 1981, under the terms of paragraphs 1 and 2 of the above resolution, the President of the General Assembly, after due consultation with the chairmen of the regional groups, appointed the following Member States as members of the Ad Hoc Committee on the Drafting of an International Convention against the Recruitment, Use, Financing and Training of Mercenaries (A/35/793):

3/ A/35/366 and Add.1-3.

Algeria
Angola
Bahamas
Bangladesh
Barbados
Benin
Bulgaria
Canada
Democratic Yemen
Ethiopia
France
German Democratic Republic
Germany, Federal Republic of
Guyana
India
Jamaica
Japan
Mongolia
Nigeria
Panama 4/
Portugal
Senegal
Seychelles
Spain
Suriname
Turkey
Ukrainian Soviet Socialist Republic
Union of Soviet Socialist Republics
United Kingdom of Great Britain and Northern Ireland
United States of America
Yugoslavia
Zaire
Zambia

3. On 10 February 1981, the President of the General Assembly informed the Secretary-General, on the basis of a letter addressed to him by the Chairman of the Latin American Group, that Panama had withdrawn from the Committee and that, taking duly into account the nomination of the Latin American Group, he had appointed Uruguay to replace Panama as a member of the *Ad Hoc* Committee (A/35/793/Add.1).

4. The *Ad Hoc* Committee met at United Nations Headquarters from 20 January to 13 February 1981. 5/

5. The session was opened on behalf of the Secretary-General by Mr. Erik Suy, Under-Secretary-General, the Legal Counsel, who represented the Secretary-General at the session.

6. Mr. Valentin A. Romanov, Director of the Codification Division of the Office of Legal Affairs, acted as Secretary of the *Ad Hoc* Committee. Miss Jacqueline Dauchy, Deputy Director for Research and Studies (Codification Division, Office of Legal Affairs), acted as Deputy Secretary to the *Ad Hoc* Committee as well as Secretary of the Working Group. Mr. Andronico O. Adede, Mr. Lucjan Lukasik, Mr. Shinya Murase, Legal Officers, and Mr. Andrew Sinjela, Associate Legal Officer (Codification Division, Office of Legal Affairs), acted as Assistant Secretaries to the *Ad Hoc* Committee.

4/ As from 10 February 1981, Panama was replaced by Uruguay (see para. 3).

5/ For the membership list of the *Ad Hoc* Committee at its 1981 session, see A/AC.207/INF.1 and Add.1.

7. At its 2nd and 3rd meetings, on 23 and 27 January, the *Ad Hoc* Committee elected the following officers:

Chairman:	Mr. Mohammed Bedjaoui (Algeria)
Vice-Chairmen:	Mr. Philippe Kirsch (Canada) Mr. E. Besley Maycock (Barbados) Mr. Andrei A. Ozadovsky (Ukrainian Soviet Socialist Republic)
Rapporteur:	Mr. Waliur Rahman (Bangladesh)

8. At its 3rd meeting, on 27 January, the *Ad Hoc* Committee adopted the following agenda (A/AC.207/L.1):

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Organization of work.
5. Drafting of an international convention against the recruitment, use, financing and training of mercenaries pursuant to paragraph 3 of General Assembly resolution 35/48.
6. Adoption of the report.

9. At its 8th, 11th and 14th meetings on 2, 4 and 13 February, having considered individual requests for participation in its work in the capacity of observers from the Permanent Missions of Cuba, Egypt, the Libyan Arab Jamahiriya, Morocco, the Sudan and Togo, the *Ad Hoc* Committee agreed that the representatives of these delegations would be able to attend the plenary meetings of the Committee and to make statements with the approval of the Committee. In accordance with the decision taken by the *Ad Hoc* Committee at its 8th and 11th meetings, the observers from Egypt, Morocco, Cuba and the Libyan Arab Jamahiriya made statements with the approval of the Committee.

10. The *Ad Hoc* Committee had before it the following documents:

(a) List of the relevant legislation of Member States and the conventions and protocols additional thereto of international and regional organizations on mercenaries, compiled pursuant to General Assembly resolution 35/48: note by the Secretary-General (A/AC.207/L.2 and Add.1);

(b) Draft international convention against the activities of mercenaries: working paper submitted by Nigeria (A/AC.207/L.3);

(c) Communication from the Permanent Representative of Trinidad and Tobago: note by the Secretary-General (A/AC.207/L.4).

At its 13th meeting, on 5 February, the *Ad Hoc* Committee acceded to the request from the Permanent Mission of Benin to have the following documents circulated as working documents of the Committee: S/12294 and Add.1, S/12319/Add.1, S/13304 and S/14211 (see A/AC.207/L.5).

11. The *Ad Hoc* Committee devoted its 3rd to 9th meetings, held between 27 January to 3 February, to a general debate in which the representatives of the following States took part: Nigeria, France, Senegal, Zaire, Suriname, Zambia, Turkey, Yugoslavia, Federal Republic of Germany, India, Guyana, Mongolia, Union of Soviet Socialist Republics, German Democratic Republic, Ukrainian Soviet Socialist Republic, Spain, Benin, Japan, United States of America, Portugal, United Kingdom of Great Britain and Northern Ireland and Bulgaria.

12. At its 8th meeting, on 2 February, the *Ad Hoc* Committee decided to set up a Working Group of the Whole to deal with the drafting of an international convention against the recruitment, use, financing and training of mercenaries pursuant to paragraph 3 of General Assembly resolution 35/48. The Working Group held eight meetings between 6 and 13 February.

13. At its 14th meeting, on 13 February, the *Ad Hoc* Committee considered and approved the report of the Working Group (see sect. III below). The report of the *Ad Hoc* Committee was adopted at the same meeting.

II. GENERAL DEBATE

A. Observations on the task before the Committee and other general observations

14. Many delegations stressed that the resurgence of mercenary activities in the last three decades fully warranted consideration of the question at the international level. They therefore welcomed the initiative of Nigeria and expressed gratitude at the consensus adoption of General Assembly resolution 35/48 which had established the Committee and requested it to elaborate, at the earliest possible date, an international convention to prohibit the recruitment, use, financing and training of mercenaries. Such a convention would, it was added, be an important contribution to the prevention and elimination of the practice of recruitment, use, financing and training of mercenaries, and to the process of codification and progressive development of international law.

15. Outlining their general position in this respect, all delegations condemned the use of mercenaries. Some delegations mentioned in this connexion the consensus adoption of Security Council resolution 405 (1977) which, inter alia, condemned all forms of external interference in the internal affairs of Member States, including the use of international mercenaries to destabilize States and/or to violate their territorial integrity, sovereignty and independence, as well as the consensus on the treatment and status to be accorded mercenaries, reached at the 1977 session of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law. Reference was also made to the adoption by consensus of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, under which:

> "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",

as well as to the consensus adoption of resolution 35/48. These delegations observed that the use of mercenaries could be a threat to self-determination and to the stability and independence of States and that interventions by soldiers of fortune against independent States should be treated just like attacks on the territorial integrity or political independence of any sovereign State in violation of the fundamental principles of the United Nations, including the principle of non-interference in the internal affairs of States, principles which brooked no exception. They accordingly condemned unequivocally the use of mercenaries, whether on private initiative or with the tacit consent or active support of Governments.

16. Some delegations recalled their reservations about the fourth preambular paragraph of resolution 35/48 which reflected the view, which was not universally accepted, that being a mercenary violated existing international law, as well as reservations about other points. Some delegations added that in recent years the greater threat to the right of all peoples to self-determination without any form of foreign interference and to the right of States, particularly young States, to

preserve their independence and territorial integrity without attempts at intimidation from outside had not been the activities of soldiers acting for private gain but disregard for the principle of the non-use of force in international relations and intervention or the threat of intervention by units of national armies in areas where they clearly did not have a legitimate reason to be.

17. A large number of delegations stressed that their position in relation to the question of mercenaries stemmed from their conviction that respect for the national independence, sovereignty and equality before the law of States, non-interference in their internal affairs and non-recourse to the use or threat of force in international relations was the major pre-condition for the establishment of international peace and security. Attention was also drawn to the need to protect the right of peoples to self-determination: in this connexion, it was said that while international law prohibited the use of force by a colonial régime in order to prevent a people under its illegal domination from exercising its inherent right to self-determination and independence, it recognized that peoples under colonial and foreign domination could resort to the use of force in order to exercise that right, so that the refusal by a colonial, racist and foreign Government to allow a people under its domination to exercise its right to self-determination and independence authorized other States to intervene and actively support the oppressed people in the exercise of that right. It was pointed out that the question of resorting to mercenaries against the independence and freedom of States and against liberation movements fighting for emancipation from colonialism and other forms of foreign domination was as old as the policy of interventionism based on the concept of "might is right" and emphasis was placed on the need to eradicate the activities of mercenaries which seemed to have intensified as the practice of interventionism and interference in internal affairs became more prevalent in international relations. Reference was made in this connexion to the objectives of the policy of non-alignment which included, above all, the resistance to all forms of intervention and interference in internal affairs, and the guaranteeing to all countries and peoples the right to develop and freely to decide independently their own destiny. Since the practice of resorting to mercenaries resulted in a direct form of interventionism, it should be viewed as a threat to international peace and security, a crime against the peace and security of mankind and a dangerous manifestation of international terrorism. The use of mercenaries against national liberation movements similarly constituted a criminal act and mercenaries themselves were criminals.

18. Some delegations further stated that in view of the traditional external policy of their countries in favour of the peaceful coexistence of States with different social systems, in support of the just struggle of peoples for national liberation and social progress and against aggressive wars, imperialism, racism, apartheid and foreign domination, they could only condemn the recruitment, use financing and training of mercenaries. They stressed that the use of mercenaries had always been linked with the planning and perpetration of aggressive acts by imperialist and reactionary circles, the seizure of small and weak countries and the gross violation of the right of peoples to self-determination. In the view of these delegations, although a number of States had special laws prohibiting the recruitment or use of mercenaries, some of the Governments of those States simply disregarded such laws when a threat arose to imperialist domination. In this connexion, the view was expressed that municipal laws were ineffective and had proved inadequate in stopping the recruitment and outfitting of mercenaries and the claim was further made that such laws had often been violated, sometimes with

the tacit approval and connivance of the competent authorities of the countries concerned. In an attempt to perpetuate imperialist domination, to stop or at least check the continued development of the national liberation movement and to save the last bastions of colonialism and racism at any price, the imperialist Powers would stoop to any methods to achieve their ends. Despite the fact that national liberation movements had achieved in recent years significant success in their struggle for freedom and independence, the forces of reaction, supported by hegemonists, were trying to halt the progress of national liberation and to nullify the progressive social conquest of peoples. Efforts to sustain the last outposts of colonialism and racism served to perpetuate the domination of imperialist Powers in regions of strategic, economic and political importance. That was why the imperialist circles were supporting and arming the racists of South Africa, who were seeking to nullify the liberation struggle of the peoples of Namibia and southern Africa; that was why they connived at aggressive acts against independent countries, stirred up armed conflicts among newly-independent States, and used puppets and reactionary elements to overthrow the legal Governments of independent States and install régimes obedient to them. The use of mercenaries was a frequent weapon of the imperialist policy of aggression and interference in the internal affairs of States, particularly against the peoples and independent countries of Africa.

19. Some delegations referred to specific cases involving the use of mercenaries. Mention was made of what was termed the colonialist and subversive actions undertaken in the former Congo, Nigeria, former Southern Rhodesia, Guinea, Benin, Seychelles, Maldives, the Comoros, Grenada and Cuba, as well as of the use of mercenaries as an instrument of foreign aggression against Zaire, Angola, Mozambique, Afghanistan and some Arab States. In connexion with Afghanistan, it was said that new information was constantly coming to light which irrefutably proved that the undeclared aggressive war against that country was being waged by mercenaries who were being recruited, trained and armed on the territories of foreign States and then sent into Afghanistan. While agreeing that mercenary activities posed a threat to the third world in general, several delegations placed particular emphasis on operations which had taken place in the last three decades on the African continent which, they maintained, had been especially ravaged and menaced by mercenarism for a long time and where hired killers had been and were still playing havoc. It was pointed out in particular that, as a result of conflicts between the authorities and certain foreign interests, the former Congo had suffered especially from incursions and attacks by armed bands of mercenaries that had been recruited, trained and financed from abroad with the aim of overthrowing the Government and sowing discord and terror, in utter disregard for the immediate victims, innocent men, women and children. It was also said that mercenaries were still active in fighting on the side of the racist régimes in southern Africa, particularly in Namibia, and that, faced with the problem of desertions from its armed forces in illegally occupied Namibia, South Africa had intensified its recruitment of mercenaries to fight against the People's Liberation Army of Namibia. Reference was finally made to the forced landing at Cotonou airport on 16 January 1977 of an unidentified pirate aircraft carrying some 100 mercenaries equipped with ultra-modern weapons who, after subduing the security units at the Beninese airport, had split up into three groups, the plan being that the first group would seize the Palais de la République and the President, the second take control of the main road to Cotonou and, in particular, the security facilities and the national broadcasting services, and the third take over the Cotonou military camp - an operation which had as its final objective the overthrow of the established authorities and the installation of a neo-colonialist

régime in its place. The invaders, it was stated, had met with a prompt and effective counter-attack and after terrorizing the population and wreaking havoc for three hours, had had to beat a hasty retreat, leaving behind a sizeable amount of war matériel, an inventory of which had been submitted to the Security Council.

20. A large number of delegations observed that the resurgence of mercenarism in various parts of the world had helped to sensitize international public opinion and prompted legal and political action at the regional and international levels. In this connexion, mention was made of the Convention for the Elimination of Mercenarism in Africa adopted by the Organization of African Unity (OAU) in 1977 6/ and the resolutions and declarations adopted by the heads of State and Government at summit meetings of OAU at Kinshasa (1967), Addis Ababa (1971) and Luanda (1976). Reference was also made to the declarations of the non-aligned countries at their summit meetings at Cairo (1965), Colombo (1976) and Havana (1979). It was also recalled that the question had been dealt with at the world-wide level by the General Assembly in its resolutions 2395 (XXIII), 2465 (XXIII), 2548 (XXIV), 2625 (XXV), 2708 (XXV), 3103 (XXVIII), 3314 (XXIX) and 34/140, and by the Security Council in its resolutions 239 (1967), 405 (1977) and 419 (1977). It was pointed out that these resolutions had outlawed mercenary activities and reopened the question of the international legal status of mercenaries under articles 1 and 2 of the Regulations concerning the Laws and Customs of War on Land, annexed to the fourth Hague Convention of 18 October 1907, 7/ and under article 4 of the third Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949. 8/ These resolutions had considerably influenced the subsequent process of codification, particularly at the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (A/32/144 and Add.1) under the auspices of which Additional Protocol I to the 1949 Geneva Conventions, and particularly article 47 thereof, had been adopted in 1977 (A/32/144 and Add.1, annex I).

21. Attention was also drawn to the existence of a large body of national legislation on the question, and reference was made to document A/AC.207/L.2 and Add.1 which summarized the laws prohibiting the enlistment or recruitment of any person within the national territory for service in the armed forces of a foreign country and prohibiting the launching of military or naval expeditions from that territory against another nation. It was noted that the content of national legislation was not uniform and that some countries had recently stated that they had no legislation on this topic. Some of the representatives supporting this approach suggested that the Secretariat should prepare further analytical studies on national legislation on mercenaries. It was added that the main task of the Committee should be to organize co-operation and the links between the international legal order and the internal legal orders of States.

22. Some delegations observed that efforts made so far had had limited objectives. Thus it was pointed out that the OAU Convention was purely regional in scope and would not suffice to deal with a problem which could be resolved only with the co-operation of all the members of the international community. With respect to

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6/ The Convention was circulated in a document of the Organization of African Unity under the symbol CM/817 (XXIX), annex II, Rev.3.

7/ The American Journal of International Law, Supplement No. 2, p. 90.

8/ United Nations, Treaty Series, vol. 75, No. 972, p. 135.

article 47 of Additional Protocol I, the view was expressed that the very framework of that provision - namely international humanitarian law - did not make it possible for it to deal with the problem of the definition of mercenaries in a comprehensive manner. As to national legislation, it was stated that while the Committee would do well to draw from the experience of the countries which had enacted laws on the problem, unilateral actions, however well intentioned, were likely to be limited in parameters as objectives were usually narrower in their perspectives. Because of this fragmented approach, there was, in the view of some delegations, a legal vacuum as a result of which mercenaries - for example those who had taken part in the Cotonou raid - enjoyed complete impunity and were free to continue their activities. Many delegations agreed that the time had come to draw up an international legally binding instrument on the question. In this connexion, it was stated that, since any threat to the peace and security of one region could degenerate into a threat to the peace and security of the world as a whole, the international community must consider it a collective responsibility to reach agreements and understandings designed to check and eventually eradicate the activities of mercenaries, thereby removing one of the constant threats to the peaceful coexistence of States.

B. General approach to the drafting of the convention

23. Several delegations expressed views concerning the general approach which the Committee should follow in discharging its mandate. Two approaches were suggested.

24. There was the view that the Committee should embark immediately upon the actual drafting of an international convention that would be universally applied against both the mercenaries and the States which recruit, use, finance, and train mercenaries. In supporting this approach, a large number of delegations mentioned that the draft convention submitted by the Government of Nigeria (A/AC.207/L.3), would provide a good basis for the work of the Committee.

25. A large number of delegations added that, in the process of drafting the convention, the Committee should take inspiration also from the relevant provisions of the Charter of the United Nations and from other United Nations instruments in which various aspects of the problem had been dealt with. Cited among the relevant United Nations instruments were: the Declaration on the Granting of Independence to Colonial Countries and Peoples, the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations and the Definition of Aggression. Also mentioned were a series of General Assembly and Security Council resolutions which addressed the question of mercenaries. These included General Assembly resolutions 2395 (XXIII) of 29 November 1968, 2465 (XXIII) of 20 December 1968, 2548 (XXIV) of 11 December 1969, 2708 (XXV) of 14 December 1970, 3103 (XXVIII) of 12 December 1973, 34/140 of 14 December 1979 and 35/45 of 4 December 1980; and Security Council resolutions 405 (1977) of 14 April 1977 and 419 (1977) of 24 November 1977. It was proposed and accepted by the Ad Hoc Committee that Security Council documents S/12294/Rev.1, S/12319 and Add.1, S/13304 and S/14211 should be considered as working documents of the Ad Hoc Committee. Other instruments of a global or regional nature mentioned by the representatives were the Protocol Additional to the Geneva Conventions of 12 August 1949 (Protocol I) adopted at Geneva in June 1977, the OAU Convention for the Elimination of Mercenarism in Africa (1977), the declaration by the International Commission of Enquiries established by the Government of Angola (1976), the declarations adopted by the heads of State and Government at the summit meetings of OAU at Kinshasa

(1967) and Addis Ababa (1971) and the declarations of the non-aligned countries meeting in Cairo (1965), Colombo (1976) and Havana (1979).

26. The view was expressed that, in order to be effective, the future convention should impose concrete obligations upon States, including the obligation to eradicate the activities of mercenaries. Such concrete obligations, emanating from an international convention, would be in line with the prohibition of the use or the threat of force in international relations and with the principles of equality and self-determination of peoples, the non-interference in the internal affairs of States, and the sovereign equality of States, as laid down in the various United Nations instruments which the representatives had cited.

27. The second approach was that the emphasis should be put on the need to harmonize domestic criminal legislation concerning the recruitment, use, financing and training of mercenaries as the primary instrument for the elimination of the activities of mercenaries, having regard to the basic elements to be included in an international convention of a universal nature and which was generally accepted.

28. Those supporting this approach emphasized that care should be taken in drafting a convention and cautioned against a hasty and overly ambitious endeavour which might lead the Committee into areas and concepts which did not have universal acceptance or which dealt with delicate legal and political questions, capable of generating endless controversies, thereby delaying the work of the Committee.

29. Some delegations expressed the view that the work should focus on criminal law and that, although State responsibility could always be invoked under the provisions of general international public law, certain legal systems could not admit that the breach of international obligations by States could be regarded as a criminal offence.

30. With regard to the mandate of the Committee, one of the representatives observed that the convention which the Committee was to draft could take different forms and content so long as it covered the recruitment, use, training and financing of mercenaries. The representative further emphasized that the final product would be an international convention between the Members of the United Nations and such other non-members as might subsequently express their consent to be bound by it. Thus it would be a convention capable of receiving a wide acceptance.

31. The representative further expressed the view that, while certain regional and global conventions such as the OAU Convention for the Elimination of Mercenarism in Africa, the international conventions in the field of aerial hijacking and those relating to the taking of hostages or the protection of diplomats might appear to be relevant to the work of the Committee, it would be unwise for the Committee to rely automatically and uncritically upon some of the provisions of these conventions. It was his view that these conventions had their specific targets and scope and addressed problems of differing complexities. They would be found to reflect certain approaches and to contain certain provisions which might not be suitable for inclusion in the present convention dealing with the problem of mercenaries in a global context.

C. Elements of the future convention

32. A number of delegations commented on the scope of the instrument under preparation.

33. In this connexion, the view was expressed that the Committee should consider all situations and not only that of mercenaries going from Western Europe to Africa. Its mandate was cast in general terms and should not result in a convention which would discriminate on the basis of race, colour, national origin, sex or similar irrelevant considerations. Nor did it seem possible to try to identify "just" and "unjust" causes and to prohibit the recruitment of mercenaries in regard only to the latter: such an approach, it was stated, would be a throw-back to the nineteenth century doctrine of the just and unjust war which had disappeared. The remark was made in this connexion that one could not extol "good" mercenaries and condemn "bad" ones depending on for whom they fought.

34. On the other hand, the view was expressed that nothing in the remarks made by delegations during the debate could be interpreted as a recognition of the dichotomy between "good" and "bad" mercenaries and that all mercenary activities should be condemned and proscribed. Yet, it was added, a clear differentiation needed to be made between the activities of mercenaries and those of "international volunteers" or of "fighters of national liberation movements" who provided assistance to peoples struggling for freedom and independence and whose work was motivated by their full sympathy with the just cause for which those peoples were fighting. Support for national liberation movements whose struggle was consistent with the concept of individual or collective self-defence as envisaged in Article 51 of the Charter was a just cause and should not come within the purview of the future convention. Attention was, however, drawn to the need to avoid terms and meanings which might give aid and comfort to individuals who, acting under the guise of volunteers, sought to thwart the legitimate aspirations of colonial peoples or to disturb the territorial integrity or political independence of States and therefore to frustrate the very objectives at which the future convention was directed.

35. In relation to the sphere of application of the future convention, it was stated that care should be taken not to impinge upon treaties allowing the presence of foreign military advisers and specialists in another State's territory. It was also stated that the right of States to recruit legitimate non-national personnel for their armed forces should remain unimpaired.

36. One element of the future convention which was generally considered fundamental was the definition of the term "mercenary". Reference was made to the definition contained in article 47, paragraph 2, of Additional Protocol I to the 1949 Geneva Conventions, which, it was noted, had been incorporated virtually without change in article 1 of the Nigerian working paper (A/AC.207/L.3). In this connexion, it was pointed out that article 47 had been a compromise text with which some delegations at the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts had not been entirely satisfied. The question therefore arose whether the discussion should be reopened with a view to deleting, adding or clarifying certain points.

37. Some delegations took the view that acceptance of the definition which had been adopted by consensus in 1977 after three years of intensive negotiations and compromise in the framework of the above-mentioned diplomatic conference might

facilitate the task of the Committee and improve its chances of success. Under that definition, a mercenary was first characterized by his motivation, namely his desire for private gain manifested by material compensation; in addition, he did not belong to regular armed forces nor was he a national or a resident of the territory in which he fought. These elements, it was stated, were not to be taken in isolation and the definition in article 47 must be interpreted in a cumulative way.

38. Many other delegations, however, felt that the definition in article 47 was vague and not entirely adequate for the purpose of the future convention. According to that definition, only individuals who took part in hostilities in exchange for compensation substantially in excess of that promised or paid to combatants of similar ranks or functions could be regarded as mercenaries. Reality showed, however, that that condition was not always met and that some mercenaries killed and plundered in the name of some self-proclaimed ideal, namely the defence of the sordid interests of certain circles, in violation of all the fundamental principles of international law. Thus, the mercenary, aside from his desire for material gain, could have as his aim the accomplishment of a so-called mission, namely forcing a sovereign State to submit to the base demands of a foreign Power, so that above and beyond the venality of the individual, the mercenary sometimes exhibited an equally reprehensible motive, the desire to destabilize a political régime and defend selfish interests. The view was furthermore expressed that the definition in article 47 envisaged only the case of the mercenary who was a private individual, and that account should be taken of the fact that a mercenary might be the agent of a country or of a group of interests. Finally it was pointed out that because of its framework the definition in article 47 referred only to the use of mercenaries in armed conflict; the future convention, on the other hand, should encompass mercenary activities in the absence of armed conflict and the definition of the term "mercenary" should be worded accordingly.

39. Some delegations stressed that the convention should outlaw all forms of mercenary activity, i.e., both the activities of the individual mercenaries and the lending of support to, and instigation of, activities carried out by various individuals, groups or organizations for the purpose of overthrowing governments and political systems regardless of whether these activities were backed by a State or by any other legal or physical entity. Such acts, it was maintained, should be regarded as crimes, the perpetrators of which should bear criminal responsibility and be punished as criminals.

40. Other delegations, however, took the view that the convention should concentrate on the criminal activities of individuals and pointed out that certain criminal law systems did not recognize the liability of bodies corporate. They also objected to the term "mercenarism" which they described as a neologism not to be found in any English, French or Spanish dictionary and insisted that this term be avoided in the discussion. They suggested that in order to cover the activities of those who aided and abetted mercenaries through the establishment and operation of organizations, use be made of the notion of "complicity", a familiar concept in the domestic law of all States which, in a single concept, brought together all the appropriate elements to be included in the scope of the criminal law.

41. Another element which gave rise to divergences of views was the proposed qualification of "mercenarism" as an international crime. Some delegations took the view that since such activities violated the basic principles of international

law established in the United Nations Charter and emphasized in General Assembly resolutions 1514 (XV) and 2625 (XXV), the future convention should characterize it as a grave international crime and further define the large-scale use of mercenaries by States as an act of aggression, taking into account article 3 (g) of the Definition of Aggression (resolution 3314 (XXIX)) and the principles contained in resolution 3103 (XXVIII). Other delegations, however, pointed out that some legal orders could not and would not admit that the breach of international obligations by States could be regarded as a criminal offence.

42. Several representatives pointed out that making a clear distinction between the criminal liability of individuals on the one hand, and State responsibility on the other, would be one of the major problems with which the Committee would have to deal.

43. For some delegations the goal of the future convention was to ensure that mercenaries were punished and to discourage their activities by the operation of suitable machinery. State responsibility, it was pointed out, was a complex subject on which the International Law Commission had been working for many years. The approach adopted by the International Law Commission lead to the conclusion that State responsibility for the activities of mercenaries would arise if the mercenary were an organ of the State or if he were in fact acting on behalf of the State, whereas if the mercenary were not acting on behalf of the State of which he was a national, that State did not incur responsibility towards another State by reason of the mercenary's activities in the territory of that other State. Attempting to create a new rule of strict or absolute liability for the private, independent activities of a State's citizens outside the national territory would, it was maintained, depart from both the International Law Commission's approach and international jurisprudence and reference was made, in this connexion, to the 1925 award given by Max Hüber in the case of the British Claims in respect of the Spanish Zone of Morocco, which made a clear distinction between responsibility for action or inaction by public authorities and responsibility for acts imputable to individuals, a distinction also to be found, for example, in the decision rendered by the United States-Mexican Claims Commission on 16 November 1925. Making States liable for acts or omissions of their nationals would furthermore, it was added, prove impracticable since States were not able - nor, under many legal systems, permitted - to exercise control over all the acts of their nationals. To illustrate this point, it was recalled that many States applied the jus sanguinis with the result that a person might have acquired by descent the nationality of a country he had never visited in his life. The question was asked how that country could be held responsible for the private conduct of the person in question outside its territory. Under general international public law on the other hand, a State incurred international responsibility when it breached an international obligation either through an act or through an omission. Under existing international law, as reflected in particular in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, States had 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; they also had the duty not to intervene in matters within the domestic jurisdiction of other States, which included the obligation not to organize, assist, foment, finance, incite or tolerate armed activities directed towards the violent overthrow of a régime of another State, as well as the obligation not to interfere in civil strife in another State. Thus, it was observed, one could say that a State which

organized bands of mercenaries for incursion into another State or carried out interventions through the instrumentality of mercenaries would be violating international law and its Charter obligations. Similarly, a State which sent mercenaries to carry out acts of armed force against another State committed, under article 3 (g) of the Definition of Aggression, an act of aggression and therefore violated international law. Furthermore, it was remarked, States incurred international responsibility when they failed to fulfil their international obligations regarding vigilance, prevention and punishment.

44. Many other delegations said that, in their approach to State responsibility in relation to "mercenarism", they started from the premise that international law had long ago recognized the right of peoples to self-determination and independent development which was embodied in the Charter and emphasized in the Declaration on the Granting of Independence to Colonial Countries and Peoples and that any actions aimed at suppressing the struggle for national liberation, and particularly violent actions, were a very gross violation of international law in general and of the Charter in particular. They also pointed out that a number of other international legal instruments of the United Nations, such as those mentioned in the preceding paragraphs, contained not only general provisions obliging States to refrain from subversive activity aimed at changing the systems of other countries by means of force or interference in their internal affairs, but also specific legal norms defining the use of mercenaries as a form of aggression and a crime against the peace and security of mankind and declaring it to be a criminally punishable action and mercenaries themselves to be criminals and outlaws. They therefore maintained that the future convention should unequivocably characterize mercenaries as criminals, bearing individual responsibility for their acts, and recognize the responsibility of States which did not prohibit the recruitment of their nationals as mercenaries, allowed mercenaries to be transported through their respective territories or in any other manner contributed to the criminal activities of mercenaries. It was added that the future convention should also lay down the responsibility of States for propaganda for the use of mercenaries, for it was no secret that in some countries publications which glorified mercenaries and contained advertisements or offers of recruitment were openly distributed. Thus, it was concluded, it was of vital importance to affirm in clear terms the international responsibility of States which acted tolerantly towards mercenary activities or failed to take effective measures against such activities. The question whether the individual had acted on behalf of the State or not was of no relevance to the international responsibility of the State on the territory of which the crime of mercenarism was committed. In this connexion, astonishment was expressed at the attempts made by some delegations to limit the discussion to the activities of mercenaries as individuals, with the clear aim of exempting States from responsibility for the existence of mercenaries.

45. A number of delegations referred to the question of the legal status of mercenaries. Support was expressed for the approach reflected in article 47 of Additional Protocol I, under which a mercenary shall not have the right to be a combatant or a prisoner of war and the claim was made that mercenaries were, in fact, professional assassins who did not enjoy international legal protection. Some delegations, however, felt that the future convention should contain adequate provisions for the humane treatment and fair trial of alleged offenders. It was said, in particular, that a literal application of article 47 would seem to overlook several principles of internationally accepted humanitarian law - namely, the principle that humanitarian considerations in a state of belligerence should

prevail over all other aspects, including the interests of war, and the principle of granting fair treatment and protection to persons captured in combat - and that mercenaries should enjoy the minimum fundamental guarantees provided in article 75 of Additional Protocol I or, as a last resort, the fundamental guarantees provided in the Martens Clause contained in the preamble to the fourth Hague Convention of 1907 and in articles 63, 62, 42 and 158 of the four 1949 Geneva Conventions. These delegations also drew attention to the provisions of a humanitarian and human rights nature for alleged offenders contained in the 1979 International Convention against the Taking of Hostages (General Assembly resolution 34/146, annex) as well as to article 11 of the Nigerian working paper (A/AC.207/L.3). Departing from this type of approach would, it was maintained, be a retrogression from existing standards.

46. Another element which it was felt necessary to include in the future convention was an affirmation of the collective duty of States to combat mercenarism and of their obligation to co-operate in the implementation of the objectives of the convention.

47. Some delegations summarized the elements which should be included in the convention. Thus, one delegation stated that the use of mercenaries was to be considered an international crime as States which failed to take effective steps to combat it bore an international responsibility. States must commit themselves to take all the legislative, judicial and administrative measures necessary to halt the recruitment, training, financing, equipping, arming, transportation and use of mercenaries, and individuals engaging in any of these activities must be held liable to criminal proceedings. The use of mercenaries to attack a sovereign State in the sense of article 3 (g) of the Definition of Aggression should be regarded as an act of aggression. Individuals should bear criminal responsibility for the following acts: recruitment, training, financing, supplying, arming, transporting and use of mercenaries. Such acts should be regarded as crimes, the perpetrators of which would be punished as criminals. All these points ought to be reflected in the convention eventually adopted. At the same time, the convention should not hamper the activities of international volunteers campaigning against colonialism, racism, apartheid and foreign domination in accordance with the purposes and principles of the Charter, nor impinge upon treaties allowing the presence of foreign military advisers and specialists in another State's territory.

48. Another delegation stated that any convention on the subject should: (a) adhere faithfully to the definition of mercenary in article 47 of Protocol I and in no way conflict with the relevant provisions of Protocol I; (b) avoid troublesome and fruitless areas such as State responsibility; (c) avoid politicizing the definition of mercenary activity, since one could not meaningfully talk about allowing "good" mercenaries and prohibiting "bad" ones depending on for whom they fought; (d) leave intact the right of States to recruit non-national personnel for their armed forces; and (e) contain adequate provisions for the humane treatment and fair trial of alleged offenders.

49. Still another delegation observed that if the convention was to be an effective instrument, it should in particular: (a) expressly characterize mercenarism as a grave international crime, so as to check the threat posed by mercenarism to the maintenance of international peace and security and impose on States an obligation under international law to prosecute and punish mercenarism; (b) provide for the repression and punishment of mercenarism on the largest scale possible, by making accountable not only the mercenary himself but also those who planned, organized or in any way promoted mercenarism; and (c) recognize the collective duty of States to combat mercenarism and their obligation to co-operate in the implementation of the objectives of the convention.

III. REPORT OF THE WORKING GROUP OF THE WHOLE

50. The Working Group of the Whole established by the Ad Hoc Committee at its 8th meeting on 2 February (see para. 12 above) held eight meetings on 6, 9, 10 and 13 February 1981. It was chaired at its 1st, 4th, 6th and 8th meetings by Mr. Philippe Kirsch (Canada), Vice-Chairman of the Committee, at its 2nd meeting by Mr. Andrei A. Ozadovsky (Ukrainian Soviet Socialist Republic), Vice-Chairman of the Committee, and at its 3rd, 5th and 7th meetings by Mr. E. Besley Maycock (Barbados), Vice-Chairman of the Committee.

51. The Working Group had before it the same documents as the Ad Hoc Committee (see para. 10 above).

52. The Working Group began its work by considering the question of the definition of the term "mercenary", and continued with the consideration of other elements that should be included in the future convention. In the course of the debate, delegations referred to specific provisions of the Nigerian working paper (A/AC.207/L.3), which was the only complete draft available.

53. With respect to the definition of the term "mercenary" as contained in article 1 of the Nigerian working paper, a number of delegations pointed out that article 47, paragraph 2, of Additional Protocol I contained a definition of the term "mercenary" which had been adopted at the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law after protracted and painstaking negotiations, and held the view that this definition should be adopted without change. In their opinion, departing from that agreed definition might not only be unrealistic - which entailed the risk of the future instrument remaining unratified and therefore useless - but also result in two different definitions of the term mercenary under international law - which would be all the more confusing as article 47 of Additional Protocol I did not specify that the definition contained therein was intended "for the purpose" of the instrument in which it appeared. Gratitude was expressed that article 1 of the working paper submitted by Nigeria was virtually identical, except for a minor variation to article 47, paragraph 2, of Additional Protocol I, and the view was expressed that trying to elaborate on such concepts as "armed conflict" might prove counterproductive.

54. Other delegations pointed out that although article 47 reflected a consensus, it left out a number of ideas which some delegations at the above-mentioned Diplomatic Conference would have liked to see included in the text. They observed that, unlike Additional Protocol I which dealt with the question of mercenaries in the context of armed conflicts, the future convention was intended to deal with the activities of mercenaries in general and that the definition in question would have to be adjusted accordingly; international law, it was added, could not remain static and definitions had to take account of new realities.

55. A number of representatives felt that the phrase "armed conflict" in subparagraph (a) of article 1 of the Nigerian draft was unduly restrictive: it was pointed out in particular that the concept of "armed conflict" was not

applicable in the case of a national liberation movement fighting for its right to self-determination and independence. In this connexion, however, the remark was made that the term "armed conflict" had to be understood not only in terms of the 1949 Geneva Conventions but also of the 1977 Protocols, more specifically of article 1, paragraph 4, of Additional Protocol I under which that term covered armed conflicts in which peoples were fighting against colonial domination and alien occupation and against racist régimes; the concept of "armed conflict" was therefore not as narrow as some delegations seemed to think.

56. It was also said that, as exemplified by recent events, there was no armed conflict in certain countries at the time of the aggression of the mercenaries who had been resorted to to carry out punitive actions or in attempts to overthrow or destabilize régimes; in this connexion, one delegation proposed to add to subparagraph (a) of article 1 of the Nigerian draft the words "or to undertake punitive actions" while another delegation proposed to insert in the definition two new subparagraphs reading as follows:

"(b) Engages in acts of aggression against sovereign States;

"(c) Engages in attempts to destabilize sovereign States;".

However, the point was made that, as clearly appeared from the use of the word "and" at the end of subparagraph (e), all the conditions listed in subparagraphs (a) to (f) had to be met for an individual to be qualified as a mercenary. The insertion of the proposed additional subparagraphs would therefore have the effect of restricting further the scope of the definition. In order to remedy that difficulty it was suggested that the conjunction "or" should be inserted at the end of present subparagraph (a) and of additional subparagraph (b) or, alternatively, to merge all three subparagraphs into one single subparagraph reading as follows:

"Is especially recruited locally or abroad in order to fight in an armed conflict or who engages in acts of aggression against sovereign States or who engages in attempts to destabilize foreign States."

57. Another suggestion was to replace the latter part of subparagraph (a) from the words "in order to fight" by "in order either to fight in an armed conflict or to spread terror or bring about destabilization in the territory of a given State".

58. The view was also expressed that the phrase "in order to fight" had a limiting effect since it suggested that action on the battlefield was a necessary condition for qualifying as a mercenary; it was therefore proposed to replace "in order to fight" by "in order to participate". This point was, however, felt to be covered by article 2 which dealt with those who organize, finance, equip, train and support mercenaries.

59. Another suggestion sought to redraft the opening sentence and subparagraph (a) as follows:

"A mercenary is a citizen of a State, who

(a) Is recruited individually on the territory of that State or on the territory of another State in order to take part:

(i) In armed activities at the side of one of the States engaged in an armed conflict;

(ii) In armed activities at the side of any Government acting to suppress the struggle of a people for their self-determination;

(iii) In an armed operation aimed at overthrowing the legitimate Government of a foreign State;"

60. In this connexion, the remark was again made that all the elements in article 1 were to be read in conjunction and that care should be taken not to restrict the definition by inserting additional conditions to be met to qualify as a mercenary. It was also asked, with respect to the words "a citizen of a State", what was the purpose of including such a nationality test in the definition: some individuals had two or more nationalities and some were stateless and there did not seem to be any reason why such individuals should be excluded from the scope of the definition.

61. With respect to subparagraph (b) of article 1 of the Nigerian working paper, it was suggested that the word "direct" should be deleted, or alternatively, that the words "or indirect" should be inserted after "direct". In support of these suggestions, it was said that requiring direct participation in the hostilities would exonerate for example mercenaries who intended to carry out an operation abroad but were stopped or intercepted while on their way to their destination. Several delegations, however, favoured the retention of the present formulation. It was recalled that the word "direct" had been inserted to make a distinction between mercenaries on the one hand and military advisers or instructors abroad on the other. With respect to "intended" mercenary activities, the view was held that the concept of intention pertained more to the moral than to the legal field and should be left out of the definition.

62. Regarding subparagraph (c) of article 1 of the Nigerian working paper, some delegations felt that particular emphasis should be placed on the pecuniary motives of mercenaries and it was suggested that the subparagraph be moved to the first place. Other delegations, on the other hand, stressed that the motivation of an individual was not always easy to ascertain and that it was furthermore not entirely logical to stress the pecuniary motive and leave aside other motivations such as belief in a cause. Some delegations favoured the deletion of the latter part of the subparagraph from the words "substantially in excess" - which, in their opinion, placed an unduly heavy burden of proof on the victims of mercenary activities - while others expressed preference for the present drafting as the phrase in question was in their opinion essential to preserve the distinction between mercenaries and foreigners serving in the regular forces of a State. Other remarks on the definition of the term "mercenary" included the observation that, unlike Additional Protocol I which was concerned with humanitarian law, the convention under preparation touched on criminal law and that if the purport of the definition under consideration was to establish a crime rather than define the features of a type of individual, strict wording was called for. If, therefore, the definition in article 47 was to be altered for the purpose of the present draft, it should be tightened rather than loosened. Some delegations, however, expressed disagreement with the view that the future convention should be confined to criminal law and maintained that the international responsibility of States and other entities which practised mercenarism should be provided for as had been done in the Convention for the Elimination of Mercenarism in Africa of the Organization of African Unity.

63. The Working Group also considered the question of the term and concept of mercenarism.

64. Several delegations emphasized that it was first of all necessary to elaborate a definition of mercenarism since "mercenarism" served as the real and material basis for the existence and activities of mercenaries. Many delegations held the view that although the term "mercenarism" might not yet be accepted in certain languages, it did exist in a number of others, including some of the official languages of the United Nations. They observed that the word "mercenarism" had been resorted to because it was necessary to find an abstract word derived from the term "mercenary" to cover a phenomenon which, in their opinion, was a fact of international life. They added that the language had to keep apace with political realities, as illustrated by the coining at a certain point in history of a word like "Fascism", and that there was in any case no harm in using a word not to be found in dictionaries provided a precise definition of it could be arrived at. The remark was further made that the word "mercenarism" was used in the OAU Convention of 1977 and also appeared in paragraph 1 of General Assembly resolution 34/140 which had been adopted by consensus. On this score, many delegations felt that concepts such as mercenarism used by the General Assembly should not be repudiated for the purpose of the future convention on linguistic, legalistic or other grounds.

65. Many delegations commented on the content of the concept of mercenarism; for some of them, mercenarism was a political, military and financial network that planned aggressions against defenceless countries; for others it was a complex system through which mercenaries were recruited, used, equipped, transported and paid; for still others it was an aggregate of a series of actions perpetrated by the covert use of armed force through the organization of armed bands of mercenaries by individual nationals, private organizations or governmental agencies of States within or outside their respective territories, which recruited, trained, financed, equipped, armed and transported mercenaries for the conduct of premeditated concerted operations. In brief, it was their view that mercenarism was more than the activities of soldiers of fortune and their accomplices.

66. Other delegations said that they did not know what was meant by "mercenarism" and that the term did not exist in their respective languages. According to these delegations, the argument derived from the fact that the word appeared in paragraph 1 of resolution 34/140 was unconvincing since the resolution in question had been adopted without having had the benefit of a discussion in the Sixth Committee. It was also recalled that that specific paragraph had given rise to a reservation on the part of some delegations. Furthermore, to those delegations, a resolution of the General Assembly was different in nature from an international convention, particularly an international convention which these same delegations felt should be penal and which would have to be applied by national courts and therefore had to be especially precise in its terminology if it was to be ratified by their States. These delegations therefore suggested to discard the term "mercenarism" and to speak of the activities of mercenaries and their accomplices.

67. It was noted that the series of imprecise words such as "network", "system" and "aggregate of actions" which had been used in the course of the debate to explain the concept of mercenarism showed that it was indeed an elusive concept which was out of place in a legal document. While agreeing that the language was not static, some delegations pointed out that law - and above all criminal law - did not easily accept new words and that a convention with a neologism, however

well defined, on a key point was less likely to achieve a consensus on the part of the guardians of criminal law in the various parliaments than a convention which would reflect a simpler approach and confine itself to the possible. These same delegations did not deny that the incidents which had been referred to by some representatives must have involved planning and co-operation, but the question arose whether there was a sufficient parallelism between the various operations to demonstrate the existence of a system and whether types of action which were different should not be envisaged in their singularity rather than brought together under a _portmanteau_ concept. To illustrate this point, it was asked whether, for example, the owner of a small newspaper who printed an advertisement aimed in fact at the recruitment of mercenaries but couched in innocent terms could be equated with a soldier of fortune who opened fire with his rifle. For reasons of substance, semantics and negotiability, therefore, these delegations counselled against using a concept which could be superficially attractive to many but might not pass the ultimate scrutiny test of national parliaments.

68. According to the view expressed by some delegations, the discussion on the term "mercenarism" had brought about the more general question of the general approach to the convention under preparation.

69. In this connexion, some delegations said that they favoured an approach which would make it a criminal offence for individuals to recruit, use, finance and train mercenaries, these four activities being mentioned in the mandate given to the _Ad Hoc_ Committee by the General Assembly in resolution 35/48, and which would further distinguish between the use of mercenaries by States and their use by private individuals. The view was expressed that such an approach was consistent with the mandate and did not seek to reduce the scope of the future instrument. It was added that there might not be any great difficulty in including an appropriate provision on complicity and that a convention along those lines would be useful in facilitating the harmonization of legislations. In this connexion, it was felt that the future convention should impose on States parties, _inter alia_, the obligation to enact national legislation against the activities of mercenaries, and reference was made to article 3 of the Nigerian working paper.

70. Other delegations rejected this approach. They pointed out that from the evidence compiled, for example, in the report of the Special Mission of the Security Council to Benin (S/12294 and Add.1), 9/ it clearly appeared that the mercenary was not a tourist who all of a sudden fancied an expedition in a foreign country: the gathering of a band in a given place and at a given time required advanced planning, extensive means of transportation, a considerable arsenal, training facilities and much money. A convention aimed at the elimination of the use of mercenaries therefore had to be targeted not only against individual mercenaries, but also, and above all, against those who provided the above-mentioned elements, an approach which was correctly reflected in articles 1 and 2 of the Nigerian working paper. The remark was made that some of the confusion as to the correct approach to the task before the Committee stemmed from the title of the future instrument as contained in General Assembly resolution 35/48. It was recalled that the suggestion had been made that the convention should bear the title "Convention on the prevention and elimination of the crime of mercenarism". The main task before the _Ad Hoc_ Committee, it was maintained, was to devise measures to eliminate mercenarism as a system. To that end, the convention under

9/ _Official Records of the Security Council, Thirty-second Year, Special Supplement No. 3._

preparation should not only provide for individual criminal responsibility and recognize that the direct participation of a mercenary in armed activities was a serious crime and should be punished as such, but should also uphold the duty of States to take all necessary steps of a penal and administrative nature, to prevent the use, recruitment, financing and training of mercenaries on their territory.

71. A discussion also took place on the question of State and individual responsibility within the framework of the future convention.

72. Some delegations stressed that mercenarism violated fundamental principles and standards of international law, including the prohibition of the use or threat of force and the principles of equal rights, non-intervention and the political, economic, social and cultural self-determination of peoples, and that it should therefore be recognized as an international crime against peace and security which entailed State responsibility. It was recalled that the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV), annex) referred to the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State, a concept which was also included in the Definition of Aggression, and that under the latter document (General Assembly resolution 3314 (XXIX), annex), the use of mercenaries to carry out attacks against the sovereignty and territorial integrity of States on the scale envisaged in article 3 (g) was an act of aggression. Those documents therefore recognized that such activities could be carried out by States, in which case they obviously entailed State responsibility. Furthermore, responsibility for the crime of mercenarism must be borne by any State which failed to take effective measures - involving, if necessary, the participation of their police and intelligence services - to prevent and punish acts endangering the security of States perpetrated by its nationals on its territory and on the territory of other States or which connived in such acts. Reference was made in this connexion to the Alabama case and to the arbitral award in the Island of Palmas case. 10/ The point was also made that it was ultimately for States to take the necessary action and that the majority of delegations therefore rightly wished to place emphasis on the attitude of States which, through action or inaction, contributed to the perpetuation of the phenomenon either by failing to take appropriate legal and administrative measures or by failing to apply their laws. Attempts at bringing out linguistic difficulties were, it was maintained, merely intended to cover up the political stand of States hostile to the recognition of the responsibility of States in this field.

73. Other delegations, without questioning the relevance of certain provisions of the friendly relations declaration and of the Definition of Aggression to the question under consideration, disagreed with the claim that these provisions adopted the concept of mercenarism or supported a plea for the existence of the crime of mercenarism. They merely showed that in 1970, and again in 1974, the phenomenon had been accepted as a reality by the General Assembly. These delegations did not deny that States could in certain circumstances incur international responsibility in the field under consideration: indeed, it was observed, the obligation of States not to tolerate on their territory activities directed against another State, and their international responsibility under

10/ Reports of International Arbitral Awards, vol. II, p. 839.

general international law in case they violated this obligation, had been established over 100 years ago in the Alabama case. But, in the view of these delegations, there was no basis in the practice of States for the establishment of the crime of mercenarism, and the inclusion in the convention of concepts which were not compatible with the legal order of States would result in the convention remaining unratified and therefore useless. In this connexion, it was pointed out that a limited number of countries had ratified the OAU Convention and that the approach reflected in that regional instrument was not likely to be any more successful at the world-wide level. The acts which it was sought to include under the term "mercenarism" varied widely: some were common crimes like killing or wounding, while others, in the legislation of many countries, were not crimes at all. In these circumstances, it was maintained, one could not speak of an international crime of mercenarism. The remark was made in this connexion that neither the Draft Code of Offences against the Peace and Security of Mankind adopted by the International Law Commission in 1954 nor the controversial article 19 of the Commission's draft on State responsibility which listed a series of international crimes and delicts, made any mention of the crime of mercenarism. The view was further expressed that under international law, States could not be held responsible for the acts of their nationals in view of the rules on the territorial application of national law and that international responsibility could only be claimed when they had failed to forestall or punish hostile acts committed on their territory against the territorial integrity or independence of States. The point was finally made that, while it might be true that the majority of delegations favoured an approach emphasizing State responsibility, all points of view had to be taken into account.

74. Some delegations made specific comments on article 2 of the Nigerian working paper, entitled "Definition of mercenarism". It was said in particular that in the opening sentence of paragraph 1 the word "crime" appeared, whereas in paragraphs 2 and 3 the word "offence" had been used and that the same word might be used throughout. Several delegations expressed preference for the word "crime". The suggestion was also made that the word "violating" might be substituted for the word "opposing", and the word "suppressing" inserted before the words "the legitimate aspirations", and that the phrase "jeopardizes the process of self-determination" might be deleted - a suggestion which gave rise to objections. It was also suggested that the phrase "territorial integrity" should be replaced by "sovereignty, territorial integrity and stability", and that the words "political, economic, social or cultural" should be included before the word "self-determination". The question was also asked whether the word "or" before "manifests" should not be replaced by "and". Another suggestion was to include after "national liberation movements" the words "recognized by the United Nations and the Organization of African Unity". This suggestion was not discussed with respect to subparagraph (a); it was suggested that the word "plans" should be inserted before "organizes" and that the last two lines should be replaced by the word "mercenaries". Other comments included the remark that subparagraph (b) called for clarification, that subparagraphs (b) and (e) could be merged as they both related to "participation" and that there was a gap in the draft since it was said nowhere that mercenaries were criminals. One last observation was that article 2 should more logically appear before article 1.

75. Some delegations held the view that the provisions of a future convention should not prejudice the activities of international volunteers, who, in conformity with the purposes and principles of the United Nations Charter, were waging a just struggle against colonialism, racism, apartheid and foreign domination, and should

also be without prejudice to intergovernmental agreements relating to the stationing of foreign military advisers and specialists on the territory of the States concerned. It was also said that the future convention should prohibit States from including mercenaries and units of mercenaries in their armed forces. The view was further expressed that the future convention should not affect the right of States to include aliens in their armed forces.

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