

**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-SEVENTH SESSION
SUPPLEMENT No. 43 (A/37/43)



UNITED NATIONS

New York, 1982

NOTE

Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

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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", in which it decided to establish an Ad Hoc Committee on the Drafting of an International Convention against the Recruitment, Use, Financing and Training of Mercenaries, composed of 35 Member States, and requested 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.

2. On 15 January 1981, the President of the General Assembly appointed 33 Member States as members of the Ad Hoc Committee (A/35/793).

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on the basis of a letter addressed to him by the Chairman of the Latin American Group, that Panama had withdrawn from the Committee and that, taking duly into account the nomination of the Latin American Group, he had appointed Uruguay to replace Panama as a member of the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. Further to his communications of 15 January and 10 February 1981, the President of the General Assembly, on 30 June 1981, informed the Secretary-General, on the basis of a letter addressed to him by the Chairman of the Group of Western European and other States, that he appointed Italy as a member of the Ad Hoc Committee (A/35/793/Add.2).

5. As a result, the Ad Hoc Committee is now composed of the following 34 Member States:

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

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

6. At its 85th plenary meeting on 4 December 1981, the General Assembly, on the recommendation of the Sixth Committee, 2/ adopted resolution 36/76 entitled "Report of the Ad Hoc Committee on the 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, 3/

"Recalling its resolutions, particularly 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 and its resolution 1514 (XV) of 14 December 1960, as well as Security Council resolutions 405 (1977) of 14 April 1977 and 419 (1977) of 24 November 1977, in which the United Nations denounced the practice of using mercenaries against developing countries and national liberation movements,

"Recalling, in particular, its resolution 35/48 of 4 December 1980, by which it established 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,

"Having considered the report of the Ad Hoc Committee, 4/

"Recognizing that the activities of the 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,

"Taking account of the fact that the Ad Hoc Committee has not completed the mandate entrusted to it,

2/ Ibid., Thirty-sixth Session, Annexes, agenda item 115, document A/36/727.

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

4/ Official Records of the General Assembly, Thirty-sixth Session, Supplement No. 43 (A/36/43).

"Reaffirming the need for the elaboration at the earliest possible date of an international convention against the recruitment, use, financing and training of mercenaries,

"1. Takes note of the report of the Ad Hoc Committee on the Drafting of an International Convention against the Recruitment, Use, Financing and Training of Mercenaries;

"2. Decides that the Ad Hoc Committee shall continue its work with the goal of drafting at the earliest possible date an international convention against the recruitment, use, financing and training of mercenaries;

"3. Requests the Ad Hoc Committee, in the fulfilment of its mandate, to consider the suggestions and proposals of Member States, bearing in mind the views and comments submitted to the Secretary-General and those expressed at the thirty-sixth session of the General Assembly during the debate in the Sixth Committee devoted to the consideration of the report of the Ad Hoc Committee;

"4. Requests the Secretary-General to make available to the Ad Hoc Committee at its next session the texts of the conventions drafted by international and regional organizations on mercenaries, as well as any other relevant documentation;

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

"6. Requests the Ad Hoc Committee to submit its report to the General Assembly at its thirty-seventh session;

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

7. The Ad Hoc Committee held its second session at United Nations Headquarters from 25 January to 19 February 1982. 5/

8. 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.

9. 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 Committee as well as Secretary of Working Group B (see para. 16). Mr. Andronico O. Adede, Senior Legal Officer (Codification Division, Office of Legal Affairs) acted as

5/ For the membership list of the Ad Hoc Committee at its second session, see A/AC.207/INF.2.

Assistant Secretary to the Ad Hoc Committee as well as Secretary of Working Group A (see para. 16). Mr. Lucjan Lukasik, Mr. Shinya Murase, Legal Officers, and Mr. A. Mpazi Sinjela, Associate Legal Officer (Codification Division, Office of Legal Affairs), acted as Assistant Secretaries to the Committee and its Working Groups.

10. At its 15th and 18th meetings, on 25 and 28 January, the Ad Hoc Committee elected the following officers:

Chairman: Mr. Mohammed Bedjaoui (Algeria)

Vice-Chairmen: Mr. Luigi Ferrari Bravo (Italy)
Mr. Yefim K. Kachurenko
(Ukrainian Soviet Socialist Republic)
Mr. Harley S. L. Moseley (Barbados)

Rapporteur: Mr. Waliur Rahman (Bangladesh)

11. At its 15th meeting, on 25 January, the Ad Hoc Committee adopted the following agenda (A/AC.207/L.7):

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 resolution 35/48 and paragraph 2 of resolution 36/76.
6. Adoption of the report.

12. At its 15th, 16th and 17th meetings on 25, 26 and 27 January, having considered individual requests for participation in its work in the capacity of observers from the Permanent Missions of Cuba, Egypt, Madagascar, Morocco, Nicaragua and Viet Nam, the Ad Hoc Committee agreed that the representatives of those delegations would be able to attend the plenary meetings of the Committee and to make statements with the approval of the Committee.

13. 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:

- (i) Working paper submitted by Nigeria (A/AC.207/L.3; see annex I);
- (ii) Revised text submitted by Nigeria of articles 1, 2, 7, 11 and 15 of the working paper (A/AC.207/L.9; see annex II);

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

(d) Communication from the Permanent Representative of Cuba: note by the Secretary-General (A/AC.207/L.8; see sect. III, appendix II);

(e) Communication from the Permanent Mission of Mozambique: note by the Secretary-General (A/AC.207/L.10);

(f) Proposals submitted by France (A/AC.207/L.11 and Corr.1; see sect. III, appendix I).

14. At the 15th meeting of the Ad Hoc Committee, on 25 January, the representative of Nigeria proposed that the Committee should begin the work of its 1982 session with a brief review of the draft convention submitted by his delegation in 1981 (A/AC.207/L.3), starting with article 3 since the questions dealt with in articles 1 and 2 had already been extensively discussed at the previous session, and leaving aside for the moment the preamble and the final clauses. He added that one of the purposes of the review would be to distinguish between the more technical questions and the more political or controversial issues which were raised by the future convention, with a view to allocating them at a later stage to two separate working groups which the Committee might consider establishing and which would meet alternately. Some delegations supported the Nigerian proposal. Others reserved their position as to the establishment of two working groups until the proposed review had been completed, especially since it was extremely difficult to determine whether a given provision gave rise to substantial or technical issues as long as the scope of the instrument under preparation had not been defined. Reference was made in that connexion to the question of penalties, which could not be settled as long as the offence had not been defined, to the question of the implementation of the convention, agreement on which presupposed agreement on the extent of the obligations of States parties under the convention, and to the question of the status of mercenaries, which could only be solved after it had been determined whether all types of mercenary involvement within and outside the framework of armed conflicts should be covered. Those same delegations stressed that their agreement to the carrying out of the proposed review was based on the fact that the draft submitted by the delegation of Nigeria was the only complete draft before the Committee and implied no commitment as to the final working product. They insisted on the need for the work to be carried out on the basis of consensus so that the final outcome might gain the approval of all Governments and all parliaments.

15. In the light of the above, the Ad Hoc Committee decided at its 15th meeting to carry out the proposed brief review. A summary of the observations made during that review which took place at the 16th, 17th and 18th meetings of the Committee held on 26, 27 and 28 January is to be found in section II of the present report.

16. At its 18th meeting, on 28 January, the Ad Hoc Committee decided to establish Working Group A, which would deal with issues of definition and with the question of the scope of the convention, and Working Group B, which would deal with all other issues relevant to the future convention, it being understood that Mr. E. Besley Maycock (Barbados) would act as Chairman-Rapporteur of Working Group A and Mr. Luigi Ferrari Bravo (Italy), Vice-Chairman of the Ad Hoc Committee, as Chairman-Rapporteur of Working Group B.

17. At its 20th meeting on 19 February, the Ad Hoc Committee approved its report and decided to include the reports of Working Groups A and B in its report to the General Assembly. These reports are accordingly to be found in sections III and IV, respectively, of the present report.

II. SUMMARY OF THE VIEWS EXPRESSED AT THE 16TH, 17TH AND
18TH MEETINGS OF THE AD HOC COMMITTEE ON 26, 27 AND
28 JANUARY 1982

Penalties (article 3 of the Nigerian working paper)

18. The text of article 3 reads as follows:

"Each State Party shall by appropriate national legislation make the offences set forth in article 2 of this Convention punishable by appropriate penalties which take into consideration the grave nature of the offence."

19. Some delegations remarked that, although article 3 of the Nigerian working paper was modelled on the corresponding provisions of the Hague Convention for the Suppression of Unlawful Seizure of Aircraft, 6/ the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation 7/ and the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 8/ subject to a few differences the reasons for which were unclear, and although it seemed to be applicable only to individuals, it none the less made reference to article 2, which was not confined to individual penal responsibility but envisaged other forms of responsibility. It was therefore felt that the relationship between the two provisions called for clarification and the remark was made that the acceptability of article 3 would depend on the content of article 2.

20. Other delegations, after remarking that the future convention would have to deal with the question of the responsibility of States in relation to mercenary activities, pointed out that article 3 made it clear that those who committed the offences referred to in article 2, i.e., not only the mercenaries themselves but also those who recruited them, trained them, used them and provided for their transportation and financial requirements with a view to carrying out subversive armed operations against States and national liberation movements, incurred penal responsibility.

21. Some delegations noted that the words "by appropriate national legislation" did not appear in the corresponding provisions of the Hague, 6/ Montreal 7/ and New York 8/ Conventions and questioned their usefulness, particularly in the light of article 4 in which the obligation implied by the words in question seemed to be subsumed.

22. The remark was on the other hand made that the words "by appropriate national legislation" referred to the case of States whose legislation did not adequately deal with the subject-matter of the future convention. One delegation observed

6/ United Nations, Treaty Series, vol. 860, No. 12325, p. 105.

7/ United Nations Juridical Yearbook, 1971, p. 143. To be published also in United Nations Treaty Series, vol. 974, No. 14118.

8/ General Assembly resolution 3166 (XXVIII), annex.

that a State whose foreign policy excluded resort to mercenaries and which forbade its nationals to carry out mercenary activities would be under no obligation to enact legislation on the subject.

23. Some delegations, while recognizing the weight of authority of precedents, felt that article 3 should be reinforced and that the phrase "which take into consideration the grave nature of the offence" might enable States parties to claim that they had discharged their obligations once they had made the offences covered by the convention punishable by light prison terms or fines.

24. It was further suggested to provide in the article for the "prosecution or extradition" principle. Attention was however drawn in this connexion to articles 13 and 14 of the Nigerian working paper.

25. Other comments included the remark that the word "offence" in the last line of the text should be put in the plural and the observation that, since article 4 of the Nigerian working paper dealt with the general question of implementation, of which the question of penalties was a specific aspect, it should precede article 3.

Implementation (article 4 of the Nigerian working paper)

26. The text of article 4 reads as follows:

"Each State Party shall take all appropriate administrative and legislative measures to implement fully the provisions of this Convention."

27. Some delegations noted that article 4 of the Nigerian working paper had no equivalent in the existing conventions mentioned in the course of the debate and that the reason therefor was probably that the obligation in question was already recognized by customary international law and articles 26 and 27 of the Vienna Convention on the Law of the Treaties; ^{9/} while warning that the absence of corresponding provisions in other conventions might lead to undesirable a contrario interpretations, they did not oppose the retention of a provision along the lines of article 4.

28. While recognizing that the obligation in article 4 was an application of the general principle "pacta sunt servanda", other delegations felt that article 4 was not superfluous. It was stressed that similar clauses were inserted in treaties whenever it was felt appropriate to highlight a specific aspect of the general obligation of States effectively to implement the treaty. The view was also expressed that articles 3 and 4 each had their specific object and that article 3 should not be considered as subsumed in article 4 because it highlighted the concept of the grave nature of the offences, which was an essential one. The remark was further made that article 4 had a wider scope than article 3 since it encompassed not only legislative but also judicial and administrative measures and that it therefore had a logical place in the conventions. It was suggested to reinforce it by providing therein that any State which failed to take the appropriate steps to prevent the recruitment, use, training, equipping, transporting and financing of mercenaries incurred international responsibility.

^{9/} Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference (United Nations publication, Sales No. E.70.V.5), document A/CONF.39/27, p. 287.

Status of mercenaries (article 5 of the Nigerian working paper)

29. The text of article 5 reads as follows:

"Mercenaries are not lawful combatants and if captured shall not be accorded prisoner of war status."

30. Some delegations noted that article 5 of the Nigerian working paper, which they viewed as a most substantive provision going to the very essence of the future instrument, differed in several important respects from article 47, paragraph 1, of Additional Protocol I to the 1949 Geneva Conventions (A/32/144 and Add.1, annex I). 10/ They pointed out that a number of States were not prepared to go beyond article 47, paragraph 1, which they considered as a maximum, nor to accept that the elaboration of the convention under consideration should provide an opportunity, in no way envisaged in the terms of reference of the Ad Hoc Committee, to reopen the difficult negotiations which had resulted in the text of article 47, paragraph 1.

31. It was observed that, apart from using the plural, article 5 of the Nigerian working paper differed from article 47, paragraph 1, in that it qualified the word "combatants" with the adjective "lawful" and was drafted in an absolute form ("are not") which did not give States parties the margin of discretion implied in the formula "shall not have the right to be". It was recalled in this connexion that, according to information provided by the International Committee of the Red Cross, the consensus had been obtained on article 47, paragraph 1, at the fourth session of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (A/32/144 and Add. 1) thanks to the adoption of a flexible formula.

32. The view was furthermore expressed that article 5, instead of indicating what the mercenary was not and what status he could not claim, should spell out the guarantees to which he, as a human being, was entitled. Attention was drawn in that connexion to article 75 of Additional Protocol I and the view was expressed that the guarantees provided in article 11 of the Nigerian working paper were insufficient and that the future convention should not grant mercenaries less than the minimum humanitarian standards established by the Additional Protocols.

33. With respect to the interpretation of the phrase "shall not have the right to be" in article 47, paragraph 1, as leaving a margin of discretion to States parties, the view was expressed that the mere possibility of such an interpretation highlighted the need to go beyond the terms of article 47, paragraph 1, in order effectively to put an end to the nefarious activities of mercenaries. It was furthermore observed that the interpretation in question found some basis only in the travaux préparatoires. Since it was clear from the text itself that a mercenary had no entitlement to be a combatant and could not claim to be treated

10/ The article reads as follows:

"1. A mercenary shall not have the right to be a combatant or a prisoner of war.

"..."

like a prisoner of war, nor could a claim to that effect be made on his behalf, recourse to the travaux préparatoires - which under article 32 of the Convention on the Law of Treaties was permissible only when the interpretation according to article 31 left the meaning ambiguous or obscure or led to a manifestly absurd or unreasonable result - was clearly unwarranted in the present instance.

34. Other delegations said that the difficulties which were raised by paragraph 5 had their source in the tendency to keep envisaging the question of mercenaries exclusively in the context of armed conflicts. It was recalled in that connexion that mercenaries had been and were being used in Africa, in Latin America and elsewhere to carry out punitive actions or in attempts to overthrow or destabilize Governments. Whereas, in the framework of an armed conflict, a mercenary could not be described as an unlawful combatant because he was not viewed as such by the State which employed him, the same did not apply in relation to a punitive or destabilizing operation; in such cases, the State of which the mercenary was a national should punish him and treat him as an unlawful combatant irrespective of its links with him. The view was therefore expressed that the article should provide that mercenaries are criminals who are not lawful combatants. Some doubts were however expressed on the description of mercenaries as criminals since articles 1 and 2 would be sufficiently clear in that respect and it was suggested that article 5 merely provide that mercenaries were not entitled in any circumstance to prisoner of war status. Attention was drawn in that connexion to an error in the French translation of the Nigerian working paper which, because it omitted the conjunction "and", gave the impression that mercenaries were denied the status of lawful combatants only when they were captured.

Establishment of jurisdiction (article 5 of the Nigerian working paper)

35. The text of article 6 reads as follows:

"1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offence in the following cases:

"(a) When the offence is committed in its territory;

"(b) When the offence is committed by any of its nationals, or body corporate registered in that State;

"(c) When the offence is committed by the representative of a State;

"(d) When the offence is committed against that State.

"2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over the offence in the case where the alleged offender is present in its territory and it does not extradite him pursuant to article 13 of this Convention to any of the States mentioned in paragraph 1 of this article.

"3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law."

36. Some delegations found it difficult to comment meaningfully on the question of jurisdiction as long as the offences to be covered by the future convention had not been defined. While recognizing that article 6 of the Nigerian working paper was

based on article 4 of the Hague Convention for the Suppression of Unlawful Seizure of Aircraft, article 5 of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, article 6 of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents and article 5 of the International Convention against the Taking of Hostages, 11/ they pointed out that it had been possible to reach agreement on the above-mentioned provisions only because all States knew exactly to what type of offences they were intended to apply. Comments were nevertheless offered on the various elements of article 6 of the Nigerian working paper.

37. It was pointed out that paragraphs 2 and 3 closely followed existing precedents and were of a technical nature.

38. With regard to paragraph 1, the view was expressed that subparagraph (a) which embodied the territorial criterion should not give rise to difficulties. The reference in subparagraph (b) to the criterion of registration of body corporates was on the other hand viewed as likely to raise technical difficulties in view of divergencies among legal systems in that respect.

39. It was also pointed out that many legal systems did not admit the concept of the penal responsibility of body corporates - which under those systems could only incur civil responsibility for injurious acts committed by their agents - and that those legal systems which admitted such a concept confined it to the field of activity of bodies corporate (as in the case of violations of anti-pollution or anti-trust legislation) and did not extend it to acts of violence.

40. Subparagraph (c) was described as a novel and controversial provision which illustrated the difficulties one was bound to encounter if one tried to deal simultaneously with the fundamentally different concepts of State and individual responsibility. The remark was made that if the phrase "representative of a State" referred to a head of State or Government or to an ambassador, subparagraph (c) would conflict with the immunity of jurisdiction which those persons enjoyed under general international law and under the Vienna Convention on Diplomatic Relations. 12/. If, on the other hand, the drafters of the text had in mind the police or intelligence authorities, the question arose whether it was advisable to place emphasis on the fact that such persons happened to be part of the State apparatus and whether the concept of complicity would not be a more useful one. As drafted, it was observed, paragraph (c) was directed against the wrong target: by trying to reach the superior levels of the State, it left untouched intermediary levels which were far more likely to become involved in mercenary activities. The remark was also made that the phrase "a State" was unclear and that if it referred to any State, subparagraph (c) would have the unwarranted effect of submitting to universal jurisdiction all the persons who happened to hold a fragment of State authority. As to subparagraph (d), it was viewed as unobjectionable in the case where the offence was committed on the territory of the victim State but as having far-reaching implications if its effect was to give the victim State the right to establish its jurisdiction over offences committed outside its territory by a national of another State.

11/ General Assembly resolution 34/146, annex.

12/ United Nations, Treaty Series, vol. 500, No. 7310, p. 95.

41. Other delegations stressed that although its wording was open to improvement, article 6 should not pose unsurmountable problems. It was pointed out in particular that subparagraph (c) was based on paragraph 1 (c) of article 3 of the International Convention on the Suppression and Punishment of the Crime of Apartheid, 13/ article 4 of the Convention on the Prevention and Punishment of the Crime of Genocide, 14/ and on article II of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, 15/ and that if those provisions had been found acceptable, it was difficult to understand why subparagraph (c) should give rise to difficulties. It was however recognized that the phrase "the representative of a State" was unclear and that the subparagraph should clarify the way in which a request for a waiver of immunity should be handled, and be linked to articles 13 and 14 dealing with extradition. The remark was also made that article 6 was closely linked with article 2 and that, should the latter article cover State responsibility, subparagraph (c) might prove unnecessary. Subparagraph (d) was similarly recognized as important but calling for improvement. It was said in particular that the words "that State" should be accompanied by appropriate qualifications that would restrict the scope of the subparagraph.

Concurrent jurisdiction (article 7 of the Nigerian working paper)

42. The text of article 7 reads as follows:

"When a State Party is accused by virtue of the provisions of articles 2 and 8 of this Convention for acts or omissions declared to be the offence under the present Convention, any State Party having jurisdiction may invoke the provisions of this Convention against the offending State before any competent international organization or tribunal."

43. Some delegations viewed article 7 of the Nigerian working paper as highly controversial. They observed that the article had no counterpart in existing conventions and that although, judging from its title, it purported to deal with the problems of conflicts of jurisdiction which arose in case several States had jurisdiction to prosecute an alleged offender, its purpose was in fact of a very different nature since it envisaged that a State could be accused of an offence of the type covered in the Convention and therefore admitted the concept of a criminal responsibility of States - a concept which was described as extremely difficult to accept. In the view of those delegations, the question of the responsibility of a State for breach of an international obligation was covered by the rules of general international law and there was no need to deal with it in the future convention. In any case, the notions of State responsibility and of individual criminal responsibility, although they could be related de facto, were legally entirely different and should be kept separate. It was furthermore observed that there did not exist any international tribunal before which the criminal responsibility of States could be invoked and that one could not assume that the authors of the text

13/ General Assembly resolution 3068 (XXVIII), annex.

14/ General Assembly resolution 260 A (III), annex.

15/ General Assembly resolution 2391 (XXIII), annex.

had intended to say, in an indirect way, that any dispute between States concerning the application of the convention should be brought before a competent international jurisdiction, because in such a case article 7 would clearly be overlapping with article 16.

44. Other delegations pointed out that if it was generally agreed that a State could incur responsibility as a result of mercenary activities, alternative wordings could be considered and a new text worked out. It was recalled that reference had been made during the general debate to cases where States incurred responsibility for subversive activities originating on their territory and mention was made in that context of the Alabama case. 16/ As to the reference to a "competent international organization or tribunal", the remark was made that it was always possible to create a new body or confer jurisdiction to an existing one.

Preventive measures (article 8 of the Nigerian working paper)

45. The text of article 8 reads as follows:

"Each State Party shall take all necessary measures to prevent the departure from its territory of any individual, group or association or body corporate, or representative of a State reasonably believed to be involved in any of the activities mentioned in article 2 of this Convention, including denial of transit and other facilities to them."

46. Some delegations stressed the usefulness of article 8 of the Nigerian working paper. It was observed that a mercenary operation required a number of preliminary steps (organization, financing, taking off to the territory of the target State, etc.) and that it was important to impose on States parties the obligation to prevent an operation from actually taking place whenever they had reasonable ground to believe that such an operation was about to be launched from their territory. Reference was made in that connexion to a mercenary expedition which had recently been dealt with in the Security Council and which could have been stopped by the State from whose territory the expedition was launched. Article 8 was felt to be all the more necessary as the actual perpetration of the offences covered by the convention could result in the destruction of States or the overthrow of governments and therefore posed a threat to international peace and security.

47. Other delegations felt that the question of preventive measures should be approached from a wider angle and that the Nigerian draft in general placed too much emphasis on prevention and not enough on repression. They felt that a detailed catalogue of the various steps which States parties would have the obligation to take to prevent the Commission of the offences under consideration would be very useful with respect, for example, to the recruitment, training and financing of mercenaries and that, once those obligations had been spelled out, the concept of State responsibility as recognized in the Alabama case would become a significant one in relation to the future convention.

16/ J. B. Moore, History and Digest of the International Arbitrations to which the United States has been a Party, vol. IV, p. 4160.

48. Some delegations commented on the relationship between article 8 and article 10. The question was asked in that connexion whether the phrase "reasonably believed to be involved" meant "reasonably believed to have committed the offence". In the affirmative, it was observed, the article should not pose any substantial problem, since all legal systems allowed for preventive detention whenever there was reason to believe that an offence had been committed - a principle which extended to inchoate offences. Reference was made to the specific case of States which would not have jurisdiction under article 6: while some delegations wondered whether article 8 would not give rise to difficulties in such a case, others felt that it was in relation to those States that article 8 assumed special importance and reference was made in that connexion to the practice of INTERPOL of sending a so-called "red notice" to the State on whose territory an alleged offender found himself to request it to detain the person concerned pending communication of evidence. The remark was however made that the phrase "to be involved in" should perhaps not be interpreted as meaning "to have committed" inasmuch as such an interpretation would result in a lesser duty (that of preventing the departure of the alleged offender) impairing the primary duty enunciated in article 10 (that of taking the alleged offender into custody).

49. Some delegations noted in that connexion that if article 8 aimed at imposing on States an obligation to deprive individuals of their freedom of movement before any offence could reasonably be believed to have been committed, it would conflict with their constitutional and legislative systems. Such an obligation was viewed as particularly difficult to comply with in the case of transit States. Other delegations noted that there was no such absolute freedom of movement of individuals in democratic societies. These freedoms, they pointed out, were subject to restrictions in the over-all interests of public policy and national security.

50. Other comments included the observation that the concepts of departure and transit were meaningless in the case of a body corporate and the remark that the reference to a State representative raised the question whether parties to the convention would be expected to prevent diplomats or heads of Governments suspected of being involved in mercenary activity from leaving their territory or making transit through their airports.

Mutual assistance (article 9 of the Nigerian working paper)

51. The text of article 9 reads as follows:

"1. States Parties shall afford one another the greatest measure of assistance in connexion with criminal proceedings brought in respect of the offence stated in article 2 of this Convention. The law of the requested State shall apply.

"2. Each State Party shall be obliged to communicate directly or through the Secretary-General of the United Nations to the other State Party concerned any information related to the activities of mercenaries as soon as it comes to its knowledge."

52. It was generally agreed that the thrust of article 9 of the Nigerian draft was a useful one which should, subject to drafting changes, be provided for in the proposed convention.

53. The remark was made that paragraph 1 of article 9 of the Nigerian working paper was based on provisions of existing conventions (articles 10 and 11 of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, ^{17/} article 10 of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents ^{18/} and article 11 of the International Convention against the Taking of Hostages). ^{19/} It was however noted that the phrase "the requested State" was unclear in that context and that article 9, unlike the above-mentioned corresponding provisions of previous conventions, did not take into account the fact that some States were bound by bilateral or multilateral treaties of mutual judicial assistance.

54. With regard to paragraph 2, attention was drawn to the need to preserve a measure of confidentiality in order to avoid premature or unwarranted disclosures which would help alleged offenders to escape and hamper prosecution.

Taking of custody (article 10 of the Nigerian working paper)

55. The text of article 10 reads as follows:

"Upon being satisfied that the circumstances so warrant, any State Party in the territory of which the alleged offender is present shall in accordance with its laws take him into proper custody or take such other measures to ensure his presence for such time as is necessary to enable any criminal or extradition proceedings to be instituted. The State Party shall immediately make a preliminary inquiry into the facts."

56. The remark was made that article 10 of the Nigerian working paper was modelled on article 6, paragraph 1, of the International Convention against the Taking of Hostages but did not contain provisions parallel to paragraphs 2 to 6 of that same article.

Judicial guarantees (article 11 of the Nigerian working paper)

57. The text of article 11 reads as follows:

"Any individual or group or association, or body corporate, or representative of a State or the State itself, on trial for the offence defined in article 2 of this Convention shall be entitled to all the judicial guarantees ordinarily granted by the law to an alleged offender in the same circumstances."

58. The remark was made that the concept of a State going on trial and enjoying judicial guarantees was difficult to envisage and illustrated the difficulties which one was bound to encounter if one tried to deal jointly with individual penal responsibility and State responsibility. It was therefore suggested to limit

^{17/} United Nations Juridical Yearbook, 1971, p. 143.

^{18/} General Assembly resolution 3166 (XXVIII), annex.

^{19/} General Assembly resolution 34/146, annex.

article 11 of the Nigerian working paper to the subjects of penal law. The view was expressed that, in formulating the article, account should be taken of the provisions of article 75, paragraph 2, of Additional Protocol I to the 1949 Geneva Conventions (A/32/144 and Add.1, annex I) and that the proper approach was to spell out the fundamental guarantees of due process of law rather than merely mentioning or paraphrasing article 75, paragraph 2, of Additional Protocol I. It was observed in that connexion that since the acts which the proposed convention was intended to cover were often aimed at overthrowing governments, the obligation to respect judicial guarantees was of special importance in view of the tendency of States to suspend such guarantees whenever they felt that their security or vital interests were threatened.

59. The view was on the other hand expressed that the proposed convention should not result in upholding the rights of mercenaries which were considered by many as criminals. The remark was furthermore made that it was illogical to provide in article 5 that mercenaries were not combatants and to refer in article 11 to article 75, paragraph 2 of Additional Protocol I which dealt with the status of combatants.

60. While recognizing that mercenaries were entitled to humane treatment and noting in that connexion that the judicial guarantees provided in article 11 should be applicable not only during the trial phase but also at all the stages of the proceedings - an approach which was reflected in article 8 of the International Convention against the Taking of Hostages - some delegations pointed out that the provisions of Additional Protocol I which dealt with the law of armed conflicts could not be systematically transposed in the context of the present instrument, which dealt with all the activities of mercenaries whether or not they took place in the framework of armed conflicts. Thus, it was concluded, specific provisions would have to be elaborated on the matter for the purpose of the future convention.

Communication of the outcome of final proceedings (article 12 of the Nigerian working paper)

61. The text of article 12 reads as follows:

"The State Party where the alleged offender is prosecuted shall in accordance with its laws communicate the final outcome of the proceedings to the Secretary-General of the United Nations, who shall transmit the information to the other States concerned and the international intergovernmental organizations concerned."

62. The remark was made that although article 12 of the Nigerian working paper was modelled on article 7 of the International Convention against the Taking of Hostages, the question arose whether the reference to international intergovernmental organizations, which was fully warranted in the case of that Convention since an official of an international organization could be the victim of an act of hostage-taking, was not out of place in the context of a convention on the activities of mercenaries.

Extraditable offences (article 13 of the Nigerian working paper)

63. The text of article 13 reads as follows:

"1. For the purposes of this Convention, any of the offences mentioned in article 2 of this Convention shall be deemed to be included as extraditable offences in any existing or future extradition convention or treaty between the States Parties. This Convention may also be the legal basis for extradition in respect of offences listed in article 2.

"2. Each State Party having jurisdiction mentioned in article 6 of this Convention may request for extradition from the other State Party where the alleged offender is found."

64. Some delegations supported article 13 of the Nigerian working paper. The remark was however made that the article made reference to article 2 of that same paper and that only once the content of article 2 had been clarified could consequential issues such as extradition be meaningfully discussed. It was observed that, in some legal systems, only serious offences gave rise to extradition and that offences such as those referred to in subparagraph 1 (c) of article 2 could not be equated with those provided for in subparagraph 1 (a) of the same article. It was also observed that, should a differentiation be made with regard to extradition between the various types of offences to be covered by the future convention, the provisions on extradition would have to be drafted accordingly. The view was furthermore expressed that article 13 should subject extradition to the law of the requested State.

Extradition (article 14 of the Nigerian working paper)

65. The text of article 14 reads as follows:

"1. For the purpose of extradition between States Parties, an offence of mercenarism shall not be regarded as a political offence or as an offence inspired by political motives.

"2. Where however the State Party in whose territory the alleged offender is found fails to extradite him, that State Party shall be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution in accordance with the laws of that State."

66. Some delegations supported article 14 of the Nigerian working paper. One delegation reserved the right to present an article excluding the perpetrators of offences of the type covered by the draft convention from the benefit of the right of asylum. Some delegations stressed that the question of extradition was closely linked to article 2 and therefore raised delicate problems. The remark was furthermore made that article 14 should contain a provision along the lines of that embodied in article 9, paragraph 1, of the International Convention against the Taking of Hostages, since there was no reason to deny alleged offenders under the future convention the benefit of guarantees which were enjoyed by alleged offenders under an existing United Nations Convention. Attention was however drawn to the fact that extradition was not the only option open to States under article 14 and to the need to keep in mind the no-safe-haven principle which underlay the entire draft.

Action for damages or reparation (article 15 of the Nigerian working paper)

67. The text of article 15 reads as follows:

"1. Where a State Party which suffers damage, or whose national or juridical person suffers any damage or loss of life as a result of mercenarism, is unable to prosecute or cause prosecution of the alleged offender because of the refusal or otherwise of the other State Party in whose territory the alleged offender is found or its national, it may none the less present a claim for damages or reparation as the case may be against that other State Party.

"2. The State Party which has suffered damages by reason of the commission of the offence mentioned in article 2 of this Convention may also claim damages or reparation against any State Parties jointly or severally for any act or omission which constitutes the offence.

"3. However, a claim for damages or reparation may only be considered when attempts to secure criminal prosecution have failed."

Some delegations endorsed the principle underlying article 15 of the Nigerian working paper, adding that they had an open mind as to the precise formulation. The concept laid down in article 15 was viewed as being perfectly consonant with the well-established principle of reparation of damage caused by the breach of an international obligation, as well as with the results of the work being carried out in this area by the International Law Commission, as reflected in particular in article 19 of its draft articles on State responsibility.

68. Other delegations pointed out that the concept of reparation was new and expressed serious doubts about article 15, which one representative described as incomprehensible. In their opinion, it was preferable to leave the question of the responsibility of States under the convention to customary international law. The remark was made that a piece-meal approach to a question which was being dealt with in the International Law Commission might pre-empt the work of the Commission. It was further pointed out that article 19 of the Commission's draft was highly controversial and that to introduce extraneous consideration on which there was no consensus was self-defeating and inappropriate. Some delegations remarked, however, that the consideration of the question of State responsibility by the Commission did not prevent any other committee set up by the General Assembly from considering the same issue. Other comments on article 15 included the remark that the term "juridical persons" was very imprecise and the observation that the text did not specify the jurisdiction which would be competent to deal with the type of claims envisaged in the article. It was also pointed out that the concept of reparation was alien to certain systems of law and would create difficulties in practical application.

III. REPORT OF WORKING GROUP A

A. General observations on the question of definition and scope of the convention

69. Working Group A held 12 meetings between 1 and 19 February 1982, under the chairmanship of Mr. E. Besley Maycock (Barbados), during which it considered the issues of definition and the scope of the convention which had been allocated to it by the Ad Hoc Committee in accordance with the decision referred to in paragraph 16 of its report.

70. At the beginning of its work, the Working Group had before it the revised text of draft articles 1 and 2 submitted by Nigeria (A/AC.207/L.9; see annex II) which read as follows:

"Article 1

"Definition of a mercenary

"For the purpose of this Convention, a mercenary is a person who:

"(a) Is specially recruited locally or abroad in order to participate in an armed conflict;

"(b) Engages in an act of aggression against sovereign States; or

"(c) Does, in fact, take part in the armed conflict or act of aggression;

"(d) Is motivated to take part in an armed conflict or act of aggression by the desire for private gain and is promised by or on behalf of a party to the armed conflict material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the regular armed forces;

"(e) Is neither a national of the State in which the armed conflict or hostility is taking place nor a resident of the territory controlled by a party to the conflict or hostility;

"(f) Is not a member of the regular armed forces of a party to the conflict or hostility; and

"(g) Has not been sent by a State which is not a party to the conflict or hostility or on official duty as a member of its armed forces.

"Article 2

"Definition of mercenarism

"1. The crime of mercenarism is committed when a mercenary, as defined in article 1 of this Convention, with the aim of opposing by threat or use of force against the territorial integrity of another State or suppressing the

legitimate aspirations of national liberation movements, manifests by overt acts any of the following:

"(a) When an individual group or association:

- (i) Recruits, uses, finances, or trains another or group of persons for the purpose of becoming a mercenary;
- (ii) Advertises, prints or causes to be advertised any information regarding subparagraph (a) (i) of the present paragraph.

"(b) In the case of a body corporate or a State:

Allows or tolerates the organization, recruitment, use, financing or training of mercenaries within its territory or control or affords facilities for transit, transport or other operation of mercenaries.

"2. (a) Any individual, group or association which:

- (i) Attempts to commit any act of mercenarism (hereinafter referred to as 'the crime') mentioned in paragraph 1 of this article;
- (ii) Participates as an accomplice of any one who commits or attempts to commit the crime,

shall be deemed to have committed such crime for the purpose of this Convention.

"(b) Any body corporate or State which:

- (i) Attempts to commit any act of mercenarism mentioned in paragraph 1 of this article;
- (ii) Participates as an accomplice of any one who commits or attempts to commit the crime,

shall be deemed to have committed such crime for the purpose of this Convention.

"3. The crime, if committed, shall be deemed to be a crime against the peace and security of a State."

71. In the course of the discussion of these articles, a number of representatives observed that, apart from its subparagraph (b) and certain other differences, article 1 of the Nigerian draft set out above was similar to article 47, paragraph 2, of Additional Protocol I to the 1949 Geneva Conventions relating to the Protection of Victims of International Armed Conflicts, adopted in 1977 at the

72. Among the questions raised with regard to the scope of the convention were: (a) whether there should be a departure from the definition of a mercenary contained in article 47, paragraph 2, of Additional Protocol I; (b) whether it was indeed appropriate for the convention being drafted to deal also with mercenaries in the context of international armed conflict already covered under the laws of war by virtue of Additional Protocol I; (c) whether, in any case, the element of motivation contained in subparagraph (d) above could be satisfactorily incorporated into national systems of criminal law and procedure on account of the difficulty in proving a person's motivation.

73. Some delegations were of the view that the convention being drafted should limit its scope to the problem of mercenaries in the context other than that of international armed conflict. Thus, the Working Group should concentrate on mercenary activities in place/time situations and thus refrain from renegotiating the laws of war by attempting to expand the definition of the term "mercenary". It was the view of these delegations that the extension of the scope of the future convention to deal with mercenaries in the context of international armed conflict might lead to the undesirable result of having two kinds of definitions of the term: one definition under article 47, paragraph 2, of Additional Protocol I, in which the primary concern was to assign a mercenary a particular status under the laws of war, and another definition for activities in other situations, by which a mercenary is identified by the commission of a particular crime he commits under the convention being elaborated. A view was also expressed that great care would be required not to disturb the laws of "armed conflict" which were the result of lengthy negotiations by experts in international law applicable in armed conflict and that the Committee should not create conflicting law. In this convention, it

20/ The article reads as follows:

"A mercenary is any person who:

"(a) Is specially recruited locally or abroad in order to fight in an armed conflict;

"(b) Does, in fact, take a direct part in the hostilities;

"(c) Is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;

"(d) Is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;

"(e) Is not a member of the armed forces of a Party to the conflict; and

"(f) Has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces."

was further observed by a delegation, progress would be more quickly achieved by concentrating on matters not already covered by international law. The view was also expressed that the Working Group had proceeded and should continue to proceed as an expert group.

74. But there was also the view that the convention being drafted should be a comprehensive one dealing with the entire question of mercenaries in all situations. Those supporting this view observed that it would not be an accurate interpretation of the mandate of the Ad Hoc Committee if it were to restrict itself to the drafting of a convention against mercenaries in peacetime only. In recognition of the possibility of two kinds of definition of the term "mercenary", it was suggested that appropriate provisions be considered clarifying the relationship between the provision of the future convention and the 1949 Geneva Conventions and the Additional Protocols.

75. Other delegations, while agreeing with the view that the scope of the convention should be a comprehensive one, favoured the approach which would, outside international armed conflicts, retain the definition of the term "mercenary", contained in article 47, paragraph 2, of Additional Protocol I.

76. On the contents of article 2 of the Nigerian draft, certain representatives stated that their laws did not allow the incrimination of States. Some delegations stressed the problem of establishing international crime of States since this aspect of the work of the International Law Commission, in the framework of the progressive development of international law, and the régime which might emerge from it were not yet known. Certain delegations were of the view that State responsibility under international law for activities by individuals attributable to States was not excluded.

77. Several delegations expressed reservation about the approach of excluding from the draft convention the definition of "mercenary" and "mercenarism". These delegations stressed that the goal of this convention was to oblige States to suppress mercenarism, which was a serious international crime. In their opinion, therefore, the convention should include the definition of the two terms. While agreeing that there should be at the beginning of the convention an enumeration of concrete manifestations of mercenary activities and those persons who organize these activities, these delegations noted that such an approach should not exclude the definitions of "mercenary" and "mercenarism" in the convention.

78. But there was also the view that it would be more practical to approach the problem of definition by first attempting to identify the possible mercenary activities that might be prohibited under the convention. Thus, instead of trying to define the author of the offence, it would be meaningful first to have a clear picture of the crimes or activities to be prohibited, then later, if necessary, to define the criminal himself. It was emphasized under this approach that the identification of the activities would thus result in the necessary association of the would-be-offender (a mercenary) with a particular offence actionable under the convention, instead of punishing a person for merely having been defined as a mercenary. Thus, it was noted, it is the commission of the prohibited acts which would be punishable and not the status of being a mercenary.

79. The Working Group, in informal consultations, followed this approach of focusing first on the identification of the mercenary activities to be prohibited under the convention. It was recognized in this connexion that some activities to

be prohibited were those applicable to persons who took part in the actual fighting or use of force in the process of committing the identified offence, while other prohibited activities applied in the case of those who did not themselves engage in the actual use of force, but conducted activities which facilitated and supported the commission of the offence by a particular mercenary or group of mercenaries. It was also observed that consideration should be given to the identification of specific duties and obligations, which States would be expected to assume when they become parties to the convention being drafted.

80. The result of this exercise was the identification of the following possible activities that might be prohibited under the convention, as applied to the individual who engaged in the actual use of force as a mercenary:

Direct participation in:

- (a) Armed conflict against a State; or
- (b) Effort to overthrow a Government;
- (c) Attempt to destabilize a Government or a State;
- (d) Attempt to suppress or frustrate the process of independence or self-determination of a people;
- (e) Attack on the civilian population of a State.

81. The following activities were also identified as constituting possible offences that might be prohibited under the convention and applied to those who facilitated the activities of individual mercenaries:

- (a) Organizing a band of mercenaries;
- (b) Recruiting a band of mercenaries;
- (c) Training a band of mercenaries;
- (d) Financing a band of mercenaries;
- (e) Using a band of mercenaries;
- (f) Enlisting in a band of mercenaries;
- (g) Advertising or publishing information designed to facilitate the recruitment, use, financing or training of mercenaries.

82. As for the list of duties and obligations of States, the following was suggested:

1. Not to engage in any form of mercenary activities;
2. To take all practical measures to prevent mercenary activities (e.g., enactment of appropriate legislation and adoption of administrative procedures);

3. To extend to one another the greatest measure of co-operation with a view to combating activities of mercenaries including:

(a) Exchange of information regarding activities of mercenaries;

(b) Arrangement for extradition procedures.

83. Having reached that stage of its work, and taking into account several specific proposals which had also been made by participants in the work of the Committee, the Working Group considered that the next step of its work was to attempt to translate the list of possible activities so identified into a framework under which further discussion could be conducted. The step, as was generally understood, was to "put the flesh on the bones", while not losing sight of an appropriate solution to the problem of definitions and scope. The result of this exercise was an informal document which, following consultations with representatives from all regional groups, the Chairman placed before the Working Group as follows:

"Use of terms

"For the purpose of this Convention:

"(a) 'A mercenary' in relation to international armed conflict means a person as defined in article 47 of Additional Protocol I of the 1949 Geneva Conventions. 21/

"For the purpose of other situations provided for in this Convention, 'A mercenary' also means any person who is specially recruited locally or abroad for armed operations outside an international armed conflict, as provided for in paragraph 1, in order to suppress the struggle of a people for self-determination, to overthrow the legitimate Government of another State, or to violate in any other manner the sovereignty, territorial integrity or political independence of another State, and who is motivated essentially by the desire for private gain;

"(b) 'Mercenary activity' means direct participation of a mercenary in, or his attempt to commit, conspiracy to commit, or complicity in the commission of hostile acts designated as a crime under this Convention;

"(c) 'Hostile acts' means, with respect to a mercenary, threat or use of force and with respect to a State, threat or use of force or aggression.

"PART A

"Section I

"Any person defined above as a mercenary commits a crime under this Convention if he directly participates in the following activities:

21/ See foot-note 20.

"(a) Hostile acts within international armed conflict; or

"(b) Hostile acts to overthrow a foreign Government;

"(c) Hostile acts to destabilize a foreign Government or State by undermining the institutions of such Government or State or by fomenting civil strife or attacking the civilian population;

"(d) Hostile acts to suppress or frustrate the process of independence or self-determination of a people.

"Section II

"Any person, or [body corporate] commits a crime under this Convention if, for the purpose of committing a crime specified in section I, he:

"(a) Organizes a group of individuals; or

"(b) Recruits an individual or a group of individuals;

"(c) Trains an individual or a group of individuals;

"(d) Uses an individual or a group of individuals;

"(e) Knowingly provides arms and equipment to an individual or to a group of individuals;

"(f) Knowingly transports an individual or a group of individuals;

"(g) Knowingly finances an individual or a group of individuals;

"(h) Knowingly advertises, or publishes information to facilitate the recruitment, use, financing or training of mercenaries.

"Section III

"It shall also be a crime under this Convention to:

"(a) Attempt to commit a crime specified in section I or II;

"(b) Participate as an accomplice of anyone who commits or attempts to commit such crimes.

"PART B

"1. States Parties to this Convention undertake:

"(a) Not to engage in the organization, recruitment, financing, training or use of an individual or a group of individuals for the purpose of committing a crime under section III;

"(b) To enact appropriate national legislation making the offences set forth in sections I and II punishable by appropriate penalties which take into consideration the gravity and nature of each particular offence;

"(c) Not to tolerate or permit the use of their territories for any form of mercenary activity.

"2. The enumeration of the duties in this part shall not affect the application to a State of any duty to which it would be subject under international law independently of this Convention.

"3. Failure of a State Party to fulfil any duty or obligation assumed under this Convention shall be an internationally wrongful act engendering international responsibility for that State." 22/

84. Some representatives were of the opinion that the above structure went too far in the direction of suggesting the drafting of actual treaty provisions and, since sufficient agreement had not yet been reached on the scope of a future convention, did not reflect accurately the stage of the Working Group. Certain delegations among those adopting this new approach wished the Working Group to continue with the exercise of identifying activities or broad areas of agreement or disagreement and not to appear to be embarking, at that stage, upon the drafting of treaty formulations. These delegations, therefore, confined their interventions to presentations of their views on which activities a convention should and should not prohibit. Others wished the document in paragraph 83 above to be the subject of further consultation before being considered by the Working Group itself.

85. According to several other representatives, however, the above document provided an important structure which was capable of assisting the Working Group in dealing with concrete issues in its attempt to "put flesh onto the bones" as a logical step in the progress of its work. The representatives who adopted this view made several specific suggestions for improving the text of the document. The basic question remained that concerning the inclusion of mercenaries in the context of international armed conflict in the scope of the convention, as reflected under the "use of terms" and in subparagraph (a) of section I of the document set out above. A suggestion was accordingly made that the provisions relating to mercenary activities in the context of international armed conflict (sect. I, subpara. (a)) should be treated separately, and introduced by an independent chapeau, from that relating to activities outside armed conflict in subparagraphs (b) and (c) of that section. It was further observed that the term "hostile acts" need not be used to qualify mercenary activities in the context of armed conflict. But even where its use was appropriate, in situations described in subparagraphs (b), (c) and (d) of section I, several delegations were of the opinion that it was not the correct term to use. It was generally agreed, therefore, to replace it by an expression such as "armed violence" or "armed attack".

86. As regards section I (a), the observation was made by one delegation that the convention should make it an offence under the laws of States Parties to engage in

22/ This formulation will be discussed further, especially in the light of the dispute settlement procedures that may be included in the convention.

armed violence to the extent to which the acts of violence were crimes under the law of place (lex situs). This observation was questioned by some delegations in the Working Group. The view was expressed by another delegation that armed conflict should not be dealt with in this convention.

87. However, other delegations expressed support for having a convention comprehensive in nature covering situations in armed conflicts as well as those outside armed conflicts.

88. As to section II of the document set out in paragraph 83 above, there was a difference of opinion between those who discussed specific language over the need to include the word "knowingly" in identifying the offences under subparagraphs (e) to (h), while leaving it out in the other paragraphs of the section. There was a suggestion for the deletion of that word where it appeared in the section on the grounds that the element of knowledge which was considered essential for that series of offences was actually already contained in the chapeau of the section. But there was also the view that section II could be even made clearer by redrafting its chapeau as follows:

"Any person, or [body corporate] also commits a crime under this section if he intentionally, for the purpose of the commission of the crime or offence specified in section I:"

It was also suggested by one delegation that the activities punishable under this section should be both "intentional" and "unlawful" as in the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation done at Montreal on 23 September 1971. 23/

89. With respect to section III, there was the view that consideration be given to the addition of conspiracy to the list of offences identified thereunder.

90. Several comments were also made on part B concerning the duties and obligations of States. It was noted that, while paragraph 1 contained suggestions which the Working Group had discussed earlier and found generally acceptable, paragraphs 2 and 3 were new. The view was expressed that paragraph 2, being in the nature of a saving clause which gave rise to no objection, should be removed from part B and dealt with in another part of the future convention. A suggestion was, however, made that the paragraph be retained in part B with an appropriate foot-note indicating that it would be placed in an appropriate place. As for paragraph 3, there was the view that it was not ripe for discussion at this stage and that the substantive issue it raised was not appropriate for treatment under part B. But there was also the view that paragraph 3 should be retained in part B and that no link should be made between its provision and the dispute settlement question. It was agreed that the issues raised in paragraphs 2 and 3 of part B should be discussed in the future.

91. Several comments were made for improvement of the texts of the three paragraphs. It was suggested that subparagraph 1 (a) should be redrafted to refer both to the attempt to commit, or commission of the crimes under sections I and II. There was another suggestion that reference to crimes under section I only

23/ United Nations Juridical Yearbook, 1971, p. 143.

would be more accurate. There was also the view that, in subparagraph 1 (c) the phrase "any form of mercenary activities" should be replaced by "any crime set forth in this convention". With respect to paragraph 3, there was the suggestion that the phrase "internationally wrongful act" be replaced by the expression "international crime", and the words "engendering responsibility for that State" be replaced by "entailing responsibility of States".

92. After its consideration of parts A and B of the document in paragraph 83 above, the Working Group then turned to the question of definition under the heading "use of terms". It was suggested that, having regard to a number of changes proposed in the various texts in part A, the definition of "mercenary activity" and "hostile acts", in subparagraphs (b) and (c) should be deleted since the two terms would no longer be used. As for the definitions in subparagraph (a), conflicting views persisted. There was the view that the future convention must deal with the problem of mercenaries in the context of both international armed conflict and also in the context of other situations not involving armed conflict. Thus two kinds of definition were needed. One would be the definition already contained in article 47 of Additional Protocol I to the 1949 Geneva Conventions. The definition should be set out in its own subparagraph to cover mercenaries envisaged under section I, subparagraph (a) of part A of the document, separated from the second definition reserved for mercenaries acting in other situations envisaged under section I, subparagraphs (b) to (d) of the document. Further drafting was however necessary to provide internal harmony between the two kinds of definition and the necessary linkage to ensure that all situations were covered.

93. In the view of another delegation, such an approach was not legally desirable nor was it necessary. International law provided a definition of the mercenary that was contained in article 47, paragraph 2, of Additional Protocol I to the 1949 Geneva Conventions which should be adhered to. It was however important to make the mercenary liable on account of some of his acts before criminal courts, as well as persons who, outside the framework of armed conflicts, committed offences to be defined by the future convention. Another view doubted the need to deal with mercenaries in the context of international armed conflict. However, if it should be agreed that the scope of the convention included acts by such mercenaries, then only the definition found in article 47 of Additional Protocol I would be appropriate. The definition of a mercenary in the other situations attempted in subparagraph (a) under the "use of terms" was, according to this view, inadequate. There was no objection to the proposal to delete the term "legitimate" in that subparagraph.

B. Framework for discussion towards a solution to the problem of definition and scope of the convention

94. Having regard to the comments in paragraphs 83-93 above, it seemed helpful for the future work of the Committee towards the fulfilment of its mandate to provide a framework for dealing with the question of definition and scope of the convention. The Chairman presented the following framework as a revision of the text in paragraph 83 which would form the basis for further discussion and negotiations:

"Use of terms

"For the purpose of this Convention:

"A mercenary in relation to international armed conflict means a person as defined in article 47 of Additional Protocol I to the 1949 Geneva Conventions;

"For the purposes of other situations provided for in this Convention a mercenary also means any person who is specially recruited locally or abroad for armed operations outside an international armed conflict, as provided for in paragraph 1, in order to suppress the struggle of a people for self-determination, to overthrow the Government of another State, or to violate in any other manner the sovereignty, territorial integrity or political independence of another State, and who is motivated essentially by the desire for private gain.

"PART A

"Section I

"Any person defined above as a mercenary commits a crime under this Convention if he directly participates in the following activities:

"(a) Within international armed conflict; or

"(b) Armed violence to overthrow a foreign Government;

"(c) Armed violence to destabilize a foreign Government or State by undermining the institutions of such Government or State or by fomenting civil strife or attacking the civilian population;

"(d) Armed violence to suppress or frustrate the process of independence or self-determination of a people.

"Section II

"Any person, or [body corporate] also commits a crime under this Convention if he intentionally, for the purpose of the commission of a crime specified in section I:

"(a) Organizes a group of individuals; or

"(b) Recruits an individual or a group of individuals;

"(c) Trains an individual or a group of individuals;

"(d) Uses an individual or a group of individuals;

"(e) Provides arms and equipment to an individual or to a group of individuals;

"(f) Transports an individual or a group of individuals;

"(g) Finances an individual or a group of individuals;

"(h) Advertises, or publishes information to facilitate the recruitment, use, financing or training of mercenaries.

"Section III

"It shall also be a crime under this Convention to:

"(a) Attempt to commit or conspire to commit a crime or an offence specified in section I or II of this Convention;

"(b) Participate as an accomplice of anyone who commits or attempts to commit such crimes or offences.

"PART B

"1. States Parties to this Convention undertake:

"(a) Not to engage in the organization, recruitment, financing, training or use of an individual or a group of individuals for the purpose of committing a crime or offence under section II of this Convention;

"(b) To enact appropriate national legislation making the offences set forth in sections I and II of this Convention punishable by appropriate penalties which take into consideration the gravity and nature of each particular crime or offence;

"(c) Not to tolerate or permit the use of their territories for any crime or offence set forth in this Convention."

C. Other proposals

95. During the course of the 9th meeting of the Working Group on 18 February 1982, the representative of France introduced the proposal contained in document A/AC.207/L.11 and Corr.1, reproduced in the present report as appendix I in section III. Because the proposal was introduced late in the stage of the work of the Working Group, it was not discussed.

96. The following other proposals were before the Working Group: proposal by Cuba (A/AC.207/L.8 of 27 January 1982), proposal by the German Democratic Republic (conference room paper 1982/1 of 3 February 1982), proposal by Jamaica (conference room paper 1982/2 of 4 February 1982) and proposal by Suriname (conference room paper 1982/4 of 5 February 1982). They are reproduced in this report as appendices II to V in section III.

Appendix I

[Original: French]

Proposals submitted by France

Article 1

A "mercenary" is any person who:

- (a) Is specially recruited locally or abroad in order to fight in an armed conflict;
- (b) Does, in fact, take a direct part in the hostilities;
- (c) Is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that party;
- (d) Is neither a national of a party to the conflict nor a resident of the territory controlled by a party to the conflict;
- (e) Is not a member of the armed forces of the party to the conflict; and
- (f) Has not been sent by a State which is not a party to the conflict on official duty as a member of its armed forces.

Article 2

A criminal offence is committed by any mercenary within the meaning of article 1 who, participating directly in combat, engages in the following acts:

- (a) Murder; torture in any form, whether physical or mental; acts of mutilation; serious acts of violence; rape; hostage-taking;
- (b) Plundering of civilian property.

Article 3

A criminal offence, within the meaning of this Convention and in the absence of armed conflict, is also committed by any person who:

- (a) Is specially recruited to carry out a concerted action aimed at overthrowing a Government by armed force;
- (b) Does, in fact, take a direct part in such action;
- (c) Is motivated to take part therein essentially by the desire for private gain and, in fact, is promised material compensation substantially in excess of that promised or paid to persons of similar ranks and functions in the armed forces

of the State of which the person is a national or, if that is not the case, of the State in whose territory the person resides;

(d) Is neither a national of the State against whose Government the action is undertaken nor a resident of the territory controlled by that State; and

(e) Has not been sent by a State on official duty as a member of its armed forces.

Article 4

A criminal offence is also committed by any person who:

(a) Participates as an accomplice in the offences defined in articles 2 and 3 of this Convention, by knowingly aiding or abetting the person or persons committing the action in acts which led up to or facilitated such action, or by procuring arms, instruments or any other means used in the action, knowing that they were to be so used, or by provoking such action or giving instructions to have it committed, by means of gifts, promises, threats, abuse of authority or power, machinations or culpable trickery;

(b) Attempts to commit the offences defined in articles 2 and 3 of this Convention, once the attempt has been manifested by a commencement of the act and provided the attempt was not suspended or did not fail to take effect save through circumstances beyond the control of the person making such attempt.

Article 5

The States Parties shall make the offences specified in articles 2, 3 and 4 of this Convention punishable by appropriate penalties which take into consideration the grave nature of the offence.

Article 6

The States Parties shall refrain from recruiting, instructing, financing or using the persons referred to in articles 1 and 3 of this Convention.

Article 7

The States Parties undertake, in accordance with international and national law, to make every effort to adopt reasonable measures with a view to preventing the offences set forth in articles 2, 3 and 4 of this Convention.

Appendix II

[Original: Spanish]

Amendments submitted by Cuba to the working paper submitted by Nigeria

1. Add a new article 1 worded as follows:

"Mercenarism is a crime under international law which must be prevented and punished."

2. Delete the chapeau and subparagraphs (a) to (f) of article 1 (Definition).
3. Replace them by a new article worded as follows:

"A mercenary is any person who is specially recruited locally or abroad in order to oppose by armed violence a national liberation movement or the process of independence or self-determination of a people or State."

4. Amend article 2 (Definition of mercenarism), dividing it into two articles. In the first article, consisting of the former paragraph 1, amend the chapeau to read as follows:

"Article _____

"The crime of mercenarism is committed when an individual, group or association, or body corporate registered in that State or representative of a State or the State itself manifests by overt acts any of the following:"

Amend subparagraph (a) to read as follows (in which the additions or changes are underlined):

"Organizes, finances, supplies, equips, instructs, promotes, maintains, trains, supports, or employs in any way individuals, bands or military forces consisting of or including persons who are not citizens of the country in which those forces are to operate and who are motivated to act by the desire for private gain through payment of salary or any other kind of material reward or recompense;"

Replace subparagraph (b) by the following:

"Enlists, enrolls or seeks to enrol in the above-mentioned forces;"

No amendments are proposed for subparagraph (c).

Amend subparagraph (d) to read as follows:

"Allows the activities mentioned in subparagraph (a) to be carried out in the territories subject to its jurisdiction or in any territory under its domination or control or affords facilities for transit, transport or other operation of the above-mentioned forces;"

No amendments are proposed for subparagraph (e).

5. In accordance with the amendment in paragraph 4 above, replace article 2, paragraph 2, by a second article worded as follows:

"Article ____

"The provisions of article ____ of this Convention apply as follows:

"Those set forth in subparagraph ____, to individuals, groups, associations, representatives and agents of a State and to the State itself.

"Those set forth in subparagraph ____, to States and to their representatives and agents.

"Those set forth in subparagraph ____, to individuals or groups."

Appendix III

[Original: English]

Proposal submitted by the German Democratic Republic

Article 1

1. A mercenary is any person who:

(a) Is specially recruited locally or abroad in order to fight in an armed conflict;

(b) Does, in fact, take a direct part in the hostilities;

(c) Is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that party;

(d) Is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict;

(e) Is not a member of the armed forces of a party to the conflict; and

(f) Has not been sent by a State which is not a party to the conflict on official duty as a member of its armed forces.

2. A mercenary is also any person who is specially recruited locally or abroad for armed operations outside an international armed conflict, as provided for in paragraph 1, in order to suppress the struggle of a people for self-determination, to overthrow the legitimate Government of another State, or to violate in any other manner the sovereignty, territorial integrity or political independence of another State, and who is motivated essentially by the desire for private gain.

Proposal submitted by Jamaica

Article 1

States Parties (agree) confirm that mercenarism and the related offences set out in this Convention are crimes under international law which they undertake to prevent and punish.

Article 2

1. Any person who:

(a) Is specially recruited locally or abroad in order to fight in an armed conflict;

(b) Does, in fact, take a direct part in the hostilities;

(c) Is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that party;

(d) Is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict;

(e) Is not a member of the armed forces of a party to the conflict; and

(f) Has not been sent by a State which is not a party to the conflict on official duty as a member of its armed forces is a mercenary and commits the crime of mercenarism within the meaning of this Convention.

2. Any person who:

(a) Is especially recruited locally or abroad to engage in the threat or use of force against the territorial integrity or political independence of any State, or to oppose by the threat or use of force the process of independence or self-determination of a people;

[here should be inserted subparagraphs (b) to (f) of paragraph 2 of article 47 of Additional Protocol I]

is a mercenary and commits the crime of mercenarism within the meaning of this Convention.

3. Any person or body corporate who recruits, uses, finances or trains (a mercenary) a person for the purpose of becoming a mercenary commits the crime of mercenarism within the meaning of this Convention.

4. Any person or body corporate who advertises, prints or causes to be advertised any information (regarding paragraphs 1, 2 and 3 of this article) for the purpose of encouraging or inducing the commission of the crimes in paragraphs 1, 2 and 3 of this article commits [the crime of mercenarism] [a crime within the meaning of this Convention].

5. Any person who:

(a) Attempts to commit the crime of mercenarism as defined in paragraphs 1, 2, 3 and 4 [paragraphs 3 and 4] of this article commits a crime within the meaning of this Convention;

(b) Participates as an accomplice of any person who commits or attempts to commit the crime of mercenarism

likewise commits the crime of mercenarism for the purposes of this Convention.

Article 3

Nothing in this Convention shall be construed as in any way derogating from the application of the Geneva Conventions of 1949, to a person who is a mercenary within the meaning of this Convention in any matter not covered by this Convention.

Appendix V

[Original: English]

Proposal submitted by Suriname

Article 1

1. A mercenary is a person who:

(a) Is specially recruited locally or abroad in order to take part in hostile activities with the aim of opposing by threat or the use of armed violence against the territorial integrity of a sovereign State or suppressing the legitimate aspirations of national liberations movements;

(b) Is motivated to take part in the hostile activities by the desire for private gain and is promised by or on behalf of an entity material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the regular armed forces;

(c) Is neither a national of the State against which the armed violence is initiated or a resident of the territory from which the liberation movement is originated;

2. In case of an armed conflict the definition of a mercenary in article 47 of the Additional Protocol I to the Geneva Conventions of 12 August 1949 shall be applicable.

IV. REPORT OF WORKING GROUP B

97. Working Group B was established by the Ad Hoc Committee at its 18th meeting on 28 January 1982 to deal with all questions relevant to the proposed convention, except those relating to definitions and to the scope of the convention, which were assigned to Working Group A, in accordance with the decision referred to in paragraph 16 of the Committee's report. The Working Group held 9 meetings between 5 and 17 February 1982 under the chairmanship of Mr. Luigi Ferrari Bravo (Italy), Vice-Chairman of the Committee.

98. The Working Group had before it two working papers submitted by Nigeria, the first containing the text of a draft international convention against the activities of mercenaries (A/AC.207/L.3; see annex I), and the second a revised text of articles 1, 2, 7, 11 and 15 contained in the first working paper (A/AC.207/L.9; see annex II).

99. At its 1st meeting on 5 February, the Working Group discussed the organization of its work. It was noted that the issues relevant to the future convention which had not been assigned to Working Group A included, inter alia, criminal law and procedure, measures of a preventive character, mutual co-operation, the question of the settlement of disputes concerning the interpretation and the application of the convention and the possible inclusion of safeguard clauses.

100. The Working Group agreed that it would take up at a later stage the issues which had a direct link with the questions being dealt with in Working Group A (such as jurisdiction and extradition) so that the discussion of those issues might benefit from the progress which, it was hoped, would by then have been made in Working Group A. In the light of the above, Working Group B decided to concentrate at the initial stage of its work on the issues of penalties, implementation, the status of mercenaries, mutual assistance, the taking of custody, the communication of the outcome of final proceedings and judicial guarantees, dealt with in articles 3, 4, 5, 9, 10, 12 and 11, respectively, of the Nigerian working papers (A/AC.207/L.3 and L.9).

101. Regarding the order of consideration of these issues, the Working Group decided at its first meeting to start with the issues of the taking into custody, the communication of the outcome of final proceedings and judicial guarantees dealt with in articles 10, 12 and 11, respectively, of the Nigerian working paper and then take up the issues of mutual assistance, penalties, implementation and the status of mercenaries dealt with in articles 9, 3, 4 and 5 of the Nigerian working paper. At its sixth meeting, after having provisionally concluded its consideration of the issues of taking into custody, the communication of the outcome of final proceedings, judicial guarantees and mutual assistance dealt with in articles 10, 12, 11 and 9, the Working Group noted that the issues of penalties and implementation had been raised in Working Group A and, in order to avoid duplication of work during the present session, decided to turn its attention at this stage to the question of preventive measures (article 8 of the Nigerian working paper) in view of its logical connexions with the question of mutual assistance (article 9 of the Nigerian working paper).

102. The results of the work carried out in Working Group B are reflected below.

It is understood that delegations will be free to present new compromise solutions or to suggest changes, especially in those cases where bracketed alternatives and comments or foot-notes signalling points which are still pending have been included. It is further understood that the results of the work are subject to an agreement on the issues dealt with in Working Group A as well as on each article and on the entire text of the draft convention. In order to make it clear that the purpose of the exercise carried out in Working Group B is to work out texts to be considered for inclusion in the future convention, the texts below are designated by letters, it being understood that the final presentation and placement of those texts will be discussed at a later stage.

Article A [Taking of custody]

103. The Working Group worked out the following text:

"Upon being satisfied that the circumstances so warrant, any State Party in the territory in which the alleged offender is present shall in accordance with its laws take him into proper custody or take such other measures to ensure his presence for such time as is necessary to enable any criminal or extradition proceedings to be instituted. The State Party shall immediately make a preliminary inquiry into the facts."

104. There was a general feeling within the Working Group that language along the lines of paragraphs 2 to 6 of article 6 of the International Convention against the Taking of Hostages 24/ should be added to this text. The Chairman offered to the Group the following formulation as for its consideration at a later stage:

"2. The custody or other measures referred to in paragraph 1 of this article shall be notified without delay directly or through the Secretary-General of the United Nations to:

"(a) The State where the offence/crime was committed;

"(b) The State against which the offence/crime has been directed or attempted;

"(c) The State of which the alleged offender is a national or, if he is a stateless person, in the territory of which he has his habitual residence;

"(d) The international intergovernmental organization against which the offence/crime has been directed or attempted;

"(e) All other States concerned.

"3. Any person regarding whom the measures referred to in paragraph 1 of this article are being taken shall be entitled:

24/ General Assembly resolution 34/146.

"(a) To communicate without delay with the nearest appropriate representative of the State of which he is a national or which is otherwise entitled to establish such communication or, if he is a stateless person, the State in the territory of which he has his habitual residence;

"(b) To be visited by a representative of that State.

"4. The rights referred to in paragraph 3 of this article shall be exercised in conformity with the laws and regulations of the State in the territory of which the alleged offender is present, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under paragraph 3 of this article are intended.

"5. The provisions of paragraph 3 and 4 of this article shall be without prejudice to the right of any State Party having a claim to jurisdiction in accordance with paragraph 1 (b) of article [6] to invite the International Committee of the Red Cross to communicate with and visit the alleged offender.

"6. The State which makes the preliminary inquiry contemplated in paragraph 1 of this article shall promptly report its findings to the States or organization referred to in paragraph 2 of this article and indicate whether it intends to exercise jurisdiction."

Article B [Communication of the outcome of final proceedings]

105. The Working Group worked out the following text:

"The State Party where the alleged offender is prosecuted shall in accordance with its laws communicate the final outcome of the proceedings to the Secretary-General of the United Nations, who shall transmit the information to the other States concerned and the international intergovernmental organizations concerned, as well as the International Committee of the Red Cross."

106. In connexion with this article, the question of transmitting the information to all States and to representatives of national liberation movements recognized by the United Nations was raised. The decision on this point was deferred to a later stage. It was understood that the phrase "international intergovernmental organizations" covered regional organizations, in particular the Organization of African Unity.

107. One delegation expressed the view that the "final outcome of the proceedings" should be understood as relating only to convictions and expressed doubts as to the appropriateness of communicating that outcome to international intergovernmental organizations.

Article C [Judicial guarantees]

108. The Working Group worked out the following text:

"Any person regarding whom proceedings are being carried out in connexion with any of the offences/crimes set forth in article [X] shall be guaranteed fair treatment from the time of arrest until the end of the proceedings in accordance with generally recognized principles of regular judicial procedure [and humane treatment as provided for in article 75 of Additional Protocol I to the 1949 Geneva Conventions and other international instruments]."

109. The opinion was expressed that it was inadmissible to grant excessive legal protection to persons who had committed the serious international crime of mercenarism. It was suggested that the words "generally recognized principles of regular judicial procedure" should be replaced by the words "principles of regular judicial procedure generally recognized by international law".

Article D [Mutual assistance]

110. The Working Group worked out the following text:

"1. States Parties shall afford one another the greatest measure of assistance in connexion with criminal proceedings brought in respect of the offence(s)/crime(s) stated in article [2] of this Convention including the supply of all evidence at their disposal necessary for the proceedings. The law of the State whose assistance is requested shall apply in all cases.

"2. The provisions of paragraph 1 of this article shall not affect obligations under any other treaty, bilateral or multilateral, which governs or will govern, in whole or in part, mutual assistance in criminal matters."

Article E

111. The Working Group worked out the following text:

"Any State having reason to believe that one of the offences/crimes mentioned in article [X] will be committed shall [in accordance with its national law] [in so far as it is not prohibited by its national law], furnish any relevant information, directly or through the Secretary-General of the United Nations, to those States which it believes would be the affected States. 25/ The same obligation shall apply when any State has reason to believe that such offences/crimes have been committed [as well as at any stage before the commencement of criminal or extradition proceedings]." 25/, 26/

Article F

112. With regard to the problem of preventive measures, the Working Group was not

25/ These provisions will be looked at again in the light of the texts which will be worked out on jurisdiction and/or extradition.

26/ The bracketed phrase will be co-ordinated with the article on assistance in criminal matters.

able for lack of time to conclude any provisions. Several approaches were suggested, namely that reflected in article 8 of the Nigerian working paper, in article 10, paragraph 1, of the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 27/ in article 4 of the International Convention against the Taking of Hostages, 28/ and in article 4 of the New York Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents. 29/ The Working Group agreed to continue discussion of this item in the future, bearing in mind, inter alia, the need to ensure consistency with the language used in article A.

27/ United Nations Juridical Yearbook, 1971, p. 143.

28/ General Assembly resolution 34/146, annex.

29/ General Assembly resolution 3166 (XXVIII), annex.

Working paper submitted by Nigeria

The States Parties to this Convention,

Reaffirming the purposes and principles of the Charter of the United Nations concerning effective collective measures for the prevention and removal of all threats to international peace and security,

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

Recognizing in particular that the General Assembly and the Security Council in several resolutions have condemned the activities of mercenaries aimed at overthrowing the Governments of Member States or jeopardizing the legitimate interests of national liberation movements,

Considering the urgent need by the international community to co-operate and to exercise utmost vigilance against the danger posed by the activities of mercenaries by all States in the interest of international peace and security,

Convinced that an international convention against the activities of mercenaries faithfully implemented will provide an effective collective measure against the menace of mercenarism,

Have agreed as follows:

Article 1

Definition

A mercenary is any person who:

- (a) Is specially recruited locally or abroad in order to fight in an armed conflict;
- (b) Does, in fact, take a direct part in the hostilities;
- (c) Is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that party;
- (d) Is neither a national of a party to the conflict nor a resident of the territory controlled by a party to the conflict;

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

(e) Is not a member of the regular armed forces of a party to the conflict;
and

(f) Has not been sent by a State which is not a party to the conflict on official duty as a member of its armed forces.

Article 2

Definition of mercenarism

1. The crime of mercenarism is committed when an individual, group or association, or body corporate registered in that State or representative of a State or the State itself with the aim of opposing by threat or armed violence the territorial integrity of another State or the legitimate aspirations of national liberation movements jeopardizes the process of self-determination or manifests by overt acts any of the following:

(a) Organizes, finances, supplies, equips, trains, promotes, supports, or employs in any way individuals, bands or military forces consisting of or including persons who are not nationals of a party to the conflict and who act for personal gains through payment of salary or any other kind of material recompense;

(b) Participates as an individual, group or association or body corporate or enlists in any force;

(c) Advertises, prints or causes to be advertised any information regarding subparagraphs (a) and (b) of the present paragraph;

(d) Allows or tolerates the activities mentioned in subparagraphs (a), (b) and (c) of the present paragraph to be carried out in any territory or place under its jurisdiction or control or affords facilities for transit, transport, or other operation of the above-mentioned forces;

(e) Actually participates in any of the acts mentioned in subparagraphs (a), (b), (c) and (d) of the present paragraph which result in the destruction of life and property.

2. Any person, group or association, representative of a State or the State which:

(a) Attempts to commit any act of mercenarism (hereinafter referred to as "the offence") mentioned in this article;

(b) Participates as an accomplice of any one who commits or attempts to commit the offence also commits the offence for the purpose of this Convention.

3. The offence if committed shall be deemed an offence against the peace and security of a State.

Article 3

Penalties

Each State Party shall by appropriate national legislation make the offences set forth in article 2 of this Convention punishable by appropriate penalties which take into consideration the grave nature of the offence.

Article 4

Implementation

Each State Party shall take all appropriate administrative and legislative measures to implement fully the provisions of this Convention.

Article 5

Status of mercenaries

Mercenaries are not lawful combatants and if captured shall not be accorded prisoner of war status.

Article 6

Establishment of jurisdiction

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offence in the following cases:

- (a) When the offence is committed in its territory;
- (b) When the offence is committed by any of its nationals, or body corporate registered in that State;
- (c) When the offence is committed by the representative of a State;
- (d) When the offence is committed against the State.

2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over the offence in the case where the alleged offender is present in its territory and it does not extradite him pursuant to article 13 of this Convention to any of the States mentioned in paragraph 1 of this article.

3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.

Article 7

Concurrent jurisdiction

When a State Party is accused by virtue of the provisions of articles 2 and 8 of this Convention for acts or omissions declared to be the offence under the present Convention, any State Party having jurisdiction may invoke the provisions of this Convention against the offending State before any competent international organization or tribunal.

Article 8

Preventive measures

Each State Party shall take all necessary measures to prevent the departure from its territory of any individual, group or association or body corporate, or representative of a State reasonably believed to be involved in any of the activities mentioned in article 2 of this Convention, including denial of transit and other facilities to them.

Article 9

Mutual assistance

1. States Parties shall afford one another the greatest measure of assistance in connexion with criminal proceedings brought in respect of the offence stated in article 2 of this Convention. The law of the requested State shall apply.

2. Each State Party shall be obliged to communicate directly or through the Secretary-General of the United Nations to the other State Party concerned any information related to the activities of mercenaries as soon as it comes to its knowledge.

Article 10

Taking of custody

Upon being satisfied that the circumstances so warrant, any State Party in the territory of which the alleged offender is present shall in accordance with its laws take him into proper custody or take such other measures to ensure his presence for such time as is necessary to enable any criminal or extradition proceedings to be instituted. The State Party shall immediately make a preliminary inquiry into the facts.

Article 11

Judicial guarantee

Any individual or group or association, or body corporate, or representative of a State or the State itself, on trial for the offence defined in article 2 of this Convention shall be entitled to all the judicial guarantees ordinarily granted by the law to an alleged offender in the same circumstances.

Article 12

Communication of final proceedings

The State Party where the alleged offender is prosecuted shall in accordance with its laws communicate the final outcome of the proceedings to the Secretary-General of the United Nations, who shall transmit the information to the other States concerned and the international intergovernmental organizations concerned.

Article 13

Extraditable offences

1. For the purposes of this Convention, any of the offences mentioned in article 2 of this Convention shall be deemed to be included as extraditable offences in any existing or future extradition convention or treaty between the State Parties. This Convention may also be the legal basis for extradition in respect of offences listed in article 2.
2. Each State Party having jurisdiction mentioned in article 6 of this Convention may request for extradition from the other State Party where the alleged offender is found.

Article 14

Extradition

1. For the purpose of extradition between States Parties, an offence of mercenarism shall not be regarded as a political offence or as an offence inspired by political motives.
2. Where however the State Party in whose territory the alleged offender is found fails to extradite him, that State Party shall be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution in accordance with the laws of that State.

Article 15

Action for damages or reparation

1. Where a State Party which suffers damage or whose national or juridical person suffers any damage or loss of life as a result of mercenarism is unable to prosecute or cause prosecution of the alleged offender because of the refusal or otherwise of the other State Party in whose territory the alleged offender is found or its national, it may none the less present a claim for damages or reparation as the case may be against that other State Party.
2. The State Party which has suffered damages by reason of the commission of the offence mentioned in article 2 of this Convention may also claim damages or reparation against any State Parties jointly or severally for any act or omission which constitutes the offence.
3. However a claim for damages or reparation may only be considered when attempts to secure criminal prosecution have failed.

Article 16

Settlement of disputes

1. Any dispute between two or more State Parties concerning the interpretation or application of this Convention which is not settled by negotiation shall at the request of any one of them be submitted to arbitration. If within six months from the date of the request for arbitration the parties are unable to agree on the organization of the arbitration, any one of the parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.
2. Each State Party may, at the time of signature or ratification of this Convention or accession thereto, declare that it does not consider itself bound by paragraph 1 of this article. The other State Parties shall not be bound by paragraph 1 of this article with respect to any State Party which has made such a reservation.
3. Any State Party which has made a reservation in accordance with paragraph 2 of this article may at any time withdraw that reservation by notification to the Secretary-General of the United Nations.

Article 17

Signature and ratification

1. This Convention is open for signature by all States until ... at the United Nations Headquarters in New York.
2. This Convention is subject to ratification. The instrument of ratification shall be deposited with the Secretary-General of the United Nations.

3. This Convention is open for accession by any State. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 18

Entry into force

1. This Convention shall enter into force on the thirtieth day following the date of deposit of the twentieth instrument of ratification or accession with the Secretary-General of the United Nations.

2. For each State Party ratifying or acceding to the Convention after the deposit of the twentieth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after deposit by such State of its instrument of ratification or accession.

Article 19

Denunciation

1. Any State Party may denounce this Convention by written notification to the Secretary-General of the United Nations.

2. Denunciation shall take effect one year following the date on which notification is received by the Secretary-General of the United Nations.

Article 20

Authentic text

The original of this Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations, who shall send certified copies thereof to all States.

IN WITNESS WHEREOF, the undersigned, being duly authorized thereto by the respective Governments, have signed this Convention opened for signature at the United Nations Headquarters, in New York, on

ANNEX II

Revised text of articles 1, 2, 7, 11 and 15 of the working paper
submitted by Nigeria

Article 1

Definition of a mercenary

For the purpose of this Convention, a mercenary is a person who:

- (a) Is specially recruited locally or abroad in order to participate in an armed conflict;
- (b) Engages in an act of aggression against sovereign States;
- (c) Does, in fact, take part in the armed conflict or act of aggression;
- (d) Is motivated to take part in an armed conflict or act of aggression by the desire for private gain and is promised by or on behalf of a party to the armed conflict material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the regular armed forces;
- (e) Is neither a national of the State in which the armed conflict or hostility is taking place nor a resident of the territory controlled by a party to the conflict or hostility;
- (f) Is not a member of the regular armed forces of a party to the conflict or hostility; and
- (g) Has not been sent by a State which is not a party to the conflict or hostility or on official duty as a member of its armed forces.

Article 2

Definition of mercenarism

1. The crime of mercenarism is committed when a mercenary, as defined in article 1 of this Convention, with the aim of opposing by threat or use of force against the territorial integrity of another State or suppressing the legitimate aspirations of national liberation movements, manifests by overt acts any of the following:

- (a) When an individual, group or association:
 - (i) Recruits, uses, finances, or trains another or group of persons for the purpose of becoming a mercenary;
 - (ii) Advertises, prints or causes to be advertised any information regarding subparagraph (a) (i) of the present paragraph.
- (b) In the case of a body corporate or a State:

Allows or tolerates the organization, recruitment, use, financing or training of mercenaries within its territory or control or affords facilities for transit, transport or other operation of mercenaries.

2. (a) Any individual, group or association which:

- (i) Attempts to commit any act of mercenarism (hereinafter referred to as "the crime") mentioned in paragraph 1 of this article;
- (ii) Participates as an accomplice of any one who commits or attempts to commit the crime,

shall be deemed to have committed such crime for the purpose of this Convention.

(b) Any body corporate or State which:

- (i) Attempts to commit any act of mercenarism mentioned in paragraph 1 of this article;
- (ii) Participates as an accomplice of any one who commits or attempts to commit the crime,

shall be deemed to have committed such crime for the purpose of this Convention.

3. The crime, if committed, shall be deemed to be a crime against the peace and security of a State.

Article 7

Responsibility of States

When a State Party is accused by virtue of the provisions of articles 2 and 8 of this Convention for acts or omissions declared to be an offence under the present Convention, any State Party to the present Convention may invoke the provision of this Convention against the offending State before any competent body, international organization or tribunal.

Article 11

Judicial guarantee

Any person or group of persons or a State regarding whom proceedings are being carried out in connexion with any of the crimes set out in article 2 of this Convention shall be entitled to all the judicial guarantees granted by the law of the State exercising jurisdiction.

Article 15

Action for damages reparation

1. A State Party which suffers damage, or whose natural or juridical person suffers damage, may present to another State Party which refuses to extradite or prosecute in accordance with provisions of this Convention a claim for damages or reparation as the case may be against that other State Party.
2. The claim for damages or reparation may be presented to other States Parties that have refused to extradite or prosecute jointly or severally.
3. However, a claim for damages or reparation shall be presented through appropriate diplomatic channels or to any competent international organization or tribunal.