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SUMMARY RECORD OF THE 52nd MEETING

Chairman: Mr. GOERNER (German Democratic Republic)

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MERCENARIES (continued)

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The meeting was called to order at 11 a.m.

ORGANIZATION OF WORK

1. The CHAIRMAN said that he had suggested to the President of the General Assembly that, when a Main Committee envisaged transferring an item on its agenda to the Sixth Committee, prior consultation involving the Chairmen of the two Committees concerned should be held in order to assess the potential beneficial effects of such a move. Further to that initiative, a meeting of Committee Chairmen had taken place and he had received from the President of the General Assembly a letter reflecting the agreement reached at that meeting. Whenever a Committee envisaged the transfer of any item to the Sixth Committee, or to any other Committee, the Chairmen concerned should consult with the President of the General Assembly, who would provide whatever co-ordination was required to ensure the orderly and proper disposition of the matter. The letter also recalled that competence for making recommendations to the plenary on the allocation of items was the prerogative of the General Committee.

AGENDA ITEM 129: REPORT OF THE AD HOC COMMITTEE ON THE DRAFTING OF AN INTERNATIONAL CONVENTION AGAINST THE RECRUITMENT, USE, FINANCING AND TRAINING OF MERCENARIES (continued) (A/39/43, 59, 60 and Corr.1, 158, 163, 203, 318, 396, 413, 473, 552, 561, 596, 611, 616 and 632)

2. Mr. VREEDZAAM (Suriname) said that the activities of mercenaries had violated the sovereign equality, political independence and territorial integrity of States, as well as the right of peoples to self-determination, and that small States had often been victims without having received any reparation for damages caused.

3. The Convention should provide a definition to cover each of the situations in which a mercenary could operate: an international armed conflict and a non-international armed conflict. Article 47, paragraph 2, of Additional Protocol I to the Geneva Conventions of 1949 could be reproduced to cover the situation of an international armed conflict. Draft article 2, without the inclusion of subparagraph (d), contained an acceptable definition to cover a non-international armed conflict.

4. Persons possessing the nationality of a victim State, who had been involved in mercenary activities against that State, must be punished by a third State if seized. Retention of the nationality criterion in the Convention would create a loophole for those persons and for those who recruited and used them. The argument that the nationality criterion could be useful for distinguishing mercenaries from political opponents and should therefore be retained, was groundless, since the victim State could always punish its nationals under the relevant provisions of its penal code, if they were seized after involvement in mercenary activities against the peace and security of the State. His delegation fully endorsed the concept of concerted action, since a person could be involved in mercenary activities only in co-operation with others.

(Mr. Vreedzaam, Suriname)

5. The approach set forth in paragraph 47 of the report was in harmony with the Penal Code of the Republic of Suriname and covered all the activities to be prohibited by the Convention, providing for punishment of both the recruiter and the recruit.

6. Suriname endorsed the Chairman's explanation given in paragraph 53 of the report, concerning the concept of a concerted action of violence aimed at overthrowing a Government or violating the territorial integrity or independence of a State, or provoking secession, revolt or civil war. Such offences could be imputed to mercenaries only in a non-international armed conflict situation; that demonstrated the difference between a situation of an international armed conflict and that of a non-international armed conflict.

7. The inclusion of the concept of the international responsibility of States in the Convention would be a useful contribution to the progressive development and codification of international law. His delegation therefore rejected the argument that the inclusion of an article on State responsibility might give rise to an undesirable a contrario interpretation in relation to other instruments which contained no such article.

8. The provisions of article 11 were justifiable, since it appeared that States had engaged time and again in the recruitment, use, financing and training of mercenaries. The principles of international law imposed on every State the obligation not to permit the use of its territory for the commission of any offence to be covered by the Convention. His Government accepted those obligations and expected other States to do the same towards Suriname. Its experience in that regard had not always been positive in the past.

9. With regard to the status of mercenaries, his delegation was of the view that since a mercenary was in no case a lawful combatant, he was not entitled to the right to be a prisoner-of-war.

10. With respect to the discussion in Working Group B, it supported article 6 of the Nigerian draft, regarding the obligation of States to establish their jurisdiction in respect of offences committed by bodies corporate registered in their territories. It was well known that bodies corporate had, in the past, orchestrated activities of mercenaries. Although persons engaged in mercenary activities on behalf of bodies corporate were punishable, the entities themselves were not, and should be liable to fines. The criminal responsibility of bodies corporate in general, particularly in respect of mercenary activities, was covered by the legal system of Suriname.

11. States must take all necessary measures to prevent preparations in their territories for the commission of those offences covered by the Convention. States also had an obligation to prevent the use of facilities in their territories for the commission of such offences.

(Mr. Vreedzaam, Suriname)

12. The principles of friendly relations among States and good-neighbourliness required that States communicate all necessary information to a potential victim State, if they had reason to believe that one of the offences covered by the Convention had been, was being or would be committed.

13. His delegation believed that a mercenary could be extradited, since he could not claim the status of a political offender. It also believed that States must be obliged to make reparation for damages caused by them in violation of their obligations under the Convention.

14. His delegation supported the renewal of the Ad Hoc Committee's mandate to enable it to carry out its task.

15. Mr. ENKHS AIKHAN (Mongolia) said that, since the collapse of the colonial system, reactionary forces were trying to prolong their domination over strategically and economically important areas by all means, including wider recourse to mercenaries. Attempts were also being made to use mercenaries to impose imperialist domination over certain parts of the world or to halt the process of national or social liberation of peoples. The fight against mercenarism was therefore acquiring special importance. Mongolia condemned the use of mercenaries and desired to contribute to its final outlawing.

16. Despite the attempts by certain States to obstruct its work, the Committee had made some progress, particularly with the adoption of the consolidated negotiating basis. As the next stage of its work, it should concentrate on the 25 draft articles reproduced in part IV of the report, with the aim of reducing the number of alternative texts and finalizing the draft text of the future Convention.

17. In order for the Convention to be most effective, it should define a mercenary in such a manner as to cover all situations, since mercenaries were being used in situations where there were no armed conflicts, or where armed conflicts were not of an international character. As regards the approach to the definition of a mercenary, it would be advisable to leave article 47, paragraph 2, of Additional Protocol I to the Geneva Conventions intact and to embark on a second definition which would cover all other situations. The adoption of a single definition would not only reopen the question whether non-international conflicts came within the purview of the above-mentioned article, but would also change the scope of the definition under the law of armed conflicts. His delegation therefore supported the concept of the single negotiating basis.

18. With regard to draft article 2, the definition should expressly point out that one of the prime aims of the mercenary was to participate in acts of violence against the Government of a foreign State by violating, inter alia, its sovereignty, political independence and territorial integrity. Contemporary international relations revealed that mercenaries were often recruited from among the nationals of the future victim State. The definition of a mercenary would thus be more comprehensive if the partially restrictive paragraph (d) of article 2 were to be deleted.

(Mr. Enkhsaikhan, Mongolia)

19. For the same reasons as were given in paragraph 41 of the report, his delegation had serious reservations with respect to the concept of "concerted action" and the restrictive approach to the possible object of such actions.

20. Persons sent by a State on official duty or as members of its armed forces should not be included in the definition: they would be representatives of States and, as such, would be covered by the provisions of the articles on State responsibility.

21. The Convention should have a provision on the status of mercenaries and his delegation was open-minded on the drafting of such a provision.

22. With respect to draft articles 4 to 7, a criminal offence should be considered as having been committed once a person had associated with or had enlisted in a group for the purpose of carrying out such an offence. The fact that the person had been unable to carry out the offence or had been prevented from doing so should not serve as an excuse for evading appropriate punishment. Moreover, the concept of criminal association was in full conformity with the national criminal legislations of most of the countries of the world. With respect to draft article 6, paragraph (e) should be retained.

23. Mercenarism should be qualified as one of the crimes against the peace and security of mankind, since it violated fundamental norms of international law and, in particular, the obligation to preserve international peace and security.

24. Draft article 11 was one of the most important articles in the Convention. It reflected the main elements of the obligations of States and could thus serve as the basis for the further elaboration and adoption of an appropriate article. Mongolia advocated the inclusion of a special article on the responsibility of States for failure to fulfil the obligations specified in the Convention. Draft article 22 should therefore be retained.

25. His delegation supported the recommendation that the mandate of the Committee should be renewed.

26. Mr. ABDEL KHALEK (Egypt) said that the description of the offences to be included in the draft Convention was important, since mercenarism was an offence against the peace and security of mankind and a violation of the principles of international law. The Convention should also include an article on the international responsibility of States which did not fulfil their obligations derived from it. Further, provision should be made for the international responsibility of States as set forth in Additional Protocol I to the Geneva Conventions of 1949.

27. His delegation welcomed the initiative to collect the proposals for the provisions under discussion in a draft structure in order to provide a consolidated negotiating basis.

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(Mr. Abdel Khalek, Egypt)

28. As regards the definition of a mercenary, article 47, paragraph 2, of the Additional Protocol I to the Geneva Conventions should be reproduced in a separate article. Another article should provide different criteria for that definition where the provisions of the Protocol did not apply. His delegation agreed with the suggestion that the Convention should include an introduction to avoid different interpretations as to the scope of the above-mentioned article 47.

29. Mercenarism was not necessarily a concerted, collective act; it could also be an individual, premeditated act. The use of the concept of material remuneration was a good criterion, but there was need first to determine how it would be used.

30. With respect to the offences to be included in the Convention, article 1 provided an excellent basis and its scope should extend to every person recruited as a mercenary, even though all the criteria listed might not apply to the person in question. The Convention should deter persons from seeking to be recruited as mercenaries and effective participation should not therefore be an overriding criterion. States must ensure that their territory was not used for the commission of the offences mentioned in the Convention.

31. On the question of jurisdiction, he did not agree with the suggestion contained in paragraph 73 of the Ad Hoc Committee's report, since the proposed wording assumed that some countries had colonies. He supported paragraph 1 (b) of the Nigerian draft and felt that it was possible to study ways of applying jurisdiction depending on the legal entity involved. He also supported paragraph 2 of the Nigerian draft; since the international community considered mercenary activities to be an extremely serious crime, universal jurisdiction could be established. On the question of extradition, he favoured article 12, paragraph 2, of the French draft, dealing with the question of extradition, but felt that article 14, paragraph 1, of the Nigerian draft should also be included in the Convention, since mercenarism could not be viewed as a political offence and States must not be able to refuse to extradite offenders. With regard to the status of mercenaries, he supported the approach in article 5 of the Nigerian draft. He was also in favour of article 15 of the Nigerian draft, as it provided for damages or reparation in the event of failure to extradite or prosecute offenders. On the settlement of disputes, he agreed with the suggestion in the final sentence of paragraph 105 of the Committee's report but found it hard to accept the proposal in paragraph 106, since there were cases where it was not easy to obtain the consent of other parties to the dispute.

32. The mandate of the Ad Hoc Committee should be renewed so that it could complete its codification work in such a vital field of international law.

33. Mr. LIU Zhenmin (China) welcomed the progress made by the Ad Hoc Committee in 1984. It was, however, clear that differences still existed on a number of key issues.

34. The definition of the term "mercenary" must take account of article 47, paragraph 2, of Additional Protocol I to the 1949 Geneva Conventions but should also cover peace-time situations, thus maintaining the original régime while

(Mr. Liu Zhenmin, China)

reflecting the development of international law. The component party of the definition must include the objectives and purposes of mercenaries, who were often used to frustrate national liberation struggles and to subvert Governments. Those purposes distinguished them from national volunteers assisting freedom fighters. Those fighting for national independence and against foreign aggression were not in the same category as mercenaries.

35. With regard to the qualification of offences, he drew attention to the view of the International Law Commission that, in so far as the practice of mercenarism was used to infringe State sovereignty, undermine the stability of Governments or oppose national liberation movements, it constituted an offence against the peace and security of mankind (A/39/10, para. 65 (c) (iv)). The articles in the consolidated negotiating basis concerning the obligations of States, State responsibility and damage reparation were all crucial to prevent and curb mercenarism. He also supported the articles on preventive measures, the establishment of jurisdiction and the obligation to prosecute or extradite.

36. As there was a clear need for a convention on mercenaries, the General Assembly should urge the Ad Hoc Committee to continue its work with a view to fulfilling its mandate at the earliest possible date.

37. Mr. DJORDJEVIC (Yugoslavia) said the consolidated negotiating basis of a convention should facilitate work towards the adoption of a final text dealing with all aspects of mercenarism and mercenaries. The Convention should contain both preventive and repressive provisions to regulate such activities ab initio, from the moment an individual enlisted as a mercenary. These provisions should apply to all situations, and the Convention should also regulate the obligations and duties of States. A narrow approach providing only for repressive measures against mercenaries as individuals would be contrary to the original goal of drafting the Convention.

38. The definition of the term "mercenary" should be broader than the one contained in article 47 of Additional Protocol I to the 1949 Geneva Conventions. Complicity and attempt should be regulated with the same care as the principal offence, so that all forms of mercenary activities might be prohibited. Work on the qualification of offences, which could greatly affect the future application of the Convention, could be pursued independently of the International Law Commission, since it should involve special and detailed consideration of the crime of mercenarism from the standpoint of international penal law. Article 11 of the consolidated negotiating basis seemed to have met the need for a clear definition of the obligations of States. In that connection, it was very important to retain the provisions of article 13 regarding the obligation of States to take preventive measures against mercenaries and to take in their territories all necessary measures to prevent the preparation of mercenary offences.

39. The future Convention should also contain provisions regarding the responsibility of States and damage reparation, in accordance with the generally recognized principle that international responsibility was engaged not only as a consequence of a breach of an international obligation but also as a result of

(Mr. Djordjevic, Yugoslavia)

failure to fulfil such an obligation. The question of the obligation to prosecute or extradite should be resolved on the basis of existing arrangements, given the existence of many international conventions and extensive international practice.

40. The Ad Hoc Committee should make additional efforts so that an international convention against the recruitment, use, financing and training of mercenaries, might be adopted at its 1985 session.

41. Mr. ALI (Democratic Yemen) said that some countries had used mercenaries to cause destruction in progressive States and to overthrow their Governments. The United Nations had condemned such activities in many resolutions, including resolution 38/137. While most countries felt that the Convention would be an important instrument, there could be no progress if some States lacked the necessary political will.

42. Turning to the report of the Ad Hoc Committee, he said that his delegation supported the ideas contained in paragraph 21, which dealt with the categorization of offences, and paragraph 25, on the need to provide for the international responsibility of States. He supported the use of a single definition of the term "mercenary", so as to avoid any doubts about the meaning of the concept. Mercenary activities must be considered criminal in all situations and from the moment that preparations or attempts were made to use mercenaries. The definition must also cover those who recruited, used, financed and provided facilities to mercenaries, thus enabling them to exist. Mercenaries should not be treated as lawful combatants or prisoners of war but were entitled to a trial and proper defence.

43. With regard to offences, mercenary activities were criminal whether or not their objectives were achieved. Therefore, the relevant bracketed text in article 6 of the consolidated negotiating basis should be maintained. Likewise, he had no difficulty with article 7. He did, however, feel that, while article 8 (a) was acceptable, article 8 (b) should be deleted since incitement and attempt were also punishable acts. Mercenary activities should be considered to be crimes against the peace and security of mankind. Provisions relating to the obligations of States should be included in the Convention, and article 11 was a good basis for further discussion. Once agreement had been reached on the definition of the term "mercenary" and on the obligations of States, he was sure that rapid progress could be made on the remaining questions.

44. Since the item was of particular importance for the developing countries, he hoped that the Ad Hoc Committee would be able to achieve results, taking into account the interests of the majority of States, and produce a Convention that was acceptable to all.

The meeting rose at 12.20 p.m.