



SUMMARY RECORD OF THE 16th MEETING

Chairman: Mr. AL-QAYSI (Iraq)

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AGENDA ITEM 137: REPORT OF THE AD HOC COMMITTEE ON THE DRAFTING OF AN
INTERNATIONAL CONVENTION AGAINST THE RECRUITMENT, USE, FINANCING AND TRAINING OF
MERCENARIES (continued)

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The meeting was called to order at 10.50 a.m.

AGENDA ITEM 137: REPORT OF THE AD HOC COMMITTEE ON THE DRAFTING OF AN INTERNATIONAL CONVENTION AGAINST THE RECRUITMENT, USE, FINANCING AND TRAINING OF MERCENARIES (continued) (A/40/43, A/40/60-S/16873, A/40/62-S/16876, A/40/63-S/16879, A/40/67-S/16882, A/40/69-S/16883, A/40/79-S/16890, A/40/80-S/16891, A/40/81-S/16892, A/40/83-S/16894, A/40/94-S/16902, A/40/111-S/16916, A/40/120-S/16944, A/40/126-S/16952, A/40/129-S/16955, A/40/134-S/16964, A/40/138-S/16968, A/40/155-S/16988, A/40/181-S/17041, A/40/182-S/17042, A/40/208-S/17060, A/40/212-S/17066, A/40/234-S/17102, A/40/240-S/17109, A/40/255-S/17112, A/40/257-S/17116, A/40/264-S/17126, A/40/268-S/17131, A/40/269, A/40/273-S/17135 and Corr.1 (French only), A/40/287-S/17155, A/40/288-S/17158 and Corr.1 (French only), A/40/294-S/17167 and Corr.1 (French only), A/40/310-S/17186 and Corr.1, A/40/311-S/17187, A/40/352-S/17236, A/40/368-S/17250 and Corr.1 (Russian only), A/40/371-S/17256, A/40/403-S/17303, A/40/424-S/17318, A/40/479-S/17339, A/40/500-S/17352, A/40/526-S/17377, A/40/538-S/17390, A/40/556-S/17403, A/40/573-S/17417, A/40/630-S/17458, A/40/664-S/17479, A/40/674-S/17489, A/40/675-S/17490, A/40/690-S/17504, A/40/732-S/17545)

1. Mr. HERRON (Australia) said that as Australia was not a member of the Ad Hoc Committee and had not sought observer status, it was particularly interested in the report and he praised the Chairman of the Committee, Mr. Mosely, for his excellent introduction and the Vice-Chairman, Mr. Treves, for the additional insights he had provided.

2. Australian legislation prohibited activities which could be defined as mercenary; the main provisions on the subject were contained in the Crimes (Foreign Incursions and Recruitment) Act 1978. The Australian authorities had had to give close consideration again that year to the application of the Act. A group of individuals from another country had accumulated a substantial consignment of light weapons and ammunition with the apparent intention of using them in a situation of local unrest in a friendly country. Although the Act appeared to be relevant it had not been invoked for evidentiary reasons.

3. However, the incident demonstrated the need to have comprehensive coverage of mercenary activities in the draft convention. Australian legislation was useful and the Ad Hoc Committee had taken it into account as a possible model for various aspects of the draft convention. The scheme used in that Act - the scheme of basing the creation of offences on the commission of acts - was sound. During the debate in the Committee he had noted that some delegations would base offences on mere fulfilment of criteria for membership in a defined category. In other words, status rather than actions would give rise to sanctions. Australian institutions had progressed beyond the barbaric sanction, part of early legal history, of declaring a miscreant caput lupinum and his delegation had thought that that was true of other societies and criminal law systems.

(Mr. Herron, Australia)

4. The related point concerning the definition of the offences listed in the convention as crimes against the peace and security of mankind should be dealt with by the International Law Commission not by the Ad Hoc Committee.

5. With regard to the definition of "mercenary" the Chairman of Working Group A had made a useful proposal, which combined in a single article separate provisions while nevertheless retaining a two-pronged definition. That new structure had the advantage of detaching the definition used in the convention from that established in article 47, paragraph 2 of Additional Protocol I to the 1949 Geneva Conventions, the specific purpose of which was humanitarian protection. All mercenaries, however defined, should receive the benefit of the minimal humanitarian protection guaranteed by the Geneva Conventions.

6. Commenting on the draft definition, he said that article 1, paragraph 2 as contained in the report of the Ad Hoc Committee would need to be refined so that the scope of the convention might extend beyond situations of actual armed conflict to cover, for example, situations of recurrent political violence, terrorism and incipient insurgency.

7. Nevertheless, his delegation had reservations about the application of the definition of "mercenary" to armed conflicts that were not international. In such conflicts the distinction between military activity, organized political violence and activity which was merely criminal might be blurred; accordingly, it was essential to base offences on mercenary acts rather than on mercenary status.

8. Although Australia did not object in principle to the enumeration of objectives in article 1, paragraph 2 of the draft it considered that extensive listing was unnecessary and agreed with the representative of Brazil that most, if not all, of the objectives contained in brackets could be subsumed under the single objective, "to interfere in the internal affairs of a State". An objective attitude should be taken on the question of mercenary activity in situations referred to in article 1, paragraph 4 of Additional Protocol I to the Geneva Convention. It was doubtful whether dealing in death for monetary gain could be less reprehensible on one side of a conflict than another, whatever the righteousness of the cause. Sanctions should fall evenhandedly on mercenaries on both sides, contrary to what seemed to be stated in the last objective listed in article 1, paragraph 2 (a) of the Consolidated Negotiating Basis.

9. As for the "nationality" criterion or, more accurately, the "non-national" criterion dealt with in paragraphs 54 and 55 of the report of the Ad Hoc Committee, his delegation considered that a national of a State against which acts of violence were carried out might, for purposes of the convention, be within the scope of the definition of "mercenary". The domestic laws of States already contained provisions on that question and his delegation would pay close attention to the results of the Ad Hoc Committee's further work.

10. His delegation opposed the inclusion of principles of State responsibility and reparations in the convention.

(Mr. Herron, Australia)

11. It supported the extension of the mandate of the Ad Hoc Committee and hoped that greater participation by Member States in the next session of the Committee would lead to progress. Advantage should be taken of the constructive tone of many of the statements made in the current debate so that the convention, which was universal in its conception, fully reflected the objective views and constructive input of all States.

12. Mr. AL-DUWAKH (Kuwait), speaking on behalf of the Arab Group, commended the Chairman of the Ad Hoc Committee for his introduction of its report.

13. Mercenary activities were a serious threat to the independence of countries and a violation of the inalienable right of peoples to self-determination. Moreover, mercenary activities were an open violation of the principle of non-interference in the internal affairs of States and, therefore, a threat to international peace and security. As the problem concerned all States, particularly the developing countries, the drafting of an international convention on the subject was a matter of urgency. Accordingly, it was unfortunate that the Ad Hoc Committee had not been able to carry out its mandate fully and to submit a draft to the General Assembly at its fortieth anniversary session. The basic problems which the Ad Hoc Committee had encountered could have been solved had there been the political will to consider technical solutions to them. It was discouraging to note that the revised text of the consolidated basis contained a very great number of provisions in brackets.

14. The Arab Group agreed with the Chairman of the Ad Hoc Committee that the unequal participation of States had had a negative impact on the Committee's results; he urged all members of the Committee to participate effectively and to show greater flexibility so that the much needed international convention on the subject could be drafted thus filling the gaps left by national legislation.

15. With regard to State responsibility, since the activities of mercenaries were a threat to the peace and security of all countries and to their territorial integrity, in order to safeguard the interests of the international community as a whole it was necessary that mercenary activities should be treated as a criminal offence and considered as a crime against the peace and security of mankind.

16. The convention should prohibit all forms or manifestations of mercenary activities and its scope should not be limited to individuals or entities that were prepared to commit, or that committed, such offences but should also take into account those who contributed to, or incited others to commit, those criminal actions. Accordingly, mercenaries could not be considered lawful combatants or prisoners of war.

17. The definition of a mercenary should cover the whole range of mercenary activities in international armed conflict and in international unarmed conflict or armed conflict that was not of an international nature, i.e., which took place in time of peace or which disturbed the peace. In that regard, he considered that the text drafted by the Working Group was a compromise solution and reflected the

(Mr. Al-Duwakh, Kuwait)

provisions of Additional Protocol I to the Geneva Conventions and the evolution of international law in that area.

18. With regard to the definition of a mercenary and the description of the criminal activities carried out by mercenaries, he considered that the text of the convention should be clear and specific on the subject. Moreover, the text of the convention should permit States to include in their domestic legal systems norms or clauses for implementing the convention, including the adoption of preventive measures.

19. With respect to State responsibility, he pointed out that the work of the Ad Hoc Committee should complement the work of the International Law Commission, which was of a more general nature.

20. Concerning the possibility of compensation, he considered that the convention should include a text on compensation of the victim State for mercenary activities.

21. Lastly, he pointed out that his comments on the text did not exclude recognition that the exchange of opinions between the parties concerned was useful and he commended the Chairmen of the Working Groups for their constructive efforts to reduce differences of opinion between those parties. The Arab Group would be pleased if the Ad Hoc Committee could accomplish its mandate at its next session and was prepared to support the renewal of that mandate.

22. Mr. LAGUMBAY (Philippines) commended the introduction of the Ad Hoc Committee's report and the work undertaken by the Working Groups on that important and urgent item. Mercenary activities constituted an international offence and a grave threat to international peace and security. His delegation was particularly concerned over the vulnerability of the developing countries, which, as weaker States, were easy victims of such activities.

23. The Philippines had expressed its support for the draft convention and considered that it should establish the obligation of States to take all necessary measures to prevent activities of that type being committed on their territories and to prohibit the transit of mercenaries through their territories. States should also clearly establish their jurisdiction with regard to crimes committed by mercenaries and ensure that they were prosecuted and punished in accordance with the law. The international convention should also include strict provisions concerning enforcement in order to give the developing countries a certain sense of security and contribute effectively to safeguarding the territorial integrity and political independence of those States.

24. With regard to the definition of a mercenary which appeared in article 1, paragraph 1 (c), of the proposed text, he considered that the words "substantially in excess" were unduly restrictive and that that qualification of material compensation would limit the scope of the definition of the term mercenary. Furthermore, it was a subterfuge that would pave the way for the exercise of such unlawful activities. In fact, there might conceivably be mercenaries who would be

(Mr. Lagumbay, Phillipines)

willing to receive material compensation that was not substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of the party that recruited them.

25. With regard to the definition of a mercenary contained in article 1, paragraph 2, he considered that, for the sake of clarity, the words "in the absence of armed conflict" should be retained after the words "any person who". That would be consonant with his country's position that mercenarism could exist both in a situation of armed conflict and in other circumstances. The inclusion of those words would make it clear that paragraph 1 covered situations of armed conflict and paragraph 2 situations in which there was no armed conflict.

26. His delegation had difficulty supporting the nationality criterion which appeared in square brackets in paragraph 2 (d). As several delegations had pointed out, there had been numerous examples of the use of nationals by foreigners to carry out mercenary activities from abroad against their country of origin. If that criterion was retained, how would nationals whose activities within their own State contained all the elements of mercenarism be categorized? Mercenarism, like terrorism, was an international offence and should be considered as such no matter where it was carried out. His delegation did not think that the exclusion of the nationality criterion would blur the distinction between a mercenary and a person who took up arms against his own Government, since it was obvious that the former was essentially motivated by financial gain and the latter by some political cause.

27. With regard to the question of qualifying offences under the convention as offences against the peace and security of mankind, the Ad Hoc Committee should preferably not examine that issue, since it was already being considered by the International Law Commission.

28. Lastly, he pointed out that it was encouraging to note that the Ad Hoc Committee's work demonstrated its awareness of the fundamental importance of its mandate and its clear wish to discharge it effectively.

29. Mr. ELARABY (Egypt) said that the Ad Hoc Committee had made some progress in its work and that that was reflected in the Consolidated Negotiating Basis. Nevertheless, if the report of the fifth session (A/40/43) was compared with that of the previous session, it might be noted that the Committee had come up against considerable difficulties and that some countries had not demonstrated the necessary political will to enable the Committee to achieve the desired results.

30. With regard to the definition of the offence constituted by mercenary activities, it should be considered as an offence against the peace and security of mankind, since it was a flagrant violation of international law.

31. Referring to the work of Working Group A, he shared the opinion of many delegations on the text of article 1 which was a good basis on which to reach agreement. The definition of a mercenary should include both cases of armed conflict and the other cases proposed. He agreed with the criterion set forth in

(Mr. ElAraby, Egypt)

paragraph 44 of the Ad Hoc Committee's report: in order to prove the existence of concerted action, it might suffice to establish a link between the mercenary and another person. Regarding the list of objectives of that concerted action, his delegation felt that both those that related to concepts of criminal law and those deriving from international law should be included.

32. Referring to article 2, which replaced article 7 of the Consolidated Negotiating Basis, he considered that activities involved in the recruitment of mercenaries were similar to training, financing and other activities mentioned in the text; there should be no distinction made between them nor should the former activities be considered as a principal offence while the others were characterized as acts of complicity or as attempts.

33. With regard to the work of Working Group B, his delegation agreed with the text proposed by the Chairman for articles 9, 11, 12 and 13 of the Consolidated Negotiating Basis. Concerning point B, the wording proposed by the Chairman should be adopted; it was similar to that contained in other international conventions, such as the International Convention on the Suppression and Punishment of the Crime of Apartheid. With regard to point D (para. 91 of the report), his delegation suggested that the current proposal should be retained, with certain stylistic improvements. Lastly, his delegation was in favour of the renewal of the Committee's mandate.

34. Mr. VAN TONDER (Lesotho) said that his delegation deeply regretted that the efforts of the Ad Hoc Committee had not borne fruit. Lesotho strongly condemned the recruitment, use, financing and training of mercenaries, and called on those States which were members of the Committee and which had recently participated half-heartedly to change their attitude. It was an open secret that mercenarism had always been one of the instruments utilized by some developed countries to destabilize third world countries bent on remaining ideologically independent. The time had come for the international community to rally round to punish mercenaries and vociferously condemn all countries involved in their activities.

35. Although his delegation welcomed the definition of mercenarism proposed by the Chairman, the incorporation of article 47, paragraph 2, of Additional Protocol I to the 1949 Geneva Conventions was inadequate since it confined itself to situations of armed conflict. The article should also cover cases in which mercenaries were used to overthrow a legitimate Government or oppose national liberation movements. His delegation also considered that the word "specially" in article 1, paragraph 1 (a), and the word "direct" in article 1, paragraph 1 (b), should be deleted, since they were superfluous and could lead to problems of interpretation.

36. It was not necessary to refer to the amount of remuneration received by mercenaries, since the crime existed provided that there was a promise of remuneration, whatever it was. Equally, the nationality, domicile or residence of the mercenary should not form an integral component of the crime. With respect to article 1, paragraph 2, he proposed the deletion of the words in brackets "in the absence of armed conflict", and of the word "specially" in article 1,

(Mr. Van Tonder, Lesotho)

paragraph 2 (a). Lesotho supported the proposal made by previous speakers to retain the catalogue of objectives in the latter paragraph, with the deletion of the brackets. Further, his delegation proposed the deletion in the last sentence of that paragraph of the word "seriously", as it might prove to be unclear. With respect to paragraph (b), he preferred the word "acts", and would consider paragraph (c) acceptable provided that the sentence in brackets was deleted. Paragraph (d) was not acceptable since it reintroduced the elements of nationality and residence. Paragraphs (e) and (f) could be combined to form one article.

37. His delegation did not support the addition of a third paragraph to article 1 as proposed by some delegations, since it would require the observance of an instrument which was extraneous to the convention, rendering its interpretation and the domestic processes of signature and ratification of the future instrument more cumbersome. With regard to article 2, his delegation supported the text proposed by the Chairman of Working Group A on page 15 of the report (A/40/43). He welcomed in particular the exclusion of the word "knowingly", as that would render the article too restrictive: the chances of anyone recruiting mercenaries unknowingly were very slight. His delegation accepted the first text of article 4 as it appeared on page 27 of the report, and viewed the alternative formulation as unnecessary. Articles 4 and 5 could be combined. With reference to the work of Working Group B, his delegation would prefer the text of article 9 as it appeared in the second sentence on page 29 of the report. It was obvious that States were under an obligation to harmonize their legislation with international instruments to which they had acceded, and the expression "necessary measures" was broad enough to accommodate the various situations which might arise. With regard to the draft text appearing as "A" in paragraph 79 of the report, his delegation agreed with those who had argued that the word "seriousness" might cause problems of interpretation and that it would be better to use the formulation "grave nature". Accordingly, he preferred the text of article 8 as it appeared on page 28 of the report.

38. His delegation welcomed the new article 11 appearing on page 29 of the report. The text of the new article 10 should be retained, since the phrase "shall prohibit such activities" imposed an obligation on States to resort to all available means, both administrative and legal. The first paragraph of article 11 should include the phrase, "co-operate in the prevention of the offences set forth in this Convention particularly by", which appeared between brackets on page 29 of the report. Nevertheless, his delegation advocated the exclusion of the words "national and" in the second line of paragraph (a) to avoid a lacuna which might result in non-compliance with the convention. Finally, article 7 of the Consolidated Negotiating Basis was most appropriate since, as stated in numerous General Assembly resolutions, the activities of mercenaries constituted a crime which violated fundamental principles of international law. His delegation supported renewal of the mandate of the Ad Hoc Committee.

39. Mr. AKPLOGAN (Benin) said that the question of the drafting of an international convention against the recruitment, use, financing and training of mercenaries was of great concern to his country, which on 16 January 1977 had been the victim of a barbaric act of aggression at the hands of a horde of mercenaries

(Mr. Akplogan, Benin)

in the pay of international imperialists. Although the United Nations Charter had, 40 years earlier, enshrined the principles of the sovereign equality, political independence and territorial integrity of States, as well as the self-determination of peoples, it was undeniable that respect for such principles on the part of all States was today far from a reality. The attacks against the national sovereignty of independent States and peace-loving peoples were tangible proof of that regrettable situation.

40. Such acts of aggression which threatened international peace and security were frequently the work of contemptible individuals in the pay of evil forces whose sole aim was colonial reconquest and the subjugation of third world countries. It was necessary to adopt firm and even restraining measures which would safeguard international peace and security in order to neutralize and eradicate the problem.

41. By establishing in 1980 the Ad Hoc Committee on the Drafting of an International Convention against the Recruitment, Use, Financing and Training of Mercenaries, the General Assembly had sought to halt that pernicious activity which, if it continued unpunished, might provoke a generalized, world-wide armed conflict. Although the Ad Hoc Committee had not attained the objective for which it had been established, it should be noted that very encouraging progress had been made at its latest session. That proved that all States, which had recognized the illegitimate nature of mercenary activities, were also aware of the need to draft forthwith international norms to apply to all on a basis of equality. Nevertheless, discrepancies on questions of detail, largely arising from efforts by some States to protect national and egoistic interests, had prevented the Ad Hoc Committee from completing its work during 1985 in accordance with the mandate given to it under General Assembly resolution 39/84, paragraph 2. It was necessary to overcome such divergencies so that the Ad Hoc Committee could promptly formulate a draft convention acceptable to all States, for the good of the international community. Accordingly, his delegation supported the proposal for the Ad Hoc Committee to hold a new session, which, he trusted, would be its last.

42. With reference to the Ad Hoc Committee's work at its latest session, his delegation thought that the definition contained in article 47, paragraph 2, of Additional Protocol I to the Geneva Conventions of 1949 did not cover all situations of armed conflict; they should all be considered. Account should also be taken of the nationality criterion, because if nationals of the victim State were excluded from the definition's scope of application, they would feel encouraged to act with impunity as mercenaries against their own country of origin, and those who recruited and used them would be free to conduct and continue recruitment drives in the victim State. Nor should the pursuit of material benefit be an essential element in the definition of a mercenary; participation in mercenary activities was in itself an abominable act.

43. As for the activities to be defined as offences in the convention being formulated, his delegation saw great merit in the proposal submitted by Working Group A. Organizing, equipping and maintaining mercenaries could be added to such activities. Particular attention should be paid to preventive and punitive measures, without which the aims envisaged in the convention could not be attained.

44. Mr. CHAN Youran (Democratic Kampuchea) noted with satisfaction that the Ad Hoc Committee had made further progress at its fifth session and expressed the hope that at its next session it would be able to continue the preparation of a definitive text for a convention on the subject.

45. With regard to the Committee's report, his delegation considered that the new article 1 of the Consolidated Negotiating Basis, which had originated in a combination of articles 1, 2 and 6 of the 1984 version of the text, represented real progress and had the particular merit of clarifying and simplifying the question of the scope of application of the definition of a mercenary. By including in a single definition the two kinds of situations which gave rise to the activities of mercenaries, namely, those in which there was armed conflict and those in which there was not, article 1 would greatly facilitate the task of national jurisdictions, especially in the case of States which were not yet parties to the Geneva Conventions of 1949 and Additional Protocol I. It was also very fitting that article 1 should include in its paragraph 1 the provisions of Additional Protocol I to the Geneva Conventions of 1949, which defined a mercenary in the case of armed conflict. On the other hand, the provisions of paragraph 2, which defined a mercenary in cases where there was no armed conflict, prompted reservations. Like other delegations, his delegation would like the words "in the absence of armed conflict" to be added to that paragraph, so as to define exactly the situation contemplated there and suitably distinguish it from the first. However, in order not to revive the problem of the scope of application of the two definitions, which had already been discussed at length in the Ad Hoc Committee, his delegation thought it unnecessary to include in article 1 the paragraph 3 which appeared in square brackets in the revised Consolidated Negotiating Basis.

46. He also thought it highly appropriate, for the purpose of facilitating the application of the future convention, to enumerate the objectives for which mercenaries might be recruited, as had been done in article 1, paragraph 2. However, he wished to point out that in his delegation's view, the Government referred to in paragraph 2 must be the legal and legitimate Government of an independent State and not a puppet Government in the pay of a foreign Power; that was necessary to avoid confusion in interpreting the provisions in question. Taking the case of his own country as an example, he said that the legal and legitimate Government of Kampuchea and its people was the Coalition Government of Democratic Kampuchea, which was recognized by the United Nations and supported by the international community in its efforts to enable the country to recover its sovereignty and independence, currently being trampled underfoot by a Vietnamese army of 200,000 men. As for the puppet régime installed by that army in Phnom Penh, it failed to qualify as a legal and legitimate Government of a State for the purposes of article 1, paragraph 2 (a).

47. With regard to paragraph 2, which specified in its subparagraph (d) that a mercenary was not necessarily a national of the State against which aggression was directed, he said that the reference to the nationality of the mercenary should be retained because suppressing or modifying it would entail the risk of leaving the way open for foreign interference in the internal affairs of a sovereign State. In that regard, he denounced the devious manoeuvre by the delegation of Viet Nam in

(Mr. Chan Youran, Democratic Kampuchea)

deliberately trying to present the Vietnamese army of aggression operating in Kampuchea as an army of "volunteers". The aim was to legalize and legitimize the occupation of Democratic Kampuchea and its annexation to a so-called "Indo-Chinese Federation" to be established under the domination of Viet Nam. At the same time, that delegation had the nerve to describe as "mercenaries" the people of Democratic Kampuchea who were fighting with the aid and support of the international community to defend their sacred national right to independence and self-determination. Such stratagems would fool no one, least of all the United Nations General Assembly, which for seven years had been demanding the complete and unconditional withdrawal of Vietnamese forces from Kampuchea so that the people of that country could exercise their right to self-determination in free elections supervised by the United Nations.

48. He had no difficulty in accepting the provisions of the new article 2 of the Consolidated Negotiating Basis since, in his view, mercenaries could have no right to the status of combatants or prisoners of war.

49. Mr. LIU Zhenmin (China) said that the activities of mercenaries had brought untold suffering to national liberation movements and to small and weak nations, and still posed a threat to international peace and security. Mercenary activities were absolutely incompatible with modern civilization and therefore should be strictly and unequivocally prohibited by international law. It was for that reason that Nigeria's proposal for the conclusion of an international convention against the recruitment, use, financing and training of mercenaries had commanded universal support when it had been submitted in 1980, and that the General Assembly had adopted by consensus the resolution on the establishment of the Ad Hoc Committee to draft the convention. Since its establishment, the Ad Hoc Committee had done a great deal of work and achieved some progress. But on such key issues as the definition of a mercenary, there had been repetitions of debates year after year and no consensus had been reached. His delegation hoped that all countries would apply themselves to finding common ground, while reserving for the future their differences on technical and minor points, so as to enable the Ad Hoc Committee to accomplish its task as soon as possible.

50. With regard to the current version of the Consolidated Negotiating Basis, he pointed out that in 1985 the Chairman of Working Group A had proposed a text on the definition of mercenaries in all situations, which appeared in article 1. Paragraph 1 of that article provided a definition of a mercenary in situations of armed conflict, together with a chapeau to make it clear that the provisions of the paragraph applied only "for the purposes of the present Convention", while paragraph 2 provided a definition of a mercenary operating "in the absence of armed conflict". The latter text had the merit of reflecting the actual situation and the present characteristics of mercenaries in a comprehensive definition. Moreover, in view of the fact that mercenaries operating in armed conflicts, whether international or not, had similar characteristics, the text enumerated all the characteristics of a mercenary contained in Additional Protocol I to the Geneva Conventions and applied them to mercenaries in all kinds of armed conflicts, while giving in a chapeau the explanation needed to avoid any effects on the relevant

(Mr. Liu Zhenmin, China)

provisions of Additional Protocol I to the Geneva Conventions. It was essential to have the reference in the text to the characteristics of a mercenary in the absence of armed conflict, in order to differentiate the offences of a mercenary from criminal offences of a general nature. In short, the text represented progress compared with the relevant provisions of the Consolidated Negotiating Basis submitted in 1984 and could certainly serve as a basis for further negotiations.

51. Developments had shown that the activities of mercenaries occurred mainly because of the States or organizations which recruited, used, financed, trained and dispatched them. In order to eliminate mercenary activities altogether, it was necessary to provide both for the obligations of States, as envisaged in articles 8 to 12 of the revised Consolidated Negotiating Basis, and for their responsibilities for failure to fulfil such obligations. Emphasis should be put on the obligations of States to refrain from certain activities, since that was the aim of the future convention. It should be explicitly stipulated in the convention that no State should recruit, use, finance or train mercenaries; that no State should allow the use of its territory or of territories under its jurisdiction as a base for mercenary activities; and that all States had the obligation not to provide any facilities for mercenary activities. With respect to the obligations of States to refrain from such activities, some more explicit and detailed provisions could perhaps be formulated on the basis of articles 10 and 11 of the revised Consolidated Negotiating Basis.

52. During the current year, the discussion in the Ad Hoc Committee had concentrated on whether the offences committed by mercenaries should be qualified as offences against the peace and security of mankind. If the offences committed by mercenaries were qualified simply as criminal offences of a general nature, the significance of the future convention would be greatly diminished. Although the Code of Offences against the Peace and Security of Mankind was still being prepared by the International Law Commission, it seemed to be the general view in the Commission that the offences committed by mercenaries should be within the scope of that Code. His delegation considered that the offences committed by mercenaries must be differentiated from criminal offences of a general nature from the point of view of international criminal law.

53. Referring to the seventh preambular paragraph of General Assembly resolution 39/84, he appealed to the members of the Ad Hoc Committee to strive to speed up the drafting of the international convention against the recruitment, use, financing and training of mercenaries, by demonstrating the political will and rededicating themselves to the purposes and principles of the Charter. As the Ad Hoc Committee had not completed its task, his delegation suggested that the General Assembly should authorize it to continue its work and urge it to complete the task of drafting the convention as early as possible.

54. Mr. ROSENSTOCK (United States of America) said that, at its fourth session, the Ad Hoc Committee had been able to formulate a framework for a future international convention against the recruitment, use, financing and training of mercenaries and to crystallize the central issues which the convention might

(Mr. Rosenstock, United States)

address. At its fifth session, the Ad Hoc Committee had progressed beyond the results achieved during the previous year.

55. The task before the Ad Hoc Committee, namely to take positive steps to help the world community to cope with a specific problem, was not a new one. The General Assembly had produced conventions on the issues of hijacking, sabotage, protection of diplomats, the taking of hostages, and torture. A convention fashioned in the tradition of those instruments would be the most prudent course and one on which agreement was most likely. It should emphasize the harmonization of domestic criminal laws as the primary instrument for control of unlawful activities and should thus focus on specific criminal offences over which States parties would assume jurisdiction under their domestic law.

56. The fundamental conceptual problems with which the Ad Hoc Committee had grappled were the issues of definition and scope. A significant development at the fifth session had been the elimination of the direct reference to the Geneva Protocol in the article containing the definition. In the view of some delegations, that reference would create a barrier to the application of the criteria contained in the Consolidated Negotiating Basis outside the context of the Protocol. Similarly, the proposed alternative solution, which appeared in footnote 10 to the report, did not contain a reference to the Protocols. In the view of his delegation, future consideration of both versions of the article containing the definition would be facilitated by that omission.

57. Despite unequivocal rejection of the term "mercenarism" by many delegations, some had still persisted in using it and had even resorted to devising a competing régime, ignoring the results of the Ad Hoc Committee's work. Such an approach was not conducive to progress, any more than was the retention of concepts such as "crimes against the peace and security of mankind", which, inter alia, prejudged the work of the International Law Commission, and that of "State responsibility", which was confusing and contributed little to the advancement of the work.

58. There seemed to be general agreement on the inclusion of the nationality criterion in respect of situations of armed conflict. The objective criterion that the individual described as a mercenary should be a non-national appeared in a number of treaties and, in the view of his delegation, was a legitimate requirement. During the debate on the item at the previous session, the representative of Nigeria had pointed out that the definition of a mercenary would be blurred unless a distinction was made with regard to nationals, who, apart from pecuniary motives, might have political motives. Nationals could still be charged with treason under domestic legislation.

59. His delegation remained optimistic that the Ad Hoc Committee could reconcile its methodological and conceptual differences. The composition of the Ad Hoc Committee was geographically and politically balanced. A co-operative effort by all concerned could lead to consensus on the key issues which had hitherto impeded progress.

60. Mr. ABDEL-RAHMAN (Sudan) said that his country attached great importance to the work of the Ad Hoc Committee. In its resolution 39/84, the General Assembly had recognized that the activities of mercenaries, apart from being contrary not only to the general principles of international law, but also to the principles of non-interference in the internal affairs of States and respect for their territorial integrity and independence, seriously impeded the process of self-determination of peoples struggling against colonialism, racism, apartheid and all forms of foreign domination. The activities of mercenaries endangered international peace and security, and mercenarism should therefore be regarded as an offence against the peace and security of mankind.

61. Africa had suffered from the activities of mercenaries, whose primary objective was to thwart the socio-economic aspirations of the African peoples. The world was currently witnessing a re-emergence of mercenarism, and what was needed was the creation of a universally accepted legal framework to combat the phenomenon. The mandate of the Ad Hoc Committee, as stipulated in the relevant resolution of the General Assembly, was to draft an international convention, not a declaration as some delegations had claimed.

62. With reference to the report of the Ad Hoc Committee (A/40/43), his delegation considered that the definition of the term "mercenary" contained in article 1 as submitted by the Chairman of Working Group A, should cover all types of mercenaries regardless of the context in which they were operating. The language of Additional Protocol I provided guidance in that respect. The legal elements should not deprive the definition of its political elements because, although the activities of mercenaries were criminal, their ultimate objectives were political. Concerning the list of objectives, his delegation supported the inclusion of the six points which appeared in paragraph 47 of the report.

63. The question of the nationality criterion was of particular importance. The Ad Hoc Committee should make every effort to gear the proposed convention to the realities of international life. The convention should not be narrow in scope, particularly where regional instruments had a wider scope; in that connection, the OAU Convention for the Elimination of Mercenarism in Africa might be cited. The definition should include the nationals of the victim State as their exclusion would leave a loophole which might open the way for meddling in the internal affairs of States through the use of nationals to launch activities against their own country.

64. Article 2 represented a key provision. Recruitment, use, financing and training constituted four interrelated principal offences. To view the use, training or financing of mercenaries in the context of complicity would abort the objectives of the convention.

65. In connection with the report of Working Group B, article 9, currently designated point A, purported to indicate that the offences covered by the convention were not all of the same gravity. In the view of his delegation, mercenarism was a serious offence and, as such, should carry a heavy penalty. His delegation had no objection to point B. Points C and D, relating to the

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obligations of States, were of fundamental importance. Point C clearly stipulated the obligation of States not to recruit, use, finance or train mercenaries. Point D should also include transport and transit of mercenaries.

66. In the view of his delegation, the mandate of the Ad Hoc Committee should be renewed. The technical problems to which the Ad Hoc Committee's report referred could be resolved if all the parties concerned demonstrated the necessary political will, bearing in mind that mercenarism was beyond any doubt an international crime.

67. Mr. NETCHAEV (Union of Soviet Socialist Republics) said that, in spite of the fact that the use of mercenaries had been condemned in numerous General Assembly resolutions, mercenaries continued to carry out their activities against States and national liberation movements. The drafting of an international convention against the recruitment, use, financing and training of mercenaries was a necessary and urgent task, as could be seen from the report of the Ad Hoc Committee. Although the Ad Hoc Committee had made some progress at its fifth session, the mandate referred to in General Assembly resolution 39/84 was still not being properly discharged. That was due to the fact that some Member States did not wish to draft an effective document which would outlaw mercenaries and close the legal loopholes which permitted their use. The bloody misdeeds carried out recently by mercenaries in Zaire, Zimbabwe, Nigeria and the Sudan, and their activities against the Governments of Guinea, the Comoros and Seychelles should be mentioned in that regard. The mercenaries' objectives were to destabilize States, overthrow Governments and combat national liberation movements. The means used by mercenaries were becoming increasingly sophisticated, and the forces which used mercenaries were resorting to them to a greater extent, now calling them "freedom fighters". Such were the freedom fighters who carried out acts of murder in Nicaragua, Afghanistan, Angola and Mozambique; the same mercenaries who had attempted to bring about the dismemberment of Lebanon and undermine the reconstruction effort in Kampuchea. Mercenaries destroyed schools and hospitals, assassinated leaders, took hostages, and committed crimes against the peaceful population.

68. The freedom fighters who had sown terror in Angola, Afghanistan, Kampuchea and Nicaragua had gathered together in 1985 at a meeting with the blessings of the leader of a country which supported the struggle against terrorism. That was because mercenaries were the instrument of the policy of State terrorism.

69. General Assembly resolution 39/159 demanded that all States should take no actions aimed at forcible change in or undermining of the socio-political system of other States, or the destabilization and overthrow of their Governments.

70. The CHAIRMAN gave the floor to the representative of the United States on a point of order.

71. Mr. ROSENSTOCK (United States of America) said that the Committee was considering a specific agenda item and that propaganda on questions relating to another item was unacceptable.

72. Mr. NETCHAEV (Union of Soviet Socialist Republics), replying to the statement by the representative of the United States, said that he had not departed from the agenda item under consideration because, in examining the convention which the Ad Hoc Committee had the task of drafting, it was necessary to study the reasons for the activities of mercenaries. He therefore intended to continue his statement.

73. The General Assembly had urged all States to respect, in accordance with the Charter of the United Nations, the sovereignty and political independence of States, the right of peoples to self-determination and their right to choose freely their socio-political system and promote their political, economic, social and cultural development. Nevertheless, there were States which did not heed the General Assembly. South Africa was conducting a policy of State terrorism against the States of southern Africa. Israel was doing the same against the Arab States with the use of regular troops. In the case of other States, State terrorism was carried out with the use of mercenaries; such was the case with the undeclared war waged by the United States against Nicaragua.

74. The CHAIRMAN gave the floor to the representative of the United States on a point of order and asked representatives to permit the Committee's debate to proceed in an orderly fashion.

75. Mr. Rosenstock (United States of America) expressed his opposition to the fact that reference was being made to incidents which, according to the delegation of the Soviet Union, involved the use of mercenaries but the application of the policy of State terrorism. Soviet propaganda on that question was out of order because it did not concern the agenda item under consideration. Furthermore, it was not necessary to mention specific names and cases in the debate.

76. Mr. NETCHAEV (Union of Soviet Socialist Republics) said that he would not name any other State but wished to stress that, if enormous resources had not been allocated for the recruitment and financing of bands of mercenaries, those bands would already have been destroyed and the peoples of Afghanistan, Nicaragua, Democratic Kampuchea, Angola and other States would be able to lead their lives in peace. The fact that those large sums had been described as assistance demonstrated the intention of continuing to support in the future the mercenaries used against States that pursued a political course which did not suit another State's policy.

77. The mercenaries were supported by powerful forces which used them to achieve their own political ends and which were the same forces that sought to halt the drafting of the convention. The difficulties with which the Ad Hoc Committee had to contend were due to the position of the States which used mercenaries.

78. One of those difficulties lay in the definition of a mercenary. The question whether a mercenary could be a national of the State against which his services were being used was one which gave rise to polemics. Experience showed that nationals or persons who had fled from a number of countries were being used with ever greater frequency as mercenaries against those same countries. Often it was a question of soldiers from the armies of dictatorial régimes which had been

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overthrown by the peoples of those countries or members of separatist movements or misled minority groups. In some cases, such persons were even forced to serve as mercenaries. The mercenaries used by the racist régime of South Africa against neighbouring countries were an example. The attempt to exclude from the definition of mercenaries nationals of the State against which the activities were directed was designed to achieve an obvious objective: to limit the scope of application of the convention and create a legal loophole permitting the subsequent use of mercenaries.

79. In defining a mercenary, it was necessary to include not only persons who carried out acts of that nature but also persons who were ready to encourage those activities or who acted in complicity with mercenaries against the legitimate Governments of States or against national liberation movements. The convention must aim at prohibiting the institution of mercenarism, and, in that connection it should be asked, if mercenaries were responsible only for the acts which they carried out, what was the difference between them and other criminals or persons who carried out criminal acts in the military field.

80. With regard to the provision concerning the desire for private gain, according to which material compensation must be substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of a party, it should be pointed out that in a number of cases mercenaries received compensation similar to that of the armed forces of the parties to the conflict. Furthermore, in practice it was difficult to obtain reliable information on the payments made. Accordingly, it would be better to use the following wording: "is promised material or other agreed compensation".

81. With regard to the requirement that a mercenary should not be a member of the armed forces of a party to a conflict, it should be kept in mind that on more than one occasion mercenaries had been members of the army or armed forces of the party which used them. At the current time, South Africa had such an organization.

82. State responsibility was another unresolved issue. The provisions of the Convention concerning that question and, in particular, those relating to the suppression of the training and use of mercenaries should be strengthened. The fact that there were more than 40 training centres in one of the countries members of the Ad Hoc Committee explained to some extent the position of that country with regard to State obligations. The obligation of States to prohibit propaganda in favour of mercenaries should also be strengthened. Furthermore, it was unacceptable that brochures or manuals should be prepared for use by mercenaries. In addition to laying down State obligations, the convention should also ensure compliance with those obligations and make provision for the case of non-fulfilment by a State of the obligations which it had assumed.

83. His delegation, like most delegations, felt that the use of mercenaries was a crime against the peace and security of mankind. In that regard, it was regrettable that after the fifth session of the Ad Hoc Committee the rule set forth in article 7 was still in brackets.

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84. Turning to the contributions made by many members of the Ad Hoc Committee, he referred to the draft convention submitted by the delegation of Cuba, which was annexed to the report of the Ad Hoc Committee. It would be useful if those provisions were taken into account in the future work of drafting the convention. Lastly, he supported the proposal that the mandate of the Ad Hoc Committee should be renewed, on the understanding that that would enable the Ad Hoc Committee to draft speedily a convention which would definitively prohibit the activities of mercenaries.

The meeting rose at 1.10 p.m.