

**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: FORTY-THIRD SESSION

SUPPLEMENT No. 43 (A/43/43)



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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. The Ad Hoc Committee on the Drafting of an International Convention against the Recruitment, Use, Financing and Training of Mercenaries was convened in accordance with General Assembly resolution 42/155 of 7 December 1987 and met at United Nations Headquarters from 25 January to 12 February 1988. 1/

2. The membership of the Ad Hoc Committee, as appointed by the President of the General Assembly, is as follows: Algeria, Angola, Bangladesh, Barbados, Benin, Bulgaria, Canada, Cuba, Democratic Yemen, Ethiopia, France, German Democratic Republic, Germany, Federal Republic of, Haiti, India, Italy, Jamaica, Japan, Mongolia, Nigeria, Portugal, Seychelles, Spain, Suriname, Toqo, 2/ Turkey, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, Viet Nam, Yugoslavia, Zaire and Zambia.

3. The session was opened by Mr. Carl-August Fleischhauer, Under-Secretary-General, the Legal Counsel, who represented the Secretary-General at the session.

4. Mr. Georgiy F. Kalinkin, Director of the Codification Division of the Office of Legal Affairs, acted as Secretary of the Ad Hoc Committee. Miss Jacqueline Dauchy, Deputy Director (Codification Division, Office of Legal Affairs), acted as Deputy Secretary of the Committee and as Secretary of its Working Group; Mr. A. Mpazi Sinjela, Legal Officer (Codification Division, Office of Legal Affairs), acted as Assistant Secretary of the Committee and its Working Group.

5. At its 46th meeting, on 25 January 1988, the Ad Hoc Committee elected the following officers:

Chairman: Mr. Werner H. W. Vreedzaam (Suriname)

Vice-Chairmen: Mr. Abdullahi N. Baqe (Nigeria)
Mr. Vladimir Y. Eltchenko (Ukrainian Soviet Socialist Republic)
Mr. Tullio Treves (Italy)

Rapporteur: Mr. Hameed Mohamed Ali (Democratic Yemen)

6. At its 46th meeting, on 25 January 1988, the Ad Hoc Committee adopted the following agenda (A/AC.207/L.27):

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.

1/ For the membership list of the Ad Hoc Committee at its 1988 session, see A/AC.207/INF.7.

2/ Toqo replaced Senegal, which was a member of the Ad Hoc Committee at its previous session (see A/42/802).

4. Organization of work.
5. Drafting of an international convention against the recruitment, use, financing and training of mercenaries, pursuant to paragraph 3 of General Assembly resolution 35/48, paragraph 2 of resolution 36/76, paragraph 2 of resolution 37/109, paragraph 2 of resolution 38/137, paragraph 2 of resolution 39/84, paragraph 2 of resolution 40/74, paragraph 1 of resolution 41/80 and paragraph 2 of resolution 42/155.
6. Adoption of the report.
7. At the same meeting and at subsequent meetings, held on 25 and 27 January and on 1 and 4 February 1988, the Ad Hoc Committee granted requests for observer status received from the Permanent Missions of Afghanistan, Argentina, Belgium, Brazil, Burundi, the Byelorussian Soviet Socialist Republic, Cameroon, Costa Rica, Czechoslovakia, Egypt, Gabon, Ghana, Indonesia, Iraq, Jordan, Kenya, Lebanon, the Libyan Arab Jamahiriya, Mexico, Morocco, the Netherlands, Nicaragua, Peru, Poland, Rwanda, Senegal, the Syrian Arab Republic, Trinidad and Tobago, Uganda, the United Republic of Tanzania, Venezuela and Zimbabwe, pursuant to paragraph 6 of General Assembly resolution 42/155, according to which the Assembly decided that the Ad Hoc Committee would accept the participation of observers of Member States, including participation in the meetings of its drafting and working groups.
8. In addition to the documents submitted at its first, second, third, fourth, fifth and sixth sessions, as listed in its reports on those sessions, 3/ the Ad Hoc Committee had before it, in accordance with paragraph 3 of General Assembly resolution 42/155, the draft articles contained in section III of the Committee's report on its sixth session, 4/ entitled "Second revised consolidated negotiating basis of a convention against the recruitment, use, financing and training of mercenaries".
9. At its 46th meeting, on 25 January 1988, the Ad Hoc Committee decided to establish a working group, with the Chairman of the Ad Hoc Committee acting as its Chairman-Rapporteur. The Working Group held 11 meetings between 25 January and 12 February 1988. The Ad Hoc Committee also decided to establish a drafting group to be chaired by Mr. Tullio Treves (Italy), Vice-Chairman of the Ad Hoc Committee. The Drafting Group held 15 meetings between 27 January and 10 February 1988.
10. The Ad Hoc Committee, recognizing the tangible progress achieved at the current session in the performance of its task through effective participation of all its members as well as observers in preparing the Third Revised Consolidated Negotiating Basis, recommended to the General Assembly that it invite the Committee

3/ Official Records of the General Assembly, Thirty-sixth Session, Supplement No. 43 (A/36/43); ibid., Thirty-seventh Session, Supplement No. 43 (A/37/43 and Corr.1); ibid., Thirty-eighth Session, Supplement No. 43 (A/38/43); ibid., Thirty-ninth Session, Supplement No. 43 (A/39/43 and Corr.1); ibid., Fortieth Session, Supplement No. 43 (A/40/43); and ibid., Forty-second Session, Supplement No. 43 (A/42/43).

4/ Ibid., Forty-second Session, Supplement No. 43 (A/42/43).

to continue its work in 1989 with the goal of drafting, at the earliest possible date, an international convention against the recruitment, use, financing and training of mercenaries.

11. At its 51st meeting, on 12 February 1988, the Ad Hoc Committee approved its report and decided to include therein, as section II, the report of the Working Group and, as section III, the "Third revised consolidated negotiating basis of a convention against the recruitment, use, financing and training of mercenaries".

12. In accordance with paragraph 3 of General Assembly resolution 42/155 of 7 December 1987, the Working Group used as the basis of its work the Second Revised Consolidated Negotiating Basis of a convention against the recruitment, use, financing and training of mercenaries, reproduced in section III of the report of the Ad Hoc Committee on its 1987 session. 5/ It agreed to review the articles contained in the Second Revised Consolidated Negotiating Basis in their numerical sequence, focusing on those provisions which were entirely between square brackets or contained bracketed language. Articles 8 and 10 to 12, which were entirely free of square brackets, were not discussed.

13. During its discussion of the Second Revised Consolidated Negotiating Basis, the Working Group decided to refer certain articles to the Drafting Group established by the Ad Hoc Committee at its 46th meeting (see para. 9 above). The outcome of the work of the Drafting Group, as approved by the Working Group, is reflected in the Third Revised Consolidated Negotiating Basis (see sect. III of the Ad Hoc Committee's report). Proposals made in the Drafting Group apart from those approved are reflected in the Statement of the Chairman of the Drafting Group reproduced in annex I to the report of the Working Group (see paras. 81 to 135 below).

Article 1

14. The Working Group, considering that the discussion of this article had reached a sufficiently advanced stage, referred it to the Drafting Group.

Article 2

15. Some delegations favoured the deletion of this article. It was observed that the Ad Hoc Committee's mandate was not to regulate the status of mercenaries but to elaborate an instrument that would put an end to the recruitment, use, financing and training of mercenaries by imposing on States parties to the future convention various obligations, including the obligation to make certain acts punishable under their laws and the obligation to extradite or prosecute the perpetrators of such acts, as well as various reciprocal assistance obligations. The remark was also made that it was illogical to include a provision borrowed from the law of war in an instrument which by general agreement was intended to catch all mercenaries in whatever context they operated and since the question of the status of mercenaries in time of hostilities had been settled in article 47 of Additional Protocol I to the 1949 Geneva Conventions and since, under article 22 of the Second Revised Consolidated Negotiating Basis, the future instrument would be without prejudice to the existing law of warfare or to humanitarian law, no useful purpose was served in raising it again in a context in which it in any case did not belong.

16. Other delegations considered it premature to eliminate article 2 and cautioned against what they viewed as a hasty move. They observed that only after the fundamental questions that were still outstanding had been resolved could the implications of the deletion of the article be fully grasped. It was pointed out

5/ Ibid., sect. III.

that a provision denying mercenaries a privileged status had an important deterrent effect and was therefore useful. The remark was also made that, as evidenced by the strenuous efforts being made towards the elaboration of a definition of the term "mercenary", the convention in preparation was intended to be an autonomous document dealing comprehensively with all the aspects of its subject-matter, and should not be dependent for some of those aspects on other instruments, particularly as the future parties thereto might not be parties to those other instruments. In reply to the observation that article 2 related only to situations of hostilities, it was suggested either to provide expressly that the article was only applicable to mercenaries operating in the framework of armed conflicts, or to widen its scope by covering in a second sentence the status of mercenaries operating outside the framework of armed conflicts.

17. The following reformulation of article 2 was proposed:

"A mercenary, when he is taken prisoner, shall be treated like an ordinary criminal."

This text was supported by some representatives who viewed it as interesting, although one of them observed that it had the drawback of ruling out the possibility of treating the offences under consideration as political offences. However, it gave rise to objections on the part of other representatives, who remarked that treating the acts dealt with by the convention in preparation as ordinary crimes was not in keeping with the "extradite or prosecute" principle reflected in article 16, nor with the characterization of the acts in question as crimes against the peace and security of mankind, as envisaged in article 7.

18. Another proposal was to replace article 2 by the following:

"The treatment to be applied to a mercenary shall be governed by this Convention."

This text was viewed by some representatives as unobjectionable but considered by others as unnecessary and potentially dangerous, inasmuch as it lent itself to an interpretation that would exclude the application to mercenaries of rules contained in other instruments such as Additional Protocol I.

19. The Working Group agreed that article 2 should be the subject of informal consultations in the light of the discussion and decided to set it aside pending the result of those consultations.

Article 3

20. Some representatives recalled that at the previous session a compromise had almost been reached whereby the word "knowingly" would only qualify the verbs "trains" and "finances". and they expressed support for this approach. The remark was made in this connection that, while it was hardly conceivable that an individual might unknowingly engage in the recruitment or use of mercenaries, one could very well imagine a language teacher or a physical education instructor being unwittingly involved in the training of mercenaries, or gullible persons contributing funds to mercenary activities disguised as a legitimate undertaking.

21. Other representatives felt that the word "knowingly" would create a dangerous loophole and that it should be left to the courts to determine in each specific case whether the intentional element was present. In their opinion, the concern

that innocent people might unwittingly get involved in the financing or training of mercenaries ought to be taken care of by narrowing down the scope of the two verbs in question, for example, by inserting the words "for military purposes" after the verb "trains", and the words "on a substantial scale" after the verb "finances". Another suggestion was to narrow the scope of the four verbs by specifying the purpose of the activities to which they referred. Thus it was proposed to add at the end of the text the words "for the purpose of engaging in hostilities or other concerted acts of violence prohibited by international law".

22. The view was furthermore expressed that the list of prohibited activities should be supplemented by the inclusion of the concepts of supplying arms and facilitating transit. Those additions were supported by some delegations but found unnecessary by others. Views were expressed that the concepts in question were covered by the existing text.

23. The remark was made that the phrase "an offence is committed" in articles 3 to 6 might erroneously be interpreted as meaning that the convention was intended to create self-executing international law, whereas its aim was to place on States an obligation to include specific offences in their domestic penal law. The suggestion was made to replace the phrase in question by "To be punished is ...". This suggestion was considered by some delegations as downgrading the seriousness of the acts to be covered by the future instrument, which required that they be classified as offences.

24. The Working Group referred article 3 to the Drafting Group.

Articles 4 and 5

25. The Working Group referred both articles to the Drafting Group.

Article 6

26. The bracketed word "criminal" was generally viewed as unnecessary. The Working Group therefore agreed to delete it and to do likewise in article 5. One delegation expressed the view that attempt and complicity should be dealt with not in a separate article but in the provision defining principal offences under the future convention.

Article 7

27. Some delegations favoured the retention of this article. It was pointed out that mercenary activities infringed the sovereignty of States, had destabilizing effects and therefore threatened the peace and security of mankind. While supporting the article, some of the delegations in question felt that it was too early to decide its fate and suggested deferring its consideration pending the outcome of the work on articles 3 and 20.

28. Other delegations stressed that there was no agreement on the concept of crimes against the peace and security of mankind nor on acts that could be characterized as such and that it would be inappropriate for the Committee to pre-empt the conclusions of the International Law Commission on those points. It was observed that, by characterizing some of the offences to be covered by the future convention as crimes against the peace and security of mankind, article 7, on the one hand, made a distinction that was not in keeping with the general approach reflected in the draft under consideration and, on the other hand, caused

the offences to which it referred to be given two different legal qualifications, and this could only be a source of confusion.

29. The Working Group agreed to suspend its consideration of article 7 until it had a clearer picture of related articles.

Article 9

30. Some delegations favoured the deletion of the bracketed phrase, which they viewed as unnecessary, inasmuch as States, by making specific acts punishable under their laws in accordance with articles 3 to 6 and 8, would ipso facto - and most effectively - prohibit the acts in question.

31. Other delegations favoured the retention of the bracketed phrase, pointing out that the first part of the sentence contained a prohibition addressed to States, whereas the bracketed phrase related to the obligation of States to exercise control over the activities of physical and juridical persons in their territory.

32. The view was also expressed that the only purpose of the bracketed phrase was to give expression to the obligation of States to prohibit the activities of persons under their jurisdiction.

33. Several of the delegations referred to in paragraphs 31 and 32 above suggested that the article be placed at the very beginning of the draft so that all subsequent articles would appear as an elaboration, on specific points, of the norm prohibiting States to recruit, use, finance or train mercenaries, enjoining them to prohibit such activities. According to one view, such a structural change would render articles 20 and 21 unnecessary since non-compliance with the norm would entail international responsibility. However, doubts were expressed as to the desirability of such a change which, it was stated, might disrupt the whole structure of the draft.

34. Reference was made in the context of article 9 to the suggestion to expand the list of activities contained in article 3. The views expressed in this connection are summarized in paragraph 22 above.

35. The Working Group referred article 9 to the Drafting Group.

Article 13

36. Some delegations favoured the retention of the bracketed phrase in paragraph 1 (a) which, in their view, took account of the unfortunate fact that some territories were under foreign domination. Other delegations, however, expressed concern that the phrase in question might appear as legitimizing illegal situations such as the occupation of territory. It was also remarked that no similar phrase was to be found in the International Convention against the Taking of Hostages (General Assembly resolution 34/146 of 17 December 1979, annex), the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (General Assembly resolution 3166 (XXVIII), annex) or the Hague and Montreal conventions.

37. Some delegations suggested including in the text the phrase "or on board a ship or aircraft registered in that State", which was borrowed from article 5 of the Convention against the Taking of Hostages and article 3 of the New York Convention, and would serve a useful purpose, particularly in the case of mercenaries in transit.

38. Another suggestion was to broaden the scope of the subparagraph by replacing the words "or in any territory under its control" by the words "or in any other place under its jurisdiction", or by substituting for subparagraph (a) language borrowed from paragraph 1 (a) of article 5 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (General Assembly resolution 39/46 of 10 December 1984, annex).

39. As regards the other bracketed part of article 13, namely paragraph 1 (c), some delegations felt that the State against which the offence was directed should be considered as having jurisdiction - and, therefore, as being entitled to request extradition - even if the offence had not been committed on its territory and if the alleged offender was not one of its nationals. They pointed out that there would otherwise be a serious loophole in the convention and that paragraph 1 (c) sought to enable States to defend themselves against activities being conducted outside their territory.

40. Other delegations stressed that the passive personality principle was unknown to their legal system and that subparagraph (c) would have 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. Concern was also expressed that subparagraph (c) might have the effect of obliging States to extradite their own nationals.

41. Still other delegations observed that the problem might be less serious than it appeared at first glance, inasmuch as the State where the alleged offender was found had the obligation, if it did not extradite him, to establish its jurisdiction in accordance with paragraph 2 of article 13 and to submit the case to its competent authorities for the purpose of prosecution under article 16. Attention was also drawn to paragraph 3, which made it clear that article 13 was without prejudice to any criminal jurisdiction exercised in accordance with national law. While retaining an open mind on the deletion or retention of subparagraph (c), the delegations in question felt that the advantages of including an additional jurisdiction criterion should be weighed against the risk of reducing participation in the future instrument.

42. The Working Group referred article 13 to the Drafting Group.

Article 14

43. Some delegations favoured the deletion of paragraph 3 (c). It was remarked that giving mercenaries an advantage which ordinary criminals did not enjoy was tantamount to discriminating in favour of the perpetrators of the most heinous crimes and was all the more unjustifiable as article 15 provided for the required guarantees of fair treatment. It was also pointed out that there was no reason to grant mercenaries - who, under article 47, paragraph 1, of Additional Protocol I to the Geneva Conventions, did not have the status of combatants or prisoners of war - the benefit of the assistance of an entity which was essentially concerned with combatants and tried in practice to avoid contact with mercenaries. It was suggested in this connection that, if it was insisted that the subparagraph be retained, the mention of the International Committee of the Red Cross (ICRC) should be replaced by a reference to any international authority dealing with the protection of persons under detention.

44. Other delegations favoured the retention of the subparagraph. It was remarked that one should refrain from hastily passing judgement on the relative gravity of

crimes and that in any case article 14 referred to "alleged offenders", who, like all persons charged with a criminal offence, should be presumed innocent until proved guilty. The intervention of ICRC was viewed as all the more legitimate as the persons concerned might be stateless and therefore not entitled to the protection of a State. The delegations in question felt that the subparagraph should not be deleted until the Working Group had a clearer picture of other provisions touching on the treatment of alleged offenders, including those contained in articles 1, 15, 16 and 22.

45. It was suggested that the subparagraph should be reformulated so as to limit its application to the case in which the rights under subparagraphs (a) and (b) could not be exercised, such an approach, it was observed, would not confer any privileged status on the alleged offender but would protect him against a miscarriage of justice. That suggestion was supported by several delegations but gave rise to doubts on the part of others.

46. Some delegations remarked that, to the extent that the objections to the subparagraph stemmed from the fact that the provision granted a right to the alleged offender, they might be met by resorting to the approach reflected in article 6, paragraph 5, of the International Convention against the Taking of Hostages, whereby the State entitled to visit the alleged offender had the option of inviting ICRC to substitute for it, for example, on account of the absence of diplomatic relations between the two States concerned, or because the involvement of a neutral entity might be more acceptable to the State having the alleged offender in its custody. It was accordingly proposed that subparagraph (c) should be deleted and a new paragraph 3 bis inserted, reading as follows:

"The provisions of paragraph 3 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 13 to invite the International Committee of the Red Cross to communicate with and visit the alleged offender."

It was suggested that the reference in the above text to paragraph 1 (b) of article 13 should be replaced by a reference to paragraph 3 (a) of article 14.

47. Some delegations, although not objecting to this text, observed that it was meaningful only to the extent that the right mentioned therein existed under international law. It was remarked in this connection that, under article 9 of the Third Geneva Convention, the intervention of ICRC was subject to the consent of the States concerned and that the convention in preparation would not prevail over the provision in question, taking into account article 22 of the Second Revised Consolidated Negotiating Basis.

48. The Working Group referred article 14 to the Drafting Group.

Article 15

49. Some representatives, while agreeing that alleged offenders were entitled to fair treatment, took the view that the article should be limited to its unbracketed part. They considered the first bracketed alternative as stating the obvious and the second bracketed phrase as extremely vague. As for the third bracketed phrase, it was viewed as having the effect of imposing on States not parties to Additional Protocol I obligations stemming from that instrument. The remark was also made that it would be illogical to refer to an instrument pertaining to the law of war

in a convention which was intended to apply both in and outside situations of armed conflict and that the phrase "other international instruments" lacked precision. A further observation was that there was no need to refer to article 75 of Additional Protocol I, in view of the saving clause contained in article 22. Readiness was however expressed to include the words "and humane" before "treatment" in the second line of the text. Another suggestion was to model article 15 on article 8, paragraph 2, of the International Convention against the Taking of Hostages, or on article 7, paragraph 3, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

50. Other representatives, while agreeing that the first bracketed phrase did not serve much purpose, insisted on the need to provide in the text for specific minimum standards, pointing out in particular that the granting of specific guarantees to the persons concerned was the counterpart of the rigorous "prosecute or extradite" régime that would be applicable to alleged offenders under the convention. They therefore expressed preference for the last bracketed alternative, pointing out in particular that the number of States parties to Additional Protocol I was sufficiently high for the standards set forth in article 75 to be considered as widely accepted. With respect to the argument that a reference to article 75 of Additional Protocol I would result in imposing on States not parties to that instrument obligations stemming therefrom, the remark was made that the text of the article or portions thereof could be reproduced in article 15. As regards the second bracketed alternative, the remark was made that, since the text was intended to apply "from the time of arrest until the end of the proceedings", a reference to judicial procedure was too restrictive, inasmuch as it did not provide the alleged offender with guarantees of fair and humane treatment during the phase covered by article 13, namely, the phase which preceded that of judicial proceedings.

51. Attention was drawn to the approach taken by the International Law Commission to a similar question in the context of its work on the draft Code of Crimes against the Peace and Security of Mankind. Reference was made to article 6, as provisionally adopted by the Commission at its last session, and to paragraph (2) of the commentary to that article, in which it was stated that, at the present stage in international relations, an instrument of a universal character such as the draft Code should rely on the International Covenant on Civil and Political Rights for guidance as to its provisions on judicial guarantees. ^{6/}

52. The Working Group referred article 15 to the Drafting Group.

Article 16

53. The Working Group noted that the bracketed sentence was identical to the second sentence of the parallel provision in the International Convention against the Taking of Hostages. It agreed to eliminate the square brackets around that sentence.

^{6/} The positions summarized in paragraphs 49 to 51 later found expression in concrete proposals that were discussed in the framework of the Drafting Group (see paras. 113 to 120 below).

Article 17

54. The Working Group agreed to eliminate the square brackets around the second sentence of paragraph 1.

Article 18

55. Some delegations favoured the deletion of the bracketed phrase, pointing out that it was difficult to see which intergovernmental organizations had competence in the area under consideration and questioning the role of the International Committee of the Red Cross (ICRC) outside situations of armed conflict.

56. Other delegations felt that the question should be approached with some caution. The remark was made that the Organization of African Unity was an obvious example of an international intergovernmental organization concerned. It was also recalled that the parallel provision of the International Convention against the Taking of Hostages contained a reference to ICRC. The remark was furthermore made that, to the extent that ICRC might play a role under article 14, paragraph 3 (c), it should be entitled to be notified of the outcome of proceedings in accordance with article 18.

57. The Working Group referred article 18 to the Drafting Group.

Article 19

58. Some delegations proposed to remove the square brackets around paragraph 4, since an analogous provision was to be found in, among others, The Hague and Montreal conventions and could be considered as generally accepted.

59. Attention was drawn to the link between bracketed paragraph 4 and bracketed paragraph 1 (c) of article 13, and the view was expressed that the former provision should be left between square brackets until an agreement had been reached in relation to the latter.

60. As regards paragraph 5, some delegations favoured its retention and others its deletion. The remark was made that if paragraph 1 of article 19 were to cover all the offences set forth in the Convention there would be no need for paragraph 5 and that, as long as this point was not settled, paragraph 5 should be retained between square brackets.

61. The Working Group referred article 19 to the Drafting Group.

Articles 20 and 21

62. Some delegations favoured the deletion of these articles. They observed that the absence of any parallel clause in other conventions might be interpreted as meaning that States did not incur responsibility for the violation of their obligations under those conventions. It was also remarked that, since nobody denied that the breach of an international obligation gave rise to State responsibility and to an obligation of reparation, the matter should be left to customary international law, and that it would be particularly inadvisable to deal with the question in a limited context at a time when the International Law Commission was engaged in the formulation of relevant rules at the general level.

63. Other delegations pointed out that the cost of mercenary activities to the victim States ran very high and that the future convention would be incomplete if it did not expressly provide for the responsibility of States which violated their obligations under the Convention.

64. The remark was made that the approach reflected in footnote 1/ in the Second Revised Consolidated Negotiating Basis might offer a solution to the issue.

65. The Working Group referred articles 20 and 21 to the Drafting Group.

Article 22

66. The Working Group noted that the subject-matter of this article was being discussed in connection with other articles in the framework of the Drafting Group. It therefore agreed to defer its consideration of article 22 to a later stage.

Article 23

67. Some representatives supported this article, pointing out that it was modelled on the dispute settlement clause of The Hague and Montreal conventions, the International Convention against the Taking of Hostages and the Convention on Early Notification of a Nuclear Accident, and could therefore be considered as a generally accepted compromise formula reflecting contemporary practice. Emphasis was placed on the need to retain paragraph 2 in order to safeguard the position of States that did not recognize the compulsory jurisdiction of the International Court of Justice.

68. Other representatives expressed disagreement with the view that article 23 embodied a compromise. They observed that paragraph 2 nullified paragraph 1 and that if the text were to be retained in its present form the convention would in fact contain no dispute-settlement clause. They held the view that the article should be re-examined at a later stage, in the light of the outcome of the work on the substantive provisions of the future instrument.

69. The Working Group referred article 23 to the Drafting Group.

Draft preamble

70. Referring to the draft preamble circulated at the previous session by the Chairman of the Ad Hoc Committee and reproduced as an annex to the present report of the Working Group (see sect. B below), some representatives observed that the time had come to engage in a preliminary discussion of that text, which had been circulated the year before and the provisions of which were familiar to all delegations, since they were largely borrowed from the resolutions relating to the Ad Hoc Committee which the General Assembly had adopted by consensus year after year since 1980. In their opinion, such a discussion would pave the way for further work on the draft proposed by the Chairman.

71. Other delegations considered it premature to engage in a discussion of the draft preamble at a time when many substantive issues were still outstanding. They observed that it was common practice in negotiating international instruments to transfer to the preamble provisions that it had not proved possible to include in the substantive part of the instrument, and that it was still too early to

determine which of the articles of the Second Revised Consolidated Negotiating Basis lent themselves to such a treatment.

72. Some delegations generally supported the draft proposed by the Chairman. Comments concerning the first paragraph included the remark that it should refer to General Assembly resolution 42/22 of 18 November 1987 entitled "Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations" and the observation that mention of General Assembly resolution 42/159 of 7 December 1987 was appropriate in this context. With respect to the fourth paragraph, the view was expressed that, while the underlying idea was a valid one, the formulation would have to be reviewed. The suggestion was made also to include in the draft the fifth preambular paragraph of General Assembly resolution 42/155 of 7 December 1987.

73. Objections were raised, on the other hand, to the first, third and fourth paragraphs. As to the fifth and sixth paragraphs, they were viewed as pre-empting the outcome of the ongoing work on the substantive part of the future convention. Doubts were furthermore expressed as to the relevance in the present context of General Assembly resolution 42/22.

74. The remark was made that, at this stage, the discussion should focus on the structure of the preamble rather than on specific formulations. In this connection, it was suggested that the preamble should (a) make reference to existing international law instruments relevant to the subject-matter of the convention in preparation; (b) indicate the principles of international law which the future instrument was intended to develop; (c) define the subject-matter of the future instrument and its objectives; and (d) cover those issues which it had not proved possible to deal with in the substantive part. Several delegations supported this general approach.

75. The Working Group referred the preamble to the Drafting Group.

Suggested new provisions

76. It was suggested to include in the instrument under elaboration, with a view to enhancing its effectiveness, provisions for the establishment of a mechanism of control on the observance by States of their obligations under the Convention.

Action taken by the Working Group at the concluding stage of its proceedings

77. At the 8th meeting of the Working Group, the Chairman presented a statement reflecting the discussion conducted and the results achieved in the framework of the Drafting Group in the course of the session. The Statement was not discussed or adopted, but the Chairman incorporated therein the changes requested by delegations. The Working Group decided to annex the Statement to its report (see sect. A below).

78. At its 10th meeting, the Working Group had before it a document entitled "Third revised consolidated negotiating basis of a convention against the recruitment, use, financing and training of mercenaries", which reflected the results of the deliberations of both the Working Group and the Drafting Group. It approved that document. One delegation however requested that paragraph 2 (c) of article 1, as contained in the said document, be replaced by the corresponding provision appearing in the Second Revised Consolidated Negotiating Basis. Consequently, the text of paragraph 2 (c) of article 1 of the Second Revised Consolidated Negotiating Basis was retained (see sect. III below).

79. Also at its 10th meeting, the Working Group agreed that, in view of the changes made in the text, the title of the Second Revised Consolidated Negotiating Basis should be modified. Some delegations proposed the title "Draft Convention (or draft articles) against the recruitment, use, financing and training of mercenaries". The Working Group decided to adopt the title "Third Revised Consolidated Negotiating Basis of a Convention against the Recruitment, Use, Financing and Training of Mercenaries". It was observed that the useful progress made in the Drafting Group could form a basis for re-examining this matter at the next session.

80. At the same meeting, some delegations proposed to include the draft preamble proposed by the Chairman of the Ad Hoc Committee between square brackets in the Third Revised Consolidated Negotiating Basis. Other delegations felt that, since the Drafting Group had not been able to discuss the draft preamble for lack of time, such a decision would be premature. The Working Group agreed to reproduce the draft preamble proposed by the Chairman of the Ad Hoc Committee as an annex to its report (see sect. B below).

A. Annex I to the report of the Working Group: Statement by the Chairman of the Drafting Group

81. At its 1st meeting, the Drafting Group decided to entrust a small informal group of members of the Committee, acting in a private capacity, with the task of preparing new texts for article 1 and the articles on offences of the Second Revised Consolidated Negotiating Basis. It furthermore entrusted its Chairman with the task of preparing new texts for articles 9, 13 to 15 and 18 to 23.

82. At its 2nd to 9th meetings, the Drafting Group considered the texts proposed by the Chairman for articles 9, 13 to 15 and 18 to 23. Those texts, as well as a short summary of the views expressed thereon, are to be found in paragraphs 105 to 135 below under the heading "Articles 9, 13 to 15 and 18 to 23".

83. At its 10th meeting, the Drafting Group considered the texts proposed by the small informal group for article 1 and the articles on offences. Those texts, as well as a short summary of the views expressed thereon are to be found in paragraphs 85 to 104 below under the heading "Article 1 and the articles on offences".

84. Throughout its deliberations, the Drafting Group tried to improve the text of the Second Revised Consolidated Negotiating Basis. Even though, on many points, significant progress was made, it was not always possible to reflect it in the Basis, which consequently remains unchanged as regards various articles which were extensively discussed. The present statement is intended to record essential developments whether or not they led to visible results.

Article 1 and the articles on offences

85. The texts proposed by the small informal group for those articles were generally considered within the Drafting Group as helpful and worthy of further consideration.

Article 1

86. The text contained in the informal paper read as follows:

"Paragraph 1: No change

"Paragraph 2: A mercenary is also any person who [in the absence of [international] armed conflict]:

"(a) Is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed [inter alia] at:

"- Overthrowing a Government or otherwise undermining the constitutional order of a State,

"- Undermining the territorial integrity of a State,

"- [Repressing the struggle of peoples against colonial domination and alien occupation and against racist régimes and other forms of foreign domination].

"(b) Deleted

"(c) Is motivated to take part therein essentially by the desire for private gain and, in fact, is promised or paid substantial material compensation such as more than that which persons of similar functions would receive in the armed forces of the State of which he holds the nationality or, failing that, in whose territory he resides;

"[(d) Is not a national or a resident of the State against which such act is directed] [Except that where a national or resident of such State is recruited, trained, financed or used by a foreign person or entity for the commission of any of the acts described in subparagraph (a) of this paragraph, such national or resident shall be considered as falling within the meaning of a mercenary as defined in this paragraph.]

"(e) Deleted

"(f) Has not been sent by a State on official duty."

87. As regards paragraph 2, some delegations felt that the bracketed phrase in the introductory sentence could be replaced by the words "in any other situation". In their opinion, there was no need to import into the present exercise the divergence of views on the scope of application of article 47 of Additional Protocol I, as long as the combined effect of the definition in paragraphs 1 and 2 would be to make the future instrument applicable to all mercenaries in whatever context they operated. Other delegations stressed that in order to avoid difficulties of interpretation, the field of application of each definition should be clearly specified, particularly as the criteria listed in each of the two paragraphs might differ as might also the régimes to which mercenaries would be subjected, depending on whether they operated within or outside the framework of an armed conflict. They therefore favoured the return to the introductory sentence of paragraph 2, as contained in the Second Revised Consolidated Negotiating Basis. 7/

7/ The text of the introductory part of paragraph 2 of article 1 remained unchanged after the discussion; see the corresponding part of paragraph 2 of article 1 in section III below.

88. With regard to paragraph 2 (a), the replacement of the first three subparagraphs, as contained in the Second Revised Consolidated Negotiating Basis, by the proposed subparagraphs generally met with approval. Some representatives observed that the bracketed words "inter alia" merely served as a reminder that, in the view of some delegations, the two unbracketed subparagraphs did not exhaust the list of the objectives which a concerted act of violence as envisaged in subparagraph (a) could pursue. In their opinion, this position was adequately safeguarded by the presence in the text of a third bracketed subparagraph. They therefore favoured the deletion of "inter alia". Other delegations welcomed the deletion of the word "inter alia", on the understanding that the list of objectives would be exhaustive and that the third subparagraph would be eliminated.

89. The Drafting Group did not discuss the substance of the third subparagraph of paragraph 2 (a). 8/

90. Paragraph 2 (b) was discussed together with the articles on offences and is therefore dealt with in the context of those articles (see paras. 99 to 104 below). 9/

91. As regards paragraph 2 (c), it was explained that the phrase "such as more than ..." was intended to provide some guidance, rather than a rigid criterion for determining whether the compensation was substantial enough for the person concerned to qualify as a mercenary. Some representatives supported the proposed reformulation. Others felt that as long as a person was motivated by private gain, the amount of the compensation was irrelevant for the purposes of the definition and that the weight to be given to this particular element in concrete cases should be left to the discretion of the courts which would have to apply the future instrument. Although they preferred to put a full stop after the words "private gain", they expressed readiness to retain the word "substantial" as long as the latter part of the text from the words "such as more than" was eliminated. Still other delegations considered that the proposed text lacked the precision necessary for the definition of a criminal offence and favoured the inclusion of the criterion contained in paragraph 2 (c) of article 1 as contained in the Second Revised Consolidated Negotiating Basis.

92. The Drafting Group agreed on the following text:

"(c) Is motivated to take part therein essentially by the desire for private gain and, in fact, is promised or paid [substantial] material compensation [[such as more than] [substantially in excess of] that which persons carrying out similar functions would receive in the armed forces of the State of which he holds the nationality or, failing that, in whose territory he resides];" 10/

8/ For the revised text of paragraph 2 (a) of article 1, as it emerged from the discussion, see paragraph 2 (a) of article 1 in section III below.

9/ The text of paragraph 2 (b) of article 1 remained unchanged after the discussion; see paragraph 2 (b) of article 1 in section III below.

10/ However, the text in the Second Revised Consolidated Negotiating Basis was subsequently retained pending further negotiations, see article 1, paragraph 2 (c) in section III below.

93. Some delegations considered it essential to retain paragraph 2 (d), as contained in the Second Revised Consolidated Negotiating Basis. They observed that, while it was not unprecedented on the international scene for groups of individuals to take up arms against their country and to receive financial support from outside, such activities came within the purview of domestic law but not that of the convention being drafted. It was also remarked that if nationals of a country rebelling against the established order were considered as mercenaries, there would be obstacles in the way of national liberation movements and that the nationality criterion provided for bona fide political opponents. The point was made that the criterion of pecuniary gain did not always permit a distinction to be drawn between mercenaries and political opponents and should be supplemented by the nationality criterion so that the future instrument would not cover persons who, possibly for money but also for political ends, engaged in activities which did not pose the same danger to the international legal order as did genuine mercenary activities. As for the "except that ..." phrase, the delegations in question viewed it as unacceptable. However, some of them felt that, although the proposal went too far, it might be useful for the purpose of further negotiations.

94. Other delegations stressed that the convention in preparation should be geared to the present realities of international life and insisted on eliminating the nationality criterion, which one of them described as hopelessly outmoded. The remark was also made that, while mercenaries of the nationality of the victim State would probably be treated as traitors by the courts of that State if they were caught on its territory, they would go unpunished in a foreign country if the nationality criterion were retained. The fear that the criterion in question might result in bona fide political opponents being mistaken for mercenaries was viewed as unfounded. It was remarked in this connection that the criteria of the definition were cumulative and that the extradition authorities in each State Party would have complete discretion in assessing the true nature of the activities for which extradition was being requested. Although they preferred to put a full stop after "private gain", the delegations in question nevertheless expressed readiness to accept the original text supplemented by the phrase "except that when a national, etc. ...". That phrase, it was observed, would on the one hand bring in the foreign element required to activate the machinery of the convention, and, on the other hand, make it clear that the nationals of the victim State were to be treated as mercenaries only when they acted as the instrumentalities of a foreign entity. 11/

95. Some delegations supported the deletion of paragraph 2 (e) as proposed in the informal paper. Others felt that, as long as there was no agreement on the other elements of the definition, the subparagraph should be retained between square brackets. 12/

96. The text proposed in the informal paper for paragraph 2 (f) was generally considered as acceptable. 13/

11/ The text of paragraph 2 (d) of article 1 remained unchanged after the discussion; see paragraph 2 (d) of article 1 in section III below.

12/ The text of paragraph 2 (e) remained unchanged after the discussion; see article 1, paragraph 2 (e) in section III below.

13/ For the revised text of paragraph 2 (f) as it emerged from the discussion, see article 1, paragraph 2 (f) in section III below.

Article 2

97. The informal paper proposed to delete this article and to cover the idea reflected therein through an amendment to article 22 (see para. 132 below).

98. This proposal was not considered for lack of time.

Articles on offences 14/

99. As previously indicated, the suggested deletion of paragraph 1 (b) of article 1 was examined in the context of the discussion of these articles.

100. The Drafting Group had before it various proposals concerning the articles on offences: 14/

(a) The informal paper referred to in paragraph 83 above proposed to eliminate paragraph 2 (b) of article 1 and to replace articles 3 to 6 by the following:

"Article 3: Any person who recruits, uses, finances or trains mercenaries commits an offence for the purposes of this Convention.

"Article 4:

"1. Any person who meets the definition of a mercenary set forth in article 1 commits an offence for the purposes of articles 8 and 13, paragraph 1, of this Convention.

"2. Any person who acts as a mercenary as defined in article 1, paragraph 2, of this Convention from the time when he participates directly in the action referred to in that provision commits an offence for the purposes of articles 13, 16 and 19 of this Convention.

"3. Any person who acts as a mercenary as defined in article 1, paragraph 1, of this Convention [and engages in one of the following acts:

"(a) Murder, torture in any form, acts of mutilation, hostage-taking;

"(b) Serious acts of violence, rape;

"(c) Plundering of civilian property;]

"commits an offence for the purposes of articles 13, 16 and 19 of this Convention.

"Article 5: Deleted.

14/ Although the text of article 6 no longer contained bracketed language as a result of the decision of the Working Group reflected in paragraph 26 above, two of the proposals before the Drafting Group contained texts for article 6.

"Article 6: The offences defined in articles 3 and 4 above include:

"(a) Attempts to commit such offences;

"(b) Complicity in the commission or attempted commission of such offences."

(b) Another proposal sought to delete paragraphs 1 (b) and 2 (b) of article 1 and to replace articles 3 to 6 by the following:

"Article 3

"Any person who recruits, uses, finances or trains mercenaries, as defined in article 1 of this Convention, commits an offence for the purposes of this Convention.

"Article 4

"1. A mercenary, as defined in article 1 of this Convention, who participates directly in hostilities or in a concerted act of violence, as the case may be, commits an offence for the purposes of this Convention.

"2. In addition, a mercenary, as defined in article 1, paragraph 1, of this Convention, who engages in one of the following acts:

"(a) Murder, torture in any form, acts of mutilation, hostage-taking;

"(b) Serious acts of violence, rape;

"(c) Plundering of civilian property;

"commits an offence for the purposes of this Convention.

"3. Nothing in this article limits the scope of application of article 6 of this Convention.

"Article 5

"Delete

"Article 6

"The offences defined in articles 3 and 4 of this Convention include:

"(a) Attempts to commit such offences;

"(b) Complicity in the commission or attempted commission of such offences."

(c) A third proposal, based on the assumption that paragraph 1 (b) of article 1 would be retained and paragraph 2 (b) of the same article deleted, sought to redraft article 4 as follows:

- "1. Any person who meets the definition of a mercenary set forth in article 1, paragraph 1, of the present Convention commits an offence for the purposes of articles 13, 16 and 19 of this Convention.
- "2. A. Any person who meets the definition of a mercenary set forth in article 1, paragraph 2 of the present Convention commits an offence for the purpose of articles 8 and 13, paragraph 1, of this Convention;
"B. Any person who acts as a mercenary as defined in article 1, paragraph 2, of the present Convention from the time when he participates directly in the action referred to in that provision commits an offence for the purposes of articles 13, 16 and 19 of this Convention."

101. The discussion focused on three main questions. The first question was whether the criterion of direct participation should be eliminated from article 1, paragraphs 1 and 2, and transferred to the article defining the offences committed by mercenaries. A number of delegations replied to this question in the affirmative, pointing out that the inclusion of the criterion of direct participation in article 1 resulted in making alleged offenders under article 3 immune from prosecution until the moment where the persons they recruited participated in hostilities or in an act of violence. Other delegations took the opposite view and felt that the difficulty referred to in the previous sentence could be solved by including appropriate language in article 3.

102. The second question was whether participation in hostilities or a concerted act of violence should be required for the mercenary to be considered as an offender under article 4 of the convention. Some representatives replied to this question in the affirmative, pointing out that the combined effect of the exclusion of the requirement of direct participation and of article 6 on attempt would be to make an "attempt to attempt" punishable under the convention. In their opinion, reprehensible acts committed prior to participation in hostilities or in an act of violence could be covered under the concept of attempt. Other delegations took the opposite view. The view was expressed that the offence commenced also from the moment where the mercenary was recruited or financed or started training. It was also observed that the concept of attempt varied from State to State and did not provide sufficient guarantee that acts committed for an illegal purpose would be covered under the "extradite or prosecute" mechanism. In connection with the proposal to retain the concept of direct participation (i.e. the proposal contained in paragraph 100 (b) above), it was suggested to include a provision which would read:

"Any person who is recruited or trained by another person for the purpose of committing the acts in paragraph 1 (a) and paragraph 2 (a) of article 1 commits an offence for the purpose of article 13, paragraph 1, of the present Convention",

it being understood that this offence would be expressly excluded from the ambit of the provision on attempt and complicity. Another proposal was to include in article 6 a provision whereby offences under this article would be punishable according to their degree of seriousness.

103. Some delegations objected to article 4 of the text reproduced under paragraph 100 (a) above, as reflecting only the second variant of article 4 in the Second Revised Consolidated Negotiating Basis.

104. The third question was whether the substance of article 5 of the Second Revised Consolidated Negotiating Basis should be retained. Some delegations observed that, if participation in hostilities or in acts of violence constituted an extraditable offence under the convention, there was no need to also cover acts which were punishable under all domestic legislations. Other delegations said that they had difficulty with this approach and expressed preference for the approach reflected in article 5 of the Second Revised Consolidated Negotiating Basis. 15/

Articles 9, 13 to 15 and 18 to 23

Article 9

105. The proposal of the Chairman (see para. 82 above) sought to merge articles 9 and 8 as follows:

"States Parties shall not recruit, use, finance or train mercenaries. They shall make the offences set forth in the present Convention punishable by appropriate penalties which take into account the grave nature of those offences."

106. The Drafting Group agreed to insert in the text the phrase which appeared in square brackets in article 9 as contained in the Second Revised Consolidated Negotiating Basis, i.e. "and shall prohibit such activities". The Group however considered it necessary to link it more closely with the obligation of States, under the Convention, to make specific acts punishable under their laws, firstly, by including after the words "such activities" the words "in accordance with the provisions of the Convention", and, secondly, by making article 8 into a second paragraph of article 5.

107. The remark was however made that the "prohibition" clause was doubly superfluous, first, because making an act into an offence was the most effective way of prohibiting it and, secondly, because article 10 already provided for the prohibition of illegal activities of persons, groups and organizations that encourage, instigate, organize or engage in the perpetration of the offences set forth in the Convention. 16/

Article 13

108. The proposal of the Chairman (see para. 82 above) sought to:

- (1) Replace paragraph 1 (a) by the following:

"When the offence is committed in its territory or in any place under its jurisdiction, ..."

- (2) Delete paragraph 1 (c).

15/ The text of articles 3 to 6 remained unchanged after the discussion; see articles 3 to 6 in section III below.

10/ For the revised text of article 9, as it emerged from the discussion, see article 8 in section III below.

109. As regards the first of these proposals, the Drafting Group agreed to replace the concept of control by that of jurisdiction and to broaden the scope of the text, firstly by including therein a reference to ships and aircraft registered in the State concerned and, secondly, by substituting for the present formulation the all-encompassing phrase "in any territory [or place] under its jurisdiction". The words "or place" are intended to cover areas which, although under the jurisdiction of a State, are not considered as part of its territory, for example artificial islands or sea platforms.

110. As regards paragraph 1 (c), the Drafting Group agreed to keep it at this stage between square brackets. 17/

Article 14

111. The proposal of the Chairman (see para. 82 above) sought to delete paragraph 3 (c) and to insert a new paragraph 3 bis, reading as follows:

"The provisions of paragraph 3 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 13 to invite the International Committee of the Red Cross to communicate with and visit the alleged offender."

112. The Working Group agreed with this proposal. 18/

Article 15

113. The proposal of the Chairman (see para. 82 above) sought to replace the text of article 15 as contained in the Second Revised Consolidated Negotiating Basis by the following:

"Any person regarding whom proceedings are being carried out in connection with any of the offences set forth in this Convention shall be entitled without discrimination through all phases of the proceedings to fair and humane treatment and to the judicial guarantees set forth in article 14 of the International Covenant on Civil and Political Rights".

114. Some delegations supported this proposal. The remark was made that it embodied a widely accepted international standard and drew on a text which had received the endorsement of the International Law Commission, namely, article 6 of the future draft Code of Crimes against the Peace and Security of Mankind. It was also said that, since no delegations considered the crimes covered by the draft Code as less serious than those dealt with in the convention in preparation, the guarantees envisaged by the International Law Commission could a fortiori be envisaged in the present context.

17/ For the revised text of article 13, as it emerged from the discussion, see article 12 in section III below.

18/ For the revised text of article 14, as it emerged from the discussion, see article 13 in section III below.

115. Other delegations disagreed with this proposal. It was remarked that a reference to article 14 of the International Covenant on Civil and Political Rights would not provide alleged offenders with more effective guarantees than a reference to national legislation, inasmuch as the Covenant, aside from the fact that many States were not parties to it, authorized States Parties, in its article 4, to derogate from some of its provisions (among which art. 14) "in times of public emergency which threatens the life of the nation", i.e., in precisely the type of situations envisaged in the convention under elaboration. The remark was also made that the inclusion in the future instrument of a reference to article 14 of the Covenant would give rise to controversies between the States Parties to one of the instruments and not to the other and that possible reservations might further compound the problem. Another observation was that, assuming there were States where alleged offenders were granted less than fair and humane treatment, singling out from among the persons under their jurisdiction the individuals dealt with in the convention under elaboration would be tantamount to discrimination. It was also recalled that the International Law Commission, in article 6 of the draft Code, had provided an international standard because it was dealing with international crimes which might come before an international court and that such an approach had no *raison d'être* in an instrument which would rely on national courts for its implementation.

116. Another proposal sought to:

(a) Replace article 15 by the following text:

"Any person regarding whom proceedings are being carried out in connection with any of the offences set forth in this Convention shall receive fair and non-discriminatory treatment, and all the rights and judicial guarantees provided for in the legislation of the State in question and those deriving from the applicable norms of international law shall be recognized.";

(b) Insert in paragraph 3 of article 14 a subparagraph (c), reading as follows:

"(c) To have its fundamental rights respected in accordance with the relevant norms of international law."

117. In support of this proposal, it was remarked that the alleged offender should be guaranteed fair treatment from the moment when he was taken into custody and not only at the stage of judicial proceedings and that the phrase "applicable norms of international law", which were intended to cover both relevant rules of customary international law and obligations deriving from the treaties binding on the State concerned, would provide the international standard which some delegations considered indispensable.

118. The proposal, however, gave rise to objections. The question was asked why alleged offenders under the Convention should have the benefit of a guarantee which alleged offenders under the International Convention against the Taking of Hostages and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment did not enjoy. It was also remarked that the words "non-discriminatory" were not in keeping with article 5 of the Fourth Geneva Convention.

119. Other proposals sought to build on article 8, paragraph 2, of the International Convention against the Taking of Hostages, one of them by adding to that text the words:

"and in accordance with the general standards of humane treatment set forth in the relevant international instruments of humanitarian law."

and the other, by including at the end of the text the words:

", taking into account the general standards of humane treatment set forth in the relevant international instruments of humanitarian law".

120. Some delegations considered those proposals as worthy of further consideration. Others saw no need to add any language to article 8, paragraph 2, of the International Convention against the Taking of Hostages. They expressed preference for the unbracketed part of article 15 of the Second Revised Consolidated Negotiating Basis. 19/

Article 18

121. The proposal of the Chairman (see para. 82 above) sought to delete from article 18 as contained in the Second Revised Consolidated Negotiating Basis the bracketed phrase reading: "and the international intergovernmental organizations concerned, as well as the International Committee of the Red Cross".

122. It was agreed that the reference to the international intergovernmental organizations concerned should be deleted. As for the reference to the International Committee of the Red Cross (ICRC), it was considered useful to the extent that paragraph 3 bis of article 14 reserved the possibility for any State Party having a claim to jurisdiction to invite ICRC to communicate with the alleged offender. However, some delegations spoke against the inclusion of a reference to ICRC. It was agreed to retain between square brackets the reference in question, preceded by the words "as appropriate". 20/

Article 19

123. The proposal of the Chairman (see para. 82 above) sought to retain paragraph 4 without square brackets. It contained no suggestion for bracketed paragraph 5.

124. The Drafting Group agreed to keep paragraph 4 between square brackets, taking into account the view of some delegations that as long as paragraph 1 (c) of article 13 was retained within square brackets, paragraph 4 of article 19 would have to remain bracketed as well.

125. The Drafting Group also agreed to retain paragraph 5 between square brackets. 21/

19/ The text of article 15 remained unchanged after the discussion; see article 14 in section III below.

20/ For the revised text of article 18, as it emerged from the discussion, see article 17 in section III below.

21/ The text of article 19 remained unchanged after the discussion; see article 18 in section III below.

Articles 20, 21 and 22

126. The proposal of the Chairman (see para. 82 above) sought to merge the three articles into a single provision, reading as follows:

"The present Convention is without prejudice to the law of international responsibility of States, to the law of warfare and to humanitarian law".

127. The Drafting Group agreed to focus on the opening part of the text and to leave aside for the moment the question of the law of warfare and humanitarian law.

128. Some delegations observed that the above proposal covered the subject-matter of article 20 but not the area dealt with in article 21. It was therefore suggested to add to the text after "responsibility of States" the words:

", including the obligation to make reparation for damage resulting from the breach of obligations under the present Convention."

129. The following reformulation of the proposal was also suggested:

"The present Convention shall not affect the obligations of States under the law of international responsibility of States, including those concerning reparation of damage resulting from the breach of obligations under the present Convention."

130. Some delegations supported this reformulation. Others insisted on retaining articles 20 and 21 as contained in the Second Revised Consolidated Negotiating Basis. Still others felt that the substance of the proposed merger could be included in a preambular paragraph. Two texts were proposed for inclusion in the preamble. One read:

"Recognizing that State involvement in the activities of mercenaries may engage in the international responsibility of States and thus may require payment of reparation.";

The second one read:

"Recognizing that breach of the obligations undertaken under the present Convention gives rise to international responsibility, including the obligation to make reparation."

131. The Drafting Group agreed to retain between square brackets articles 20 and 21 as they appeared in the Second Revised Consolidated Negotiating Basis, together with the accompanying footnote. 22/

132. With respect to article 22, the informal paper referred to in paragraph 3 above, proposed, jointly with the deletion of article 2, a reformulation of article 22, which read as follows:

22/ The text of articles 20 and 21 remained unchanged after the discussion; see articles 19 and 20 in section III below.

"The present Convention shall be applied without prejudice to the existing law of warfare or to humanitarian law, in particular the provisions relating to the scope of application of the status of combatants or prisoners of war."

133. This proposal was not considered by the Drafting Group for lack of time. 23/

Article 23

134. This article was not considered by the Drafting Group for lack of time.

Preamble

135. The preamble was not considered by the Drafting Group for lack of time.

B. Annex II to the report of the Working Group: Draft preamble proposed by the Chairman of the Ad Hoc Committee

The States Parties to this Convention,

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 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,

Having in mind the purposes and principles as enshrined in the Charter of the United Nations concerning the maintenance of international peace and security,

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

Considering that the resolutions of the Security Council and General Assembly of the United Nations are indicative of the development of new rules of international law making mercenary activities international offences,

Considering that mercenary activities are offences of grave concern to the international community and that any person committing any act prohibited in this Convention shall either be prosecuted or extradited,

Convinced 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 as enshrined in the Charter of the United Nations, and that it is necessary to develop international co-operation among States for the prevention, prosecution and punishment of all mercenary activities,

Have agreed as follows:

23/ The text of article 22 remained unchanged after the discussion; see article 21 in section III below.

III. THIRD REVISED CONSOLIDATED NEGOTIATING BASIS OF A
CONVENTION AGAINST THE RECRUITMENT, USE, FINANCING
AND TRAINING OF MERCENARIES a/

Article 1

For the purposes of the present Convention,

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;

(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 in the absence of [international] armed conflict:

*(a) Is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at:

- Overthrowing a Government or otherwise undermining the constitutional order of a State;

* The provisions marked with an asterisk contain a revised version, worked out during the present session, of the corresponding provision of the Second Revised Consolidated Negotiating Basis as approved at the sixth session.

a/ This text is subject to the second paragraph in section (3) of the report of Working Group A at the fourth session of the Ad Hoc Committee (A/39/43 and Corr.1, section II, paragraph 63) and to the second paragraph in section (c) of the report of Working Group B at that same session (A/39/43 and Corr.1, section III, paragraph 120). It is understood that this text is also subject to agreement being reached on the future draft convention as a whole.

The order of the articles is provisional and does not prejudice the final structure of the convention.

- Undermining the territorial integrity of a State;

[- Repressing the struggle of peoples against colonial domination and alien occupation and against racist régimes and other forms of foreign domination;]

[(b) Does in fact take direct part in such an act;]

[(c) Is motivated to take part therein essentially by the desire for private gain and, in fact, is promised or paid [substantial] material compensation [substantially in excess of that which he would receive in the armed forces of the State of which he holds the nationality or, failing that, in whose territory he resides]);]

[(d) Is not [necessarily] a national or a resident of the State against which such act is directed;]

[(e) Is not a member of the armed forces of the State on whose territory the act is undertaken;]

*(f) Has not been sent by a State on official duty.

Article 2

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

Article 3

An offence is committed by any person who recruits, uses or [[knowingly] finances or trains] mercenaries.

Article 4

[An offence is committed by any person who is recruited, trained [and] [or] acts as a mercenary as defined in the present convention.]

[An offence is committed by any person who acts as a mercenary as defined in [article 1] [article 1, paragraph 2] of the present Convention from the time when he participates directly [in hostilities or] in the action referred to in article 1, paragraph 2.]

Article 5 b/

[A [criminal] offence is committed by any mercenary as defined in article 1 [, paragraph 1,] who, participating directly in combat, engages in one of the following acts:

(a) Murder, torture in any form, acts of mutilation, hostage-taking;

b/ Should the first variant of article 4 be retained, article 5 will become unnecessary.

- (b) Serious acts of violence, rape;
- (c) Plundering of civilian property.]

Article 6

*An offence is committed by any person who:

- (a) Attempts to commit one of the offences defined in the present Convention;
- (b) Is the accomplice of the person who commits or attempts to commit the offences defined in the present Convention.

Article 7

[The recruitment, use, financing or training of mercenaries constitutes a crime against the peace and security of mankind.]

Article 8 c/

*1. States Parties shall not recruit, use, finance or train mercenaries and shall prohibit such activities in accordance with the provisions of this Convention.

2. They shall make the offences set forth in the present Convention punishable by appropriate penalties which take into account the grave nature of those offences.

Article 9 (Former article 10)

States Parties shall co-operate in the prevention of the offences set forth in this Convention particularly by:

(a) Taking all practicable measures to prevent preparations in their respective territories for the commission within or outside their territories of those offences, including the prohibition of illegal activities of persons, groups and organizations that encourage, instigate, organize or engage in the perpetration of such offences;

(b) Co-ordinating the taking of the administrative and other measures, as appropriate, to prevent the commission of those offences.

Article 10 (Former article 11)

States Parties shall co-operate in taking the necessary measures for the implementation of the present Convention.

c/ Replacing articles 8 and 9 of the Second Revised Consolidated Negotiating Basis.

Article 11 (Former article 12)

Any State Party having reason to believe that one of the offences mentioned in this Convention has been, is being or will be committed shall, in accordance with its national law, communicate relevant information, as soon as it comes to its knowledge, directly or through the Secretary-General of the United Nations, to the States Parties affected.

Article 12 d/ (Former article 13)

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over any of the offences set forth in articles ___ in the following cases:

* (a) When the offences are committed in any territory [or place] under its jurisdiction or on board a ship or aircraft registered in that territory;

(b) When the offence is committed by any of its nationals or, if that State considers it appropriate, by those stateless persons who have their habitual residence in its territory;

[(c) 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 offences set forth in articles ___ in the case where the alleged offender is present in its territory and it does not extradite him pursuant to article 15 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 national law.

Article 13 (Former article 14)

1. Upon being satisfied that the circumstances so warrant, any State Party in the territory of which the offender or alleged offender is present shall in accordance with its laws take him into 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.

2. When a State Party, pursuant to this article, has taken a person into custody or has taken such other measures referred to in paragraph 1 of this article, it shall notify without delay either directly or through the Secretary-General of the United Nations:

d/ It is understood that the question as to whether the "articles" referred to in paragraph 1 and those referred to in paragraph 2 should be the same is left open to be decided after an agreement on the question of the definition of offences has been reached.

- (a) The State Party where the offence was committed;
- (b) The State Party against which the offence has been directed or attempted;
- (c) The State Party of which the natural or juridical person against whom the offence has been directed or attempted is a national;
- (d) The State Party 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;
- (e) Any other interested State Party which it considers it appropriate to notify.

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

(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 protect his rights 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 provisions of paragraph 3 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 12 to invite the International Committee of the Red Cross to communicate with and visit the alleged offender.

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

Article 14 (Former article 15)

Any person regarding whom proceedings are being carried out in connection with any of the offences set forth in this Convention shall be guaranteed fair treatment from the time of arrest until the end of the proceedings [in accordance with national law] [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].

Article 15 (Former article 16)

*The State Party in the territory of which the alleged offender is found shall, if it does not extradite him, 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, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State.

Article 16 (Former article 17)

*1. States Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of the offences set forth in 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 concerning mutual judicial assistance embodied in any other treaty.

Article 17 (Former article 18)

*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, as appropriate, the International Committee of the Red Cross].

Article 18 e/ (Former article 19)

1. The offences set forth in articles ___ of this Convention shall be deemed to be included as extraditable offences in any extradition treaty existing between States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.

2. If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may at its option consider this Convention as the legal basis for extradition in respect of those offences. Extradition shall be subject to the other conditions provided by the law of the requested State.

3. States Parties which do not make extradition conditional on the existence of a treaty shall recognize those offences as extraditable offences between themselves, subject to the conditions provided by the law of the requested State.

[4. The offence shall be treated, for the purpose of extradition between States Parties, as if it had been committed not only in the place in which it occurred but also in the territories of the States required to establish their jurisdiction in accordance with article 12.]

[5. For the purpose of extradition between States Parties, the offences [under articles ___] [under the Convention] shall not be regarded as political offences.]

e/ It is understood that the question as to whether the cross reference to other articles of the Convention in paragraphs 1 and 5 should be replaced by a reference to "the present Convention" shall be decided upon after an agreement on the definition of offences has been reached.

Article 19 f/ (Former article 20)

[Failure of a State Party to the Convention to fulfil the obligations specified in [relevant] articles of the present Convention constitutes an international wrongful act engendering the international responsibility of that State.]

Article 20 (Former article 21)

[States Parties to this Convention shall be obliged to make reparation for damages caused by them in violation of their obligations under this Convention.]

Article 21 g/ (Former article 22)

[The present Convention shall be applied without prejudice to the existing law of warfare or to humanitarian law.]

Article 22 (Former article 23)

1. Any dispute between two or more States Parties concerning the interpretation or application of this Convention which is not settled by negotiation shall, at the request of 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 those 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 States 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.]

f/ The differences of opinion among delegations relate not so much to the principle stated but rather to the desirability of including a provision relating to the international responsibility of the State in the future Convention. There are links between this text and article 22.

The following text was also proposed to replace articles 19 and 20:

[The present Convention is without prejudice to the rules of international law concerning State responsibility.]

g/ The view was expressed that there is a linkage between the retention of this article and the retention of article 2.