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SUMMARY RECORD OF THE 21st MEETING

Chairman: Mr. GASTLI (Tunisia)

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The meeting was called to order at 3.25 p.m.

AGENDA ITEM 120: CONSIDERATION OF THE DRAFT ARTICLES ON MOST-FAVOURED-NATION CLAUSES: REPORT OF THE SECRETARY-GENERAL (continued) (A/38/344)

1. Mr. CALERO RODRIGUES (Brazil) recalled that at its thirty-sixth session the General Assembly had decided to consider the substance of the draft articles on most-favoured-nation clauses, together with any amendments thereto, at its thirty-eighth session with a view to taking a decision thereon. However, the topic had a long history, the International Law Commission having worked on it for 11 years, and the draft articles were therefore complex and raised many collateral questions. It followed that the Committee, which had to decide what to do with the articles, would have to examine them most carefully, especially since the comments and observations received from Governments and international organizations showed that opinions were still divided on many questions - for example, whether article 1 should limit the scope of the draft to clauses contained in treaties between States or should extend also to treaties in which international organizations participated; whether the relationship of cause and effect between the most-favoured-nation clause and most-favoured-nation treatment established in articles 4 and 5 was sufficient; whether it should be considered irrelevant that the treatment accorded to a third State had been accorded in a bilateral or a multilateral agreement (art. 17), or was extended against compensation (art. 15), or was accompanied by a provision that it was not to be extended to other States (art. 16), or was national treatment (art. 18); whether the contractual nature of the clause should be stressed, as in article 7, or the draft should recognize a general most-favoured-nation clause to be universally applied in favour of developing countries; whether articles 11 to 13 were satisfactory in dealing with the effect of the clause in cases subject to compensation or reciprocal treatment; and whether the exceptions established in articles 23 to 26 were sufficient.

2. He was generally satisfied with the content of the draft articles, although some doubts which still remained deserved further consideration. Even when a text satisfactory to all had been worked out, the Committee would still have to consider whether the resulting articles were necessary and useful, since the most-favoured-nation principle seemed to be no longer so well regarded in the world as it had been in the past. For example, as had been pointed out at the first session of the United Nations Conference on Trade and Development, the traditional most-favoured-nation principle had been designed to establish equality of treatment, but to treat as equals countries that were economically unequal amounted in practice to inequality of treatment. Moreover, the relevance of the most-favoured-nation clause seemed to decrease as attention became focused more and more on the general concept of most-favoured-nation treatment. The basic question was whether the Committee could be sure that it would be advantageous, in the light of such considerations, to freeze the evolution of the most-favoured-nation concept in an international instrument. The analysis that the Committee would have to make in order to answer that question would be facilitated if previous agreement could be reached on the content of the rules which it was proposed to adopt.

(Mr. Calero Rodrigues, Brazil)

3. The Committee had three choices: it could decide that there was no point in continuing to consider the draft articles, at least for the time being, and in that case it could decide whether to set a date for a new look at the question; it could decide that there must be further discussion of the general question whether or not draft articles on the most-favoured-nation clause were needed; or it could decide to concentrate on a full analysis of the International Law Commission's text to see whether it could agree on the provisions, without prejudging the question whether they could be put to any future use. His delegation was inclined to favour the third alternative, though it raised many practical problems. Whatever the Committee decided, he did not think that it should at present accept the International Law Commission's invitation to move towards the conclusion of a convention. Such a convention could not be concluded without convening a diplomatic conference, and that was a possibility that for the time being his delegation was not prepared to support.

4. Mr. MAKAREWICZ (Poland) said that the proposed instrument on the most-favoured-nation principle had taken on increased significance in the current international situation, in which illegal economic sanctions were being used to exert political pressure on sovereign States and the practice of ignoring treaty obligations or applying discriminatory measures had unfortunately become habitual for certain States.

5. As the International Law Commission had pointed out, the draft articles on most-favoured-nation clauses constituted both codification and progressive development of international law. The value of the draft as an international instrument depended on how far it adequately reflected the principles and rules of international law emerging from the general practice of States, and on whether it met the requirements of the international community, including developing countries. Generally speaking, the draft articles, with some improvements, could constitute a useful basis for the elaboration of a legally binding instrument covering the specific problems of applying a most-favoured-nation clause as a means of enhancing the stability of international relations and thereby promoting the establishment of the new international economic order.

6. The "conditional" most-favoured-nation clauses contained in draft articles 12 and 13 had fallen into disuse, and there was therefore no case for including such clauses in the proposed instrument. The conditional clause by its very nature constituted a method of discrimination and offered none of the advantages of the most-favoured-nation clause proper, which was designed to eliminate economic conflicts and simplify and strengthen international trade.

7. The International Law Commission had stated in its relevant report (A/33/10) that, although the grant of most-favoured-nation treatment was frequent in commercial treaties, there was no evidence that it had developed into a rule of customary international law. Accordingly, States still had no legal basis for invoking the general principle of non-discrimination in case of refusal to accord such treatment. But there was certainly a legal duty on States not to discriminate in applying existing obligations under bilateral and multilateral treaties and, in particular, not to make the performance of their obligations conditional on the

(Mr. Makarewicz, Poland)

fulfilment by their partners of requirements whose nature was completely alien to the content of a given treaty or to invoke their own internal legislation to justify their failure to perform their treaty obligations.

8. He supported the Commission's decision not to include a provision on the settlement of disputes, since questions of the interpretation of a most-favoured-nation clause would in practice arise only in connection with a specific treaty containing such a clause. The inclusion of such a provision in the draft articles could create a situation in which the most-favoured-nation clause would be covered by two different systems of settlement of disputes, one provided by the draft articles and another by the particular treaty in which the clause was included.

9. From the standpoint of progressive development of international law, the draft articles in general created a framework appropriate to the present needs of the international community. In particular, they could serve to strengthen confidence in international economic relations and to promote certain justified demands of developing countries in the field of international trade, as expressed in the final documents of the Seventh Conference of Heads of State or Government of Non-Aligned Countries.

10. There were of course many differences of opinion on the substance of the draft articles, but if it became a common conviction that they could constitute a useful international instrument conducive to more equitable relations between States, any such differences would be easier to overcome.

11. His delegation was ready to take a flexible position on the procedure to be followed, but in its view the establishment of a working group of the Sixth Committee, as proposed by the representative of the Byelorussian SSR, could be the best solution.

12. Mr. ENKHASAIKHAN (Mongolia) noted that the General Assembly had received a number of comments from Member States and international organizations on the substance of the draft articles on most-favoured-nation clauses and the procedures to be followed in finalizing and adopting them. Mongolia's position on the question was set forth in document A/36/145 and had been repeated in the Committee; his country attached great importance to the codification of rules of international law promoting co-operation among States with different social and economic systems, facilitating international trade and contributing to the establishment of the new international economic order. The draft articles could serve as a basis for a legally binding instrument which would promote the elimination of discrimination in economic and trade relations and thus strengthen world peace and security.

13. The draft articles represented both codification of customary law and progressive development of international law. For example, under draft article 5 most-favoured-nation treatment would extend to such areas as the rights and privileges of States, the treatment of foreign physical and juridical persons, intellectual property and access to courts and administrative tribunals. In the light of current international practice, the article was important and useful.

(Mr. Enkhasaikhan, Mongolia)

14. As a land-locked country, Mongolia welcomed draft article 25, according to which a beneficiary State other than a land-locked State was not entitled under a most-favoured-nation clause to rights and facilities extended by the granting State to a land-locked third State to facilitate its access to and from the sea. That provision was in full accordance with existing practice and existing international instruments.

15. A number of delegations had referred to a proposed article 23 bis; he had difficulty in accepting their proposal, because the inclusion of such an article was likely to widen the existing gap between developing and developed countries. Nor could he accept a provision whereby the granting of most-favoured-nation treatment would be accompanied by various irrelevant conditions. That was likely to defeat the purpose of the exercise and would not eliminate discrimination among States or facilitate mutually beneficial economic relations. He agreed with the representative of Poland that there was no need to include a dispute settlement procedure in the draft convention.

16. Generally speaking, he did not agree with the view that the draft article failed to respond to new developments in international trade. They did reflect substantive positive developments, and it remained for the international community to give them legally binding force. The General Assembly should therefore set a target date for the final consideration and adoption of the draft convention. Its adoption would be an effective means of eliminating all forms of economic discrimination, especially that arising from the imperialists' policy of using economic leverage to blackmail other States, in flagrant violation of the United Nations Charter and the Charter of Economic Rights and Duties of States. The legitimate concern of the overwhelming majority of States about such policies and the hindrance to normal economic relations which they represented was reflected in the resolution on the rejection of coercive economic measures adopted at the sixth session of UNCTAD and in the final documents of the recent meetings of the non-aligned countries and the Group of 77.

AGENDA ITEM 129: REPORT OF THE AD HOC COMMITTEE ON THE DRAFTING OF AN INTERNATIONAL CONVENTION AGAINST THE RECRUITMENT, USE, FINANCING AND TRAINING OF MERCENARIES (continued) (A/38/43, A/38/106-S/15628, A/38/135-S/15678, A/38/327-S/15911, A/38/371-S/15944, A/38/432-S/15992, A/38/507-S/16044)

17. Mr. YOUGH (Nigeria) said his delegation had always been convinced that it was possible to draft, within the foreseeable future, an international convention prohibiting the activities of mercenaries. It was only a matter of time before the Ad Hoc Committee completed its mandate. Already at its 1983 session there had been a significant movement towards agreement, especially with regard to the scope of the convention and the question of State responsibility.

18. At its first two sessions, the Ad Hoc Committee had focused on the complete draft Convention submitted by Nigeria. His delegation had not, however, objected to France's draft Convention, which broadly represented the views of the Western delegations. There were important areas of common ground between the two drafts,

(Mr. Yough, Nigeria)

and Working Group A of the Ad Hoc Committee had been able to combine elements of the texts in an effort to produce a generally acceptable instrument.

19. Article 47, paragraph 2, of Additional Protocol I to the Geneva Conventions of 1949 defined the term "mercenary" in the context of international armed conflicts. It had been recognized, however, that mercenaries did not operate solely in such conflicts; in Africa, they had repeatedly operated in the absence of any international armed conflict. The Ad Hoc Committee had been seeking a generally acceptable definition that would cover all situations involving the use of mercenaries. It was clear from the Committee's report (A/38/43) that much fruitful work on that question had been accomplished at the 1983 session.

20. Paragraph 56 of the report contained the draft articles which the Chairman of Working Group A had introduced as a basis for future work. Nigeria endorsed the retention in toto of article 47, paragraph 2, of Additional Protocol I to the Geneva Conventions. Draft article 1 was clear, since it applied only to situations of armed conflict. Some work still had to be done on draft articles 2, 3, 4, 5 and 6. There had not been enough time to examine most of those provisions, especially the underlined portions of draft article 6.

21. His delegation believed that the definition of a mercenary in relation to situations other than those occurring in international armed conflicts would be at the heart of the future convention. It therefore fully supported draft article 2, which covered political and socio-economic aspects. Nigeria was particularly happy to note the reference to economic sabotage. It urged the Ad Hoc Committee to give serious consideration to that draft article with a view to removing the square brackets and reaching general agreement. Nigeria would fully participate in that process.

22. Draft article 3 was uncontroversial. Both the Nigerian and the French drafts had embodied the concepts of individual liability and complicity. Draft article 4, which was also uncontroversial, used some of the language of the French draft. Draft article 5 was straightforward and posed no problem to his delegation. Draft article 6 was well formulated and struck the right balance between the Nigerian and French drafts. There was a reasonable measure of agreement on the principles embodied in that draft article. What remained was for the Ad Hoc Committee to agree on a formulation which would not imply any erosion of the sovereignty and territorial integrity of States. The merit of that draft article would become clearer when the Ad Hoc Committee had an opportunity to make a comprehensive review of it.

23. With regard to the questions considered by Working Group B, his delegation was aware of the differences between Nigeria's draft article 8 and France's draft article 7. It believed that Nigeria's draft article 15 was consistent with the well-established norm that the breach of an international obligation entailed international responsibility. It did not agree that those provisions would pre-empt the work being done by the International Law Commission. Nigeria simply wished to reaffirm the provisions of article 19 of the draft articles on State responsibility provisionally adopted by the Commission in 1980.

(Mr. Yough, Nigeria)

24. Many delegations believed that paragraph 2 of Nigeria's draft article 16 was inconsistent with paragraph 1. His delegation would be prepared to submit a revised version for consideration by the Ad Hoc Committee at its next session.

25. The two Working Groups were functioning in perfect harmony. Nigeria hoped that they would consolidate and finalize their work in 1984 and that the Ad Hoc Committee would consider establishing a drafting group to refine all the texts negotiated and agreed by them.

26. His delegation had willingly made concessions in order to facilitate the work of the Ad Hoc Committee. If an international convention on the question of mercenaries was to be concluded, a spirit of compromise on the part of all concerned would be essential. Ultimately, the entire international community would stand to benefit from such a convention. It was in 1977 that the Organization of African Unity had adopted a convention prohibiting the activities of mercenaries on the African continent. If OAU could conclude such a convention without undue delay, then so could the United Nations.

27. His delegation would continue to play an active role in the General Assembly's consideration of item 129. It would be consulting with all interested delegations and would introduce a draft resolution calling for the renewal of the mandate of the Ad Hoc Committee to enable it to complete its work. With the necessary political will on all sides, there was no reason why it should not do so at its next session.

28. Mr. KHALEK (Egypt) said that his delegation's interest in the drafting of an international convention against the recruitment, use, financing and training of mercenaries stemmed from the fact that Egypt was part of the African continent, many States continued to be exposed to operations by mercenaries. It was imperative that the Ad Hoc Committee should negotiate a text acceptable to all parties and capable of being implemented in practice.

29. All were agreed on the need to prohibit the activities in question, and such disagreement as existed had to do with the question what elements the proposed convention should contain, particularly with regard to the definition of the term "mercenary". The fact that three years had passed without agreement on that matter clearly reflected a lack of political will on the part of some States to conclude a legally binding convention, while at the same time their statements strongly condemned the activities concerned and called for their prohibition.

30. In the view of his delegation, it was important that the use of the term "mercenary" should not be restricted only to the situations envisaged in article 47, paragraph 2, of Additional Protocol I to the Geneva Conventions of 1949. Individuals operating in situations outside armed conflict must also be regarded as "mercenaries" and an appropriate, separate definition, more inclusive than that contained in Additional Protocol I, should be formulated. Egypt and the other non-aligned countries had accepted a restricted definition in 1977 in the context of a general convention on the protection of human rights, but now that the purpose was to draft a convention aimed specifically at presenting the recruitment,

(Mr. Khalek, Egypt)

use, financing and training of mercenaries, a definition which would cover both situations of armed conflict and other situations should be adopted.

31. It was important, in order to introduce a psychological deterrent factor, that in declaring mercenary activity a criminal offence, the crime should be deemed to begin at the time when the individual enlisted as a mercenary.

32. With regard to the draft articles introduced by the Chairman of Working Group A as a basis for future work, which were reproduced in paragraph 56 of the report (A/38/43), his delegation considered it important that article 2 should precede article 1 so that the draft would begin with the general definition of a mercenary in situations other than those of armed conflict, to be followed by that applying to the more particular situation covered by article 47, paragraph 2, of Additional Protocol I to the Geneva Conventions.

33. Article 2, paragraph 1 (b), would consider as a mercenary any individual who took direct part in carrying out or attempting to carry out hostile acts. That would severely restrict the definition of "mercenary", and his delegation therefore proposed the insertion of the words "or indirect" after the word "direct".

34. With regard to the definition of "hostile act" contained in article 2, paragraph 2, his delegation did not regard the list under that definition as exhaustive. Some of those acts were also too vague and too general to conform to the basic rules followed in penal law when specifying the material act instituting a crime and would leave room for varying interpretations under different types of internal legislation; the result would then be several definitions of a single crime which varied according to the State against which it was committed. Such a situation would be contrary to the goal of drafting a convention containing precise provisions by which all States would be bound.

35. Article 3 of paragraph 2 (b) began with the qualifying word "knowingly". In the nature of things, anyone who undertook to perform such acts did so in full knowledge, and "knowingly" should therefore be deleted.

36. Article 4 seemed to contain a needless repetition. The "murder, torture in any form [and] acts of mutilation" mentioned in subparagraph (c) could be understood as being already subsumed under the term "aggravated assault or serious acts of violence" in subparagraph (b). The two subparagraphs should therefore be reformulated and combined.

37. His delegation considered that there should be full linkage between the obligations imposed upon States under the convention and the international responsibility entailed by breach of such obligations. While draft article 6 addressed itself in detail to the obligations of States, it made no reference whatever to the international responsibility entailed by a breach of them. The article should be reformulated to make specific reference to international responsibility. That would be perfectly consistent with international law and with the well-established principle that breach of an international obligation entailed international responsibility. Article 91 of Additional Protocol I to the Geneva

(Mr. Khalek, Egypt)

Conventions provided for the liability of any party which violated the provisions of the Conventions or the Additional Protocols and, since article 47, paragraph 2, of Additional Protocol I concerned mercenaries, the provisions of article 91 would apply in that connection.

38. On the subject of preventive measures, discussed by Working Group B, the Chairman had proposed the text reproduced in paragraph 69 of the report as article F. In the view of his delegation, the term "offences" was clearer and more appropriate than the term "crimes", since the latter presupposed that all national legislations would define such acts as criminal. That could not be expected to happen, given the different legal systems in use among Member States.

39. Working Group B had not reached agreement on the wording of article 15 of the revised draft submitted by Nigeria. His delegation objected to the idea of making a claim for damages by a State which suffered damage, or whose natural or juridical person suffered damage, conditional on the refusal of another State party to extradite or prosecute a mercenary. If the two elements of damage and the material act which entailed international responsibility were established, then, according to the general rules of international law, appropriate compensation would be paid whether or not the other State refused extradition or prosecution. Furthermore, the present text did not impose any sanctions on the breach of obligations of greater importance than those of prosecution and extradition, such as the obligation to refrain from the recruitment, use, financing and training of mercenaries. His delegation could only interpret the article in its present form as meaning that, except in the case of damage requiring compensation, any State might breach its obligations without sanction.

40. His delegation could accept paragraph 1 of the text concerning the settlement of disputes, reproduced in paragraph 79 of the report if the words "by negotiation" were replaced with the words "by any other means of peaceful settlement of disputes". That would broaden the concept of the means of peaceful settlement of disputes to include negotiation, conciliation and arbitration.

41. His delegation was totally opposed to paragraph 2 of the same text which nullified paragraph 1 by enabling States to freely opt out of the envisaged system. Such a situation would be in open conflict with the provisions of Article 33 of the Charter of the United Nations and with section I, paragraph 9, and section II, paragraph 5, of the Manila Declaration on the Peaceful Settlement of International Disputes.

42. His delegation supported the renewal of the Ad Hoc Committee's mandate and reaffirmed its commitment to continue to participate actively in the efforts to draft a convention.

The meeting rose at 4.45 p.m.