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SUMMARY RECORD OF THE 26th MEETING

Chairman: Mr. GASTLI (Tunisia)

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INTERNATIONAL CONVENTION AGAINST THE RECRUITMENT, USE, FINANCING AND TRAINING OF
MERCENARIES (continued)

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The meeting was called to order at 3.15 p.m.

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/38/432-S/15992, A/38/371-S/15944, A/38/507-S/16044)

1. Mr. SINGH (India) said that his delegation did not intend at that stage to comment on the draft articles proposed by the Chairman of Working Group A in paragraph 56 of the report of the Ad Hoc Committee (A/38/43), since it had already had an opportunity to submit its views in the Working Group. However, it wished to state that, in general, it endorsed the draft articles, which provided a good basis for making further progress, represented an attempt to synthesize different views expressed and drew largely upon formulations common to the Nigerian and French drafts. It thanked the delegations of Nigeria and France for their useful initiatives.
2. The progress made in Working Group B was also heartening. A number of the concepts discussed in that Working Group, such as preventive measures, damage reparation and the settlement of disputes, were extremely important from the point of view of State responsibility in the context of mercenary activities.
3. The question of the recruitment, use, financing and training of mercenaries was a matter of great concern to all developing countries and non-aligned countries that had recently thrown off the yoke of colonialism and were still struggling against the aftermath of that scourge. Mercenaries of different categories had been used to suppress national liberation movements and movements fighting racial discrimination, to promote civil strife, to endanger innocent civilian populations and to damage public and private property, which were all activities often accompanied by offences under ordinary law. The Seventh Conference of Heads of State or Government of Non-Aligned Countries, held at New Delhi from 7 to 12 March 1983, had stressed how urgent it was for the United Nations to adopt a convention covering all types of situations involving the recruitment, use, financing and training of mercenaries.
4. His delegation was happy to note the constructive attitude displayed by all delegations in the Ad Hoc Committee, which had contributed to the development of common ground on a number of points. For example, all delegations agreed on the need to distinguish between situations involving international armed conflict and other situations. There was complete agreement on the use of the definition of the term "mercenary" laid down in article 47, paragraph 2 of Additional Protocol I to the Geneva Conventions of 1949 in connection with situations involving international armed conflict. While all delegations believed that the motive of private gain was one of the principle criteria for identifying a mercenary, both in such situations and in situations not involving international armed conflict, his delegation, together with other delegations, believed in the usefulness of other criteria for establishing a definition of a mercenary, such as the methods of the mercenary's recruitment, the activities aimed at and nationality other than that of the target country.

(Mr. Singh, India)

5. Regardless of how mercenaries were defined, it was essential to distinguish mercenaries clearly from other categories of persons, such as members of regular armed forces, military technicians and advisers and members of a militia or a voluntary corps, who were entitled to be treated as prisoners of war. A clear-cut indication of the persons excluded from the definition of a mercenary would make a positive contribution to the effectiveness of the proposed convention.
6. Although the discussions held in the Ad Hoc Committee had revealed several points of convergence, they had also uncovered problems that had yet to be solved. However, those problems were not so serious that they could not be solved within a reasonable length of time and within the context of well-established norms of criminal justice. What was most needed was the political will to adopt a convention that would be an effective deterrent not only to individuals lured by pecuniary gain but also to institutions and States and to such régimes as the racist régime of South Africa. It was in fact chiefly the latter that recruited, used, financed and trained mercenaries, thus violating in a cowardly manner the Charter of the United Nations and fundamental human rights and freedoms.
7. Mr. EDON (Benin) said that analysis of the report of the Ad Hoc Committee (A/38/43) had been facilitated by the concise and precise approach that had been taken in preparing it. The differences of opinion that were becoming apparent in the process of drafting the international convention against the recruitment, use, financing and training of mercenaries were chiefly due to the wide range of interests involved. The Ad Hoc Committee had been established by the General Assembly as a result of the international community's growing awareness of the curse of mercenarism and of the serious threat it posed to international peace and security.
8. For a number of years international imperialists had been using mercenaries as a new weapon for the subjugation of peoples, for the subversion of Governments, for economic sabotage, for the suppression of the aspirations of the oppressed peoples of the world to attain freedom and for the destabilization of the political systems of sovereign and independent States that they were no longer able to control politically, exploit economically and alienate culturally.
9. A number of progressive countries, including Benin itself on 16 January 1977, Angola, the Comoros, Mozambique, Guinea, Cuba, Nicaragua and Seychelles, had been attacked by mercenaries. The developing countries were therefore in the last analysis the chief target of mercenaries, which meant that they were obliged to devote energies to their defence that they would have preferred to use for their development. Mercenarism, which was a form of subversive warfare and direct or disguised intervention in the internal affairs of other countries, was contrary to the relevant provisions of the Charter of the United Nations.
10. However, the era of foreign domination was over and the future of mankind lay not in conflict but, rather, in the policy of good-neighbourliness and in international co-operation in seeking mutual advantages. Nothing could therefore prevent the peoples of the world from choosing their own system of government and building societies that were in keeping with their legitimate aspirations.

(Mr. Edon, Benin)

11. It could be seen clearly from the report of the Ad Hoc Committee and from the oral introduction to the report made by the Chairman of that Committee that the most controversial issue was the question of the definition of the term "mercenary". Although there was no question of disregarding the definition of a mercenary set forth in article 47 of Additional Protocol I to the Geneva Conventions of 1949, which was already accepted in international law, it must be acknowledged that its scope was narrow, since it only concerned situations involving international armed conflict. His delegation therefore welcomed the approach to the drafting of the definition taken in draft articles 1 and 2 set forth in paragraph 56 of the report, which, while not overlapping with the definition in article 47 of Additional Protocol I, expanded that definition so as to cover all situations in which mercenary activities were most likely to take place. With regard to draft article 2, paragraph 1, both direct and indirect participation in carrying out hostile acts should be covered by subparagraph (b). Moreover, the word "necessarily" should definitely be included in subparagraph (d). The definition of the term "hostile act" set forth in draft article 2, paragraph 2, fully met his delegation's concerns. Although the chief purpose of the mercenary attack perpetrated on Benin in 1977 had been to overthrow the revolutionary Government in office and to establish a puppet régime that would have been in the pay of international imperialism, that was not the sole aim of mercenary ventures, and the Ad Hoc Committee had rightly listed, in the five subparagraphs of draft article 2, paragraph 2, other reprehensible activities that might be carried out by mercenaries. Lastly, with regard to the use of mercenaries to suppress the struggle of a people for self-determination, the Ad Hoc Committee should take account of the special situation of national liberation movements, as some of the General Assembly resolutions referred to in the preambular part of General Assembly resolution 37/109 did.

12. It was regrettable that it had been possible neither to define the scope of State responsibility nor to express that concept in legal terms. The way in which State responsibility was dealt with in article 6 of the draft convention submitted by France (A/38/43, annex) and in draft article 6 set forth in paragraph 56 of the report of the Ad Hoc Committee was unsatisfactory, since those articles merely echoed a principle of international law referred to in the annex to General Assembly resolution 2625 (XXV), namely, the principle that every State had the duty to refrain from organizing ... mercenaries. In a convention, the responsibilities of both individuals and States should be expressed in a positive manner, and the terms "undertake", "refrain from" and "endeavour to" sounded extremely weak.

13. The subject of preventive measures, which, together with the questions of damage reparation and settlement of disputes, had been considered by Working Group B, was one of the essential aspects of the future convention, as was evident from paragraph 62 of the report, and an area in which States had an important role to play. In that respect, while the provisions of article 7 of the French draft seemed weak, article 8 of the Nigerian draft and article F in paragraph 64 of the report could serve as a basis for the drafting of an effective provision acceptable to all delegations.

(Mr. Edon, Benin)

14. He noted that only the draft submitted by Nigeria (A/37/43, annex II) made provision, in article 15 for damage reparation. In his view, a convention against mercenarism which did not contain such a provision would be incomplete, firstly, because it would not give effect to the principle that the breach of an international obligation entailed the international responsibility of the author, and, secondly, because the activities of mercenaries were very costly to the countries which were victims of them. It was in that light that one should read Security Council resolution 527 (1982), paragraph 2, in which the Council had demanded "the payment by South Africa of full and adequate compensation to the Kingdom of Lesotho for the damage to life and property resulting from [its] aggressive act".

15. His delegation was not convinced by the argument that in some countries, mercenary activities involved only private groups unconnected with the State. Governments which had at their disposal considerable financial and material resources to ensure the security of the State could not be unaware of the fact that mercenaries were being recruited in their territory. There were even countries where recruitment was conducted through newspaper or television advertisements, and the responsibility of the groups involved must entail the responsibility of the State under whose jurisdiction they were. Indeed, by including in the draft convention a provision on State responsibility, the Ad Hoc Committee would be contributing to the progressive development and codification of the rules of international law relating to mercenarism and thus, as noted by the General Assembly in the seventh preambular paragraph of resolution 37/109, to the implementation of the principles of the Charter, without prejudice to the work of the International Law Commission on State responsibility.

16. The mechanism provided for the settlement of disputes should be strengthened by allowing for recourse to the means of settlement listed in Article 33 of the Charter, and also to good offices and to the Security Council which had an important role to play in that field.

17. There were still many areas of disagreement in the Ad Hoc Committee, and much remained to be done. In 1982, the Sixth Committee had considered the possibility of the Ad Hoc Committee's holding its third session away from New York, and he regretted that, for financial reasons, Benin had been unable to serve as host for that session.

18. It was essential for the Ad Hoc Committee to settle the question of the definition of the term "mercenary" at its next session, failing which its work would be deadlocked, and the Sixth Committee must therefore express its views on that point at the current session. In that respect, although those delegations which had submitted proposals and papers to the Ad Hoc Committee deserved thanks, the Committee should be able to continue the elaboration of the convention on the basis of the documents it already had, and care must be taken to ensure that the multiplicity of documents did not impede the advancement of its work.

(Mr. Edon, Benin)

19. He hoped that all the members of the Ad Hoc Committee would approach the forthcoming session in a spirit of co-operation, fairness and mutual understanding, so that a convention to suppress the activities of mercenaries and of those who supported them could be drafted as quickly as possible.
20. Mr. AENA (Iraq) said the report of the Ad Hoc Committee (A/38/43) showed that, despite the consensus which had emerged within the international community on the need to eliminate mercenarism, a crime that threatened the territorial integrity and security of States, the Committee had been unable to complete its elaboration of the proposed convention owing to the fact that the position of the parties on the elements to be included in such a convention had remained unchanged.
21. Working Group A, to which the fundamental question of the definition of the term "mercenary" had been referred, had adopted a pragmatic approach in its attempt to draft a precise definition, but had been unsuccessful owing to the divergent views which had been expressed. In the view of his delegation, a definition covering both situations of international armed conflict and other situations would not only not duplicate or be incompatible with the definition in article 47, paragraph 2, of Additional Protocol I to the Geneva Conventions of 1949 but would contribute to the progressive development of international law in accordance with Article 13, paragraph 1, of the Charter of the United Nations.
22. As the representative of Greece had noted, careful consideration should be given to all the political and legal implications of the definition in order to arrive objectively at a legal definition which was scientific and untainted by political concerns and which would not subsequently allow of fallacious or mistaken interpretations. Moreover, as the representative of Yugoslavia had emphasized, generalities should be avoided and the emphasis placed instead on the essential aspects of mercenary activities. Mercenarism could not be condemned in general terms, and in that regard Working Group A had taken an important step forward with the drafting of articles 1 and 2 reproduced in paragraph 56 of the report. Nevertheless, care must be taken to cover all aspects of the activities of mercenaries whether the latter participated directly or indirectly in carrying out the hostile acts referred to in the Convention. In that connection, the brackets should be removed from the expression "hostile acts", which correctly defined the activities of mercenaries, who violated the principles and purposes of the Charter of the United Nations, particularly the principle of the prohibition of use of force in international relations. Note should also be taken of the close relationship between the concept of hostile acts and the definition of aggression. If there was no agreement on that point, the expression "hostile acts" could be replaced by "mercenary acts".
23. Although the crimes committed by mercenaries against the sovereignty, political independence, territorial integrity and security of States and the security of persons and of property were quite exhaustively defined in articles 2, 3 and 4, account should be taken of the fact that those acts were generally responsive to the political motivations of the countries which used, recruited, trained and financed mercenaries. Paragraphs 1 and 2 of article 2 should therefore

(Mr. Aena, Iraq)

bring out that political motivation of the States which encouraged mercenaries. Such a widening of the definition would be compatible with articles 3 and 4. In that respect, paragraph 1 of article 3, seemed unnecessary, since its substance was covered by paragraph 2 (d) of the same article.

24. With regard to articles 5 and 6, he considered it wrong to draw a distinction between mercenarism and ordinary crimes, based on the means employed, since the end sought should be the decisive criterion. Those two articles needed to be carefully studied with a view to establishing international co-operation in the sphere of criminal law to combat mercenarism.

25. Article 7, which imposed on States certain obligations with regard to the prevention and suppression of mercenary activities at the national level, was a logical and well-balanced provision.

26. Article 8, which provided that failure of a State party to the Convention to fulfil its obligations under the Convention would engender international responsibility, must be considered in the light of the individual criminal responsibility of mercenaries themselves at the international level. There was no doubt that States which supported the activities of mercenaries violated the principles of public international law and of the Charter of the United Nations and must incur responsibility accordingly.

27. On the question of preventive measures, which, together with damage reparation and settlement of disputes, had been considered by Working Group B, his delegation supported the provisions of article F reproduced in paragraph 69, such provisions being essential if States parties were to apply the Convention in an effective manner by taking all possible legislative and administrative measures to prevent the use, recruitment, financing and training of mercenaries.

28. The important question of damage reparation should be given more thorough consideration in the light of the principles of international responsibility of States.

29. Lastly, if the greatest number possible of accessions by States was to be secured, the Convention must contain provisions governing any possible disputes regarding its implementation and interpretation.

30. Since the question of mercenary activities had been included in the Assembly's agenda owing to the fact that the phenomenon was taking on increasingly threatening proportions, that phenomenon's underlying causes, which were the very factors that made it so complex, should be given objective consideration. Moreover, it was necessary to see that, in drafting the future convention, the Ad Hoc Committee, whose mandate should be extended, did not take an approach that prejudiced the provisions laid down by the General Assembly for the benefit of peoples struggling to attain independence and to achieve self-determination.

31. Mr. GHARBI (Morocco) said that the fact that the delegation of Nigeria had submitted a draft convention (A/37/43, annex) at the very outset of the Ad Hoc Committee's work meant that it was reasonable to expect that a convention on the question under consideration would be adopted at least as rapidly as the International Convention Against the Taking of Hostages. However, it could be seen from the most recent report of the Ad Hoc Committee (A/38/43) that there had been no follow-up to the progress made at that Committee's first two sessions, since the differences of opinion on the key issue of the definition of the term "mercenary", on the future convention's material and temporal scope and on the meaning of State responsibility were so fundamental that it did not appear that it would be possible to reduce them rapidly, unless all the parties involved showed the necessary determination.

32. At the Ad Hoc Committee's third session, the delegation of France had submitted another set of draft articles (A/38/43, annex), which presented the advantage of demonstrating a genuine will to negotiate but were at the same time extremely disappointing both from the point of view of some of the proposals it contained, which were often at variance with proposals put forward in the Nigerian draft, and from the point of view of what they omitted. It was to be hoped that that new text would not contribute to a consolidation of the differences of opinion, which had far-reaching political implications, but would, rather, give a further dialectical impetus to the codification exercise.

33. In general, it was above all necessary to go beyond the definition laid down in article 47, paragraph 2, of Additional Protocol I to the Geneva Conventions. The new codification exercise should focus chiefly on the prevention and suppression of mercenary activities, both in peace-time and in time of war, as well as on the assignment to States parties of specific obligations, whose non-fulfilment would entail international responsibility.

34. With regard to the activities of Working Group A, he noted that similar differences of opinion persisted with regard to the definition of a mercenary, its temporal application and the nature of the conflicts to which it should apply. However, most of the delegations from African countries and delegations of non-aligned countries that had participated in the Ad Hoc Committee's work were now convinced that the definition of the term "mercenary" laid down in article 47, paragraph 2, of Additional Protocol I to the Geneva Conventions was inadequate in every respect, even though they recognized that the adoption of that definition in 1977 had represented progress in the reaffirmation and development of humanitarian law relating to armed conflicts.

35. Firstly, the criterion of private gain, to which reference was made in article 47, paragraph 2 (c), would appear to be both inadequate and superficial. The criterion that the mercenary's material compensation should be substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of the party recruiting him was no longer in keeping with reality, since mercenaries were no longer solely nationals of industrialized countries with high standards of living but, rather, were often recruited at paltry rates of pay

(Mr. Gharbi, Morocco)

in poor countries. Moreover, it was virtually impossible for the State that was the victim of mercenary activities to provide evidence showing the exact level of the compensation received by mercenaries.

36. Secondly, in certain instances it would prove impracticable merely to restate the definition laid down in Additional Protocol I, particularly since it had been designed to apply specifically to situations involving armed conflicts. The concept of an armed conflict was no longer as clear-cut as it had been at the time of the drafting of the Geneva Conventions of 1949, and any distinction between situations involving armed conflict and other situations was absolutely superfluous. Moreover, as the representative of Nigeria had rightly pointed out, there were no longer any objective criteria that could be used as a basis for differentiating between internal armed conflicts and international armed conflicts. The Ad Hoc Committee had therefore been given a clear mandate for the progressive development of the relevant international law, taking account of the many new aspects of mercenarism that had emerged since the 1960s and laying the foundation for international rules genuinely geared to the actual situation that was to be changed. In that connection, the most recent conference of non-aligned countries, held at New Delhi from 7 to 12 March 1983, had reflected the desire that the Ad Hoc Committee's mandate should be fulfilled without delay and that it should be expanded with a view to preventing mercenaries from benefiting from transit facilities.

37. The two articles defining the term "mercenary" both in situations involving armed conflict and in other situations, which were set forth in paragraph 30 of the report of the Ad Hoc Committee, appeared to meet some of the major concerns of a good number of delegations. However, the Ad Hoc Committee would have been better advised to adopt a single article on that question in order to avoid repetition and to settle the question of the link between the definition made in 1977 and the one that was to be drafted for inclusion in the future convention, by inserting into that article on the definition of a mercenary, a paragraph specifying that the new definition should be applicable for the purposes of the convention, without prejudice to article 47, paragraph 2 of Additional Protocol I. Such a compromise would at least present the advantage of removing an enormous obstacle, by relying on the interplay of conventions gradually to eliminate from international, bilateral and multilateral practice a difference of opinion that must not be allowed to paralyse the Ad Hoc Committee indefinitely.

38. Since they complemented each other, it would be advantageous for articles 3 and 6 (paragraph 30 of the report) to be placed one immediately after the other.

39. Article 3 (f) was related to the proposal put forward by the delegation of the Bahamas (A/38/43, para. 23), concerning armed violence to bring about the secession of part or parts of a State's territory, which his delegation endorsed.

40. As a complement to article 3, article 5 dealt with the question of the degree of seriousness and the imputability of the offence to which it referred. His delegation could under no circumstances endorse the view that the acts of

(Mr. Gharbi, Morocco)

recruiting, financing and training mercenaries amounted to no more than collusion, since they should be regarded as principal offences with the same status as mercenary acts themselves, if the purpose of the future convention was actually to put an end to the practice of mercenarism and not merely to suppress illicit activities carried out by mercenaries.

41. It was therefore absolutely essential to lay down precise domestic and international obligations for States, and that was exactly what was being attempted in article 7. However, the wording of that article was too restrictive, and in some cases even evasive, which was unfortunate in a field of criminal law where it was above all a guaranteed punishment that was called for. There was a risk that the ambiguous reference made to national law, which was juxtaposed to a reference to international law, would enable individual future State parties to interpret the convention's scope in a subjective manner. That dual reference was absolutely unjustifiable outside the classic context of final clauses concerning the requirements for the entry into force of a convention and was a devious way of diminishing the future convention's legal impact. Lastly, the word "reasonable" used in subparagraph (b) should be replaced by the word "necessary", since the assessment of what constituted reasonable measures was entirely arbitrary.

42. In considering the question of preventive measures, Working Group B had had a choice between the text proposed by the delegation of Nigeria and that submitted by the delegation of France; the latter text prompted the same remarks as article 7. The draft article on action for damage reparation (A/38/43, para. 73) had generated a heated discussion on the desirability of including a provision on the international responsibility of States bound by the future convention. His delegation still believed that provisions clearly laying down States obligations relating to the prevention and suppression of mercenarism and the circumstances in which international responsibility was entailed, in the event of non-fulfilment of those obligations, remained a key feature of the codification exercise and the process of progressive development of international law upon which the Ad Hoc Committee had embarked. Taking as a basis the principles set forth in the Charter of the United Nations and refined by international judicial precedent, the Ad Hoc Committee could delimit State responsibility in the field in question, or at least succinctly state the principle of State responsibility, leaving it to the International Law Commission to complete its work in that area. State responsibility was based on the sole exercise by the State of sovereignty over its entire territory and all its nationals. With regard to the relationship between the positive attributes of sovereignty and the obligations flowing therefrom, Max Huber, the arbitrator, had helped to identify two principles at the time of the case concerning United Kingdom property in Spanish Morocco (1925) and the case concerning the island of Palmas (1928). No State could justifiably permit the exercise of concurrent sovereignty over its own territory, and consequently no State could under any circumstances evade direct responsibility for actions perpetrated from its territory.

43. There were three reasons why the item under consideration had been included in the agenda of the thirty-sixth session of the General Assembly. Politically, it had become necessary to tackle a phenomenon whose modern forms had become so

(Mr. Gharbi, Morocco)

nebulous that they were no longer covered by the definitions of positive law. Legally, there had been a need for the further development of international law on the subject, in the framework of international penal law and not only in that of humanitarian law applicable in armed conflicts. Socially, the aim had been not only to prohibit but also to prevent and suppress a practice which, although of long standing, was the object of growing contempt in the conscience of peoples.

44. The era of decolonization had given birth to a reincarnation of mercenarism, which served as an instrument of international intrigue, concealed aggression and covert subversion while allowing the States that employed it to evade their responsibilities.

45. Mr. ALEXANDROV (Bulgaria) said that the use of mercenaries was, unfortunately, still frequent in the modern world; they had been used against the heroic people of Viet Nam, were still being used against Nicaragua and were contributing to the heightening of tensions in Central America. Mercenaries were also systematically used by South Africa, which continued to violate the independence and sovereignty of neighbouring States and persisted in its attempts to destabilize their Governments. Against that background, his delegation attached particular importance to the drafting of an international convention on the subject.

46. His delegation welcomed the progress made by the Ad Hoc Committee. In its view, the draft convention put forward by Nigeria in 1981 (A/37/43, annex I), as well as the compromise texts contained in the report of the Ad Hoc Committee (A/38/43), were an acceptable basis for further work.

47. As far as Working Group A was concerned, his delegation welcomed the compromise texts reproduced in paragraph 56 of the report. While the definition of the term "mercenary" in article 47, paragraph 2, of Additional Protocol I to the Geneva Conventions was fully adequate in the case of mercenaries operating in a situation of international armed conflict, the future convention must include a separate definition of a "mercenary" operating in situations outside such conflict, which were radically different. However, in the opinion of his delegation, the criterion of direct participation in hostile acts unnecessarily narrowed the scope of the definition and did not conform to some of the objectives of the Ad Hoc Committee as implied by the name of the convention it was to draft. The provision that the mercenary should not be a national of the State against which hostile acts were carried out should also be omitted, since, in fact, mercenaries recruited for operations against a State often included nationals of that State. Furthermore, a person taking part in such operations might have no papers evidencing his nationality, might be stateless or might possess dual nationality. That should not mean that, in situations other than international armed conflicts, such a person was not considered a "mercenary".

48. In order to be effective, the future convention must also expressly and categorically prohibit States from recruiting, using, financing or training mercenaries and impose on them an obligation not to tolerate in their territories the acts prohibited under the convention.

(Mr. Alexandrov, Bulgaria)

49. The issues under consideration in Working Group B were also extremely important.

50. His delegation was in favour of renewing the mandate of the Ad Hoc Committee, so that it could draft an international convention at the earliest possible date.

51. Mr. KABAYABAYA (Burundi) said that vulnerable societies would be unable resist mercenarism - a scourge of developing countries - until the international community resolved to repudiate and combat such activities by means of an effective instrument.

52. The definition of a mercenary was without doubt an important element of the future convention and should cover both situations of armed conflict and peace-time situations. Punitive or destabilizing operations were undertaken outside armed conflicts, and the future convention should take account of such situations, which were far from being the exception, since otherwise it might eventually prove too limited in scope.

53. Particular attention should be given to the question of responsibility, without which the convention could not serve its purpose. Codification of the obligations of States was an urgently needed step towards the prevention and suppression of mercenarism, and the breach of an international obligation must always be redressed. Delegations which argued that the inclusion of provisions on State responsibility would be an unfortunate precedent were displaying a legal "stand-pattism" which ran counter to the task assigned to the Sixth Committee; while some delegations referred to the lack of equivalent provisions in other conventions, he maintained that the present omissions and imperfections in positive law should not be regarded as something inevitable and as a justification for the survival of immoral and inhuman practices.

54. The Ad Hoc Committee had already considered every aspect of the question of mercenarism, and all that was lacking now was the political will of States to reach agreement. In the behalf that mercenarism could and should be suppressed at all stages of its organization, his delegation favoured the renewal of the Committee's mandate.

55. Mr. ALAKWAA (Yemen) said that the activities of mercenaries had contributed to a great extent to the tensions in international relations and had impeded the progress of developing countries. Those activities ran counter to the right of peoples to self-determination, the principles of the Charter and the norms of international law governing relations between States. Yemen, which strongly condemned such criminal activities, firmly supported the drafting of an international convention against the recruitment, use, financing and training of mercenaries, and was convinced that such a convention would contribute to the progressive development of international law.

(Mr. Alakwaa, Yemen)

56. His delegation had noted from the report of the Ad Hoc Committee (A/38/43) that differences still existed regarding the definition of the term "mercenary", the nature of mercenary activities, the status of mercenaries, preventive measures and the responsibility incurred by those who participated directly or indirectly in their activities. However, it was optimistic and believed that the Ad Hoc Committee had established a good basis for continuing its work.
57. While his delegation was not opposed to the inclusion in the future convention of the definition of the term "mercenary" contained in article 47, paragraph 2, of Additional Protocol I to the Geneva Conventions, it felt that it should apply only to situations of international armed conflict. In the modern world, these were situations which could not be equated to international armed conflict and which the Ad Hoc Committee was bound to take into account by preparing a separate definition to cover them, without prejudice to existing international legal provisions.
58. Where the status of mercenaries was concerned, his delegation was of the view that a mercenary should be considered a criminal outlaw, on condition, however, that human rights, including the right to a fair trial, were respected.
59. With regard to preventive measures and the responsibilities incurred by those who participated directly or indirectly in activities preparatory to mercenary activities, the Ad Hoc Committee should consider the measures to be taken by States and the commitments they should fulfil in order to achieve the objectives of the future convention as reflected in its title.
60. His delegation was grateful to the Nigerian and French delegations for their positive contributions, and to all delegations which had submitted useful proposals.
61. His delegation favoured the renewal of the mandate of the Ad Hoc Committee.
62. Mr. HAYASHI (Japan) said he was pleased to note that the Ad Hoc Committee had made progress at its latest session, particularly by clarifying various concepts regarding certain key issues, by narrowing differences of opinion regarding the framework of a future convention, and by completing tentative texts of several draft articles dealing with relatively less controversial technical questions.
63. He paid a tribute to the French delegation for presenting a draft convention (A/38/43, annex) that had guided the Ad Hoc Committee's work in the right direction.
64. Despite those positive developments, the members of the Ad Hoc Committee were still sharply divided on a number of specific substantive questions: (a) whether, in case the future convention defined the term "mercenary" in exactly the same manner as article 47, paragraph 2, of Additional Protocol I to the Geneva Conventions, the term "armed conflict" should be restricted to cover solely situations of "international armed conflict"; (b) whether in situations not covered by that definition, a person committing certain acts usually characterized as those of mercenaries should also be designated a "mercenary"; (c) how the future convention should define the offender (or mercenary) in such other situations;

(Mr. Hayashi, Japan)

(d) whether a person first had to commit a specific act such as murder or a serious act of violence before being considered a mercenary or the perpetrator of an offence punishable under the proposed convention; (e) whether persons who engaged in the recruitment, use, financing and training of mercenaries should be considered principals or accomplices; (f) whether the future convention should include a provision stating that a breach of any of its obligations by a State entailed international responsibility on the part of that State.

65. Those questions were extremely important because they would constitute the key elements of the legal régime to be established in the future convention. The utmost care must therefore be taken in co-ordinating and reconciling the different positions of various Governments. His delegation urged all delegations to approach the future negotiations in a realistic spirit, fully conscious of the long-term legal implications. In particular, they must not forget that the convention being prepared would establish norms of criminal law that would lead to the deprivation of rights and freedoms of the individual.

66. As was often stressed when conventions of that kind were being drafted, the elaboration of draft articles too far removed from national legislation or from the reality of the international community could well make the exercise a purely academic one and consign any ensuing convention to dead-letter status. He hoped that the members of the Ad Hoc Committee would keep that in mind as they continued their work.

67. In that connection, his delegation was particularly concerned about two issues. The first was the question of State responsibility, which was currently being studied by the International Law Commission. It would be unwise for the Ad Hoc Committee, which was charged with drafting a convention with a very limited scope of application, to take up such a complex and important question of general international law. It could even be detrimental to the progressive development and codification of international law in the area. Furthermore, inserting a clause on State responsibility in a convention before the organ with supreme authority in the international legislative process had completed its work on that topic would be tantamount to deliberately introducing an incomplete provision before all its legal ramifications had been clarified. His delegation feared that such an ambiguous provision might greatly damage the convention itself.

68. The second question was whether there should be a reference in the future convention to the struggle of peoples for self-determination. That question had already been dealt with in Additional Protocol I to the Geneva Conventions, specifically in article 1, paragraph 4, and article 47, paragraph 2. As the representative of Jamaica had already pointed out, it would not be advisable to make such a reference in the future convention. The provisions of the Additional Protocol represented a delicate balance and were the result of arduous negotiations. Any new provision would give rise to complicated questions, particularly regarding its relationship to the existing provisions of the Additional Protocol. A safeguard clause of the kind proposed by the Italian delegation (A/38/43, para. 44) would be one of the best ways of dealing with that question.

69. Mr. RIDDELL (United States of America) said that the 1983 session of the Ad Hoc Committee had been a positive one. Provided it kept to the main aspects of the question of mercenary activity, there were grounds for some optimism about its future prospects. If it allowed itself to be distracted by irrelevant or marginal issues, there would be no basis for optimism.
70. Recognition of what had already been achieved by Additional Protocol I would simplify the Ad Hoc Committee's task and facilitate progress. On the other hand, progress would be hampered if the Ad Hoc Committee tried to deal with State responsibility, which was separate from the question of the obligations of States. If there was also an attempt to introduce such novel notions as gradations of State responsibility, the prospects for progress would be nil.
71. There would also be little prospect for agreement if there was persistence in seeking to establish a status crime rather than a régime applicable to those who fell within the definition of "mercenary" and committed certain specific acts. The use of neologisms such as "mercenarism" served to cloud the very issues which had to be clarified as a pre-condition for any progress towards an agreement. Nor would any progress be possible in the near future unless the usefulness of the definition of "mercenary" contained in article 47, paragraph 2, of Additional Protocol I was recognized. Although at the time of the drafting of the Additional Protocols it had seemed important to some to establish a distinction between international and non-international armed conflicts, the situation was completely different in the case of the convention being prepared by the Ad Hoc Committee. What was at issue was not the humanitarian protection to be afforded to those engaged in armed conflict, but simply the manner in which States should co-operate with a view to discouraging certain activities in all circumstances. There was no basis in law or logic for the fear that the use of the definition in Protocol I for both types of armed conflict would have consequences of the type which had caused concern in 1977.
72. Progress in the Ad Hoc Committee would undoubtedly be facilitated by the recognition that those who aided and abetted mercenaries or otherwise actively contributed to their activities should be regarded as accessories before or after the fact.
73. It was regrettable that some delegations had sought, both in the Ad Hoc Committee and in the Sixth Committee, to engage in polemics that prevented any rational discussion. The use of mercenaries was neither the only nor the most serious form of violence in the contemporary world. The conduct of certain States and certain acts of violence posed a far greater threat to world peace and security. The United States denounced the hypocrisy of those who were feigning concern for human rights and seeking to poison the atmosphere as a cover for their atrocious practices. It would approach future work on the question of mercenaries in a positive spirit.
74. Mr. LAMAMRA (Algeria) said that the consensus on the mandate of the Ad Hoc Committee augured very well for its work. That body owed its existence to an initiative by Africa, which had been the primary victim of the misdeeds of

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mercenaries. His delegation regretted that the three sessions already held by the Ad Hoc Committee had not been enough for the drafting of a generally acceptable instrument. It had become apparent by the second session that each delegation was in a position to develop its own self-consistent approach. The proliferation of formal proposals since that time had encouraged parallel argumentation, thus delaying the necessary acceptance by all of a single structure having the basic advantage of covering every aspect of the subject. The Ad Hoc Committee could certainly live with that situation, which was due to the freedom of action and initiative of delegations, provided they agreed to regard their positions as the basis for, rather than the outcome of, negotiations. In that connection, he wished to pay a tribute to the delegation of Nigeria for its willing acceptance of amendments to its draft convention.

75. The work of Working Group A was obviously of vital importance for the future convention, because it was the matters before it that posed the main difficulties. Those matters included the highly political question of the "scope of the convention". His delegation reiterated its support for a convention that would prohibit the recruitment, use, financing and training of mercenaries, as well as their activities, in situations of international and non-international armed conflict and in other situations. Principles of international law such as non-interference and non-intervention in affairs related to the exclusive national jurisdiction of States fully justified the determination of the criminality of mercenaries and their financial backers in situations of internal peace or civil war. The ab initio determination of the criminality of mercenaries involved in an international armed conflict found solid justification in the right to neutrality, based on the Charter principle that States should refrain from the threat or use of force, in the body of legislation of countries belonging to different legal systems, which prohibited nationals from enlisting in foreign armed forces, and in the doctrine and decisions of the Nürnberg Tribunal, which had established the criterion of direct influence in the commission of international crimes.

76. Added to those general principles were the specific provisions of article 47 of Additional Protocol I to the Geneva Conventions which denied mercenaries the status of combatant or prisoner of war, and, naturally, all the legislative provisions adopted by the General Assembly to afford active protection to the right of peoples under colonial or foreign domination to self-determination and independence. The fact that the defence of that right was accompanied by condemnation of the use of mercenaries against national liberation movements, by the proclamation of the legitimacy of the armed struggle of such movements, and lastly by the recognition that their struggle had the status of international armed conflict definitely confirmed the absolute necessity of establishing the criminality of mercenaries engaged in an international armed conflict. The consistency of positive international law in that area was at stake.

77. The existence of a definition of the term "mercenary", in article 47 of Additional Protocol I to the Geneva Conventions of 1949 had had a rather adverse effect on the work of the Ad Hoc Committee. Many delegations had argued that it would be a legal heresy to have two definitions of the term "mercenary" in

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international law, implying that the definition which the Geneva Diplomatic Conference on Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts had produced in a very specific context should be imposed on all international lawmakers, especially because of the universality of that text and its applicability in all branches of international law. More recently, it had been argued that, since the existing definition referred to, inter alia, the criterion of direct participation in an armed conflict, and not specifically in an international armed conflict, it would ipso facto have the advantage of being applicable both to international and to non-international armed conflicts. Such misleading statements had not been and could not be supported by legal arguments. His delegation wished to reiterate its position on that question.

78. Firstly, for the purposes of the convention, the definition of the term "mercenary" contained in Protocol I could be usefully retained only in reference to the situations covered by that Protocol, namely situations of international armed conflict. Secondly, the law-making process was one of endless resources; two definitions, or more if necessary, of a given phenomenon could coexist in the international legal order. Thirdly, a new definition specifically concerned with "mercenaries" involved in a non-international armed conflict or carrying out reprehensible operations in times of internal peace would be needed in the future convention.

79. His delegation was in favour of the approach adopted by the Ad Hoc Committee in drafting a new definition of the term "mercenary". It did not believe, however, that the answer to the question whether there was a desire for private gain on the part of the mercenary should be based on a comparison between his compensation and that of members of the armed forces of the country of which he was a national. That was a deliberate attempt to increase considerably the burden of proof, which naturally was borne by the State or national liberation movement that was the victim of mercenary activities, and therefore was tantamount to giving excessive guarantees to those guilty of such acts.

80. With regard to the key criterion of the reprehensible nature of the acts, which would be the corollary of the criterion of direct participation in hostilities, the single reference to "overthrowing a government by armed force" failed to cover the whole range of destructive activities in which mercenaries were traditionally engaged. His delegation, like most others which had participated in the Ad Hoc Committee's work, had strongly advocated a concept such as that of "hostile acts" which would cover some activities that were typical mercenary activities and could be designated in terms of criminal offences, including the overthrow of a Government by armed force, direct participation in an armed rebellion, and the destruction of State property and private property. Certain delegations' categorical rejection of the offence of "mercenarism" as a potential corner-stone of the convention was another source of difficulty. The formula being worked out would involve incorporating in the definition of a "mercenary" an element of criminality. If that solution proved satisfactory to delegations, work

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would be sure to progress. If not, the only viable solution would be to resort to the idea of mercenarism, to which most members of the Ad Hoc Committee would certainly not object.

81. For a few members of the Ad Hoc Committee, the main criminal offence was that for which the mercenaries themselves were responsible, the financial backers being relegated to the status of accomplices. The obligations of States already laid down in international law were another source of difficulties. His delegation, while affirming its support for an exhaustive range of positive and negative obligations, also supported the suggestion that the convention should refer, in a general clause, to all the relevant principles and norms of international law concerning the actual behaviour of States and their organs, as well as to the obligations derived from their sovereignty over their territory and their jurisdiction over their nationals. Failure to fulfil such obligations, in addition to failure "to prosecute or extradite", naturally engendered the international responsibility of States. His delegation saw no reason why the future convention could not follow the example of existing instruments of humanitarian law in establishing the elementary obligation of damage reparation.

82. The adoption of preventive measures - another State obligation - could have such a deterrent effect that the need for punitive measures would be obviated. It was essential that the provisions on "preventive measures" should be rigorous in form and exhaustive in content. They should be elaborated on the basis of the existing conventions, the many international texts on the subject and the legislation of many States which provided that a State should use all the means in its power - including, if necessary, armed force - to forestall any internationally wrongful expedition organized from its territory or a territory under its control.

83. A settlement-of-disputes machinery adapted to the requirements of a world-wide campaign against mercenaries naturally had its place in a convention intended to be effective. Such a machinery, based on that which had already received the support of States under conventions already in force, should provide for recourse to the Security Council and the General Assembly, through a reporting system along the lines of the system for the security and safety of diplomatic and consular missions and representatives.

84. The drafting of a convention on the question of mercenaries gave the Sixth Committee the opportunity to play a more influential role in the multilateral treaty-making process. The system of small ad hoc committees would allow it to expedite that process while appreciably reducing the financial implications. The pursuit of consensus and the accompanying vigorous efforts to reconcile positions could be a means of guaranteeing universal acceptance of the results of the Ad Hoc Committee's work, providing they did not lead to acceptance of the lowest common denominator.

The meeting rose at 6.10 p.m.