

**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: THIRTY-EIGHTH SESSION

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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. At its 107th plenary meeting, on 16 December 1982, the General Assembly, on the recommendation of the Sixth Committee, 1/ adopted resolution 37/109, entitled "Drafting of an international convention against the recruitment, use, financing and training of mercenaries", which reads as follows:

"The General Assembly,

"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, as 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, 2/

"Recalling its resolutions, particularly resolutions 2395 (XXIII) of 29 November 1968, 2465 (XXIII) of 20 December 1968, 2548 (XXIV) of 11 December 1969, 2708 (XXV) of 14 December 1970, 3103 (XXVIII) of 12 December 1973 and its resolution 1514 (XV) of 14 December 1960, as well as Security Council resolutions 405 (1977) of 14 April 1977, 419 (1977) of 24 November 1977, 496 (1981) of 15 December 1981 and 507 (1982) of 28 May 1982, in which the United Nations denounced the practice of using mercenaries, in particular against developing countries and national liberation movements,

"Recalling in particular its resolution 36/76 of 4 December 1981, by which it renewed the mandate of the Ad Hoc Committee on the Drafting of an International Convention against the Recruitment, Use, Financing and Training of Mercenaries, composed of thirty-five Member States,

"Having considered the report of the Ad Hoc Committee on its second session, 3/

"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,

"Bearing in mind the pernicious impact that the activities of mercenaries have on international peace and security,

"Considering 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 of the Charter,

"Taking account of the fact that, although the Ad Hoc Committee has made substantial progress, it has not yet fulfilled its mandate,

"Reaffirming the need for the elaboration, at the earliest possible date, of an international convention against the recruitment, use, financing and training of mercenaries,

"1. Takes note of the report of the Ad Hoc Committee on the Drafting of an International Convention against the Recruitment, Use, Financing and

Training of Mercenaries and the progress made, especially during its second session;

"2. Decides that the Ad Hoc Committee shall continue its work, with the goal of drafting, at the earliest possible date, an international convention against the recruitment, use, financing and training of mercenaries;

"3. Requests the Ad Hoc Committee, in the fulfilment of its mandate, to consider the suggestions and proposals of Member States, bearing in mind the views and comments submitted to the Secretary-General and those expressed at the thirty-seventh session of the General Assembly during the debate in the Sixth Committee devoted to the consideration of the report of the Ad Hoc Committee; 4/

"4. Requests the Secretary-General to make available to the Ad Hoc Committee at its next session any up-to-date and relevant documentation on the subject;

"5. Also requests the Secretary-General to provide the Ad Hoc Committee with any assistance and facilities it may require for the performance of its work;

"6. Decides that the Ad Hoc Committee shall hold its third session for four weeks, from 2 to 26 August 1983;

"7. Requests the Ad Hoc Committee to submit its report to the General Assembly at its thirty-eighth session;

"8. Decides to include in the provisional agenda of its thirty-eighth session the item entitled 'Report of the Ad Hoc Committee on the Drafting of an International Convention against the Recruitment, Use, Financing and Training of Mercenaries'."

2. The membership of the Ad Hoc Committee, as appointed by the President of the General Assembly, is as follows:

Algeria	Mongolia
Angola	Nigeria
Bahamas	Portugal
Bangladesh	Seychelles
Barbados	Spain
Benin	Suriname
Bulgaria	Togo*
Canada	Turkey
Democratic Yemen	Ukrainian Soviet Socialist Republic
Ethiopia	Union of Soviet Socialist Republics
France	United Kingdom of Great Britain and Northern Ireland
German Democratic Republic	United States of America
Germany, Federal Republic of	Uruguay
Guyana	Yugoslavia
India	Zaire
Italy	Zambia
Jamaica	
Japan	

* Togo replaced Senegal which was a member in 1982 (see A/37/91).

3. The Ad Hoc Committee held its third session at United Nations Headquarters from 2 to 26 August 1983. 5/

4. The session was opened on behalf of the Secretary-General by Mr. John F. Scott, Director and Deputy to the Under-Secretary-General for Legal Affairs, who represented the Secretary-General at the session.

5. Mr. Valentin A. Romanov, Director of the Codification Division of the Office of Legal Affairs, acted as Secretary of the Ad Hoc Committee. Miss Jacqueline Dauchy, Deputy-Director for Research and Studies (Codification Division, Office of Legal Affairs), acted as Deputy Secretary to the Committee as well as Secretary of Working Group B (see para. 10). Mr. Andronico O. Adede, Senior Legal Officer (Codification Division, Office of Legal Affairs), acted as Assistant Secretary to the Ad Hoc Committee as well as Secretary of Working Group A (see para. 10). Mr. Lucjan Lukasik and Mr. A. Mpazi Sinjela, Legal Officers, and Miss Maritza Struyvenberg, Assistant Legal Officer (Codification Division, Office of Legal Affairs), acted as Assistant Secretaries to the Committee and its Working Groups.

6. At its 21st and 22nd meetings, on 2 and 3 August, the Ad Hoc Committee elected the following officers:

<u>Chairman:</u>	Mr. Mohamed Sahnoun (Algeria)
<u>Vice-Chairmen:</u>	Mr. Luigi Ferrari Bravo (Italy) Mr. E. Besley Maycock (Barbados) Mr. Boris I. Tarasyuk (Ukrainian Soviet Socialist Republic)
<u>Rapporteur:</u>	Mr. Moritaka Hayashi (Japan)

7. At its 21st meeting, on 2 August, the Ad Hoc Committee adopted the following agenda (A/AC.207/L.13):

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Organization of work.
5. Drafting of an international convention against the recruitment, use, financing and training of mercenaries pursuant to paragraph 3 of resolution 35/48, paragraph 2 of resolution 36/76 and paragraph 2 of resolution 37/109.

8. At the same meeting and at its 23rd meeting, held on 26 August, the Ad Hoc Committee, after having considered requests for observer status received from the Permanent Missions of Cuba, Egypt, Mozambique, Nicaragua, and Viet Nam, decided to grant those requests.

9. In addition to the documents submitted at its first and second sessions, as listed in paragraph 13 of the Ad Hoc Committee's report on its second session in 1982 (A/37/43 and Corr.1), 3/ the Ad Hoc Committee had before it:

(a) Its report to the thirty-seventh session of the General Assembly (A/37/43 and Corr.1), to which were annexed the text of a draft convention submitted by Nigeria, as well as a revised version of several of the articles of that draft;

(b) A note by the Secretariat (A/AC.207/L.14 and Add.1);

(c) The text of a draft convention submitted by France (A/AC.207/L.15 and Corr.1) (see the annex to the present report);

(d) A communication from the Permanent Representative of Angola (A/AC.207/L.16).

10. At its 21st meeting, the Committee agreed to reconstitute its two working groups, Working Group A, which would deal with issues of definition and with the question of the scope of the convention, and Working Group B, which would deal with all other issues relevant to the future convention, it being understood that Mr. E. Besley Maycock (Barbados), Vice-Chairman of the Ad Hoc Committee, would act as Chairman-Rapporteur of Working Group A, and Mr. Luigi Ferrari Bravo (Italy), Vice-Chairman of the Ad Hoc Committee, as Chairman-Rapporteur of Working Group B.

11. Also at the 21st meeting, the representative of France introduced the draft convention submitted by his delegation (A/AC.207/L.15 and Corr.1). Statements of a general nature were made by the representatives of the Union of Soviet Socialist Republics and the United States of America at the same meeting, as well as by the representative of the Bahamas at the 22nd meeting.

12. Taking into account the fact that the Ad Hoc Committee has not completed the mandate entrusted to it under paragraph 2 of General Assembly resolution 37/109, the Committee recommends to the Assembly that it should invite the Committee to continue its work in 1984 with the goal of drafting, at the earliest possible date, an international convention against the recruitment, use, financing and training of mercenaries.

13. At its 23rd meeting, on 26 August, the Ad Hoc Committee approved its report and decided to include the reports of Working Groups A and B in its report to the General Assembly. These reports are accordingly to be found in sections II and III, respectively, of the present report.

II. REPORT OF WORKING GROUP A

14. To continue its work towards the fulfilment of its mandate of dealing with issues of definition and with the question of the scope of the convention, Working Group A held its 13th to 31st meetings, between 3 and 25 August 1983, under the chairmanship of Mr. E. Besley Maycock (Barbados).
15. At the beginning of its work during the present session of the Ad Hoc Committee, the Working Group had before it the report of that Committee to the General Assembly at its thirty-seventh session 3/ and the relevant documents annexed to that report.
16. It also had before it the relevant articles of the proposal for a complete draft convention submitted by the delegation of France, contained in document A/AC.207/L.15 and Corr.1 (see annex to the present report).
17. Certain points continued to take a centre stage, constituting broad areas of possible agreements and also areas with respect to which more precise ideas were yet to emerge concerning the question of definition of the term "mercenary".
18. It was widely held that the Convention should cover both the situations of armed conflict and peacetime situations and that the Working Group should indeed focus its attention on the problem of the definition in such situations and also attempt to specify the offences or activities to be prohibited under the Convention.
19. It was generally agreed that the definition of the term "mercenary", contained in article 47, paragraph 2, of the additional Protocol I 6/ to the Geneva Conventions of 12 August 1949, relating to the protection of victims of international armed conflicts should be used for situations envisaged by that article, if included in the convention being drafted.
20. Some delegations were, however, of the view that the individuals operating in situations outside armed conflict should be regarded as criminals under the Conventions, but not denominated mercenaries. According to those delegations, the term "mercenary" would only be used only in those situations envisaged in article 47, paragraph 2, of the Additional Protocol I to the Geneva Conventions of 1949.
21. That approach to the definition of the term "mercenary" mentioned above, in the view of several other delegations, was too limited in scope for the purposes of the convention under consideration. They were of the view that the individuals operating in situations outside armed conflict must also be regarded as "mercenaries" and that an appropriate, separate definition should be formulated. The problem remained concerning the link between that separate definition and the one contained in the additional Protocol I.
22. There was also the view that account should be taken of the distinction between situations of "international armed conflict" and situations of "non-international armed conflict" in approaching the problem of the definition of the term "mercenary". With respect to that issue, several delegations were of the view that the definitions contained in article 47, paragraph 2, of the additional Protocol I dealt only with "international armed conflict", while others were of the view that the definition in question, as can be seen from its text, covered both situations.

23. In addition to the other written proposals already before the Working Group, the delegation of the Bahamas introduced a proposal contained in document A/AC.207/1983/CRP.1, which reads as follows:

"Add at the end of section I of part A of the text contained in paragraph 94 of the report of the Ad Hoc Committee to the General Assembly at its thirty-seventh session (A/37/43 and Corr.1), 3/ the following new paragraph: (e) Armed violence to bring about the secession of part or parts of a State's territory."

24. Taking into account the trend of the discussions, the Working Group, at its 16th meeting, decided to establish a small open-ended drafting group to prepare draft articles on the definition of the term "mercenary" and the activities to be prohibited under the convention for the consideration of the Working Group as a whole.

25. The Drafting Group held six meetings between 5 and 10 August.

26. The following conference room papers reproduced in paragraphs 27 to 30 and 49 below were examined by the Working Group.

27. Conference room paper A/AC.207/1983/CRP.2, which reads as follows:

"Article ___" *

"In the absence of international armed conflict, a criminal offence is committed under this Convention by any [mercenary as defined above] [person] who:

"(a) Is especially recruited to carry out [hostile acts against any State] [concerted action aimed at overthrowing a Government] and/or does, in fact, take a direct part in such action; or

(b) [Engages in a concerted action] directly participates in armed violence in order to violate the sovereignty, political independence, territorial integrity, national unity and security of any State, in violation of the Charter of the United Nations.

** To be completed by taking into account, inter alia, article 3, para. 1 (c)-(e) of A/AC.207/L.15 and Corr.1 and article 1, paras. (d)-(g), of annex II in document A/37/43 and Corr.1, and the definition to be agreed on the term "mercenary" outside armed conflict."

28. Conference room paper A/AC.207/1983/CRP.3/Rev.1, which reads as follows:

"Article ___"

"It shall be a criminal offence under this Convention to:

"(a) [Knowingly] recruit, use, train, finance, or promote in any manner [a person or group of persons] [a mercenary] for the purpose of committing an offence specified in article ...;

"(b) Procure arms, instruments or any other means [knowing that they are intended to be] used in facilitating the commission of any such offence."

"Article ___"*

"It shall be a criminal offence under this Convention for any person to:

"(a) Attempt to commit any of the offences specified in articles ...;

"(b) Participate as an accomplice of anyone who commits or attempts to commit any such offence.

** The view was expressed that it might not be necessary for the Convention itself to cover the offence described in this article."

29. Conference room paper A/AC.207/1983/CRP.4, which reads as follows:

"Article ___"

"2. In relation to situations other than that of armed conflict, "a mercenary" means a person who, motivated essentially by the desire for private gain, is:

"(a) Especially recruited locally or abroad for the purpose of carrying out a hostile act against any State;

"(b) Not a national of a State against which the hostile act is carried out;

"(c) Not sent by a State on official duty as a member of its armed forces.

"3. For the purpose of the definition under this article, "hostile act" means, inter alia, action to:

"(a) Overthrow the government of any State;

"(b) Suppress the struggle of a people for self-determination;

"(c) Commit any of the crimes specified in article ___ of the present Convention."

30. After an examination of conference room papers A/AC.207/1983/CRP.2-4, during which account was taken of proposals made by delegations, as well as other texts before the Committee, the Working Group examined, in the same manner, conference room paper A/AC.207/1983/CRP.5, which reads as follows:

"Article 1

"In relation to [international] armed conflict, a "mercenary", under the present Convention, means a person who:

"(a) Is especially 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, and

"(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.

"Article 2

"In relation to situations other than that of [international] armed conflict, a "mercenary", under the present Convention, means a person who:

"(a) Is especially recruited for the purpose of carrying out a hostile act against any State or a people struggling for self-determination;

"(b) Is motivated essentially by the desire for gain to do so [to carry out such hostile acts];

"(c) [Is not a national [or a resident] of a State against which such hostile acts are carried out];

"(d) [Has not been sent by a State on official duty [or] [as] a member of its armed forces.]

"Article 3

"For the purpose of the definition under article 2, "hostile act" means armed violence to:

"(a) Carry out concerted action aimed at overthrowing a government by armed force;

"(b) Engage in a concerted action [or] [and] directly participate in armed violence in order to violate the sovereignty, political independence, territorial integrity, national unity and security of any State, in violation of the Charter of the United Nations;

"(c) Suppress the struggle of a people for self-determination by armed force;

"(d) Destroy State property and private property;

"(e) Commit aggravated assault or serious acts of violence, rape, against any person;

"(f) Incite civilian population to rebellion, secession or a civil strife;

"(g) Commit murder, torture in any form, whether physical or mental, acts of mutilation, hostage taking, or any other violation of the security of the civil aviation;

"(h) Engage in any action of economic sabotage against any State.

"Article 4

"The definitions of the term "mercenary" in articles 1 and 2 are solely for the purposes of the present Convention and are without prejudice to article 47, paragraph 2, of the additional Protocol I 6/ to the Geneva Conventions of 1949.

"Article 5

"It shall be [an offence] prohibited under the present Convention for a mercenary, as defined in articles 1 and 2, to commit any of the acts specified under article 3.

"Article 6

"It shall be prohibited under the present Convention for any person to:

"(a) [Knowingly] recruit, use, train, finance, or promote in any manner [a person or group of persons] [a mercenary] for the purpose of committing an offence prohibited under article 5;

"(b) Procure arms, instruments or any other means [knowing that they are intended to be] used in facilitating the commission of any such offence;

"(c) Attempt to commit any act prohibited under the present Convention;

"(d) Participate as an accomplice of anyone who commits or attempts to commit any such acts."

31. Several questions were raised and a number of suggestions made during the discussion by the Working Group of the text referred to in paragraph 30 above. The main trends indicated by the discussions were in the form of specific proposals for improving both the content of each of the articles set out in A/AC.207/1983/CRP.5 above and the possible structure of a text for the part of the convention being worked on by the Working Group.

32. The view was expressed that whatever definition of the term was arrived at, it must be applicable to a mercenary, regardless of which side he is fighting on.

33. With respect to article 1, the view was widely held that its chapeau should be redrafted to read as follows: "In relation to the situation to which article 47, paragraph 2, of the additional Protocol I to the Geneva Conventions of 1949 applies, a 'mercenary' is any person who:".

34. Several delegations expressed the view that the expression "international" placed between the square brackets in the chapeau of article 1 was essential, taking into account the scope of Protocol I, and that the brackets should be deleted. Some delegations, however, expressed the opposite view and emphasized that the text of article 47 of the additional Protocol I, which it seeks to reproduce, does not use the word "international". According to them, that expression was to be deleted.

35. Articles 2 and 3 of document A/AC.207/1983/CRP.5 were taken together for discussion by the Working Group and several comments were made on both the approach to the problem of definition they reflected, as well as their contents.

36. Consequent upon the suggestion for redrafting the chapeau of article 1 of A/AC.207/1983/CRP.5 along the lines indicated in paragraph 33 above, it was widely held that the chapeau of article 2 of that paper should also be tentatively reformulated as follows: "In situations other than those covered in article 1, a 'mercenary' is any person who:".

37. Some delegations, while agreeing with the first part of the above formulation, found the approach reflected in articles 2 and 3 of A/AC.207/1983/CRP.5 unacceptable. Thus, consistent with the view already outlined in paragraph 20 above, they maintained that the approach followed in articles 1 to 6 of document A/AC.207/L.15 and Corr.1, submitted by the delegation of France was the appropriate one.

38. Certain delegations also pointed out that some of the clauses contained in articles 2 and 3 were too vague to be included in a convention aiming at the establishment of criminal offences to be transformed into national penal law. They suggested that such clauses be deleted or, if other delegations wished to maintain them, that they be placed between square brackets. Objections were also made to the clause referring to the struggle of a people for self-determination as used in article 2 (a) and article 3 (c) of A/AC.207/1983/CRP.5. It was suggested that instead of those clauses, appropriate cross-reference should be made to the relevant articles of the additional Protocols to the 1949 Geneva Conventions. Also to be placed between square brackets because of vagueness, according to that view, were the full texts of subparagraphs (b) and (h) of article 3.

39. It was also observed that the element of direct participation in the activities specified in the definition under article 2 should be added and that to make it absolutely clear that the elements in the definition were cumulative, the word "and" should be introduced at the end of the penultimate paragraph. The point was also made that the term "hostile act" used in article 2, and defined in article 3 was inappropriate. A suggestion was accordingly made to replace it by the expression "concerted action", which would also be defined.

40. The delegations which had found the approach of articles 2 and 3 of A/AC.207/1983/CRP.5 unacceptable further pointed out that some of the acts listed in article 3 did not belong even to the category of defining a "hostile act" against a State. Several delegations observed that some of the acts such as those listed in subparagraphs (d), (e) and (g) of article 3, could be more meaningful if removed and placed under article 5 of that paper.

41. The view was expressed by several delegations that the approach reflected in articles 2 and 3 of document A/AC.207/1983/CRP.5 was a valid one which, moreover, reflected the views of many who had spoken on A/AC.207/1983/CRP.1 to 4. To those delegations, articles 2 and 3 of A/AC.207/1983/CRP.5 reflected the appropriate approach because it regarded an individual operating in situations outside armed conflict also as "mercenary" instead of treating such an individual simply as a "criminal", as was clearly done in article 3 of document A/AC.207/L.15 and Corr.1. They pointed out also that one need not be a mercenary in order to be prosecuted as a criminal for committing any of the acts listed under article 2 of the above-mentioned document. It was their view that the definitions of "mercenary" in a peacetime situation should be based on the actual activities carried out in several developing countries and not upon a rigorous adherence simply to the definition contained in article 47, paragraph 2, of the additional Protocol I 6/ to the 1949 Geneva Conventions which was, after all, a compromise formulated for a specified set of circumstances.

42. While thus welcoming the approach reflected in articles 2 and 3 of A/AC.207/1983/CRP.5 in broadening the definition of a "mercenary" for the purposes of the new convention, those delegations made several comments and suggestions for improving the contents of the two articles. They suggested that subparagraphs (a), (b), (c), (f) and (h) of article 3 should constitute paragraph 2 of article 2 in order to define what "hostile acts" meant as used in paragraph 1 of the article itself. They also suggested that subparagraph (f) of article 3 should be redrafted so as to reflect more precisely the role likely to be played by a mercenary in the acts specified in the article. In thus restructuring article 3 of that paper, the same delegations suggested that in subparagraph (d), the word "and" should be changed to "or" and that the subparagraph, as amended, together with subparagraphs (e) and (g) of the same article, should be used under article 5.

43. Commenting on the specific provisions of article 2 of A/AC.207/1983/CRP.5, those delegations observed that it would be counterproductive to attempt to establish, in subparagraph (b) of the article, a criterion or a standard for the comparison of material compensation promised to a mercenary in a peacetime situation. It was their view that, in any event, the diversity of the activities envisaged by a mercenary was such as to make it almost impossible to relate them all to any particular standard. With respect to subparagraph (c) of article 2, those delegations found it irrelevant and stated that it should be deleted. A suggestion was also made that, if it were retained, the word "necessarily" should be inserted after the word "not" in the subparagraph. As to subparagraph (d) of article 2, those delegations felt that the criteria provided therein were important and that the subparagraph must reflect the realities of the modern-day situations by making provisions allowing for assignments of officials other than military personnel from one State to another under special agreements.

44. The Working Group agreed to postpone consideration of article 4 of A/AC.207/1983/CRP.5 in light of the proposal for a new formulation, generally applicable to the convention as a whole, suggested by the delegation of Italy in A/AC.207/1983/CRP.7, which reads as follows:

"Nothing in the present Convention shall be interpreted as altering in any way or affecting the application of existing international instruments relating to the law of warfare or to humanitarian law, in particular the Geneva Conventions of 1949 and the Protocols of 10 June 1977 annexed thereto."

45. With respect to article 5 contained in document A/AC.207/1983/CRP.5, there was general agreement that its approach was acceptable, but some delegations were reluctant to comment on its substance until such time as the Working Group shall be in a position to formulate agreed versions of articles 1 and 2.

46. As to article 6 of that paper, there was, on the one hand, the view that its subparagraphs (a) and (b) should not be treated as separate activities constituting major offences but that they should be treated as specific examples under subparagraph (d) dealing with accomplices. Some of those supporting that view were, however, prepared to make an exception to "recruitment" and to regard it as a separate offence, as is also mentioned in paragraph 2 of article 3 in document A/AC.207/L.15 and Corr.1. On the other hand, there was the view that article 6 of A/AC.207/1983/CRP.5 was acceptable as drafted and that it could indeed be expanded by introducing an additional offence against enlisting as a mercenary. Those supporting that article, as contained in A/AC.207/1983/CRP.5, further pointed out that it did not, in fact, distinguish between major and minor offences. Thus, it should be taken as leaving States the freedom of treating the offences specified under the article as they deem appropriate under their legal systems.

47. Taking into account the articles which specify the activities to be prohibited under the convention, the view was expressed that a provision should be included in the convention stipulating that the commission of any of the offences therein mentioned shall constitute a crime against the peace and security of a State, as was suggested in article 2, paragraph 3, of the revised text of the working paper submitted by the delegation of Nigeria and annexed to the report of the Ad Hoc Committee. 7/ Certain delegations were also of the view that an element of knowledge or intention should be included in the definition of the offences as contained in article 6, subparagraphs (a) and (b).

48. Having concluded its consideration of the proposals which addressed the question of the definition of the term "mercenary" and those attempting to list the acts to be prohibited, the Working Group then took up the question of "obligations of a State" under the convention.

49. For its discussion on the issue, the Working Group had before it the proposals presented by delegations as well as document A/AC.207/1983/CRP.6, which reads as follows:

"Article 7

"States parties to the present Convention undertake, in accordance with international law and national law:

"(a) To refrain from recruiting, instructing, financing or using the persons referred to in articles 1 and 2 of the Convention;

"(b) To adopt reasonable measures for preventing the commission of any of the acts prohibited under articles 5 and 6 of the Convention;

"(c) To enact appropriate national legislations:

"(i) Making it an offence for anyone to carry out any of the acts prohibited under articles 5 and 6 of the Convention;

"(ii) Making such offence punishable by appropriate penalties which take into account the gravity and nature of each particular offence;

"(d) Not to tolerate or permit the use of their territories for the commission of any of the acts prohibited under the present Convention.

"Article 8

"Failure of a State party to the present Convention to fulfil the obligations provided under article 7 shall constitute an international wrongful act engendering international responsibility for the State."

50. Most of the delegations commenting on document A/AC.207/1983/CRP.6 considered together articles 7 and 8 but made more detailed comments on article 7 and only brief general remarks on article 8 aimed at assessing its place in the future convention, if any.

51. It became clear that the Working Group would not be in a position, at the present session, to address fully the issues raised by article 8. While some delegations remarked, in a preliminary way, that they found the substance of the article acceptable for the future convention, others were categorical in stating that the provision envisaged under article 8 of document A/AC.207/1983/CRP.6 would constitute an unwelcome and unacceptable precedent if included in the future convention. Having regard to those preliminary remarks on the article, it was agreed that the Working Group should continue focusing only on article 7 of A/AC.207/1983/CRP.6.

52. As for article 7, a number of suggestions were made for its improvement. It was generally recognized that the article addressed two types of obligations for a State; namely, obligations addressed to the activities of the State itself, and obligations to prevent or prohibit the commission of certain acts within the territories under its jurisdiction. In that connection, there was the suggestion that subparagraphs (a) and (d) of the article could be made into a separate main paragraph, thus leaving subparagraphs (b) and (c) also to constitute another main paragraph of the article. With respect to subparagraph (a), several delegations expressed the view that the word "refrain" was not strong enough. Some delegations suggested that it could be replaced by the word "prohibit". Another suggestion was to treat the beginning of that paragraph in the same way as subparagraph (d). As to subparagraph (d), a suggestion was made that, after the word "territories", the phrase "or territories under their jurisdiction", should be added.

53. With respect to the chapeau of the article, it was generally pointed out that the clause "in accordance with international law and national law" might be out of place there since it did not apply equally to all the subparagraphs. Some suggested that the phrase would be more appropriate in relation to the provisions of subparagraph (b) and would conform to its use, for example, in article 7 of document A/AC.207/L.15 and Corr.1. Other delegations suggested that the phrase had a certain relationship also to the provisions of subparagraph (d).

54. With respect to subparagraph (b), several comments were made on the phrase "reasonable measures". Some delegations wanted to replace the word "reasonable" by the word "necessary", others, however, opposed that suggestion and expressed preference for retaining the word "reasonable". A suggestion was also made that the word "appropriate" might be used as a compromise. There was also the view that there was no need to qualify the word "measures" in the article. It was also pointed out that account should be taken of the solution adopted on the article concerning preventive measures under consideration by Working Group B. Another suggestion was made with respect to the article calling for the addition of the phrase "and suppressing" after the word "preventing".

55. With respect to subparagraph (c), no objection was raised to its subparagraph (ii). The view was expressed, however, that its subparagraph (i) should be redrafted so as not to prejudice the issue of jurisdiction or the consideration of overlapping issues by Working Group B. A further view was that it might be possible to do without subparagraph (i) altogether, since it had no counterparts in other conventions. A suggestion was made to add to subparagraph (c) (i) the following formulation: "and to take all necessary measures to prosecute and to punish all persons who have committed such offences or to extradite them". There were also several suggestions made concerning additional formulations requiring States to enact appropriate legislation to implement the provision specified in subparagraphs (a), (b) and (d) of the article and to prohibit in their territories illegal activities of persons, groups and organizations that encourage, instigate, organize or commit any of the offences specified under the convention. The following other suggestions were also made for inclusion in the article: to prohibit activities of groups and organizations whose aim it is to commit any of the offences listed in articles, and to prohibit any dissemination of information and propaganda that promotes the recruitment and use of mercenaries.

56. On the basis of the discussions, the Chairman of the Working Group introduced the following draft articles as a basis for future work:

"Article 1

"[In relation to the situation to which article 47, paragraph 2, of Protocol I additional to the Geneva Conventions of 1949 applies] 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; and

"(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.

"Article 2

"1. [In relation to situations other than those covered in Article 1] a "mercenary" is also any person who:

"(a) Is specially recruited for the purpose of carrying out [a hostile act] against any State or [the self-determination of a people];*

"(b) [Does in fact take direct part in carrying out or attempting to carry out such [hostile acts]];

"(c) Is motivated essentially by the desire for [private/personal] gain to do so [to carry out such hostile acts];

"(d) [Is not [necessarily] a national [or a resident] of a State against which such [hostile acts] are carried out]; and

"(e) [Has not been sent by a State on official duty [or] [as] a member of its armed forces].

"2. For the purpose of the definition under this article, [hostile act] means:

"(a) [Concerted action or direct participation to violate the sovereignty, political independence, territorial integrity, national unity and security of any State, in violation of the Charter of the United Nations];

"(b) Concerted action aimed at overthrowing a Government by armed force;

"(c) [Suppression of the struggle of a people for self-determination by armed force];*

"(d) Bringing about rebellion, secession or civil strife in any State; or

"(e) [Concerted action of economic sabotage against any State].

"Article 3

"1. It shall be prohibited for a mercenary, as defined in articles 1 and 2, paragraph 1, to commit any of the acts specified under article 2, paragraph 2.

"2. It shall also be prohibited to:

* It was agreed that efforts should be made to cross-reference these terms with relevant provisions of the additional Protocols to the Geneva Conventions of 1949.

"(a) Enlist as a mercenary;

"(b) [Knowingly] recruit, use, train, finance, or promote in any manner [a person or group of persons] [a mercenary] for the purpose of committing an offence prohibited under paragraph 1 of this article;

"(c) Procure arms, instruments or any other means [knowing that they are intended to be] used in facilitating the commission of any such offence;

"(d) Attempt to commit any act prohibited under the present Convention;

"(e) Participate as an accomplice of anyone who commits or attempts to commit any such act.

"Article 4

"It shall also be prohibited for any mercenary to:

"(a) Destroy State property or private property;

"(b) Commit aggravated assault or serious acts of violence, rape, against any person;

"(c) Commit murder, torture in any form, whether physical or mental, acts of mutilation [, hostage taking, or the security of civil aviation];

"Article 5

"[The Commission of any of the acts prohibited under articles 3 and 4 shall be deemed a crime against the peace and security of a State.]

"Article 6**

"1. States parties to the present Convention shall undertake:

"(a) Not to recruit, use, finance or train mercenaries;

"(b) Not to tolerate or permit the use of territories under their jurisdiction for the commission of any of the acts prohibited under this Convention.

"2. States parties shall also undertake:

** The underlined portions of the text of article 6 represent those suggestions which were made during the last day of the substantive work of the Working Group and with respect to which there was not sufficient time for delegations to react except in a very preliminary way.

"(a) To adopt appropriate measures for preventing [and suppressing] the commission of any of the acts prohibited under the present Convention in accordance with international law and national law [and to take all necessary measures to prosecute and punish all persons who have committed such offences or to extradite them];

"(b) To enact appropriate national legislation:

"(i) [Implementing the provisions specified in subparagraphs 1 (a), 1 (b) and 2 (a) of this article];

"(ii) [Prohibiting in their illegal activities of persons, groups and organizations that encourage, instigate, organize or commit any of the offences specified under articles ... of the present Convention];

"(iii) Making it an offence [in any territory under their jurisdiction] to carry out any of the acts prohibited under articles ... of the present Convention;

"(iv) Making such offence punishable by appropriate penalties which take into account the gravity and nature of each particular offence;

"(c) [To prohibit activities of groups and organizations whose aim it is to commit any of the offences listed in articles ... of the present Convention];

"(d) [To prohibit any dissemination of information and propaganda that promotes the recruitment and use of mercenaries.]"

III. REPORT OF WORKING GROUP B

57. At its 21st meeting, on 2 August 1983, the Ad Hoc Committee decided to reconstitute Working Group B with the mandate to deal with all questions relevant to the proposed convention except those relating to definitions and to the scope of the convention, which were, as in 1982, assigned to Working Group A. Working Group B held six meetings between 15 and 23 August 1983 under the Chairmanship of Mr. Luigi Ferrari Bravo (Italy), Vice-Chairman of the Ad Hoc Committee.

58. The Working Group had before it the draft convention submitted by Nigeria at the 1981 session of the Ad Hoc Committee and subsequently revised, 7/ and a draft convention submitted by France at the current session (A/AC.207/L.15 and Corr.1) (see annex to the present report).

59. While noting that articles A to E which it had tentatively worked out at the previous session contained bracketed language and therefore called for a second reading, the more so as there were, in the draft convention submitted by France, parallel provisions in the light of which the five articles in question would have to be reviewed, the Working Group decided to start its work from where it had left off in 1982, namely, with consideration of a provision on preventive measures (article F) on which the debate held in 1982 had remained inconclusive. 8/ It further decided that after disposing of the provision in question, it would take up the issues of damage reparation, status of mercenaries and settlement of disputes, it being understood that the questions of jurisdiction and extradition would be examined at a later stage in view of their close links with matters being dealt with in Working Group A.

A. Preventive measures

60. In connection with this question the Working Group had before it article 8 of the draft submitted by Nigeria, reading as follows:

"Each State Party shall take all necessary measures to prevent the departure from its territory of any individual, group or association or body corporate, or representative of a State reasonably believed to be involved in any of the activities mentioned in article 2 of this Convention, including denial of transit and other facilities to them."

and article 7 of the draft convention submitted by France contained in document A/AC.207/L.15 and Corr.1 (see annex below), reading as follows:

"The States Parties undertake, in accordance with international and national law, to make every effort to adopt reasonable measures with a view to preventing the offences set forth in articles 2 to 4 of this Convention."

In connection with the first of the above-mentioned texts, the sponsoring delegation recalled that it was prepared to eliminate the references to "representative of a State" and "body corporate".

61. Some delegations stressed that the concept of prevention was an essential one in an instrument directed against certain mercenary activities, whether on the part of individuals or of networks. In their opinion, the fact that Working Group A was dealing with the problem of the obligations of States under the convention could

not be a bar to Working Group B considering the whole gamut of prevention-oriented obligations and means which the future instrument should cover if it were to be effective. Emphasis was placed, in that connection on the territorial and nationality links related to the prerogatives of States in relation to their nationals and to the persons residing on their territory. Reference was also made to the 1928 Havana Convention on Maritime Neutrality.

62. Other delegations shared the view that prevention was an essential element of the future convention. In their opinion, any State which ratified the future convention should ipso facto undertake the obligation to prohibit the activities referred to in the mandate of the Ad Hoc Committee and, therefore, to take the legislative, administrative and practical steps required to prevent the recruitment, use, financing and training of mercenaries. That, they observed, did not mean that the convention should not provide for the obligation of States to take concrete steps of the type envisaged in article 8 of the draft submitted by Nigeria, but that that obligation could only be meaningful after the political, administrative and legal framework required for the prevention of mercenary activities had been established in all States.

63. Still other delegations supported the approach reflected in article 7 of the draft submitted by France, even though some of them regretted that that text did not include the territorial element which was mentioned in a number of other conventions of the same type. They stressed that trying to deal, within the framework of the problem under consideration, with the question of prevention on too broad a front would lead the Working Group to trespass on the grounds of Working Group A which was tackling the question of the obligations of States under the convention. However, certain delegations were of the opinion that the obligation of States to enact legislation making certain acts punishable fell under article 6 of the draft submitted by France which was being considered in Working Group A. Any possibility of overlap disappeared if one concentrated, in the article under discussion, on the taking by States of concrete steps, such as preventing the departure from their territories of individuals or groups believed to have committed acts of the type forbidden by the Convention.

64. At the request of one delegation, the Chairman submitted to the consideration of the Working Group the text of article F which he had prepared at the previous session in the light of the discussion, but which had not been discussed for lack of time. That text reads as follows:

"Contracting States shall, in accordance with international and national law, take all practicable measures for the purpose of preventing the offences/crimes mentioned in article (X) of this Convention. Such measures shall include prevention of the departure from, and forbidding of transit through, the territory of the State concerned of any individual or group reasonably believed to have committed any of the above-mentioned offences/crimes. [It was understood that the question of the inclusion of a reference to 'body corporates' will be decided upon at the later stage.]"

65. Some delegations expressed support for that text. Questions were, however, raised as to the relationship between the first and second sentences. In particular, it was pointed out that there was a contradiction between the first sentence, which aimed at preventing the commission of certain acts, and the second sentence, which envisaged a situation in which those acts had already been committed. In that connection, the remark was made that the draft submitted by

Nigeria was more satisfactory in that it did not relate to the actual commission of the crimes but to involvement in certain types of activities. It was added that the situation where a criminal act appeared to have been committed should be dealt with in article A and that the article under consideration should focus on the situation where a criminal act was about to be committed. Clarification was however requested whether the intention behind the draft submitted by Nigeria was to prevent the transit of the persons in question through the territory of third States and, if so, whether it was by preventing their departure from that territory or by denying them entry in the first place. In answer to this query, it was stated that the preventive measures envisaged in article 8 concerned prevention before a criminal act was committed and that if a State in which the mercenary had committed or attempted to commit a crime was reasonably satisfied that a crime had been or was about to be perpetrated, the offender should be prevented from leaving the territory under that State's jurisdiction. It was added that denial of transit facilities was the responsibility of a third State and was not intended for lawful passengers.

66. Other delegations expressed the view that that approach raised complex issues related to respect for human rights and that it would be preferable to cover in article A the type of measures envisaged in the second sentence and to limit article F to the first sentence which, it was noted, was very similar to article 10, paragraph 1, of the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation 9/ and to article 7 of the draft submitted by France.

67. Disagreement was expressed with that approach which, it was remarked, was that reflected in article 7 of the French draft. The view was expressed that the text should follow the approach of article 4 of the International Convention against the Taking of Hostages. 10/ In that connection, the suggestion was made that article F should include the language of both subparagraphs (a) and (b) of the said article 4 or, as an alternative solution, merely the language of subparagraph (b), provided it was understood that the content of subparagraph (a) would be included in article 6 of the draft submitted by France.

68. Specific comments on the first sentence included the remark that the phrase "in accordance with international and national law" weakened the text and the observation that the phrase "all practicable measures" was also too weak and should be replaced by the Nigerian formulation, i.e. "all necessary measures". Other delegations were of a different view.

69. Further to the discussion summarized above, the Chairman proposed the following text:

"Article F

"[In accordance with international and national law], States parties shall co-operate in the prevention of the offences/crimes set forth in articles _____, particularly by:

"(a) Taking all practicable measures to prevent preparations in their respective territories for the commission of those offences/crimes within or outside their territories, [including, as appropriate, prevention of the departure from, forbidding of transit through, and use of facilities in their

territories by any individual or group of individuals that encourage, instigate, organize or engage in the perpetration of such offences/crimes;]

"(b) Exchanging information and co-ordinating the taking of administrative and other measures, as appropriate, to prevent the commission of those offences/crimes."

70. The debate on that text revealed the same difference of approach as that reflected in paragraphs 61 to 63 above. Some delegations supported that text and felt that it offered a correct approach to the concept of prevention and constituted a good basis for future work. In order to reinforce the text, it was suggested to divide subparagraph (a) into two separate subparagraphs and to replace the concept of "preparations" by that of "perpetration".

71. Specific comments on the text included the suggestion to replace the word "practicable" by alternatives such as "necessary" and "reasonable" and the suggestion to include, after the word "territories", the words "and other territories under their control".

72. Other delegations expressed serious doubts about that text and reiterated their support for article 7 of the draft submitted by France. They stressed that the proposed approach would result in enlarging ad infinitum the range of acts punishable under the convention; they favoured a more general approach, including the elimination of some of the ideas contained in the "chapeau" and in subparagraphs (a) and (b) of article 4 of the International Convention against the Taking of Hostages. 10/

B. Damage reparation

73. Article 15 of the revised draft submitted by Nigeria 7/ reads as follows:

"Action for damages reparation

"1. A State Party which suffers damage, or whose natural or juridical person suffers damage, may present to another State Party which refuses to extradite or prosecute in accordance with provisions of this Convention a claim for damages or reparation as the case may be against that other State Party.

"2. The claim for damages or reparation may be presented to other States Parties that have refused to extradite or prosecute jointly or severally.

"3. However, a claim for damages or reparation shall be presented through appropriate diplomatic channels or to any competent international organization or tribunal."

74. Some delegations endorsed the general concept underlying article 15 of the draft submitted by Nigeria. It was pointed out that the cost of mercenary activities to the victim States often ran very high and that the future convention would be incomplete if it did not provide for the reparation of the damage caused by the activities it purported to prohibit. The remark was also made that the article was perfectly consistent with international law and with the well-established principle that breach of an international obligation entailed international responsibility. Reference was made in that connection to paragraph 2

of Security Council resolution 527 (1982), whereby 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 this aggressive act", as well as to the outcome of numerous arbitration and judicial proceedings. While recognizing that some of the instruments considered as relevant to the work of the Ad Hoc Committee did not contain provisions parallel to article 15 of the draft submitted by Nigeria, several delegations stressed that under the seventh preambular paragraph of General Assembly resolution 37/109, the Committee was expected to contribute to the progressive development and codification of international law. Furthermore, it was added, additional Protocol I to the Geneva Conventions of 1949 provided in its article 91 6/ for the liability of any party which violated the provisions of the Conventions or the additional Protocols thereto. Among the supporters of the inclusion of the proposed provision, some noted that it was first and foremost failure to comply with the obligation to prevent the activities of mercenaries which should entail international responsibility; preference was accordingly expressed for the original version of article 15 of the draft submitted by Nigeria, which contained a provision to that effect in its paragraph 2. Alternatively, it was suggested to delete the words "which refuses to extradite or prosecute in accordance with the provisions of this Convention". It was, however, recalled that the concept embodied in paragraph 2 of the original text had been eliminated from article 15 in a spirit of compromise on account of the reluctance of some States to accept responsibility for the activities of individuals and that criticisms of the revised text based on the absence of a provision on the responsibility of States for the violation of their primary obligations under the convention were unacceptable. In any case, it was added, the text as drafted at present did not seek to absolve States which violated those primary obligations but merely placed emphasis on the specific obligation to extradite or prosecute provided for in the convention.

75. Other delegations stressed that article 15 of the draft submitted by Nigeria had no equivalent in other instruments considered as relevant to the work of the Ad Hoc Committee. They stressed that, aside from the fact that that provision seemed based on the rather unfortunate premise that States parties would not abide by their obligations under the convention, 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 noted that since nobody denied that the breach of an international obligation gave rise to responsibility, the question of damage reparation should be left to customary international law, particularly as a piecemeal approach to the question of State responsibility might pre-empt the work being carried out in the International Law Commission. It was also remarked that the reference made in the course of the debate on Security Council resolution 527 (1982) pinpointed the difficulties inherent in providing for State responsibility on account of mercenary activities; that resolution, it was observed, concerned a State which had directly attacked a neighbouring country and to which a violation of international law, in the present instance an act of aggression, could clearly be ascribed. The convention under preparation, on the other hand, raised the issue of making a State financially responsible for the activities of individuals acting on their own private initiative. Other observations included the remark that the proposed text did not sanction the breach of obligations more fundamental than the obligation to prosecute or extradite alleged offenders, such as the obligation to refrain from using, recruiting, financing or training mercenaries, as well as the remark that, as drafted at present, article 15 could be interpreted as meaning that if no damage were involved, a State party could violate with impunity its obligations under the

convention. Thus, it was concluded, article 15 raised extremely complex questions which it would take an inordinate amount of time and efforts to solve and which should be left aside if the goal of producing a generally acceptable convention was to be achieved in a reasonably near future.

76. In view of the existing differences of opinion on questions of principle, the Working Group was not able to agree at the present stage on any language concerning the problems under consideration.

C. Status of mercenaries

77. Article 5 of the draft submitted by Nigeria reads as follows:

"Mercenaries are not lawful combatants and if captured shall not be accorded prisoner of war status."

78. Further to the Chairman's observation that this question seemed to arise only in the context of international armed conflicts, it was agreed, at the request of the sponsoring delegation, to defer consideration of the ideas contained in article 5 of the Nigerian draft until such time as the concept of mercenaries operating outside armed conflicts had been clarified.

D. Settlement of disputes

79. The Working Group discussed the following text as contained, with identical wording, in the draft submitted by Nigeria (article 16) and in the draft submitted by France (article 14):

"Settlement of disputes

"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 State 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."

80. Some delegations observed that, in view of the complexity and controversial character of many of the issues at stake, one had to assume that the implementation

and interpretation of the future convention would give rise to disputes and that the effectiveness of the new instrument would largely depend on its providing for a meaningful and workable system of settlement of disputes which should be binding and in accordance with existing international law. Those delegations held that that requirement was essentially met by paragraph 1 of the above text, but objected to paragraph 2 which, they maintained, nullified paragraph 1 by enabling States to freely opt out of the envisaged system. Reference was made, in that connection to the Manila Declaration on the Peaceful Settlement of International Disputes which had recently been adopted unanimously (see General Assembly resolution 37/10, annex) and could be considered as an authoritative elaboration of the relevant provisions of the Charter of the United Nations. It was recalled that under section I, paragraph 9, of the Declaration, "States ... should also include in bilateral and multilateral conventions to be concluded, as appropriate, effective provisions for the peaceful settlement of disputes arising from the interpretation or application thereof" and that section II, paragraph 5, of the Declaration provided that "States should bear in mind that legal disputes should as a general rule be referred by the parties to the International Court of Justice" and stressed the desirability for States to "consider the possibility of inserting in treaties, whenever appropriate, clauses providing for the submission to the International Court of Justice of disputes which may arise from the interpretation or application of such treaties". Paragraph 2 of the text under discussion was, it was stated, totally inconsistent with the commitments referred to above.

81. Some delegations, on the other hand, found it encouraging that the draft submitted by Nigeria, in its article 16, and the draft submitted by France, in its article 14, should deal with the question of peaceful settlement of disputes in identical terms, which were also those used in the Montreal and Hague Conventions, in the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents 11/ and in the 1979 International Convention against the Taking of Hostages. They observed that, at the present stage of development of international law, all future States parties could not realistically be expected to commit themselves in advance to compulsory arbitration or to the jurisdiction of the International Court of Justice - as evidence by their reluctance to make the declaration provided for in Article 36, paragraph 2, of the Statute of the Court. They stressed that the essential point was to provide for the obligation of States parties to settle by peaceful means their disputes arising from the application or interpretation of the Convention. Some of the supporters of the text under discussion pointed out that by providing for resort to compulsory arbitration or to the International Court of Justice, the text in no way intended to limit the freedom of choice of States which would, of course, retain all the options provided for in Article 33 of the Charter. In answer to certain concerns expressed during the debate and in order to make the text clearer in this respect and also to avoid the possibility of a contrario interpretations, whereby failure to means of settlement such as conciliation or mediation would relieve the parties from the obligation to resort to arbitration or judicial settlement, it was suggested to replace the words "by negotiation" in paragraph 1 with the words "by any means of peaceful settlement of disputes other than binding third party settlement". Another suggestion was to replace the words "by negotiation" with the words "by any other means of peaceful settlement of disputes".

82. Some other delegations expressed doubts on the practical effectiveness of the system provided for in the text under discussion and on its suitability in the context of the prevention and elimination of mercenary activities. They recognized

that one could not realistically envisage imposing on States parties the obligation to resort to arbitration or judicial settlement, which explained the presence of paragraph 2, but noted that that paragraph was likely to result in a paralysis of the proposed system of settlement of disputes. The remark was made in that connection that, as drafted at present, paragraph 2 could be interpreted as authorizing reservations in relation to the obligation to conduct negotiations. Those delegations observed that negotiations could prove difficult to initiate in relation to mercenary activities and that providing for an obligation to resort to the whole range of the means provided for in Article 33 of the Charter, including mediation and conciliation, or to the good offices of the Secretary-General or other personalities, might more effectively ensure the peaceful settlement of the disputes arising from the implementation and interpretation of the future convention, including those related to damage reparation as envisaged in article 15 of the draft submitted by Nigeria. Attention was also drawn to the handling by the Security Council of situations involving mercenary activities, for example in the former Congo (Leopoldville) and more recently in the Seychelles. Mention was further made to article VIII of the Convention on the Prevention and Punishment of the Crime of Genocide 12/ and to the reporting system established by the General Assembly, in relation to the protection of diplomatic and consular missions and representatives (resolutions 35/168, 36/33 and 37/108).

83. The question was, however, asked whether the involvement of the Security Council and the reporting system referred to above could genuinely be considered as means for the peaceful settlement of disputes. It was also recalled that the competence of the Security Council was limited to disputes, the continuance of which was likely to endanger the maintenance of international peace and security.

84. At the concluding stage of the discussion, the Chairman observed that, subject to minor drafting changes, there was a sizeable measure of understanding with respect to paragraph 1 of the text under consideration, but that in further discussions this paragraph would have to be examined in the light of paragraphs 2 and 3 on which there did not seem, at this stage, to be a general understanding.

Notes

1/ Official Records of the General Assembly, Thirty-seventh Session, Annexes, agenda item 121, document A/37/648.

2/ General Assembly resolution 2625 (XXV), annex.

3/ Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 43 (A/37/43 and Corr.1).

4/ Ibid., Thirty-seventh Session, Sixth Committee, 9th-15th, 53rd and 56th meetings.

5/ For the membership list of the Ad Hoc Committee at its third session, see A/AC.207/INF.3 and Add.1 and 2.

6/ See A/32/144, annex I.

7/ Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 43 (A/37/43 and Corr.1), annexes I and II.

8/ Ibid., para. 112.

9/ United Nations Juridical Yearbook, 1971, p. 143. To be published also in United Nations Treaty Series, vol. 974, No. 14118.

10/ General Assembly resolution 34/146, annex.

11/ General Assembly resolution 3166 (XXVIII), annex.

12/ The text of article VIII of the Convention, as contained in General Assembly resolution 260 (III) A, reads as follows:

"Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III."

Draft convention submitted by France*

[Original: French]

Article 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 the territory controlled by a party to the conflict;
- (e) Is not a member of the armed forces of the party to the conflict; and
- (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.

Article 2

A criminal offence is committed by any mercenary within the meaning of article 1 who, participating directly in combat, engages in one of the following acts:

- (a) Murder, torture in any form, whether physical or mental, acts of mutilation, hostage-taking;
- (b) Serious acts of violence, rape;
- (c) Plundering of civilian property.

Article 3

1. A criminal offence is also committed by any person who, in the absence of armed conflict:

* Previously issued under the symbol A/AC.207/L.15 and Corr.1.

(a) Is specially recruited to carry out a concerted action aimed at overthrowing a government by armed force;

(b) Does, in fact, take a direct part in such action;

(c) Is motivated to take part therein essentially by the desire for private gain and, in fact, is promised material compensation substantially in excess of that promised or paid to persons of similar ranks and functions in the armed forces of the State of which the person is a national or, if that is not the case, of the State in whose territory the person resides;

(d) Is neither a national of the State against whose Government the action is undertaken nor a resident of the territory controlled by that State; and

(e) Has not been sent by a State on official duty as a member of its armed forces.

2. A criminal offence is also committed by any person who recruits persons referred to in paragraph 1.

Article 4

A criminal offence is committed by any person who:

(a) Participates as an accomplice in the offences defined in articles 2 and 3 of this Convention, by knowingly aiding or abetting the person or persons committing the action in acts which led up to or facilitated such action, or by procuring arms, instruments or any other means used in the action, knowing that they were to be so used, or by provoking such action or giving instructions to have it committed, by means of gifts, promises, threats, abuse of authority or power, machinations or culpable trickery;

(b) Attempts to commit the offences defined in articles 2 and 3 of this Convention, once the attempt has been manifested by a commencement of the act and provided the attempt was not suspended or did not fail to take effect save through circumstances beyond the control of the person making such attempt.

Article 5

The States Parties shall make the offences specified in articles 2 to 4 of this Convention punishable by appropriate penalties which take into consideration the gravity of the offences.

Article 6

The States Parties shall refrain from recruiting, training, financing or using the persons referred to in articles 1 and 3 of this Convention.

Article 7

The States Parties undertake, in accordance with international and national law, to make every effort to adopt reasonable measures with a view to preventing the offences set forth in articles 2 to 4 of this Convention.

Article 8

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 2 to 4 in the following cases:

- (a) When the offence is committed in its territory;
- (b) When the offence is committed by one of its nationals;
- (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 2 (a) and 3 and also over attempts to commit and participation as an accomplice in such offences as defined in article 4, in the case where the alleged offender is present in its territory and it does not extradite him pursuant to article 12 of this Convention 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 9

1. Each State Party shall be obliged to communicate directly or through the Secretary-General of the United Nations to any other State Party concerned any information related to the activities of mercenaries as soon as it comes to its knowledge.

2. States Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of one of the offences defined in articles 2 to 4 of this Convention. The law of the State requested shall apply.

Article 10

1. Upon being satisfied that the circumstances so warrant, any State Party in the territory of which the alleged offender is present shall, in accordance with the provisions of its national legislation, take him into custody or take other measures to ensure his presence for such time as is necessary to enable any criminal or extradition proceedings to be instituted. That State Party shall immediately make a preliminary inquiry into the facts.

2. Any person taken into custody pursuant to paragraph 1 of this article may communicate immediately with the nearest competent representative of the State of which he is a national; he shall be accorded every facility for that purpose.

3. When a State, pursuant to this article, has taken a person into custody, it shall immediately notify the States mentioned in article 8, paragraph 1, and, if it considers it advisable, any other interested States, of the fact that such person is in custody and of the circumstances which warrant his detention.

Article 11

The State Party where the alleged offender is prosecuted shall, in accordance with the provisions of its national legislation, 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.

Article 12

1. The offences set forth in articles 2 to 4 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 8, paragraph 1.

Article 13

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.

Article 14

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 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.

Article 15

1. This Convention is open for signature by all States until ..., at United Nations Headquarters in New York.

2. This Convention is subject to ratification. The instruments of ratification shall be deposited with the Secretary-General of the United Nations.

3. This Convention is open for accession by all States. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 16

1. This Convention shall enter into force on the thirtieth day following the date of deposit of the twentieth instrument of ratification or accession with the Secretary-General of the United Nations.

2. For each State ratifying or acceding to the Convention after the deposit of the twentieth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after deposit by such State of its instrument of ratification or accession.

Article 17

1. Any State Party may denounce this Convention by written notification to the Secretary-General of the United Nations.

2. Denunciation shall take effect one year following the date on which notification is received by the Secretary-General of the United Nations.

Article 18

The original of this Convention, of which the Arab, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations, who shall send certified copies thereof to all States.

IN WITNESS WHEREOF the undersigned, being duly authorized thereto by their respective Governments, have signed this Convention, opened for signature at United Nations Headquarters, New York on ...

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