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CM/447

REPORT OF THE ADMINISTRATIVE SECRETARY-GENERAL

ON THE AFRICAN CONVENTION FOR THE ELIMINATION OF MERCENARY

IN AFRICA



CMO 447

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REPORT OF THE ADMINISTRATIVE SECRETARY-GENERAL
ON THE AFRICAN CONVENTION FOR THE ELIMINATION OF MERCENARY
IN AFRICA

1. Following the aggression to which the Republic of Guinea fell victim on November 22nd 1970, the Council of Ministers met in Lagos from 9th to 12th December 1970 in its seventh extra-ordinary session and decided, among other things, to request Administrative Secretary-General "to prepare a draft convention outlawing the recruitment, training, equipping and use of mercenaries, as well as prohibiting the passage of such mercenaries and their equipment, in all countries for consideration by the Council of Ministers at its seventeenth ordinary session" (Resolution ECM/RES.17 (VII)).

2. In accordance with this resolution and the directives of the Council of Ministers, the Administrative Secretary-General prepared a draft convention for the elimination of mercenaries from the African continent which was submitted to the Council during its 17th ordinary session under number CM/388-Rev.1.

3. Following this session, the Council of Ministers decided (decision CM/Dec.158 (XVII)):

"(1) To refer the draft convention in document CM/388/Rev.1 as an additional task, to the team of lawyers which had already been established for purposes of drawing up recommendations on Inter-African cooperation in legal matters. Representatives from countries which had experienced activities of mercenaries would be added to the team;

(ii) To urge those Member States which had not yet done so, to submit their comments on that draft within the next three months;

(iii) That the team of lawyers would meet in October 1971 and draw up the second draft convention, taking the views of Member States into account, and submit it to the Secretariat which would circulate it to Member States;

(iv) That Member States should submit their comments on the second draft convention to the Secretariat, for submission to the Council of Ministers".

4. The Council would further call on Member States to submit their observations and suggestions on the draft convention on mercenaries drawn up by the General Secretariat.

5. Prior to the meeting of the nine legal experts the Government of the Federal Republic of Nigeria forwarded to the General Secretariat an African draft convention on mercenaries, which document was circulated to Member States on September 6th by Note POL.110/2/1101-71.

6. Moreover, the Government of the Republic of Madagascar, in Note No.028/71/VP2/AE/AD/OOA dated November 3rd 1971, communicated to the General Secretariat its observations on the draft convention drawn up by the Nigerian Government. These comments were circulated to Member States by Note No.LEG.90/GEN/22-72 of 6th January 1972.

7. The draft convention was also the subject of comment on the part of the Republic of Zambia. These comments were communicated to Member States through Note LEG.90/GEN/1518-71.

8. Further, the Government of the Republic of Upper Volta in mid-February sent the Secretariat its comments and suggestions both as to the draft convention drawn up by the Secretariat and that drawn up by the Federal Government of Nigeria. These comments are appended to the present report.

9. The Committee of experts met in Addis Ababa from January 10th to 26th. It drew up a draft convention for the elimination of mercenary in Africa and another on extradition.

10. On account of the insufficient time they were granted, the members of the Committee of nine legal experts were unable to draw up the introductory report to the draft convention for the elimination of mercenary in Africa before the end of their work. This task was entrusted to the resident members of the Committee who were only able to complete their task a few days before the opening of the 18th ordinary session of the Council of Ministers.

11. For all these reasons, the Administrative Secretary-General had suggested, in his report to the 18th ordinary session of the Council, (document CM/432) that examination of the draft convention on mercenaries be postponed to the 19th ordinary session.

No.0337/AE/SG/AAM

The Ministry of Foreign Affairs of the Republic of Upper Volta presents its compliments to the General Secretariat of the Organization of African Unity and has the honour to convey to it the Volta Government's observations on the Inter-African draft Convention on mercenaries proposed by the OAU General Secretariat and the Federal Republic of Nigeria.

ARTICLE 1: Article 1 of the draft prepared by the OAU General Secretariat defines the mercenary as "any person who has no genuine link of nationality with a given African State and who, for monetary considerations, commits against such States acts that are reprehensible".

Paragraph 2 of Article 1 of the draft of the OAU General Secretariat enumerates a certain number of reprehensible acts as crimes against International Peace and Security in Africa. These include acts constituting the principal activities of mercenary, and beyond these the cases of complicity by incitement, assistance, participation

It would seem that this enumeration is in no way limiting, since acts would also constitute reprehensible acts which "are similar acts not specifically mentioned", which leaves room for a more or less extensive interpretation.... what remains may appear unusual enough, as it concerns provisions falling within the domain of Criminal Law.

In a general way, reprehensible acts could be analysed as acts liable to interfere with the Independence of an OAU Member State or its territorial integrity. This notion would embrace

grosso modo that of acts challenging the Security of the State in actual Voltaic law. It would nevertheless appear that these notions do not exactly overlap. For the Republic of Upper Volta, like other independent States, possesses a repressive system which tends essentially to protect it against acts compromising its own external or internal security, without prejudice to the possibility of extension provided for by Article 86 paragraph 3 of the Penal Code.

For its part, the draft would tend to create a new category of crimes qualified as crimes against International Peace and Security in Africa, and punishable as such.

This new category would differ from that already existing in actual law embracing "crimes and offences against the Security of the State" subdivided into "crimes and offences against the external Security of the State" and into "attacks against the external Security of the State".

The definition of mercenary proposed by the draft submitted by the Federal Republic of Nigeria lays much stress on the recruitment and training of the mercenary, given that recruitment and training are aimed at "an illegal armed attack against an OAU Member State."

The mercenary thus defined in the Nigerian draft, in a way at the preparatory stage, and all those who participate in the recruitment, and training (instigators, accomplices, receivers ..) commit (Article 1-2) an offence (the term offence here being incorrect) termed "crime."

Paragraph 3 of Article 1 gives some indications of a general order which apparently need not be rejected a priori.

The notion of mercenary is not ordinarily appreciated in relation to the State against which the activity of the mercenary is directed but rather vis-a-vis the recruiting body.

In addition, the definition of the Nigerian draft does not take remuneration into account. If mercenary usually implies some idea of lucre, of remuneration ... this element is not, perhaps, indispensable in this case.

All the same, since the Nigerian draft attacks the evil "in the egg" so to speak, it could, in its "preparatory" stage, complete, under this heading, the draft prepared by the OAU General Secretariat which aims more directly at mercenary activity properly speaking.

ARTICLE 2: Article 2 of the draft of the OAU General Secretariat provides for a complementary form of mercenary. The assimilation envisaged seems very broad since it would, notably, tend towards the incrimination of reprehensible acts in a very broad context, against any asset belonging to a national liberation movement recognized by the OAU.

ARTICLE 3: The provisions of Article 3 of the draft of the OAU General Secretariat lays it down in principle that the acts committed by mercenaries shall be regarded as offences against common law.

These provisions avoid the difficulties that could have been raised by an analysis of the legal nature of reprehensible acts (political infringements or common law infringements?) and the consequences this analysis could have on extradition, bearing in mind the traditional principle according to which political offences cannot result in extradition.

The principle that offences committed result in extradition is also retained by the Nigerian draft (Article 7 of the Nigerian draft), whose particular wording no doubt finds an explanation in the method followed in Nigerian law in the domain of extradition.

ARTICLE 4: Article 4 of the draft of the OAU General Secretariat obliges all member States to prevent by all appropriate means engaging in any of the reprehensible acts, as earlier defined, which implies for each State, at internal level, obligations of a preventive and repressive order.

Certain precisions concerning the measures to be adopted can apparently be deduced from the provisions of Article 5 (draft of the OAU General Secretariat) which is aimed at the cooperation of the member States in the tracking down and repressing of mercenary.

ARTICLE 5: Article 5 of the draft prepared by the OAU General Secretariat in effect enumerates a certain number of engagements to be undertaken by each member State tending in a general way to tolerate no mercenary activity on its territory and, in particular, to prevent entry and passage of any mercenary, and will forbid the recruitment, training .. and, obviously, have no recourse to the service of mercenaries (which goes, it would seem, without saying).

The cooperation required would notably take the form of an exchange of information relating to the activity of the mercenaries.

Paragraph e) - in fine - of Article 5 is of particular interest to the Department of Justice in that it deals with the legal provisions necessary to the application of the Convention.

These provisions imply the undertaking to complete the Voltaic legislation - (in particular, the criminal legislation) - in accordance with the obligations resulting from the Convention. It will also be necessary to provide, to this end, for the incrimination, in internal criminal law, of reprehensible acts, as finally defined by the inter-African Convention on mercenaries, and the penalties incurred under these headings.

According to the provisions to be definitively adopted at OAU level, certain other adaptations of Voltaic law might show themselves to be necessary. As things are, the draft prepared by the OAU General Secretariat raises no particular problems as regards competence.

In the draft submitted by the Federal Republic of Nigeria the engagements to be undertaken by the contracting States stem notably from the provisions of Articles 3, 4 and 6 of the said draft.

The States must also undertake, in a general way, to prevent the recruitment, training and arming of mercenaries (Article 3 of Nigerian draft).

The undertaking to take the necessary measures to harmonize the respective internal legislations with the exigencies of the Convention with regard to repression is to be found in Article 4 of the Nigerian draft.

Paragraph 2 of Article 6 of the Nigerian draft provides, following the measures prescribed in the preceding paragraph dealing with securing the person of the "criminal" for the notification of the details of the information to the State concerned and to the OAU General Secretariat. But the necessary cooperation between

the contracting States, mentioned here in connexion with extradition, is set down in Article 9 of the Nigerian draft, which agrees on this point with the provisions of Article 5 of the draft of the OAU General Secretariat.

Article 5 of the Nigerian draft deals above all with questions of jurisdiction (and extension or prorogation of competence) according as to whether the crime is committed within of the State, or whether the presumed criminal is present. Despite their particular wording, the proposed provisions do not appear, basically to be incompatible with the rules of internal or international competence of the Voltaic repressive Jurisdiction (see notably articles 670 and following of the Criminal Code Procedure).

ARTICLE 6: Sub-paragraph 1 of Article 6 of the draft of the OAU General Secretariat lays each member State under an obligation to hand over the mercenaries of the State on whose territory he happens to be. Despite the terminology employed, it can be considered that these provisions relate to the extradition of mercenaries as complementing those of Article 3.

The Conventions so far ratified by the Republic of Upper Volta retained the principle of the non-extradition of nationals with, as a corollary, the engagement undertaken by the contracting States to try their own nationals. In accordance with a more recent tendency, the refusal to extradite a national would be purely facultative. The provisions of sub-paragraph 2 of Article 6 of the draft of the OAU General Secretariat, in accordance with this new tendency, would henceforth appear to be acceptable.

In the Nigerian draft, the contracting States are under an obligation - either to pursue and try the mercenary - or to extradite him (Article 5 paragraphs 2 and 5), it being laid down that extradition can only be refused if the State requested proposes to institute the necessary proceedings (see Article 8, 2nd) the result of the proceedings is, further, communicated (Article 8, 3rd) to the interested States, in the sense of paragraph 4 of Article 8 of the Nigerian draft.

From a general standpoint, as dealing with extradition, these provisions will assuredly find a place in the Conventions relating to Judicial Cooperation although limited to extradition.

It would, in any case, be convenient to harmonize these provisions - with the relative internal legislation - with the other Conventions already linking the Republic of Upper Volta (OCAMM - Republic of Mali) whilst, besides, taking account of the principles clarified with a view to the drawing up of a multilateral Convention of Judicial Cooperation within the framework of OAU, especially as regards extradition.

ARTICLES 7,8,9: (draft prepared by the OAU General Secretariat)

Resuming the usual Articles as regards: signature - ratification - adhesion deposition of instruments - entry into force - notification - these Articles call for no particular comment.

ARTICLE 10: of the draft of the OAU General Secretariat deals with the request for revision.

ARTICLE 12 of the Nigerian draft further provides for the option of denouncing the Convention. One cannot, a priori, conceive of any reasons which might motivate this denunciation.

ARTICLE 12: The provisions of the two drafts relative to settling differences which might arise on the subject of the application of the Convention are inspired by the same conciliatory spirit. However, the provisions of the Nigerian draft are more precise on this point than those of the draft of the OAU General Secretariat, which simply refers to the principles of the OAU Charter.

Comparative study of the two drafts enables a better apprehension of the different aspects of the mercenary problem. Far from being mutually exclusive, the two drafts can be considered complementary to one another. They could thus serve as the basis of the work of synthesis. The resulting Convention should enable OAU member States to coordinate their efforts with a view to effectively combating the activities of mercenaries in Africa.

The Minister of Foreign Affairs of the Republic of Upper Volta avails himself of this opportunity to renew to the Secretary-General of the Organization of African Unity the assurance of his high consideration.

Ouagadougou, February 9th, 1972.

The General Secretariat of the Organization of African Unity presents its compliments to delegations from Member States of OAU to the Nineteenth Ordinary Session of the Council of Ministers and has the honour to forward them copies of the draft inter-African Convention on Mercenaries and Note No. MEA/6511 Vol. 2 of 22 May 1972 from the Ministry of Foreign Affairs of the Republic of Gambia.

The Secretariat would like to inform the delegations that the draft Convention and the Note referred to above reached the Secretariat on 31 May 1972.

The General Secretariat of the Organization of African Unity avails itself of this opportunity to renew to delegations from Member States of OAU to the Nineteenth Ordinary Session of the Council of Ministers, the assurances of its high consideration.

Rabat, 3 June 1972.

Ministry of External Affairs,
Bathurst.

MEA/6511, Vol.2.

The Ministry of External Affairs of the Republic of The Gambia presents its compliments to the General Secretariat of the Organization of African Unity and with reference to item No. 14 of the Provisional Agenda on the Inter-African Draft Convention on Mercenaries, has the honour to forward herewith a draft for the consideration of the 19th Ordinary Session of the Council of Ministers to be held in Rabat on 5th June, 1972.

The Ministry of External Affairs of the Republic of The Gambia avails itself of this opportunity to renew to the General Secretariat of the Organization of African Unity the assurances of its highest consideration.

Bathurst. 22nd May, 1972.

The General Secretariat of
the Organization of African Unity,
P. O. Box 3243,
Addis Ababa,
ETHIOPIA.

INTER-AFRICAN CONVENTION ON MERCENARIES

Preamble

THE STATES PARTIES TO THIS CONVENTION - CONSIDERING the regular occurrence of unlawful activities of mercenaries which have resulted in loss of lives and untold destruction of properties on the African Continent;

CONSIDERING that the occurrences of such acts is a matter of grave concern and a threat to peace and stability of the African Continent.

CONSIDERING that for the purpose of deterring such acts, there is an urgent need to provide appropriate measures for punishment of offender:

HAVE AGREED AS FOLLOWS:

ARTICLE 1

Each state undertakes to :

(1) Prevent the recruitment or training or financing of any person within its territory where the purpose of the recruitment or training or financing is directed towards the employment of the person in an armed attack on a Member State of the O.A.U.

(2) Prevent any person or authority within its territory from recruiting, organizing or financing the recruitment or training of any person in any country where the activities of the person concerned are directed towards an armed attack on a member state of the OAU.

(3) To make activities falling within the ambit of paragraphs (1) and (2) of this article punishable by severe penalties under its laws.

ARTICLE 2

The provisions of Article 1 shall not apply to cases where the recruitment, training, organizing or financing is in furtherance of any liberation movement recognized by the O.A.U.

ARTICLE 3

Where any arrest is made under Article 1 the state making the arrest shall forthwith notify (i) the state against which the offence is directed and (ii) the Secretary-General of the O.A.U. of the arrest and any steps taken subsequently.

ARTICLE 4

The several offences mentioned in Article 1 shall be deemed to be extraditable offences in any extradition treaty existing between the contracting states.

ARTICLE 5

1. When a Contracting State requests the extradition of an offender or alleged offender under Article 4 of the Convention the Contracting State to whom the request is directed shall without delay take every necessary steps to effect the surrender of the offender.

2. A request for extradition shall not be refused on any ground other than that the State to whom the request for extradition is directed intends to exercise jurisdiction on the offender in accordance with the provision of paragraph (iii) of Article 1.

3. Where prosecution is done in accordance with paragraph 2 of this Article, the State initiating the prosecution shall without delay notify the State which had earlier made a request for the extradition of the offender or any other State interested in the prosecution, the result of the prosecution.

4. A State shall be deemed interested in a prosecution within paragraph 3 of this Article if the facts available in the case show that the offence was aimed at its territory or planned in its territory or its territory is in any way linked with the offence.

ARTICLE 6

The Contracting State shall afford one another the greatest measure of assistance in connection with the investigation and criminal proceedings brought in respect of an offence under Article 1 and other acts connected with the activities of the offender.

ARTICLE 7

1. Any dispute between two or more Contracting States concerning the interpretation or application of this Convention which cannot be settled through negotiation, shall, at the request of one of them, be submitted to the Commission

on Mediation, Conciliation and Arbitration of the OAU within two months from the date of the request.

2. No reservation shall be allowed in respect of any provision of the Convention.

ARTICLE 8

1. The Convention shall be open for signature at the Secretariat of the O.A.U. and shall be subject to ratification by the signatory states.

2. Instruments of ratification and instruments of accession shall be deposited with the Secretary-General of the OAU who is hereby designated as the Depository Authority and shall notified each Contracting party of any notification of ratification or accession he receives.

3. This Convention shall enter into force thirty days following the date of the deposit of instruments of ratification by (fifteen) states signatory to this Convention.

4. For other States, this Convention shall enter into force on the date of entry into force of this Convention in accordance with paragraph 3 of this Article or thirty days following the date of deposit of their instruments of ratification or accession which ever is later.

5. The Depository Authority shall, as soon as this Convention comes into force, register it pursuant to Article 102 of the Charter of the United Nations.

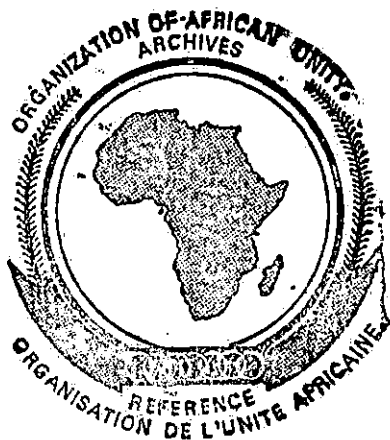
ARTICLE 9

1. Any Contracting State may denounce this Convention by written notification to the Depository Authority.

2. Denunciation shall take effect six months following the date on which notification is received by the Depository Authority.

IN WITNESS WHEREOF the undersigned plenipotentiaries, being duly authorised thereto by their Governments, have signed this Convention.

DONE at this.....day of.....
19.... in two originals, each being drawn up in two authentic texts in the English and French Languages.



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