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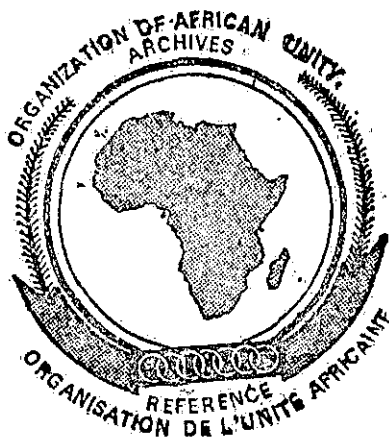
CM/817 (XXIX)

TWENTY-NINTH ORDINARY SESSION

LIBREVILLE - GABON

23 /- 30 June, 1977.

ADMINISTRATIVE SECRETARY-GENERAL'S REPORT ON THE DRAFT OAU
CONVENTION FOR THE PREVENTION AND ELIMINATION OF MERCENARISM IN AFRICA



ADMINISTRATIVE SECRETARY-GENERAL'S REPORT ON THE DRAFT OAU CONVENTION FOR THE
PREVENTION AND ELIMINATION OF MERCENARISM IN AFRICA

At its 28th Session in Lome, the Council of Ministers observed that:

"Only a few Member States have submitted their observations on the Draft Convention on Mercenaries submitted by Angola in Mauritius, July 1976. The Committee urged Member States to transmit their observations to the General Secretariat at the latest by 15 April 1977, to draw up a Draft Convention on Mercenaries and submit it to the forthcoming Session of the Council of Ministers. The meeting of Legal Experts should take place even if Member States do not send their observations to the General Secretariat of the OAU. Some Members of the Committee expressed the view that the Committee of Legal Experts should be sufficiently large to allow Member States which have fallen victim to aggression by mercenaries and other interested Member States to take part in the deliberations of the Committee of Legal Experts".

It is intended that the Convention to be drawn up by the Committee of Legal Experts will be presented to this Session of the Council of Ministers for approval. Member States of the OAU who are known to have been victims of aggression by mercenaries are Angola, Sudan, Benin, Guinea, Nigeria and Zaire. Of these, Guinea, Nigeria and Sudan are members of the Committee of Legal Experts. Therefore, Angola, Benin and Zaire were invited to send Legal Experts to the meeting of the Committee.

The General Secretariat had in 1971 drawn up a Draft Convention on Mercenaries, which was put before the Council of Ministers at its 17th Session. With this (CM/388 Rev.1) and the Draft Convention on Mercenaries presented by the Federal Republic of Nigeria, OAU Legal Experts drew up a Draft Convention on Mercenaries (CM/433 Rev.1) which was discussed by the Council at its 19th Session and referred to Member States for further consideration.

The menace of mercenaries in Africa has for years threatened the stability of independent African States. Some of the mercenaries were caught and put to trial by Member States. The notable trials being those of the Sudan and Angola. In Angola the trial was observed by an International Commission of Enquiry, who thereupon drew up a Draft Convention with the view of having it studied and adopted by the OAU and the United Nations.

With the OAU Draft Convention (CM/433 Rev.1) and the Draft Convention drawn up by an International Commission of Enquiry in Angola with the observations of Member States on it as working papers the OAU Committee of Legal Experts met from 3rd to 8th May. Annex I is the ~~report~~ report of the Committee's Rapporteur, and Annex II is the Draft Convention the Committee drew up. Those documents, were forwarded to Member States by the Secretariat in May for study as it explained that Draft Convention would be submitted to the present Session of the Council of Ministers for approval. The Council may now wish to approve.

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ANNEX I

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MEETING OF OAU COMMITTEE OF LEGAL EXPERTS - 3 TO 8 MAY 1977 -

RAPPORTEUR'S REPORT

The meeting was declared open by the Secretary-General of the Organization of African Unity was attended by experts from Angola, Benin, Egypt, Ethiopia, Guinea, Nigeria, Senegal, Sudan, Tanzania, Zaire and Zambia. Participating also in the work of the Committee were delegates from Burundi, Kenya, Libya, Madagascar, Mozambique and observers from the Office of the United Nations High Commissioner for Refugees (UNHCR). Reviewing the history of mercenary invasion on the continent of Africa, the Secretary-General re-emphasized the urgent need for a regional Convention on the Prevention and Suppression of mercenary activities in Africa.

2. As the Committee unanimously agreed that Egypt should continue to take the Chair, Mr. Mahamoud Abdel-Raheim Pasha was elected the Chairman. Mr. C.O. Magreola of Nigeria was also unanimously elected the Rapporteur of the Committee.

3. Bearing in mind the time at the disposal of the Committee for its deliberation, the Secretariat proposed that there should be two Sessions, morning and afternoon for each day of the meeting. The morning Session, it was proposed, would commence at 10 a.m. and end at 1 p.m. while the afternoon Session would commence at 4 p.m. and end at 7 p.m. This proposal gained consensus in the Committee and it was approved.

4. The Committee had before it the following working documents:

- a) Draft Convention on the Prevention and Suppression of Mercenarism prepared by an International Commission invited by the Republic of Angola to observe the trial of Mercenaries (hereinafter referred to as the Angolan Draft).
- b) Draft Convention prepared by the OAU Secretariat and the Secretary-General's Report on it - Document CM/388/Rev.1.

- c) Report of the Administrative Secretary-General on the Draft Convention on Legal Co-operation and on Mercenaries - Document CM/432.
- d) Report of the Administrative Secretary-General on the African Convention for the Elimination of Mercenary in Africa, including observations of Member States on the Draft Convention presented by the Federal Republic of Nigeria - Document CM/447.
- e) Observations of Member States on the Draft Convention on the Prevention and Suppression of Mercenarism - Document CAB/LEG/68.1/167.
- f) Report of the OAU Committee of Nine Legal Experts on the Convention on the Elimination of Mercenaries in Africa, including a Draft Convention prepared by the Committee (hereinafter referred to as the OAU Draft) - Document CM/433/Rev.1.
- g) OAU Resolutions on Mercenaries - Document CAB/LEG/68.1/167/Add.4.
- h) Message from the Geneva International Conference on Humanitarian Laws and the subject of Mercenaries - Document CAB/LEG/68.1/167/Add.2.

5. The Committee began its substantive work by making a choice from all the documents which would form the basic working documents. Following the suggestion made by the Chairman that the OAU Draft should be the basic working document and that members of the Committee are however free to make cross-references to the Angolan Draft or any other Draft they desired, argument arose as to whether the Angolan Draft should not be the basic working document. It was contended

that since only the Angolan Draft was the subject of comments and observations by Member States and that in fact it was the Draft that was recommended by the OAU Council of Ministers in Mauritius for the consideration of the Committee of Experts there was no reason to take any other document as the basic working document. After deliberation, it was agreed that the OAU Draft be taken as a basic document. The Committee also agreed as a procedural matter that the Draft should be examined article by article, paragraph by paragraph.

6. TITLE

It was contended that the title to the OAU Draft only took account of a mercenary as person but did not take note of the activities of mercenaries. It was suggested therefore that the word 'mercenary' should be changed to 'mercenarism'. It was also proposed to delete the word 'elimination' from the title so that it would read 'OAU Convention on Mercenarism in Africa'. Again there was considerable argument in the Committee on the use of the propositions 'on' and 'for'. It was contended by the proponents of the latter that the title 'OAU Draft Convention for the Elimination of Mercenarism in Africa' is more dynamic and clearly brings out the intention of the draftsman. On the other hand, the proponents of the former maintained that the use of the proposition 'on' was consistent with international usage and should be retained. After a prolonged debate the title agreed on by consensus reads: "OAU Convention on Elimination of Mercenarism in Africa".

7. PREAMBLE

The Committee adopted without any modification the first preambular paragraph. In the course of the debate on the second paragraph of the preamble it was proposed that reference should be made to the threat which mercenary activities posed to the various liberation movements.

It was therefore sought to insert the words 'free exercise of the right of the African People to independence' between the words 'territorial integrity' and the words 'and the harmonious development'. However, it was felt that the second paragraph of the preamble was essentially directed to sovereign states, Members of the OAU and that an inclusion of the liberation movements might breed confusion into the meaning of the paragraph. Consequently, it was agreed that the paragraph be left as it is and that a new paragraph be carved out to take account of the liberation movements. Hence a new paragraph 3 was couched thus:

'Conscious of the threat which the activities of mercenary posed to the legitimate exercise of the right of African People to their independence and freedom'.

After deliberation on the new paragraph it was agreed that the words 'under colonial or racist domination' be inserted between the words 'African People' and the words 'to their independence and freedom'.

On the fourth preambular paragraph it was proposed that the introductory word 'Considering' should be changed to 'convinced' and proposal was carried. It was also proposed that the word 'total' be deleted but it was felt by the majority in the Committee that since the retention of the word was not harmful it might as well be retained.

In the course of the debate, it was suggested that it might be desirable and in order to give the Draft Convention an international outlook to recite the UN and OAU Resolutions concerning mercenaries. It was in light of this suggestion that the Committee agreed to lift paragraph 5 of the Angolan Draft to form a new paragraph 5 in the OAU Draft. That paragraph reads:



'Considering that the resolutions of the UN and the OAU and the statements of attitude and the practice of a growing number of States are indicative of the development of new rules of international law making mercenarism an international crime'.

It was also proposed that the words 'mercenary system' in paragraph 6 of the preamble be changed to 'mercenarism'.

The preamble as adopted by the Committee reads:

"We, the Heads of State and Government of the Member States of the Organization of African Unity;

Considering the grave threat which the activities of mercenaries represent to the independence, sovereignty, territorial integrity and the harmonious development of Member States of the Organization of African Unity;

Conscious of the threat which the activities of mercenary have posed to the legitimate exercise of the right of African People under colonial or racist domination to their independence and freedom;

Convinced that total solidarity and co-operation between Member States are indispensable for putting an end to the subversive activities of mercenaries in Africa;

Considering that the resolutions of the UN and the OAU and the statements of attitude and the practice of a growing number of States are indicative of the development of new rules of international law making mercenarism an international crime;

Determined to take all necessary measures to eliminate from the African continent the scourge that mercenarism represents;

Have agreed as follows:

8. Article 1 - Definition

In keeping with the procedure it was suggested that Article 1 of the Angolan Draft was more comprehensive and exhaustive than the definition contained in Article 1 of the OAU Draft. On the introductory paragraph it was argued whether a

State could be criminally liable and therefore the words 'the State itself' was sought to be deleted. Against this argument, it was contended that under international law a State which is in breach of an international obligation incurs responsibility and is bound to make reparation. This did not however, mean that a State such as the individual could be arrested or committed to prison. As the latter view found consensus in the Committee the expert from Tanzania observed that he did not think that it is legally justifiable to make a State criminally liable.

It was also proposed that immediately after the words 'self determination' there should be added the words 'or the territorial integrity of another State' in order to include in the definition mercenary activities both against Member States of the Organization and the Liberation Movements.

The word 'which' appearing on the second line of the introductory paragraph was also agreed to be deleted. The introductory paragraph as adopted reads:

'The crime of mercenarism is committed by the individual, group or association representative of State and the State itself with the aim of opposing by armed violence a process of self determination or the territorial integrity of another state, practices any of the following acts':

Sub-Paragraph (a)

It was proposed and agreed to by the Committee that the phrase 'through the payment of a salary or any other kind of material recompense' should be replaced by the words 'material or otherwise'. It was argued that the amendment was to take account of the fact that mercenaries do not always fight for remuneration or material gain but also for purpose of an adventure or fame.

It was also proposed that the words 'shelters' and 'assists' should be included in the list of acts which are prohibited by the sub-paragraph. On this proposal it was argued that the idea of sheltering and assisting was already taken care of by sub-paragraph (c) and that the words 'promoters' and 'supports' were wide enough to cover these grounds. However, the Committee agreed that the word 'shelters' should introduce the sub-paragraph while the word 'supplies' should be replaced by the word 'assists'.

There was considerable argument on the question whether the definition of the crime of mercenarism should not include nationals. Supporters of this view championed by Guinea contended that the realities of the situation had to be faced and that there are instances of nationals in collaboration with foreigners committing this crime. On the other hand it was contended that the principle of non-nationality in the definition of mercenary should be adhered to. That there are adequate safeguards in the municipal laws of the Member States of the Organization of African Unity against such nationals. That the inclusion of nationals in the definition would fall outside the mandate of the Committee. After deliberation, the Committee agreed that the text of the sub-paragraph should read:

'shelters, organises, finances, assists, equips, trains, promotes, supports or employs armed forces partially or wholly consisting of persons who are not nationals of the country where they are going to act, for personal gain, material or otherwise'.

Sub-Paragraph (b) and (c)

The Committee adopted these sub-paragraphs without any modification.

9. Article 2 - Paragraph 1

It was thought desirable to harmonise the provisions of Article 1 of the Angolan Draft with the provision of paragraph 1 of Article 2 of the OAU Draft. Hence it was suggested that the paragraph should read:

'Any person who commits the crime of mercenarism as defined in Article 1 of this Convention commits an offence considered as a crime against peace and security in Africa and shall be punished as such'.

Following the view that Article 1 was not limited to natural persons but included entities such as associations and States it was proposed to insert the words 'natural or juridical' immediately after the words 'any person'.

The text as adopted reads:

'Any person, natural or juridical who commits the crime of mercenarism as defined in Article 1 of this Convention commits an offence considered as a crime against peace and security in Africa and shall be punished as such'.

Paragraph 2

It was unanimously agreed by the Committee that in view of the provisions of Article 1 this paragraph should be deleted. In the course of the debate on Article 2 of the Angolan Draft the Committee agreed that paragraph 1 of Article 2 of the OAU Draft as adopted should form paragraph 2 of Article 1.

10. Article 2

After deliberation on Article 2 of the Angolan Draft, it was resolved by the Committee that although the Article required drafting changes it should form an Article on its own. The Article was consequently amended to read:

'The fact of assuming command over or giving orders to mercenaries shall be considered as an aggravating circumstance'.

11. Article 3

The discussion of this Article was based on the provision of Article 4 of the Angolan Draft. There was a lengthy argument on the question whether the word 'lawful' qualifying combatants was to be retained, deleted or substituted for the adjective 'regular'. As a compromise solution, it was suggested that the Article should be worded as follows:

'Mercenaries shall not be entitled to prisoners of war status'.

As this suggestion appeared not to gain consensus in the Committee it was finally resolved that the Article should read:

'Mercenaries shall not enjoy the status of combatants and shall not be entitled to prisoners of war status'.

Article 4

The text for discussion was Article 5 of the Angolan Draft. Argument was advanced by experts from Nigeria and Tanzania that the Article states the obvious. That a mercenary who in the course of committing the crime of mercenarism as defined in Article 1 commits other crimes shall undoubtedly, in the absence of

an express provision to the contrary contained in the enabling law, be answerable for such other offences. On the other hand, it was contended that there is merit in maintaining the Article. The purpose, it was argued, was to bring it to the attention of Member States that a mercenary could also be guilty of other offences. Convinced that the climate in the Committee was consistent with maintaining the Article a number of proposals were made to improve the text. One of such proposals reads:

'A mercenary shall bear responsibility both for the crime of being a mercenary and for any other related offences'.

The question then arose as to whether the original formulation intended to make a mercenary liable for any other offences he commits or only answerable to other offences related to the crime of mercenarism. If it were the latter view, argument was advanced that since the crime of mercenarism is a peculiar indeed a unique offence it might be desirable to enumerate the related offences in the text as they are unknown. In view of the divergent opinions in the Committee the Chairman decided to set up a sub-committee consisting of Angola, Guinea, Nigeria, and Tanzania to explore the possibility of reconciling the two views.

13. Article 5

Article 3 of the OAU Draft on obligations of States was then discussed. It was proposed that the operating paragraph of the Article should read:

'To this end, each contracting State shall undertake to'.

Paragraph (a)

This paragraph was adopted without any modification except to make reference to Article 2 agree with the text adopted by the Committee. Hence reference to Article 2 in the text was changed to Article 1.

Paragraphs (b) and (c) were adopted without any modification.

Paragraph (d)

It was argued that the text as presently formulated leaves the choice open to Member States to communicate any information on mercenary activities which

come to its knowledge any time it desired. To ensure that such information are communicated as soon as it comes to the knowledge of Member States the text was re-drafted thus:

'Communicate to the other Member States of the Organization of African Unity any information related to the activities of mercenaries as soon as it comes to its knowledge'.

Paragraph (e)

It was thought desirable that the provision of the paragraph should embrace all acts prohibited by Article 1 of the Convention. Hence it was proposed that the phrase 'and any other form of activities likely to promote mercenarism' should be added. The paragraph as adopted reads:

'Forbid on its territory the recruitment, training, financing and equipment of mercenaries and any other form of activities likely to promote mercenarism'.

Paragraph (f)

As the Committee was convinced that not only legislative measures was required to implement fully the provisions of the Convention the proposal to include other measures was supported. The Committee adopted the paragraph with this formulation.

'Take all the necessary legislative and other measures to ensure the immediate entry into force of this Convention'.

14. Article 6

After deliberation, the provisions of Article 3 of the Angolan Draft were adopted with slight amendments:

1. 'When the representative of a State is responsible by virtue of the provisions of Article 1 of this Convention for acts or omissions declared by the aforesaid Article to be criminal, he shall be punished for such an act or omission'.

2. When a State is responsible by virtue of the provisions of Article 1 of this Convention for acts or omissions declared by the aforesaid article to be criminal, any other State may invoke such responsibility:

(a) in its relations with the State responsible, and

(b) before competent international Organization or bodies.

15.

Article 7

The view generally held in the Committee was to apply the most punitive sanction preferably capital punishment for the crime of mercenarism. Hence Article 4 of the OAU Draft was amended to reflect this view point. The Article as adopted reads:

'Each contracting State shall undertake to make the offences defined in Article 1 of this Convention punishable by severest penalties under its laws including capital punishment'.

16.

Article 8

The discussion was based on Article 5 of the OAU Draft. The expert from Guinea proposed that it shall be obligatory for the State to hand over the offender to the State against which the crime is directed unless the State could under its laws prescribe more or equivalent penalties which the requesting State could have inflicted had the offender been handed over. As this proposal seemed to be the only voice in the wilderness the Committee agreed to adopt the original text with slight amendments. The Draft as adopted reads:

'Each contracting State shall undertake to take such measures as may be necessary to punish any person who commits an offence under Article 1 of this Convention and who is found on its territory if it does not extradite him to the State against which the offence has been committed'.

Upon the adoption of this text Guinea expressed its reservation and wished to be recorded as objecting to the text as adopted. However, the Article was referred to the sub-committee for further consideration.

17. Article 9

The text for discussion was Article 7 of the OAU Draft. Paragraph 2 of this Article was only the subject of comments by delegates. It was contended that in view of the generally accepted international law principle and practice of non-extradition of nationals whether the paragraph was worth meaning. On the other hand, it was argued that there is some logic in the provision and should be retained. After deliberation, however, it was agreed by consensus that the paragraph should be retained in as much as it does not compel the States to extradite their nationals. The Article as adopted reads:

1. 'A request for extradition shall not be refused unless the requested State undertakes to exercise jurisdiction over the offender in accordance with the provisions of Article 8.
2. Where a national is involved in the request for extradition, the requested State shall take proceedings against him for the offence committed if extradition is refused.
3. Where proceedings have been initiated in accordance with paragraphs 1 and 2 of this Article, the requested State shall inform, the requesting State or any other State of the OAU interested in the proceedings, of the result thereof.
4. A State shall be deemed interested in the proceedings within the meaning of paragraph 3 of this Article if the offence is linked in any way with its territory or is directed against its interests'.

The Committee also decided that paragraph 2 of Article 8 of the Angolan Draft should form paragraph 1 of this Article and that the Article should be renumbered accordingly.

18. The Sub-Committee of four which was mandated to explore the possibility of reconciling the two versions on the provisions Article 4 (Article 5 of the Angolan Draft) and to give further consideration to the Guinean proposal on Article 5 of the OAU Draft reported its success to the Committee. The Sub-Committee was able to find an acceptable formulation of the provision of Article 5 of the Angolan Draft which accommodated the two views generally held in the Committee.

'A mercenary is responsible both for the crime of mercenarism and all related offences, without prejudice to any other offences for which he may be prosecuted'.

The Sub-Committee having given due consideration to the Guinean proposal agreed to insert the words 'in accordance with the provision of Article 7 of this Convention' between the words 'to punish' and the words 'any person'. The text as adopted reads:

'Each contracting State shall undertake to take such measures as may be necessary to punish in accordance with the provision of Article 7 of this Convention any person who commits an offence under Article 1 of this Convention and who is found on its territory if it does not extradite him to the State against which the offence has been committed'.

19. Article 10

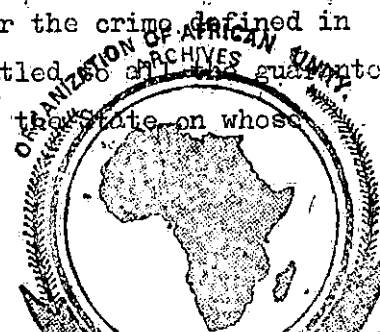
The text of Article 10 of the Angolan Draft was expanded to ensure mutual assistance among the contracting States both during investigation and trial. The text adopted reads:

'The contracting States shall afford one another the greatest measure of assistance in connection with the investigation and criminal proceedings brought in respect of the offence and other acts connected with the activities of the offender'.

20. Article 11

The discussion on this Article centred on judicial guarantees to mercenaries during trial. The Committee was of the view that it would suffice to guarantee the right to fair trial to mercenaries without enumerating those rights. The Committee therefore agreed to this formulation.

'Any person or group of persons on trial for the crime defined in Article 1 of this Convention shall be entitled to the guarantees normally granted to any ordinary person by the State on whose territory he is being tried'.



21. Article 12

The Committee adopted the provisions of Article 8 of the OAU Draft without any modification.

22. Article 13

Article 9 of the OAU Draft was adopted with only a change. The word 'to' appearing on the first line of paragraph 1 was changed to 'for'.

23. Article 14

Article 10 of the OAU Draft was also adopted without modification.

24. Article 15

Although the Committee accepted the formulation of Article 11 of the OAU Draft it nevertheless desired to incorporate in the Article a new paragraph concerning registration of the Convention with the United Nations Secretariat in pursuance to Article 102 of the UN Charter. The text of the new paragraph reads:

'The Administrative Secretary-General of the Organization of African Unity shall, as soon as this Convention comes into force, register it pursuant to Article 102 of the Charter of the United Nations'.

25. Conclusion

The Committee wishes to place on record its appreciation and gratitude to the Secretariat for placing before the Committee all documents and Draft Conventions prepared by Member States with a view to assisting the Committee to arrive at an acceptable text on the OAU Convention on Elimination of Mercenarism in Africa. The Committee is also grateful to all the experts and participants for their useful exchange of views and the spirit of brotherhood which permeated the discussion throughout the meeting.

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