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THE RIGHT OF PEOPLES TO SELF-DETERMINATION AND ITS APPLICATION TO PEOPLES UNDER COLONIAL OR ALIEN DOMINATION OR FOREIGN OCCUPATION

Note by the United Nations High Commissioner for Human Rights

The High Commissioner for Human Rights has the honour to transmit to the members of the Commission on Human Rights the report of the meeting of experts on the traditional and new forms of mercenary activities as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, which took place in Geneva from 29 January to 2 February 2001.

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Annex

REPORT OF THE MEETING OF EXPERTS ON THE TRADITIONAL AND NEW FORMS OF MERCENARY ACTIVITIES AS A MEANS OF VIOLATING HUMAN RIGHTS AND IMPEDING THE EXERCISE OF THE RIGHT OF PEOPLES TO SELF-DETERMINATION

Geneva, 29 January-2 February 2001

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Introduction

1. In paragraph 12 of resolution 54/151, the General Assembly requested the High Commission for Human Rights to convene expert meetings to study and update the international legislation in force and to propose recommendations for a clearer legal definition of mercenaries that would allow for more efficient prevention and punishment of mercenary activities.

2. At its fifty-sixth session, the Commission on Human Rights adopted resolution 2000/3. In paragraph 10 of that resolution, the Commission decided, in accordance with the request of the General Assembly, to convene a workshop on the traditional and new forms of mercenary activities as a means of violating human rights and impeding the exercise of the right of peoples to self-determination. It also requested the High Commissioner to report on the outcome of the workshop to the Commission at its fifty-seventh session.

3. In accordance with these resolutions, the Office of the High Commissioner for Human Rights extended an invitation to nine experts from different geographical regions to attend an expert meeting from 29 January to 2 February 2001 on the traditional and new forms of mercenary activities as a means of violating human rights and impeding the exercise of the right of peoples to self-determination. The Special Rapporteur of the Commission on Human Rights on the issue since the inception of the mandate, Mr. Enrique Bernales Ballesteros, was also invited to participate.

4. The following experts attended the meeting: Professor Chaloka-Beyani (Zambia); Professor Javier Guerrero Baron (Colombia); Ms. Julia Kalinina (Russian Federation); Mr. Damian Lilly (United Kingdom of Great Britain and Northern Ireland); Doctor Olga Miranda Bravo (Cuba); Professor Abdel-Fatau Musah (Ghana); Mr. Ravi Nair (India); Ms. Anne Ryniker (Switzerland). Mr. David Shearer (New Zealand), the ninth expert invited to participate, was unable to attend.

5. On 29 January 2001, the meeting decided that the Chair would rotate. Ms. Ryniker agreed to act as Rapporteur. The meeting proceeded to adopt the agenda. Each expert was invited to contribute a paper on a given topic to present to the meeting, which would be followed by a general discussion on the subject.

6. The present report contains summaries of the papers presented by the Special Rapporteur and the experts and of the discussions that followed, as well as conclusions and recommendations.

I. BACKGROUND TO THE RESPONSE OF THE UNITED NATIONS TO THE MERCENARY PHENOMENON

7. The Special Rapporteur of the Commission on Human Rights on the question of the use of mercenaries, Mr. Enrique Bernales Ballesteros, in his presentation on the background to the response of the United Nations to the mercenary issue, made reference to resolutions of the Economic and Social Council, the General Assembly and the Commission on Human Rights on the matter. Since his appointment in September 1987, the Special Rapporteur had undertaken a

survey of mercenary activities, reviewed the state of international law on the question, developed a typology of mercenary activities and made an analysis of cases of mercenary activities reported in the past and of the way they had been dealt with in the international forums.

8. The Special Rapporteur recalled that mercenary practices went far back in time and were relatively frequent, tolerated and even encouraged by States themselves or the political organizations out of which they grew. At a later stage, mercenary forces were used to overthrow or destabilize some of the Governments of States that had won their independence as a result of the decolonization process. In response to reports of increasing and very diverse mercenary activities, the General Assembly established in 1979 the Ad Hoc Committee on the Drafting of an International Convention against the Recruitment, Use, Financing and Training of Mercenaries. The General Assembly adopted the International Convention on 4 December 1989. Twenty one States had completed the process of ratification of the Convention.

9. Mercenary activities were related to such internationally unlawful acts as interference in the internal affairs of other States, military opposition to national liberation movements, violations of the territorial integrity, sovereignty and independence of States and the destabilization and overthrow of legitimate Governments, subordination of the target country to the interests of the Power instigating the conflict and the violation of fundamental human rights. Mercenaries tended to be present mainly in armed conflicts, where they offered their services to one or more parties to the conflict in exchange for payment. Mercenaries also committed serious crimes, such as trafficking of persons, drugs and arms and terrorist attacks.

10. In their current state, international norms concerning mercenaries were inadequate and ambiguous as regards their interpretation and application. This situation was compounded by the lacunae that existed in the national legislation of most countries, which did not characterize mercenarism as a separate crime.

11. The Special Rapporteur also noted that the recruitment and hiring of mercenaries had become a profitable business and that the number of persons prepared to become mercenaries had increased. No significant progress had been observed in reducing the number of mercenary activities. Parties to armed conflicts continued to hire mercenaries to boost their military might and capacity to do damage.

12. The Special Rapporteur explained that it was necessary to distinguish between “mercenary” as a concept related to the agent, and “mercenarism” as a concept including all phases of the crime: its planning, design, and the involvement of States.

13. An expert raised the question of the possible mercenary character of “praetorian guards” in African and Asian countries. Another expert noted that the position of several African Governments with regard to the use of mercenaries had changed from total rejection to their authorized use in some circumstances and situations. Another expert stated that mercenaries principally came from developed countries with high military technology. The Special Rapporteur said that according to his information, they came from 17 countries.

14. The Special Rapporteur closed his presentation by stating that individuals had different motivations than States, enterprises or criminal organizations. His mandate had been easier to

carry out at the beginning, during early 1990, as since the end of the cold war the problem of the use of mercenaries had became more complex. During his years as Special Rapporteur, no Government had attempted to justify mercenary activities in any way in its replies to his communications. He added that the apparent connection between an increase in mercenary activity and the inadequacy of international rules in that area should be examined. Mercenaries based their claims to comparative advantage and greater efficiency on the fact that they did not regard themselves as being bound to respect human rights or the rules of international humanitarian law.

II. INTERNATIONAL LEGISLATION

A. Article 47 of Additional Protocol I to the Geneva Conventions

15. One expert made a presentation about international humanitarian law, and in particular article 47 of the Additional Protocol I to the Geneva Conventions, and its implications for the phenomenon of mercenaries.

16. The expert explained that international humanitarian law (IHL) was a set of rules which, for humanitarian reasons, sought to limit the effects of armed conflict. It protected those who were not, or were no longer, taking part in the fighting and restricted the means and methods of warfare. IHL was applicable irrespective of the legitimacy of the use of force and applied for the aggressor and the victim of the aggression alike.

17. The attempt to outlaw mercenaries by using the laws of warfare confused the *ius ad bellum* (part of the law of peace that regulated the use of force) with the *ius in bello* or IHL (the law that regulated hostilities once they had begun). During the negotiations on Additional Protocol I, the Swiss delegation was of the opinion that that provision had no place in a humanitarian convention and that the prohibition of the use of mercenaries should be the subject of a special treaty. Many scholars now agreed with that statement. The expert quoted Frits Kalshoven: "Article 47 might prove to have done considerable harm to the cause of humanitarian law as it runs counter to the basic rule that in principle, all those who take an active part in hostilities should be treated equally and without discrimination on the basis of their motives for joining the fighting".

18. When considering article 47, the expert recalled the importance of keeping in mind the historical situation at the moment the provision was adopted in 1977. The 1960s and the 1970s had seen decolonization and the recognition of the right to self-determination. At the same time, concern appeared at the extent to which mercenaries were involved in the decolonization process. The United Nations began to condemn the use of mercenaries and to declare support for national liberation movements, mainly in connection with the independence process taking place in various parts of Africa. In 1968, the General Assembly declared that the practice of using mercenaries against national liberation movements was a criminal act and characterized mercenaries as outlaws. Article 47 of Protocol I was the product of those politically and emotionally charged debates. It was therefore not extraordinary that Protocol I endorsed a new position, characterizing wars of liberation no longer as internal but as international conflicts.

19. Article 47 considered mercenaries in general terms and did not take into account whether they fought against a national liberation movement. The Protocol referred to "mercenary" but not to "mercenarism", which was a broader concept that included the responsibilities of the States and organizations concerned in mercenary acts. The mere fact of being a mercenary was not made a criminal act.

20. Paragraph 1 of article 47 stated that "A mercenary shall not have the right to be a combatant or a prisoner of war". In an international armed conflict, a captured combatant usually had the status of prisoner of war (POW). A POW could be detained until the end of the hostilities and could be prosecuted for war crimes, but not for having been engaged in the conflict itself. Under article 47, a mercenary could be condemned under national law, even to death, solely for having been a mercenary.

21. The expert noted that although a mercenary did not have the right to claim combatant status, the State could nevertheless grant him that status. And even though mercenaries could not claim POW status, they remained protected by the fundamental guarantees stipulated in article 75 of Protocol I such as the prohibition of torture or the right to judicial guarantees. Besides, if there was any doubt concerning the status of a mercenary, article 5 of the Geneva Convention Relative to the Treatment of Prisoners of War, provided that such person shall enjoy protection until his status had been determined by a competent tribunal.

22. If there was widespread support for the inclusion of a provision denying combatant and POW status to mercenaries during the negotiations on Protocol I, it proved to be somewhat difficult to translate it into a definition of mercenary. Some delegations favoured a short and simple definition, while others called for an enumeration of criteria and the exclusion of certain types of individuals from the definition. Given that the definition could have life or death consequences for a person charged with being a mercenary, delegations thought it was important to find a definition that reduced the risk of misusing it and placing the lives of lawful combatants at risk.

23. Finally, the almost automatic outlawing of mercenaries was tempered by the introduction in article 47 of six criteria which must be fulfilled to meet the definition of a mercenary. This very restrictive definition could easily be circumvented. As Geoffrey Best said: "any mercenary who cannot exclude himself from this definition deserves to be shot and his lawyer with him!".

24. The expert described the main problems of the definition as follows. Paragraph 2 of article 47 stated that a mercenary is any person who "(a) is specially recruited locally or abroad in order to fight in an armed conflict." It must then be proved that a special recruitment operation for a special conflict had been organized. That would be difficult, because such operations were mostly secret. Second, the person "(b) does, in fact, take a direct part in the hostilities." That would exclude advisers, trainers, persons who recruited others to fight as mercenaries and those who furnished arms. Third, the person "(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." Motivations of

belief, ideology or politics were excluded, making this one of the most criticized criteria because a definition which required positive proof of motivation was seen as unworkable. It would be very easy for the mercenary and for the employer to hide the fact of compensation bearing in mind that mercenaries' wages were paid either in their own countries or into bank accounts in other countries." Fourth, the mercenary "(d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict." If necessary nationality or residency could be granted by the State without problem. Fifth, the mercenary "(e) is not a member of the armed forces of a Party to the conflict." It would suffice to integrate the mercenary into the State's armed forces. This criterion had been introduced explicitly to exclude Nepalese Gurkhas in the United Kingdom, members of the French Foreign Legion and Swiss Papal Guards. Last, the mercenary "(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."

25. The expert explained that although article 47 had been adopted by consensus, it should not be thought that all delegations were fully satisfied with the final text. A number of delegates said that they would have preferred a stronger text which would have required States to prohibit recruitment and training, and to prohibit their citizens from enlisting as mercenaries. Even if some States were not satisfied with the final result, many said that it was probably the best compromise possible at that time. And it has been seen as a first step by the international community. Some delegations said that the text might be supplemented by regional agreements, and in fact the Organization of African Unity adopted its convention the same year.

26. The expert stressed that moreover article 47 of Protocol I was applicable only in international armed conflicts. Common article 3 of the Conventions and Protocol II governed non-international conflicts; none made any reference to mercenaries. There was no mention of mercenaries with regard to non-international armed conflicts, owing to the fact that in such conflicts there was no immunity for merely having taken up arms. The Government could condemn any dissident combatant for doing so, even if he had not committed any war crimes.

27. Finally, if traditional mercenaries could easily evade the restrictive definition of article 47, the expert indicated that the definition did address the issue of private security companies. It would make no sense to look for ways that article 47 could be used to prove that individual employees of private security companies could be classified as mercenaries. The expert thought an ad hoc regulation for this issue was necessary.

28. Concerning these private security companies some principles of IHL were recalled. If a State, a rebel group or a multinational company recruited military personnel through a private security company and if these persons participated in combat, then they had to respect IHL. Under IHL, persons were criminally responsible for the violations they committed personally or that they ordered committed. Besides, the fact that a subordinate committed a violation of IHL did not absolve his superiors from penal or disciplinary responsibility if the latter knew or had information which should have enabled them to conclude that the subordinate was committing a crime (Protocol I, art. 86). Nevertheless, if individual criminal responsibility existed under IHL, for the time being there was no criminal responsibility for legal persons.

B. International Convention against the Recruitment, Use, Financing and Training of Mercenaries

29. The genesis of the International Convention was described. On the initiative of Nigeria, a Special Committee was formed in 1979 to elaborate a convention against the recruitment, use, financing and training of mercenaries. The Special Committee had to address four principal questions: the definition of a "mercenary", the extent of both individual and State responsibility, the extent and basis of jurisdictional competence and, finally, judicial cooperation in the provision of evidence and extradition.

30. From the outset of the discussions, two opposite positions emerged: on one side States of the third world and socialist countries and, on the other side, Western States. The first group wanted a political approach to the problem, the second group a legal one.

31. After nine years of hard discussions, the Convention was finally adopted by consensus by the General Assembly in resolution 44/34 of 4 December 1989. But, more than 10 years after its adoption, the Convention has still not entered into force, lacking one ratification to obtain the 22 necessary.

32. The Convention foresaw two types of offences. The first one consisted in recruiting, using, financing, or training mercenaries and the second one concerned the mercenary himself when participating directly in hostilities or in a concerted act of violence. Attempt and complicity were also criminalized.

33. The definition of the mercenary as given in Additional Protocol I was adopted as a starting point in the negotiations, but it appeared that it did not answer one of the basic concerns of third world countries: the use of mercenaries to overthrow a Government, or analogous situations.

34. In addition, the exclusion of a national from the definition and the criteria to define what was meant by "private gain" were hotly discussed. Very soon the Special Committee decided to adopt two different definitions. The first one applied in cases of armed conflict, whether international or non-international (art. 1, para. 1): it was almost word for word the definition contained in article 47, except that subparagraph (b) was taken out and constituted the subject of a separate article 3. Indeed, it was decided to delete the "direct participation" in hostilities from the definition so as not to link the prosecution of those committing the second type of offence, i.e. the recruitment of mercenaries, to their active participation in combat.

35. The second definition was an adaptation of the definition contained in paragraph 1, but was broader (art. 1, para. 2): "A mercenary is also any person who, in any other situation: (a) is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at: (i) overthrowing a Government or otherwise undermining the constitutional order of a State; or (ii) undermining the territorial integrity of a State; (b) is motivated to take part therein essentially by the desire for significant private gain and is prompted by the promise or payment of material compensation; (c) is neither a national nor a resident of the State against which such an act is directed; (d) has not been sent by a State on official duty; and (e) is not a member of the armed forces of the State on whose territory the act is undertaken.

36. The inclusion of other elements (i.e. subparagraph (a) (i)) was discussed at length. Third world countries wanted to introduce also the repression of the struggle of people fighting against colonial domination, alien occupation or racist regimes; Western States, still having colonial possessions, could not accept their demand. The compromise reached finally was that opposing the struggle of peoples seeking to exercise their right of self-determination was deleted from the definition of the mercenary but was introduced in another article of the Convention, namely article 5, paragraph 2 of which says: "States Parties shall not recruit, use, finance or train mercenaries for the purpose of opposing the legitimate exercise of the inalienable right of peoples to self determination, as recognized by international law, and shall take, in conformity with international law, the appropriate measures to prevent the recruitment, use financing or training of mercenaries for that purpose."

37. One of the problems of adapting article 47 of Protocol I to the second definition envisaged in the Convention was the question of "private gain", which gave rise to lengthy discussions. Third world States held that in certain circumstances even modest remuneration could be sufficient for a person to accept to be recruited as a mercenary. As it was true that in the situations concerned the comparison with "compensation paid to combatants of similar rank in the armed forces of that party" was not relevant, the criterion was adapted as follows: "[a mercenary] is motivated to take part [in a concerted act of violence] essentially by the desire for significant private gain and is prompted by the promise or payment of material compensation".

38. The other point that had to be adapted from the definition contained in article 47 of Protocol I was the one concerning the nationality of the mercenary. States such as Nicaragua and Cuba wanted to delete this condition, which would have automatically excluded the possibility of considering the "Contras" as mercenaries. But Western States supported the opposite opinion, saying that even the OAU maintained this condition. The expert expressed the view that without it, a consensus on the Convention would probably never have been reached.

39. Contrary to IHL, the Convention created international offences and set binding obligations upon State parties (art. 5 ff). States were also required to cooperate in the prevention of the offences and to make the Convention offences punishable by appropriate penalties. Each State party shall take such measures as may be necessary to establish relevant jurisdiction and prosecute or extradite. Unfortunately, the principle *aut dedere aut judicare* was said to be of little importance when there were so few States parties.

40. The safety clause in article 16 stipulated that the Convention would be applied without prejudice to "[t]he law of armed conflict and international humanitarian law, including the provisions relating to the status of combatant or of prisoner of war", meaning that the mercenary should enjoy the fundamental guarantees and the protection of article 5 of the Third Geneva Convention if there was any doubt concerning his status.

41. The expert concluded by saying that humanitarian law did not provide an appropriate forum to combat mercenary recruitment as such. The United Nations Convention was the preferred regulatory approach to the mercenary problem. But the weaknesses of the Convention were well known. In particular, there was no control mechanism and its definition was no better

than the one contained in article 47. In that respect, the expert recalled the conclusion of the Diplock Report (United Kingdom) that: "... any definition of mercenaries which required positive proof of motivation would be unworkable [and that] mercenaries can only be defined by reference to what they do and not by reference to why they do it".

42. Moreover, the expert underlined that States were not interested in tackling the problem like they did at the time when the texts were negotiated, i.e. from the rather narrow anti-colonialist viewpoint. That fundamental approach was considered no longer to be relevant. In particular the problem of private security companies should not be addressed on the basis of the mercenary issue as it was dealt with in the 1970s. In that sense, the expert regretted that despite their interesting contents, the reports prepared by the Special Rapporteur were still focused on the old approach, as was evident in its title. In ending the presentation, the expert advised that any attempt to regulate private security companies must recognize the difference between *ius in bello* and *ius ad bellum*.

III. REGIONAL LEGISLATION: THE OAU CONVENTION

43. One expert argued that the OAU Convention could be considered more elaborate than the International Convention as it devoted a substantive paragraph to the purpose for which the act of mercenarism was committed: opposing by armed violence a process of self-determination, stability of another State or its territorial integrity. Article 1, paragraph 2 (a) of the OAU Convention clearly held States or their representatives, individuals, groups or associations responsible for acts of mercenarism. The terms "Group" or "Association" and "juridical" were crucial in the light of current manifestations of mercenarism. Thus, a private security company or a private military company or a corporation could be prosecuted for crimes of mercenarism committed by individuals hired by them. This was in addition to the prosecution of the individuals themselves.

44. Article 6 of the OAU Convention prevented the use of territories of African States as transit routes by mercenaries and was quite eloquent when it came to the responsibilities and obligations of States to discourage and root out mercenary activity from their territory. The OAU Convention went further, requesting States to enact laws in consonance with the Convention to prosecute mercenaries (arts. 7 and 8), and stipulated unambiguously that States had a duty to offer all necessary assistance to victim States in matters of investigation (art. 10) and extradition (art. 9) related to mercenary activity. However, no African State had taken a cue from the Convention to integrate its provisions into domestic law in any meaningful way.

45. The expert noted some of the main reasons for the shortcomings and the ineffectiveness of the OUA Convention. Concepts of self-determination, stability and territorial integrity had lost their original meaning as understood in the process of decolonization, the anti-apartheid struggle and the consolidation of political independence. The meaning of self-determination had shifted to internal self-determination, a right recognized by the African Charter of Human and People's Rights. The Convention covered almost exclusively the question of extraterritorial deployment of mercenaries but was silent on internal deployment.

46. The expert proposed that the Convention should be updated to address the deployment of mercenaries by member States in internal conflicts. It was necessary to revise the articles

dealing with the pecuniary motives behind mercenary activities while broadening the articles dealing with the purposes of the mercenary activities as well as the impact of those activities. By means of an additional protocol, the OAU could add provisions to the Convention that banned the use of mercenaries by private military companies in situations of civil war and only permit the deployment of such companies in exceptional circumstances under very strict regulation. In situations of peace, the activities of those companies related to escort duties and provision of security guards could be permitted, in accordance with the laws of the State.

47. Lastly, the expert stated that for the proposals to have any effect, any OAU initiative on new legislation on mercenaries should be backed by similar initiatives at the level of the United Nations.

IV. NATIONAL LEGISLATION

48. An expert gave a presentation and analysis of various national legislation dealing with the issues related to mercenaries in the world and made some recommendations as to what national legislation should take into consideration.

49. The expert explained that the first, and by far the oldest, category of legislation to be passed relevant to mercenary activity was in response to the requirements of neutrality laws. The aim behind those laws was to ensure the neutrality of Western States in the event of armed conflict in which such States were not involved. The neutrality type of legislation was generally enacted under the title of foreign enlistment laws, as in the cases of the United Kingdom and the United States of America. In some cases, such as those of France and Sweden, criminal codes carried provisions which made the foreign enlistment of nationals criminal.

50. Foreign enlistment laws tended to prohibit totally the enlistment of nationals in the armed services of other States when those States were at peace with the State of nationality. They also prohibited the enlistment of nationals without the consent of the State of nationality. The effect of those laws was to prohibit the enlistment and the recruitment of nationals to fight as mercenaries in foreign wars.

51. The second type of legislation dealt directly with mercenaries and mercenary activity. An example can be found in Belgian law. Enacted in 1979, Belgian law prohibited recruitment (in Belgium) of mercenaries and the act of becoming a mercenary. The specific acts are punishable with a term of imprisonment. Exceptionally, effect is given to certain Security Council resolutions (161 (1961) and 169 (1961)) which were adopted during the involvement of Belgian mercenaries in the Congo. That and other experiences in the Congo accounted for the character and attractive quality of Belgian legislation. Interestingly, revisions made to the penal codes of the Russian Federation and countries of Eastern Europe after the break-up of the former Soviet Union had criminalized mercenary activity in that region.

52. The third type of legislation was that which regulated the provision of foreign military assistance as opposed to just mercenary activities, which dealt with direct participation in conflicts. The principal and most recent example of such legislation was the South African Regulation of Foreign Military Assistance Act passed in July 1998. The scope of the Act

covered natural and legal persons, including individuals and private military companies, who provided foreign military services from within the territory of South Africa to engage in mercenary activities.

53. The Act was an attempt to develop a legal instrument to address both traditional mercenaries and emerging private security and military companies. A distinction was therefore made within the legislation between mercenary activity and the provision of foreign military assistance. The Act did not use the definitions of a mercenary and mercenarism in the International and OAU Conventions, but instead defined mercenary activity to mean simply "direct participation as a combatant in armed conflict for private gain". Engagement in mercenary activity including recruitment, use or training, or financing, was, however, prohibited by the Act (sect. 2) within South Africa or elsewhere, also suggesting that it had extraterritorial effect.

54. The fourth type of legislation according to the expert, was that which included military services within arms export control systems. That was how the activities of private military companies were regulated in the United States. Those companies wishing to enter into contracts with foreign Governments to provide military services were dealt with in the same way as those supplying arms and other military equipment. The relevant legislation was the International Traffic in Arms Regulations (ITAR) introduced in March 1998. ITAR is included in the United States Arms Export Control Act of 1968 and was overseen by the Office of Defence Trade Controls in the Bureau of Political-Military Affairs of the Department of State.

55. Finally, the expert suggested that a number of key features should be included in the formulation and drafting of effective national legislation which would combine aspects of provisions relating to traditional mercenaries in international law as well as of the more recent efforts to provide regulation of private military companies. He also expressed the view that there could be a risk that the corporations would move to other States if the regulations were too strict, but hoped that many States would have similar legislation so that, in the end, the companies would have no way of avoiding them. He also recommended that a system be established that would allow monitoring of those companies, both in their country of origin and in the country where they provided services. The expert recommended that there be an explicit prohibition against paying such companies with natural resources, to prevent illegitimate Governments from using the natural resources of the State for that purpose.

V. MEASURES TO IMPLEMENT EXISTING LEGISLATION - SUPPLEMENTARY MEASURES TO EXISTING LEGISLATION

56. An expert presented for the consideration of the group several opinions and specific recommendations related to international measures for dealing with the new forms of mercenaries. He emphasized that his presentation was directed more specifically to the issue of private security companies.

57. The expert stated that there were at present a plethora of non-State private security groups, including volunteers, private militias, civil defence forces and vigilantes, that posed a common challenge to the State as the principle provider of security. In each case the monopoly over the use of force had moved outside the exclusive realm of the State into the private sphere. If there was a common denominator to all those manifestations, it was the trend towards the privatization of security and violence that was occurring in a number of countries where the State was weak and unable to provide security for its citizens.

58. The expert added that new forms of mercenaries, and in particular private security companies, fell outside the existent international instruments. There was thus a distinct lack of accountability within international law for the non-State privately motivated armed groups. It was important to realize that it was not so much a lack of legal instruments that was the problem but rather the failure to apply them. There were aspects of international human rights law relevant to this sort of issue, but they were set up to deal with State actors. These gaps and lack of accountability had led to a culture of impunity for the new forms of mercenaries committing grave violations of human rights.

59. In the view of the expert, any additional measures should only target the new forms of mercenaries and not the host of other non-State irregular groups that were very similar in character and displayed many of the same features. There needed to be a distinction made between new forms of mercenaries on the one hand and volunteers, arms traffickers, terrorists, organized crime consortia, etc. on the other. While mercenaries might be involved in such activities, which were certainly interrelated, it was necessary to deal with them conceptually separately if realistic and focused policy responses were to de developed. It was, furthermore, important that additional measures did not duplicate but rather coordinated with existing international instruments pertaining to the related issues for which a number of instruments already existed. The key purpose and consideration for the development of additional measures should therefore be to rectify the current lack of accountability for new forms of mercenaries in international human rights and humanitarian law. This might require not only legal measures but also new ways in which existing international human rights standards could be applied.

60. The expert noted that the existing international instruments were not strongly supported by the national legislation of Member States, not even those countries experiencing mercenary activity which, if they felt it necessary, could be expected to attempt to take unilateral action regardless of international standards. While there were notable concerns about the enforceability of international instruments such as the International Convention that stemmed from their narrow definition of mercenary, the obligations on States were, perversely, quite meagre. Therefore, if they were to be redrafted, it could be argued that they would not receive greater support from Member States than at present. That led to the conclusion that to amend existing international instruments might not be the priority at the present stage.

61. The expert added that another option could be an additional protocol to existing instruments to rectify the noted inadequacies and introduce supplementary measures to address new forms of mercenaries. However, it would be difficult to promote additions to instruments that were either poorly implemented, as in the case of the OAU Convention, or had not yet entered into force, as in the case of the International Convention. The expert emphasized that, while it might be an appropriate course of action at a later stage, the priority at present was to

ensure the effective implementation of existing instruments and further study of new forms of mercenaries in order to develop clear guidance as to how they should be addressed. The expert stressed that, as a start, the entering into force of the International Convention would represent an important step towards eradicating and preventing mercenaries in their traditional form. It would help characterize situations where mercenaries threatened the right of peoples to self-determination and assist in prosecuting and punishing such offenders, if appropriate extradition and prosecution procedures were enforced. It might even oblige States to regulate some, though not all, of the activities of private security companies that were deemed to be of a mercenary character. It was important to note that there was no monitoring mechanism attached to the International Convention. Once, or if, it did come into force the United Nations should introduce such a mechanism to ensure its effective enforcement.

62. The expert went on to add that national legislation was the most feasible and effective means of regulating new forms of mercenaries. He added that some countries did have legislation regulating the activities of modern-day private security companies and their supply of military assistance abroad, as opposed to traditional forms of mercenaries, but as yet there had been no initiatives to promote international standards for such legislation nor for ideological and other forms of new mercenaries.

63. In the view of the expert the priority at present was the development of effective model legislation and information-sharing amongst States to ensure best practice. In that regard the United Nations could work to assist and to promote international standards for model national legislation. It could also work with regional bodies so that collective action was taken in areas of the world that were either experiencing the problem or in regions from where private security companies originated.

64. Commentators on this issue suggested that a regulatory body could be set up under the auspices of the United Nations to register and monitor the activities of private security and military companies. Administered by an appropriate branch of the United Nations, companies would be certified only if they met an internationally agreed set of principles and standards reflecting international human rights and humanitarian law. As with the United Nations Register on Conventional Arms, it would be the responsibility of each Member State to gather and submit information on companies operating out of their territory. Such a mechanism would certainly help set important precedents for much-needed transparency and standard-setting in the international market for private security and military companies. Even though the register would be voluntary and not comprehensive to begin with, there would nonetheless be a willingness on the part of companies to submit information, as it would give credibility to what they were already doing in exchange for greater acceptance by the international community. There would also be an added incentive for those companies not already meeting the required standards to raise theirs. However, before such a system could be established there would need to be major advances in terms of supplier countries providing regulations for companies operating out of their territory. If the United Nations were to accredit companies, it might appear as if it had the power to authorize their use, which was clearly not the case. Such responsibility should remain within the competence of each Member State.

65. In relation to the mandate of the Special Rapporteur on the use of mercenaries, the expert stated that it had an important role to play in analysing, monitoring and reporting on the impact

on human rights of new forms of mercenaries. In the absence of legal safeguards the independent role of the Special Rapporteur of studying the issue and raising awareness of the problem provided public sanction for human rights abuses of new forms of mercenaries. However, the current wording of the resolution that supported the mandate of the Special Rapporteur arguably only reflected the problem as it was experienced in post-colonial Africa and the precise role played by mercenaries in that era. As a result, the issue came under agenda item 5 of the Commission on Human Rights on the right of peoples to self-determination and its application to peoples under colonial or alien domination of foreign occupation. This narrowly conceived interpretation of the problem had severely restricted the utility of the mandate. New forms of mercenaries threatened not only the right of peoples to self-determination, but also a host of other human rights. It could be more productive to place the issue under another agenda item of the Commission such as that dealing with civil and political rights. Furthermore, the activities of new forms of mercenaries such as private security companies did not at present come strictly within the current remit of the Special Rapporteur's mandate - something that the Special Rapporteur had himself noted. Officially, there was no mechanism within the United Nations system to study and monitor new forms of mercenaries to ensure the protection of human rights.

66. A revised mandate of the Special Rapporteur would provide a more comprehensive approach to the problem. It could also begin to promote the kinds of measures being offered at the present meeting. In that regard, the mercenary issue should not be taken up by the Sixth Committee of the General Assembly, as some delegations in the Commission on Human Rights would wish. Explicitly devoted to the drafting of legal documents, the Sixth Committee would be an inappropriate forum in which to analyse and discuss the consequences of new forms of mercenaries. Sending the issue to the Sixth Committee would pre-empt a thorough examination of the issue and represent the loss of an opportunity for dialogue on how the international community wished to address the question. As noted earlier, it was not so much a lack of law that was the problem, but rather the lack of any agreed policy response. A revised mandate for the Special Rapporteur could therefore help promote the sorts of measures that were required. In addition to promoting the development of and adherence to the existing legal framework, the revised mandate would also provide a means of reporting on and monitoring the new forms of mercenaries, and in particular the conduct of private security companies, so that they adhered to internationally agreed human rights standards. The new role of the mandate could also provide much-needed coordination amongst the diverse activities undertaken in different parts of the United Nations system that were currently tackling different aspects of the problem. A meeting should be convened as a matter of priority of all the different branches of the United Nations in order to provide conceptual clarity on the true nature of the problem.

67. The expert also made reference to a code of conduct, stating that there had been a number of instances of the use of private security companies by multinational corporations in the oil and mining industries which had led to human rights abuses. That had encouraged companies, with the encouragement of Governments and NGOs, to draw up codes of conduct and guidelines to safeguard against such occurrences. In particular, during 2000, the Governments of the United Kingdom and the United States took the initiative to convene a number of companies in the extractive sector and NGOs - all with an interest in human rights and corporate social responsibility - which led to the elaboration of a set of "Voluntary Principles on Security and Human Rights" to guide companies in maintaining the security of their operations whilst

ensuring the protection of human rights. It was important to realize, however, that, while important, voluntary codes of conduct were not enforceable and only formed a small part of a comprehensive regulatory framework for new forms of mercenaries. However, the initiative was an important advancement in needed accountability in the private security industry.

68. The expert also addressed the issue of self-regulation, stating that security and military companies often outlined in their company profiles the sorts of contracts that they were prepared to accept and those that they were not. Some companies, for instance, stated that they would not engage in combat roles, whereas others made it clear that they would only work for internationally recognized Governments. A number of companies also stated the principles and values which they pledged to abide by when accepting a contract from a client, including self-imposed measures to ensure adherence to international human rights standards and international humanitarian law during their operations. The adoption of self-imposed standards in that way was a means by which companies could gain greater acceptance. Such efforts by some of the more progressive companies were laudable and provided leadership in setting industry standards that other companies must aspire to. The United Nations could support such initiatives through appropriate dialogue with private security companies and training in international human rights standards. However, self-regulation by the industry was by no means rigorous or enforceable and should not divert attention away from more urgent forms of regulation.

69. The expert also made reference to arms export controls, stating that the link between new forms of mercenaries and arms trafficking was widely recognized. The use of weapons, usually small arms, was integral to their activities and there had been many instances of such actors being involved in the transfer of weapons into conflict regions by acting as arms-brokering agents. The expert added that there were few national or international controls over the activities of arms-brokering agents. However, there was growing interest by the international community in tackling the issue of arms trafficking and brokering. The draft Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition and other Related Materials to the recently agreed United Nations Convention against Transitional Organized Crime was expected to be agreed shortly in Vienna during final negotiations. Mercenaries were in fact included in the preamble to the Protocol. In July, the United Nations would also be holding the Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects which would tackle a wide range of issues associated with illicit arms trafficking and represented an important opportunity to highlight the role played by new forms of mercenaries in the arms trade.

70. In the view of the expert, it was also feasible that in the future military services provided by private military companies might begin to fall within the scope of arms export controls, as already occurred in the United States regulatory system. In that regard, the European Union Code of Conduct on Arms Export adopted by EU member States in 1998 could be amended to incorporate military services and by so doing set important standards for arms-supplying nations that also had private military companies based in their territory. In a similar vein, the International Code of Conduct promoted by a group of Nobel laureates in fact already included military services within its definition of arms but had yet to be adopted by the international community.

71. Lastly, the expert asserted that to ensure that a comprehensive approach was adopted, it was important to develop preventive measures designed to discourage individuals from becoming involved in mercenary acts in the first place. The expert noted that there were a number of important United Nations initiatives in that regard. In the expert's opinion, the report of the Panel on the United Nations Peace Operation (the Brahimi report) contained key recommendations for improving the effectiveness and the capacity of the United Nations to conduct peacekeeping missions. It set out a broad framework within which the United Nations could take measures to help prevent violent conflicts and, in turn, the environment in which new forms of mercenaries were likely to be most active. Beleaguered States would in this way find it less necessary to use private military companies. Improvements in demobilization and reintegration schemes for former combatants would also make it less likely for them to engage in new mercenary activities. The prevention of violent conflict is, of course, a massive task, but preventive measures such as those represented practical ways in which the United Nations could help reduce new forms of mercenary activities.

VI. RELEVANCE OF THE INTERNATIONAL DEFINITION OF MERCENARY

72. An expert stated that in the International Convention there were two criteria characterizing the offence of mercenarism, one subjective (receiving payment or compensation) and the other objective (being recruited to fight in military groups or carry out acts of violence whose aims contravene international law). The subjective criterion of the desire for private gain was a necessary condition. The identifying characteristic of a mercenary's behaviour was the perverse intent that provided the subjective motivation. This subjective criterion was an essential element of the offence of mercenarism, not only because it was stipulated in the legislation, but also because it was one of the elements that set mercenarism apart from other criminal behaviour such as treason or enlisting in the armed forces of another State against one's own State. The only flag of a mercenary was his own private gain. Paragraph 2 (a) of article 1 of the Convention was more realistic than paragraph 1 (a), since the concept of "armed conflicts" was more restrictive than the idea of participation in acts of violence with defined aims. Thus paragraph 2 (a) and (b) of article 1 should form the core of the definition of mercenary, or at least have equal status with paragraph 1. In the definition given in the Convention, nationality figured as an eliminating factor, like residence, but, in the view of the expert, owing to developments in mercenarism, that could not be taken into account for present purposes. According to the objective criterion of the definition, nationals could be considered mercenaries even when they acted against the basic interests of their own country. In short, it was a mistake to refer to nationality in the definition of a mercenary. The mercenary became a mercenary merely by selling his effort to do harm at the behest of the person recruiting and paying him. The mercenary has no nationality, nor concept of homeland. A national acting against his own country is no less a mercenary, as long as the subjective criterion applies. That was the decisive factor in the offence.

73. It was absurd to define mercenary in terms of the level of compensation, as in paragraph 1 (b); it would have been sufficient to restrict this paragraph to material compensation and leave out the rest. It was not how much a mercenary was paid that made his actions punishable. Moreover, the language of the Convention, which attempted no less than a definition of an offence requiring maximum precision, included expressions such as

"substantially in excess". Who decides, and by what criteria, that the amount of compensation is substantially higher? This part of paragraph 1 (b) considerably weakened the definition of mercenary. The same applied to the use of the word "significant" in paragraph 2 (b).

74. Nor was it appropriate, in the expert's view, to make a connection to military operations by a country's armed forces since the status, organization and characteristics of armed forces were duly defined in humanitarian law, in the Geneva Convention and Protocols.

75. The topic of the use of mercenaries could not be discussed separately from the terrorist activities assigned to those mercenaries. The connection between mercenarism and international terrorism was implied by the Security Council, which stated in its resolution 748 (1992) that "Every State has the duty to refrain from organizing, investigating, assisting or participating in terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when such acts involve a threat or use of force". Moreover, whatever the definition of mercenary, the element of terror was present and mercenarism could therefore be said to have been, and to remain, the executive arm of international terrorism. It was important to have a clear definition of mercenarism and its criminal nature, so that when States defined it in their own criminal legislation they could adopt the same approach. The expert believed that concerted acts of violence, which were becoming more common than fighting in armed conflicts, should not be relegated to second place.

76. The experts had a discussion based on the presentation of the expert. Some of the experts felt strongly that the definition of mercenary should not exclude nationals of the State where the criminal acts were committed. Other experts recognized the problems this raised in practice, but felt that the requirement should be kept. In the end, no consensus was reached. The experts agreed that this situation required more analysis and discussion. Another expert stated that during the 1990s there had been a decrease in the military budgets of many States and a reduction of military personnel. That process was accompanied by a decline in United Nations peacekeeping operations and an increase in the establishment of private military companies. It had been recognized that there was a lack of accountability of these companies in terms of human rights violations. Some critics considered them a source of instability instead of a source of security. Governments' attitudes with regard to these companies ranged from a permissive position, to legal regulation, or even to proscription. Some Governments, in particular those where the highest number of mercenaries originated, seemed eager to keep all their options open.

VII. TRADITIONAL AND CURRENT FORMS OF MERCENARY ACTIVITIES

A. The case of Africa

77. One of the experts submitted a typology of African States at the end of the cold war, describing the forms and dynamics of the conflicts that were shaping them. Mercenary activity was at the base of trade and raw material exploitation during colonization. However, mercenary activities became prominent in the 1960s in the context of peoples' struggles to assert their rights to self-determination and independence. Mercenaries were hired by former colonial powers and other external interests to undermine the rights of the people of Algeria (1956), the Congo (1960s), the Comoros (1970s-1990s) and Benin (1970s) to assert their political independence and choose their leaders, or to destabilize sovereign States (Guinea, Angola, the Seychelles,

Mozambique). Since the mid-1980s, internal conflicts that were suppressed by cold war priorities had intensified and proliferated. Mercenary groups had become a major instrument in resource appropriation at almost no cost, as the struggle to recognize power relations within Africa intensified.

78. The archetypal mercenaries in Africa acted as “lone wolves” or in small bands, were motivated by financial gain, sentimentality, a feeling of racial and/or professional superiority or by adventure. They were very much a feature of current internal conflicts in Africa. However, they were hired more often by local “strong men”, at times acting in tandem with foreign secret services, than by foreign Governments.

79. The advent of private military companies had not led to the decline of traditional mercenary activities in Africa. On the contrary, they had become new launching pads for traditional mercenary activities. Angola, the Democratic Republic of the Congo and Sierra Leone demonstrated that. The greater the number and variety of private security structures involved in any particular conflict, the deadlier and more intractable the conflict became. The unending cycle of violence in those countries could not be divorced from the interplay between illegitimate resource appropriation, transnational corporate greed, arms proliferation and impunity, all of which were linked to private military companies. Anti-élite sentiments, revulsion at the patronage system and extreme exclusion sparked the wars, which were very popular at the onset. As the struggles became protracted, they degenerated into resource-based and proxy wars.

80. The expert added that purely internal struggles for control of resources and, ultimately, for State power were made more sophisticated and deadlier by external influences, and that private military intervention in conflicts was a function of both dynamics. The conflicts in Africa were provoked by deep-seated causes - impoverishment of the majority by the few amidst gross abuse of human rights. By controlling resources - a primary cause of conflicts - and controlling the security of the State, the private military companies, with their mining partners, effectively controlled the sovereignty of the afflicted State. There was a need to focus international attention towards building the capacity of regional structures to deal with local conflicts. However, the international community, particularly the Western States, had been reluctant to extend any meaningful assistance to the Military Observer Group of the Economic Community of West African States until recently. The affluent States of the world should assist proactively in building the capacity of regional structures to manage local conflicts.

81. An expert stated that mercenaries were no longer adventurers, individuals recruited clandestinely to fight in an armed conflict, but professionals capable of conducting combat or teaching command skills. Traditional mercenaries had as their primary motivations profit or adventure. The question of military groups compelled by religion or ideology to fight in foreign countries was also discussed.

B. The case of Russia

82. An expert presented a typology of Russia, describing the diverse forms of violence that had emerged after the end of the cold war and their root causes linked to the socio-economic problems that Russia was facing.

83. The expert explained that there were very few choices for young males in Russia today. Too many youngsters were left with the only options of entering criminal gangs, being hired by private security companies to work as security guards to protect businesses or as body guards, or to enlist to fight in war zones as mercenaries. The criminal gangs were the roots of mercenary groups and in many cases were paid by parties to a conflict to carry out terrorist acts.

84. The expert explained that during the last 10 years Russians had many possibilities to participate in real wars as the break-up of the Soviet Union led to ethnic conflicts. Thus, Russian mercenaries were fighting in Nagorny-Karabakh (starting in 1989), on both the Azerbaijani and Armenian sides; in the Republic of Moldova, where they came to support Moldovan Russians who wanted to separate their region, Pridnestrovje, from Moldova; in Georgia, where in 1993 Russian mercenaries were fighting on the side of Abkhazia; in Tajikistan, where the Government was engaged in an endless battle with the opposition; in Yugoslavia, where Russians supported "brother Serbs" and, since 1994, in Chechnya. Approximately 2,000 mercenaries were fighting with the Chechens at present, and since the beginning of the war in 1994 approximately 5,000-7,000 mercenaries had taken part.

85. The expert explained that there were several categories of mercenaries in Chechnya. The first category consisted of rootless persons from East and South-East Asia who were occasional, non-professional recruits. The second category were just the opposite - professional soldiers, very experienced and well organized. These mercenaries were provided by Muslim extremist organizations and constituted their platoons and detachments among the Chechen ranks. They were paid through bank accounts in other countries. The funds used to pay mercenaries in many cases came from "legitimate" companies used as covers or whose completely legal profits were used for this purpose. If such a mercenary were wounded, his colleagues would bring him to a hospital in a third country, where a permanent representative of their organization would take care of all the expenses until complete recovery.

86. The third category was volunteers on the Russian side who were fighting because of deep, desperate poverty. Moreover, a huge part of them enlisted for the second Chechnya campaign because they had fought in the first campaign and were "infected" by war. In Russia they were called "dogs of war". Those mercenaries were the most dangerous because all the others could be reduced or eliminated by economic means or by new laws. But the "dogs of war" were pure products of war. They did not depend on poverty or a poor social situation as other types of mercenaries did.

87. The experts also noted that in the last few years mercenaries from Eastern Europe had been working in Latin America and Africa. They believed that this was due to the number of unemployed soldiers and cheap labour.

88. The experts discussed whether members of fundamentalist groups were mercenaries because of pecuniary reasons and not just from purely religious or ideological motives. Some of the experts expressed their conviction that many of them were fighting because of the high pay they received. In some cases they would enter the profession for religious or ideological reasons, but stayed and fought for monetary reward.

89. The experts identified as one the root causes of the problem of mercenaries that States after the cold war were not able to take appropriate measures to reduce their armies properly so that many former soldiers became mercenaries.

C. The case of Colombia

90. One of the experts presented a briefing on the situation in Colombia. He gave an overview of the internal context, its evolution and the worldwide context. He also explained the kinds of mercenarism in Colombia.

91. In the Colombian conflict, cases of mercenarism were not as frequent as in other conflicts, but some kinds of mercenarism could nevertheless be cited. First of all were cases of mercenarism *strictu sensu*, i.e. mercenaries along the borders with foreign countries involved in the Colombian conflict as armed actors. According to reports, foreign individuals had trained paramilitary armed forces in connection with drug trafficking and with private or para-State goals.

92. As the concept of mercenarism had a limited legal sense, the expert developed the concept of a mercenarism process, which was broader. This new concept would be applied in cases where individuals, including nationals, involved themselves in war in order to obtain personal profit. For example:

(a) Private armed forces or private justice groups. In many cases, owing to the lack of security, businessmen or business groups (legal or not) formed private armed forces in order to protect their companies and properties or in order to fight against other armed groups, trade unions, human rights defenders or to control strategic zones;

(b) Mafia armies. Private justice groups and hired killer organizations were used for illegal activities administrated by criminal organizations. These organizations were often used politically for selective killings and benefited from a certain degree of impunity;

(c) Groups of soldiers or individuals changing bands with a view to personal profits. Members of institutional bodies became members of paramilitary groups, former guerrilla members joined counterinsurgency groups, etc.;

(d) Joining up for the money. In many cases former paramilitaries or guerrilla militants declared that they had joined the conflict because they earned more than they would have as farmers.

93. The expert added that one of the main reasons for the existence of mercenaries was precisely the weakness of the State. He explained that a State that was not able to control its borders and had lost the monopoly of force led to de facto division of the territory among different actors such as drug traffickers, guerrillas, paramilitary groups, oil companies with private armies, and others. In the Colombian case, the State had delegated the counter-insurgency to private actors, creating what he called the “privatization of the war” that facilitated the entry of mercenaries in the conflict.

94. Another expert said that there had been internal conflicts in Africa for a long time but during the cold war attention was given predominantly to external conflicts. Many of the internal conflicts grew after the world Powers stopped providing the assistance and investment they had provided during the cold war. States were forced to take huge loans from the international banking system and in places where military regimes were in power, the vacuum that was created was filled by private military companies, many of them made up of mercenaries.

95. The expert added that a new form of mercenarism was the large number of African mercenaries used for commercial purposes.

96. Responding to questions, the expert stated that many of the private security companies that provided praetorian guards to State dignitaries in Africa were in fact involved in mercenary activities. He emphasized the need to look into the motivation that drove people to become engaged in this type of activity, and to see what international instruments or mechanism could be used against those who committed human rights violations.

97. The expert described the phenomenon of "corporate colonization": in some cases States had lost control of the exploitation of its natural resources and its monopoly on the use of force to private companies with very complex business interests and which used mercenaries to maintain their status and power.

98. Another participant commented that there was a need to make a clear distinction between mercenaries and other situations involving groups of violent individuals who were not mercenaries. As an example, he said that paramilitaries were a result of privatization of the army, charged with tasks that States could not otherwise accomplish legitimately.

99. One expert added that in some cases, there was a clear link between mercenaries and State terrorism, and the only way to end that evil was with the will of States.

100. At the end of the five-day meeting, the experts reached the following conclusions and recommendations.

VIII. CONCLUSIONS AND RECOMMENDATIONS

A. Conclusions

101. During the cold war, mercenary activities related to the process of decolonization were largely located in Africa. Since the cold war, the phenomenon has not disappeared. It has instead become more extensive and diversified. It occurs in armed conflicts affecting self-determination. Given the characteristics of the new types of war, in which the ideological objectives are minimized or eclipsed, strategies, scenarios and economies of war are changing. That is the reason why it is now very difficult to make the distinction between wars of liberation, acts committed by organized crime, illegitimate paramilitary action, terrorism, acts of violence motivated by private interests and human rights violations committed by governmental agents.

102. In this connection, mercenary activities are used to destabilize legitimate Governments or to control natural resources of great economic or strategic value. In all these situations, mercenarism is the cause of serious damage to the enjoyment of human rights, and contributes to the commission of crimes against humanity and violations of international humanitarian law. In most of the cases analysed, responsibility was not established and the responsible persons enjoy absolute impunity.

103. Among the types of mercenary activities are the traditional ones, including direct hiring of individuals with military expertise for use in armed conflicts or in criminal activities in the interest of the parties who have hired them. Another type of activity involving mercenaries is terrorist acts, illegal arms and drug trafficking. Lastly, there are the modern multipurpose security corporations which may include forms of military service provided by mercenaries.

104. The treatment by the United Nations of the question of mercenaries should take into account, on the one hand, the criminal responsibility of individuals who sell their military services in the knowledge that they will be carrying out criminal acts of mercenarism; on the other, there should be criminal responsibility of those recruiting, training, financing, planning and deploying mercenaries when those acts lead to breaches of international humanitarian law and criminally violate the human rights of individuals and peoples.

105. The continued existence and diversification of mercenary activities require an appropriate legal framework. There are no effective punitive norms for “old” mercenary activities and new forms of mercenary activities fall outside existing frameworks. Few national laws make new forms of mercenarism an offence and international law is still deficient in this respect.

106. In past years there has been a considerable increase in private security companies offering services in the military field. These companies have a modern structure and are characterized by their efficiency and the multipurpose nature of the services they offer, but there is an objection to their participation in internal conflicts through the mercenary units which make up private armies. These aspects, as well as others related to illegal arms and drug trafficking and human rights violations by mercenaries from these companies, have so far no adequate mechanisms for their control, prevention and monitoring.

107. The important role of the United Nations Special Rapporteur on the use of mercenaries in analysing, monitoring and reporting on all forms of mercenarism is recognized. However, it is felt that the resolution that supports the mandate does not adequately address new forms of mercenaries and their impact on human rights and humanitarian law. Owing to the interrelated nature of these crimes, there is a need for the Special Rapporteur to coordinate his/her activities with other United Nations agencies dealing with arms and drug trafficking, terrorism and organized crime.

108. It is recognized that the relationships between mercenaries and human rights has changed. New forms of mercenarism threaten not only the right to self determination - although this may be the case - but also affect and violate a wide range of human rights.

B. Recommendations

109. The group recommends that the United Nations reaffirm its condemnation of mercenary activity and associated crimes, whether by States, organizations, groups or individuals. The group also calls upon the United Nations to recognize that there are new kinds of mercenaries which require additional action and measures. The problem of mercenarism in all its forms affects the enjoyment of human rights, peace and security, and economic and social development.

110. The group recommends that a systematic and comprehensive review of the legal definition of mercenary should be considered as a matter of urgency and should include, inter alia, the elements of motive, purpose, payment, type of action and nationality. Particular attention should be given to the purpose for which a mercenary is hired. However, a distinction should be made between new forms of mercenaries and related crimes such as terrorism, arms trafficking and organized crime in which mercenaries might be involved.

111. The group urges the States Members of the United Nations to ratify the International Convention against the Recruitment, Use, Financing and Training of Mercenaries and take the necessary measures to ensure its effective implementation. Consideration should be given to the establishment of a monitoring body for the Convention. In view of the gaps and loopholes in the Convention noted by the group, Member States should enact national legislation that gives effect to the principles of the Convention while remedying the noted inadequacies.

112. The group notes that mercenary activity in whatever form is associated with grave violations of human rights and international humanitarian law. To avoid a culture of impunity, Member States are called upon to introduce legislative measures which implement all relevant international human rights instruments and international humanitarian law under which all kinds of mercenaries may be prosecuted.

113. Although the Statute of the International Criminal Court does not refer to mercenaries, the group recommends that further consideration should be given to the extent to which mercenarism could be considered an aggravating circumstance in the event of liability for genocide, crimes against humanity and war crimes.

114. Private security and military companies should be considered in the context of freedom of association, freedom of movement, free enterprise, and corporate responsibility and liability. Their participation in the area of security is recognized, but this can also be the source of the same problems as are associated with traditional forms of mercenaries which they may well use. States are primarily responsible for maintaining public security and law and order and should not abdicate from these responsibilities, leaving them to private entities. The group recommends that States introduce specific laws and regulations to prohibit these companies from participating in armed conflicts, creating private armies, engaging in illicit arms trafficking, recruiting mercenaries, and being involved in the illegal extraction of natural resources.

115. The group recommends that all United Nations treaty monitoring bodies - in particular the Human Rights Committee and the Committee on Economic, Social and Cultural Rights - request from States parties information on all forms of mercenarism when examining their reports.

116. The group recommends that the discussions on the possible renewal of the mandate of the Special Rapporteur on the use of mercenaries at the fifty-seventh session of the Commission on Human Rights lead to its extension and the broadening of its remit to include private security and military companies and all other new forms of mercenarism and to more explicit reference to the human rights problems associated with their use.

117. The group recommends that the link between new kinds of mercenaries and arms transfers (including of strategic technologies) should be addressed at the forthcoming United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects and that ways should be investigated to integrate such activities into arms export controls.

118. The group recommends that the continuing work of the United Nations with civil society should include the issue of all forms of mercenarism.
