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

**Use of mercenaries as a means of violating human rights and impeding
the exercise of the right of peoples to self-determination; report submitted
by Mr. Enrique Bernales Ballesteros, Special Rapporteur**

Executive summary

This is the final report submitted by Mr. Enrique Bernales Ballesteros as Special Rapporteur on the question of the use of mercenaries, after 16 years in the discharge of his mandate. The Special Rapporteur analyses the changes in mercenary activities, from activities against the exercise of the right of peoples to self-determination carried out by individual mercenaries or more or less informal groups of mercenaries, to their recruitment and use by extremist organizations, terrorist groups and organizations engaged in trafficking in people, migrants, arms and munitions, diamonds and precious stones, and drugs. In the context of these changes the Special Rapporteur considers the growth and expansion in the activities of private companies offering military assistance, consultancy and security services, which are now established on the five continents and some of which have recently obtained contracts worth tens of millions of United States dollars.

The Special Rapporteur analyses the use of mercenaries in the context of aggression against various African peoples and against national liberation movements by the South African apartheid regime, for covert operations in Central America, in attempts to overthrow the Government of Maldives, and to commit terrorist acts in Cuba, among others. He reviews his official missions since 1988, the difficulties encountered in efforts to eradicate mercenary activities, and, in particular, shortcomings in international legislation. To this end the report contains a proposal for a new legal definition of a mercenary formulated by the Special Rapporteur.

The report also analyses the progress made in Sierra Leone and the continuing difficulties in Côte d'Ivoire and Liberia with regard to the use of mercenaries in West Africa. It contains information on the current status of ratifications of and accessions to the 1989 International Convention against the Recruitment, Use, Financing and Training of Mercenaries. The report ends with consideration of the difficulties and problems encountered by the Special Rapporteur in the discharge of his mandate and suggestions regarding the future of the mandate.

The Special Rapporteur concludes that the renewal of the mandate by the Commission on Human Rights is relevant to efforts to eradicate mercenary activities and to promote peace, international security and the protection of human rights. The new Special Rapporteur to be appointed in August 2004, should the mandate be extended, should continue to consider the question of the legal definition of a mercenary and should conduct the visits planned by the Special Rapporteur, as well as participate in various official missions sent by United Nations bodies.

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Introduction

1. The present report is the last submitted to the Commission on Human Rights by the Special Rapporteur, after 16 years in the discharge of the mandate established by Commission resolution 1987/16.
2. By resolution 2003/2 of 14 April 2003 the Commission took a number of measures that emphasize the breadth of the subjects embraced by the mandate since its establishment in 1987. Resolution 2003/2 reaffirms, as have all resolutions on the mandate, its condemnation of mercenary activities as a violation of the principle of self-determination to which all peoples have a right, pointing out that such activities constitute a danger to peace and security in developing countries, particularly in Africa and in small island States. The resolution refers to loss of life, the substantial damage to property, and the negative effects on the policy and economies of the countries affected by the criminal activities of mercenaries, in a clear allusion to the serious human rights violations that they occasion.
3. The Commission, pursuant to the investigations conducted by the Special Rapporteur, recognized that armed conflicts, terrorism, arms trafficking and covert operations by third Powers, inter alia, encourage the demand on the global market for mercenaries. The Commission urged all States to take the necessary steps and to exercise the utmost vigilance against the menace posed by the activities of mercenaries.
4. The Commission reaffirmed, inter alia, that the use of mercenaries and their recruitment, financing and training were causes for grave concern to all States and violated the purposes and principles enshrined in the Charter of the United Nations. It welcomed the entry into force of the International Convention against the Recruitment, Use, Financing and Training of Mercenaries; it welcomed the cooperation extended by those countries that had received a visit from the Special Rapporteur and welcomed the adoption by some States of national legislation that restricted the recruitment, assembly, financing, training and transit of mercenaries.
5. The Commission also requested the Special Rapporteur to hold consultations on implementation of the resolution and to report, at its sixtieth session, with specific recommendations, his findings on the use of mercenaries. The Commission also requested the Special Rapporteur to continue taking into account in the discharge of his mandate that mercenary activities were continuing to occur in many parts of the world and were taking on new forms, manifestations and modalities.
6. The Commission called upon all States to consider taking the necessary action to ratify or accede to the International Convention; it invited them to investigate the possibility of mercenary involvement whenever and wherever criminal acts occurred; and it urged them to cooperate fully with the Special Rapporteur in the fulfilment of his mandate.
7. On 22 December 2003 the General Assembly adopted its resolution 58/162 on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination. The General Assembly took note with appreciation of the proposal of a legal definition of mercenaries formulated by the Special Rapporteur, and requested the Secretary-General to seek the views of Member States to include them in the report of the Special Rapporteur to the General Assembly. It also recommended that the Commission

on Human Rights should renew the mandate of the Special Rapporteur for a period of three years. The General Assembly also requested the Special Rapporteur to report, with specific recommendations, to the General Assembly at its fifty-ninth session.

8. For the above reasons, and pursuant to Commission resolution 2003/2, the Special Rapporteur has the honour to submit this report to the Commission for its consideration at its sixtieth session. As this is the last report to be submitted at the end of 16 years of the mandate, the Special Rapporteur wishes to record his gratitude at the confidence placed in him and continually renewed. He conveys his appreciation to the Commission for having understood the complex nature of a mandate undertaken in the context of the defence of the right to self-determination of peoples, but that subsequently had to be extended to other criminal manifestations that involved mercenaries in the commission of serious violations of human rights, and in crimes against humanity. Clearly, the work, studies, missions and other activities conducted by the Special Rapporteur would not have been possible without the support and encouragement first of the former United Nations Centre for Human Rights, and later of the Office of the United Nations High Commissioner for Human Rights, which assigned professionals of high intellectual and moral qualities to service the mandate.

9. In placing on record his gratitude for the support he has received, the Special Rapporteur expresses the hope that the Commission and the Office of the High Commissioner will continue always to enjoy success in their mission of protecting the dignity of the human person and ensuring that human rights are enjoyed fully and effectively by all the peoples of the world.

I. ACTIVITIES BY THE SPECIAL RAPPORTEUR

A. Implementation of the programme of activities

10. The Special Rapporteur travelled to Geneva from 19 to 24 March 2003 to attend the fifty-ninth session of the Commission on Human Rights; from 23 to 27 June 2003 to attend the tenth meeting on special procedures of the Commission; and from 8 to 12 December 2003 to draft the present report. He also travelled in October to United Nations Headquarters to submit his report to the Third Committee of the General Assembly.

11. During his stay in the two cities the Special Rapporteur held consultations with representatives of various States and met with members of non-governmental organizations. He also held working meetings with the Special Procedures Branch of the Office of the United Nations High Commissioner for Human Rights. In New York he held meetings with the representatives of Côte d'Ivoire, Cuba and Panama.

B. Correspondence

12. Pursuant to General Assembly resolution 57/196 of 18 December 2002, and Commission on Human Rights resolution 2003/2 of 14 April 2003, the Special Rapporteur sent a communication to all States Members of the United Nations on 22 May 2003 requesting: (a) information on the possible existence of any recent mercenary activities (recruitment, financing, training, assembly, transit or use of mercenaries); (b) information on participation by nationals of their country as mercenaries in committing acts against the sovereignty of other States, the exercise of the right to self-determination by other peoples or the enjoyment of human

rights; (c) information on the possible existence of mercenary activities in the territory of another country against the State in question; (d) information on the possible participation of mercenaries in committing internationally wrongful acts such as terrorist attacks, formation of and support for death squads and paramilitary organizations, trafficking in and kidnapping of persons, drug trafficking, arms trafficking and smuggling; (e) information on existing domestic legislation and on treaties outlawing mercenary activities to which the State is party; (f) suggestions for enhancing the international treatment of the topic, including suggestions for a clearer definition of a mercenary; and (g) information and views on private security services and military consultancy and training companies, and on the connection between mercenarism and terrorism.

13. In a note verbale dated 19 June 2003 the Permanent Mission of Lebanon to the United Nations Office at Geneva stated that there were no mercenaries present in Lebanon and confirmed its opposition to all forms of the use of mercenaries as a means of violating human rights and impeding the exercise of peoples to self-determination.

14. In a note verbale dated 7 August 2003, the Permanent Mission of the Russian Federation to the United Nations Office at Geneva provided the following information:

(a) At present the greatest threat to the security of the Russian Federation and the other member States of the Commonwealth of Independent States is represented by radical fundamentalist organizations operating in the countries of the Near and Middle East. One of the main activities of these organizations is the recruitment of volunteers to participate in the jihad in Chechnya and other regions of the Russian Federation. Once they have completed a course of military training and ideological preparation, the mercenaries are assigned to different units, from where they are sent to places in which they are to carry out subversive activities, in particular terrorist activities. The sending of mercenaries to so-called hot spots, in particular in the North Caucasus, is generally by legal means. Islamic extremists fund the training and the mercenary activities through benevolent and charitable organizations using funds from various regions of the world;

(b) In December 2002, in connection with a hearing in a criminal case, the Office of the Procurator-General of the Russian Federation sent a request to the Attorney-General of the United States of America, Mr. D. Ashcroft. The request sought the handing over, for trial in connection with their participation in the armed conflict in Afghanistan as mercenaries in the service of the Taliban movement, of the following citizens of the Russian Federation: R.S. Akhmiarov, A.N. Bakhitov, R. S. Gumarov, T.R. Ishmuratov, R.V. Kudayev, R.K. Mingazov, R.A. Odzhiyev and S. R. Khazhiev. These individuals were arrested by the armed forces of the United States in Afghanistan in November 2001, and are being held at the United States naval base at Guantánamo, Cuba. The question of their release to the judicial organs of Russia by the United States has yet to be resolved;

(c) Representatives of extremist organizations are seeking to strengthen their presence in Europe with the aim of recruiting new members and combatants and establishing new networks to finance terrorists. Experts believe that some 300 foreign mercenaries are currently involved in Chechen gangs;

(d) In recent years the problem of mercenaries has been closely linked to international terrorism. Its importance is reflected in the broad reach and worldwide scope of the activities of extremist groups of combatants, who have significant financial resources. At present radical groups typically recruit mercenaries by word of mouth and very carefully check the backgrounds of the recruits so as to ensure security and detect any possible relationship with anti-terrorist bodies;

(e) Article 359 of the Criminal Code of the Russian Federation establishes criminal responsibility for activities relating to mercenarism. The recruitment, training, financing and provision of any other material assistance to mercenaries, as well as use of mercenaries in armed conflict or military operations, is punishable by four to eight years' imprisonment. Participation by a mercenary in an armed conflict or in military operations is punishable by three to seven years' imprisonment. Pursuant to article 3 of the constitutional Act of the Russian Federation on the military situation, the sending of mercenaries by a foreign State may be considered as aggression against the Russian Federation. The Federal Counter-Terrorism Act, of 25 July 1998, covered certain aspects of mercenarism;

(f) A mercenary is a person who acts in order to gain material recompense and is not a citizen of the State participating in the armed conflict or in military operations, who has no permanent residence in its territory and is not a person sent to discharge official functions;

(g) The Criminal Code of the Russian Federation, in its article 205-1, stipulates that use of a person to commit an offence criminalized under the articles of the Code, incitement to participate in the activities of a terrorist organization, the provision of arms, the training of a person with the aim of committing such offences, and the financing of acts of terrorism or of terrorist organizations, are punishable by four to eight years' imprisonment. The Federal Counter-Terrorism Act of 27 June 2002 defined extremism as activities by organizations (including civil society and religious organizations) with a view to planning, organizing, preparing and committing acts for the purpose of carrying out terrorist activities. There is also a Federal Counter-Terrorism Act which defines terrorism as an activity involving the organization, planning, preparation and conduct of terrorist acts. The legislation also recognizes the existence of links between mercenaries and terrorism.

15. The Permanent Mission of Uruguay to the United Nations Office at Geneva, in a note verbale dated 11 August 2003, stated the following: "The Uruguayan State, within the legal framework of the Criminal Code, punishes as offences of the utmost seriousness those involving acts of sedition or acts aimed at overthrowing the Government of a State or affecting in any way whatsoever the integrity or territorial sovereignty of a State, in particular when such activities involve the use of mercenaries, whether nationals or aliens."

16. Further to the visit made by the Special Rapporteur to El Salvador and Panama in 2002, the Government of El Salvador submitted information on the National Civil Police regarding the investigations into the Posada Carriles case. The Government states that Mr. Raúl Bermúdez Landaverde is the subject of criminal proceedings, and has been charged with misrepresentation and falsification with regard to the obtaining by Luis Posada Carriles of false identity documents and a false Salvadoran passport. The Government indicates that it has not been possible to open an investigation into the three persons who at various times had links with Luis Posada Carriles, including the owners of the three vehicles that he used in the country,

because an investigation can only be initiated on the basis of a complaint, an order or in case of flagrante delicto, there being no investigation otherwise. The homes indicated by Luis Posada Carriles in his departures from and entries to the country, under the names of Franco Rodríguez Mena and Ramón Medina Rodríguez, either do not exist, or belong to people who do not know him. The Government concludes by stating that Luis Posada Carriles is the subject, in absentia, of criminal proceedings in El Salvador for misrepresentation and falsification, and the use of false documents.

17. The Government of Panama also submitted information on this case. In a letter dated 3 July 2003 the Permanent Representative of Panama to the United Nations Office at Geneva, Ambassador Anel E. Béliz, transmitted a communication from the chief prosecutor of the first judicial circuit of Panama, Mr. Arqímedes Sáez C., according to which the following are currently under arrest in Panama: Luis Posada Carriles, also known as Franco Rodríguez Mena; Gaspar Eugenio Jiménez Escobedo, also known as Manuel Díaz; Guillermo Novo Sampol; Pedro Crispín Remón Rodríguez; and José Manuel Hurtado Viveros. Raúl Rodríguez Hamouzova is the subject of an open arrest warrant. José Valladares, also known as Pepe el Cubano, who was under house arrest, died, apparently from natural causes. César Andrés Matamoros Chacón is prohibited from leaving the country and is under parole.

18. These individuals have been formally accused of unlawful possession of explosives (Act No. 53 of 12 December 1993); offences against civil security policy, a danger to society (Criminal Code, art. 237); unlawful association with a view to committing an offence (art. 242); and forgery of documentation (arts. 265, 266 and 271). On 5 December 2002 the preliminary hearing began with the aim of determining whether the necessary criminal elements for a trial existed. The hearing was suspended with the filing by the National Workers Federation of a motion for constitutional protection. The motion was subsequently set aside by the First High Court. The decision has been appealed, with suspensive effect, by the original applicants. The Supreme Court is due to make a determination in the near future.

II. MERCENARY ACTIVITIES IN AFRICA

19. This chapter deals with developments in mercenary activities in Africa. This was the question the Special Rapporteur first considered: the problems caused by the apartheid regime of the then South African Government, and the armed conflicts in Angola and Mozambique. The presence of mercenaries was undeniable, and relevant information was required to enable the United Nations to adopt a firm position against the presence of mercenaries.

20. The armed conflict in Angola arose after the country's independence in 1975 and was a result of its former colonial domination. The process of organizing a sovereign, democratic Angola committed to the sound use of its natural resources was interrupted by the appearance of the União Nacional para a Independência Total de Angola (UNITA), a rebel movement, which, under the leadership of Jonas Savimbi, refused to recognize the democratic Government of President Eduardo dos Santos, and managed to gain a foothold in certain key areas of Angolan territory. The armed conflict was long and bloody. The conflict continued throughout the 1990s, even though the parties signed a number of peace agreements under United Nations auspices. At present there are no mercenaries in Angola, the conflict is over, and there is reason to hope that peace in that country will contribute to political stability and economic progress on the continent.

21. The destabilizing activities undertaken under apartheid affected all southern Africa. In South Africa and outside South African territory, members of the African National Congress (ANC) were persecuted and, in more than one case, murdered by mercenaries. During the 1990s South Africa freed itself from that regime, which was replaced by a multiracial democracy that respected its various ethnic communities and was firmly committed to the protection of human rights. In that new context the Special Rapporteur visited South Africa in 1997. Today South Africa has interesting legislation that, in particular, prohibits any kind of mercenary activity, the country having moved forward in the regulation and supervision of private companies that offer security services internationally so as to prevent them from employing mercenaries.

22. The situation in West Africa is of particular concern to the Special Rapporteur. The presence of mercenaries has been observed in the armed conflict that has affected Sierra Leone since the 1996 elections, particularly during the so-called “cleansing operation” in 1998 and the invasion of Freetown in January 1999. The Special Court, meeting in London, tried the leaders of the Revolutionary United Front and of the Armed Forces Revolutionary Council, Augustine Gbao, Johnny Paul Koroma, Sam Bockarie, Issa Hassan Sesay, Alex Tamba Brimay and Morris Callón, as well as the head of the Civil Defence Forces, Sam Hinga Norman. On 4 June 2003 the Court issued a public indictment of the former President of Liberia, Charles Taylor. Sam Bockarie and Johnny Paul Koroma died in Liberia. Foday Sankoh died in July 2003.

23. Sierra Leone is well on the way towards peace and an improved human rights situation. Nevertheless violent acts continue in some areas, particularly along the border with Liberia. In January 2003 a village in Kailahun district was attacked by irregular Liberian armed groups. The situation in the diamond-producing areas is also disquieting, in that it has not proven possible to consolidate State authority and the presence of mercenaries guarding installations has been observed.

24. On 14 September 2003 a coup d’état took place in Guinea-Bissau, sparked, among other things, by the fact that the Government of Kumba Kobde Yala was nine months behind in paying the wages of the armed forces. In Côte d’Ivoire, the Forces nouvelles and the Rassemblement des républicains party announced on 23 September 2003 that they were suspending their participation in the Government of National Reconciliation, and that they were withdrawing their eight cabinet ministers. A number of militias continue to operate in the country, such as the Groupement des patriotes pour la paix, responsible for violence in Abidjan. In the northern provinces, various armed groups continue to hold sway, unchallenged by the State authorities. Some of these groups lay waste to villages and engage in robbery, pillaging and extortion. Others extort money from travellers on the highway. The situation is particularly serious in Bovaké, Korhogo and Man. In the west of the country irregular armed groups from Liberia continue to operate. The forces of the ECOWAS Military Observer Group (ECOMOG) merely supervise the ceasefire line between the territories controlled by the country’s armed forces and the Forces nouvelles. This does not permit a return to the situation of normality existing before the crisis of September 2002. Implementation of significant provisions of the Linas-Marcoussis Agreement is still pending.

25. The Special Rapporteur was informed that at the end of August 2003 a group of mercenaries that was preparing to travel to Côte d'Ivoire was arrested by the French police at a Paris airport. The group had reportedly been recruited by Sergeant Major Ibrahim Coulibaly. In the final months of 2003 a resurgence of tension in the country was observed. In November 2003, 200 farmers from Gagnoa were expelled from their land owing to their ethnicity. In Liberia, devastated by civil wars in 1997 and 2003, a peace agreement was concluded in August 2003; there is now a multiparty Government. Nevertheless, sporadic fighting between supporters of Charles Taylor and former rebels continues in the south-east of the country, particularly in Grand Bassa county.

III. DEVELOPMENT OF MERCENARY ACTIVITIES AND OF THE MANDATE

26. The mandate on the use of mercenaries was created in 1987 in a context in which it was necessary to reaffirm the right of peoples to self-determination, particularly as it was threatened by mercenary activities in Africa. However, the Special Rapporteur soon needed to concern himself with the presence of mercenaries in Central America, another centre of conflict at that time. Guatemala and El Salvador were experiencing internal armed conflict, and in Nicaragua the Sandinista National Liberation Front, which had succeeded in freeing the country from the bloody Somoza dictatorship, had to confront the Contras. The Iran-Contra scandal revealed the involvement of mercenaries in the conflict. The Special Rapporteur received numerous reports of this on his visits to the United States of America and Nicaragua in 1989 and investigated various covert operations.

27. In the early 1990s, the Special Rapporteur had to make a visit to Maldives, following an attempted coup d'état by mercenaries and young Sri Lankans belonging to the Tamil ethnic group. The Special Rapporteur was thus able to observe the particular risk to which small island developing States, facing the possibility of external aggression involving a mercenary element, are exposed. The Special Rapporteur also observed that any State, organization, or rich political adventurer with territorial ambition or designs on power could relatively easily arm groups of mercenaries by recruiting inexperienced young men in exchange for payment.

28. The disappearance of bipolar tensions and the end of the cold war gave birth to the hope that more favourable conditions would arise for greater respect for the self-determination of peoples and for a gradual lessening of armed conflict. Regrettably this has not come to pass. On the contrary, new sources of tension, stoked by various dominant interests, have emerged. The use in practice of mercenaries has increased, as has their use in the commission of violations of human rights and of international humanitarian law. The disappearance of the Soviet Union generated friction between some of the sovereign, independent States that emerged on its former territory. In the former Yugoslavia the "weekend mercenaries" appeared, and in both Bosnia and Herzegovina and Afghanistan the presence of mujahedin, or Muslim combatants, fighting for a cause and not for money, has been observed. The Special Rapporteur visited Croatia and the then Federal Republic of Yugoslavia in September 1994.

29. Subsequently, the Special Rapporteur was called upon to consider the new problem represented by the use, recruitment and training of mercenaries by private military security companies offering their services on the international market. He analysed the activities of Executive Outcomes in Angola and Sierra Leone and of Sandline International in Sierra Leone

and Papua New Guinea. Today hundreds of new companies have emerged that have developed the model for the delivery of international military security services; they now operate on the five continents. The downsizing of a number of national armies has given rise to an abundant supply of well-trained military professionals, who suddenly lost their jobs.

30. Whether acting individually, or in the employ of contemporary multi-purpose security companies, the mercenary is generally present as a violator of human rights. On occasion he acts as a professional agent in terrorist operations; he takes part in illicit trafficking; he commits acts of sabotage, among others. The mercenary is an element in all kinds of covert operation. In comparison with the cost of mobilizing armed forces, the mercenary offers an inexpensive means of conducting operations, and is available to governments, transnational corporations, organizations, sects and groups, simply for payment. The mercenary is hired because he has no scruples in riding roughshod over the norms of international humanitarian law or even in committing serious crimes and human rights violations. The Special Rapporteur conducted an in-depth study of military security companies during a visit in January 1999, at the invitation of the British Government, to the United Kingdom of Great Britain and Northern Ireland.

31. At the Special Rapporteur's suggestion, the issue of military security companies was taken up at the two meetings of experts on mercenaries organized by the Office of the United Nations High Commissioner for Human Rights in 2001 and 2002. There are continued reports of crimes and offences committed by employees of these companies, including murders, rapes and kidnappings of children, which generally go completely unpunished. International law and domestic legislation in States must regulate the activities of these companies and establish oversight and monitoring mechanisms that clearly differentiate military consultancy services from participation in armed conflicts and from anything that could be considered intervention in matters of public order and security that are the exclusive responsibility of the State.

32. The Special Rapporteur received reports on a number of occasions about the involvement of mercenaries in the Colombian armed conflict, mainly connected with the drug cartels but also with self-defence paramilitary groups and private oil companies. There were also reports of involvement of mercenaries in activities by gangs of drug traffickers and paramilitaries that operated in Peru in association with the National Intelligence Service (SIN) during the Alberto Fujimori Administration.

33. Cuba has also suffered from mercenary activities, in 1997 a series of bombings of tourist facilities in Havana began, at a time when the country's economy was prioritizing investments in tourism as a means of obtaining foreign exchange to counter the United States embargo against the country. When President Fidel Castro attended the Tenth Ibero-American Summit in Panama, evidence emerged of an attempt to assassinate the Cuban President. The Special Rapporteur visited Cuba on an official mission in 1999. He had an opportunity to visit in prison the foreigners who had participated in some of the attacks and had caused the death of an Italian citizen. Mercenaries of Central American origin had been recruited, hired, trained and paid to carry out terrorist acts in Cuba.

34. The Special Rapporteur was invited to visit El Salvador and Panama in 2002. In Panama he interviewed in prison those accused of having participated in the conspiracy to take the life of President Fidel Castro. The investigations conducted by the public prosecutor's office in Panama appeared conclusive in terms of the criminal intent of this group of foreigners.

IV. TERRORISM AND MERCENARY ACTIVITIES

35. On several occasions the Special Rapporteur has requested the inclusion of the link between terrorism and mercenary activities in his mandate. The Special Rapporteur dealt with this issue in his report for 2000 (E/CN.4/2001/19, paras. 50-61). Nothing prevents mercenaries, for payment, from taking part in the commission of a terrorist act, understood as a criminal act committed for ideological reasons with claims of political legitimacy, and with the aim of promoting collective terror. The possibility of mercenary involvement should not be discarded in the investigation of any terrorist attack.

36. The terrorist act does not necessarily need to be carried out by a member of the clandestine organization. Such organizations may make use of mercenaries with sound experience in the military arts, piloting of aircraft, handling of sophisticated weapons, preparation of high explosives, etc. These relationships are not, however, organizational or ongoing. Yet those who plan terror do not always rely on fanatical devotees to the cause. This connection has been overlooked in the recent, extensive international counter-terrorism legislation. The involvement of mercenaries in the commission of terrorist acts must always be investigated. The impunity of mercenaries must not continue.

V. PROPOSAL FOR A NEW LEGAL DEFINITION OF A MERCENARY

37. In the course of his work, the Special Rapporteur has found that one of the greatest problems in combating mercenary activities is the absence of a clear, unambiguous and comprehensive legal definition of a mercenary.

38. Article 47 of Protocol I Additional to the Geneva Conventions of 1949 contains a definition of a mercenary intended to deny the mercenary the rights of a combatant or of a prisoner of war. Given its nature as an instrument of international humanitarian law, the Protocol does not legislate on mercenaries themselves, but on their possible involvement in an armed conflict. It restricts itself to regulation of a specific situation. It provides what is to be understood by mercenary for this purpose, stipulating a set of elements that must be present, cumulatively, to determine who is and who is not a mercenary. The loopholes and shortcomings in the international legislation are compounded by the fact that the domestic legislation of most States does not criminalize mercenary activity. A mercenary may become a social outcast, but the law can take no action against him.

39. In 1989, by its resolution 44/34, the General Assembly adopted the International Convention against the Recruitment, Use, Financing and Training of Mercenaries. However, the Convention entered into force only in 2001. Some of its provisions could be considered progress towards eradicating mercenary activity, since the International Convention includes provisions that facilitate the prosecution of mercenaries and promote inter-State cooperation in that regard. But the Convention essentially maintains the concurrent elements required to define a mercenary. Article 1, paragraph 1, repeats almost word for word the definition of mercenary found in article 47 of Additional Protocol I, while article 1, paragraph 2, refers to the use of mercenaries in concerted acts of violence against the constitutional order or territorial integrity of a State.

40. International legislation contains a number of loopholes regarding the requirements relating to nationality, residence, changes in nationality to conceal identity as a mercenary, the participation of mercenaries in illicit trafficking or in organized crime, and, lastly their participation in terrorist acts.

41. It seems necessary to conduct further study of the connection between the increase in mercenary activities and the obvious lacunae in the definition and in international legislation.

42. Notwithstanding statements condemning mercenaries, their numbers are increasing on all five continents. This is creating a situation in which the international community is defenceless against mercenaries; this is particularly so for small and vulnerable developing countries.

43. The Special Rapporteur has formulated a proposal for a new legal definition of a mercenary, with the following major elements:

(a) Empirical evidence shows that because international law does not deal thoroughly enough with mercenary activity, such activities have expanded. In cases in which mercenaries have been brought to trial for crimes such as aggravated homicide, the fact that they were mercenaries was never taken into account, even as an aggravating circumstance;

(b) Mercenary activities seriously violate one or more legal rights. The motivation for a mercenary's activities always threatens fundamental rights such as the right to life, physical integrity or freedom of individuals. Such activities also threaten peace, political stability, the legal order and the rational exploitation of natural resources;

(c) Mercenary activity must be considered a crime in and of itself and be internationally prosecutable, both because it violates human rights and because it affects the self-determination of peoples. In this crime, the mercenary who participates directly in the commission of the crime must be considered a perpetrator with direct criminal responsibility. It must also be borne in mind that mercenary activity is a complex crime in which criminal responsibility falls upon those who recruited, employed, trained and financed the mercenary or mercenaries, and upon those who planned and ordered his criminal activity;

(d) Where mercenary activity is proved to have occurred because of a decision by a third Power which uses mercenaries to intervene in another State, that activity must be considered a covert crime. Hiring mercenaries in order to avoid acting directly cannot be considered a mitigating factor, as international law tolerates neither direct nor indirect intervention. States which use mercenaries to attack another State or to commit unlawful acts against persons must be punished;

(e) Mercenaries themselves use their professional know-how and sell it for the commission of a crime which involves a dual motivation: that of the purchaser, and that of the person who, for payment, sells himself;

(f) The term "mercenary" signifies, and applies to, persons with military training who offer paid professional services to take part in criminal activity. Mercenary activity has usually involved intervention in an armed conflict in a country other than the mercenary's own;

(g) The presence of mercenaries has been noted in such activities as arms and drug trafficking, illicit trafficking in general, terrorism, destabilization of legitimate governments, acts related to forcible control of valuable natural resources, selective assassination, abduction and other organized criminal activities. What is involved, therefore, is an activity that can take multiple forms, all of them criminal, where the highly skilled professionalism of the agent is what is prized and paid for;

(h) The new legal definition of a mercenary includes the use of mercenaries by private companies offering military assistance, consultancy and security services internationally, which generally employ them in countries experiencing internal armed conflict. Accordingly, there would need to be an international legal method of prohibiting these companies from hiring mercenaries and from engaging in any type of intervention that would mean their direct participation in military operations in the context of international or internal armed conflicts;

(i) The fact that it may be a government which hires mercenaries, or hires companies which in turn recruit mercenaries, for its own defence and political purposes within its country or to bolster positions in armed conflicts, does not change the nature of the act or its illegitimacy. The principle that should be adopted in elaborating the new legal definition of mercenary is that the State is not authorized to recruit and employ mercenaries. International law and the constitutional law of each State assign the tasks of security, public order and defence to the regular military and police forces, by virtue of the concept of sovereignty;

(j) The proposal for a new legal definition of a mercenary should also take into account the fact that the current norms of international and customary law referring to mercenaries and their activities condemn mercenary acts in the broad sense of paid military services that are not subject to the humanitarian norms applicable in armed conflicts - services which usually lead to the commission of war crimes and human rights violations;

(k) The provisions in force include a requirement that a mercenary be a "foreigner" in the affected country, along with other requirements for defining a person involved in such acts as a mercenary. This requirement of being a foreigner should be reviewed, so that the definition rests mainly on the nature and purpose of the unlawful act to which an agent is linked by means of a payment. To the question of whether a national who attacks his own country and commits crimes can be defined as a mercenary, the reply would need to be affirmative if that national is linked to another State or to an organization of another State which has paid him to intervene and commit crimes against the country of which he is a national. Such a paid criminal act would be a mercenary act because of its nature and purpose.

44. First, the concept of a mercenary should be inclusive; that is, it should cover the participation of mercenaries in both international and internal armed conflicts. Second, and going well beyond article 47 of Additional Protocol I, the definition should include both the mercenary as an individual agent and mercenarism as a concept related to the responsibility of the State and organizations concerned in the planning and execution of mercenary acts. Third, mercenary activity should be considered not only in relation to the self-determination of peoples but also as encompassing a broad range of actions, including the destabilization of constitutional governments, various kinds of illicit trafficking, terrorism and violations of fundamental rights.

45. The main basis for the proposal is the consensus that a new definition should be established, that it should take into account or be applicable to all forms of mercenary activity, that it should avoid a systematic accumulation of competing requirements, which would always prevent the identification of a mercenary, and, lastly, that the change should be proposed as an amendment to the International Convention against the Recruitment, Use, Financing and Training of Mercenaries.

46. The proposal should affect neither the status nor the treatment of the obligations of mercenaries and of the parties to a conflict under international humanitarian law; in other words, the amendment should be debated and approved within the text of the Convention, without prejudice to article 47 of Additional Protocol I to the 1949 Geneva Conventions.

47. The Special Rapporteur has proposed the following amendments to the first three articles of the 1989 International Convention against the Recruitment, Use, Financing and Training of Mercenaries:

“Article 1

For the purposes of the present Convention,

1. A mercenary is any person who:

(a) Is specially recruited locally or abroad in order to participate in an armed conflict or in any of the crimes set forth in article 3 of this Convention;

(b) Is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict or of the country in which the crime is committed. An exception is made for a national of the country affected by the crime, when the national is hired to commit the crime in his country of nationality and uses his status as national to conceal the fact that he is being used as a mercenary by the State or organization that hires him. Nationality obtained fraudulently is excluded;

(c) Is motivated to participate in an armed conflict by profit or the desire for private gain;

(d) Does not form part of the regular armed forces or police forces at whose side the person fights or of the State in whose territory the concerted act of violence is perpetrated. Similarly, 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.

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, legal, economic or financial order or the valuable natural resources of a State; or

- (ii) Undermining the territorial integrity and basic territorial infrastructure of a State;
- (iii) Committing an attack against the life, integrity or security of persons or committing terrorist acts;
- (iv) Denying self-determination or maintaining racist regimes or foreign occupation;

(b) Is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict or of the country in which the crime is committed. An exception is made for a national of the country affected by the crime, when the national is hired to commit the crime in his country of nationality and uses his status as national to conceal the fact that he is being used as a mercenary by the State or organization that hires him. Nationality obtained fraudulently is excluded;

(c) Is motivated to participate in an armed conflict by profit or the desire for private gain;

(d) Does not form part of the regular armed forces or police forces at whose side the person fights or of the State in whose territory the concerted act of violence is perpetrated. Similarly, has not been sent by a State which is not a party to the conflict on official duty as a member of its armed forces.

Article 2

Any person who recruits, uses, finances or trains mercenaries, as defined in article 1 of the present Convention, commits an offence for the purposes of the Convention.

Article 3

1. A mercenary, as defined in article 1 of this Convention, who participates directly in hostilities or in a concerted act of violence, as the case may be, commits an international crime for the purposes of the Convention. A mercenary who participates in the following acts also commits an internationally prosecutable offence: destabilization of legitimate governments, terrorism, trafficking in persons, drugs and arms and any other illicit trafficking, sabotage, selective assassination, transnational organized crime, forcible control of valuable natural resources and unlawful possession of nuclear or bacteriological materials.

2. Nothing in this article limits the scope of application of article 4 of this Convention.

3. Where a person is convicted of an offence under article 1 of the Convention, any dominant motive of the perpetrator should be taken into account when sentencing the offender.”

VI. CURRENT STATUS OF THE INTERNATIONAL CONVENTION AGAINST THE RECRUITMENT, USE, FINANCING AND TRAINING OF MERCENARIES

48. The International Convention adopted by the General Assembly on 4 December 1989 entered into force on 20 October 2001 when the twenty-second instrument of ratification or accession was deposited with the Secretary-General of the United Nations. There are now 25 States parties to the Convention. Costa Rica deposited its instrument of accession on 20 September 2001, Mali on 12 April 2002, Belgium on 31 May 2002 and Guinea on 18 July 2003.

49. Twenty-five States have completed the formal process of expressing their willingness to be bound by the International Convention. These States are: Azerbaijan, Barbados, Belarus, Belgium, Cameroon, Costa Rica, Croatia, Cyprus, Georgia, Guinea, Italy, the Libyan Arab Jamahiriya, Maldives, Mali, Mauritania, Qatar, Saudi Arabia, Senegal, Seychelles, Suriname, Togo, Turkmenistan, Ukraine, Uruguay and Uzbekistan. Nine other States have signed the International Convention, but have not yet ratified it. They are: Angola, the Congo, the Democratic Republic of the Congo, Germany, Morocco, Nigeria, Poland, Romania and Yugoslavia.

50. With a view to improving the effectiveness of efforts to combat mercenary activities, the Special Rapporteur wishes to suggest that it is in the interest of States to give favourable consideration to ratification of or accession to the International Convention, and, in that regard, expedite internal procedures to facilitate their early accession to the Convention as a State party. The basis of this suggestion is the fact that the growth in mercenary activities throughout the world and the extent of the unlawful acts in which mercenaries are involved require the international instrument intended to counter such activities to be fully supported by a large number of States. Secondly, in any amendment of the Convention to make it more effective in the prosecution of offences and internationally wrongful acts attributable to mercenaries, the proposals and machinery in play should engage a broad number of States parties.

VII. COMMENTS ON CONTINUANCE OF THE MANDATE

51. This present report is the last under the mandate of the current Special Rapporteur. Assuming that the mandate is renewed, as requested by the General Assembly, and that a new Special Rapporteur is appointed in mid-2004, it seems appropriate to offer some considerations and suggestions that might contribute to a significant improvement in the discharge of the mandate.

A. Difficulties and problems encountered in discharge of the mandate

52. Unlike other thematic mandates discharged within the established framework of an international legal instrument under which reality can be verified, the mandate on the use of mercenaries lacks a clear and precise legal framework. One chapter in this report analyses this question and formulates proposals thereon. The limitations of the definition of a mercenary contained in the 1997 Protocol I Additional to the General Conventions of 1949, the

shortcomings in the International Convention and the general lack of national legislation on the subject and of precedent involving cases of mercenaries who have been tried and convicted constitute serious lacunae in the work of analysis and identification of situations that the mandate should cover.

53. The Special Rapporteur was called upon to make good this deficiency, by having recourse to international customary law, legal doctrine, and expert views, and by seeking the opinion of Governments, jurists, politicians in government posts and members of international and non-governmental organizations. Unfortunately the scientific literature on the matter is limited, and the available material comprises newspaper articles, television reports, fictional accounts, leaflets, and other materials that deal superficially with the topic of mercenaries. Popular imagination has been fed by the belief that the mercenary is a redeeming hero, a being who kills evil oppressors without let or hindrance and whose watchword is freedom. The criminal nature of mercenary activities is hidden. These widespread beliefs have had an impact on the work of the Special Rapporteur, particularly on some missions, where he has suffered from a lack of understanding and ideological attacks on his work.

54. In interviews that he conducted with young men held in prison on charges of being mercenaries, the Special Rapporteur noted the damage created by heroic propaganda extolling mercenaries, stoked by low quality literature in Western countries. These young men said that they felt like superheroes of freedom. Their awareness was generally clouded when they acted as criminal agents. They accepted that they had received money for the commission of their crimes, but not that they had acted as mercenaries.

55. In any event, the confessions of these young men indicated the existence of complex networks for recruitment, hiring and military and ideological training, and of links with paramilitary organizations, extremist groups and intelligence services. It is very difficult to disentangle these complex networks and connections. It is very difficult to gain access to this level, well protected as it is. The Special Rapporteur has had to work for the most part on the basis of confessions, reports by third parties, State investigations, circumstantial evidence and logical inferences.

56. The development in the modalities of mercenarism revealed by the study of international mercenary activities is a further complex issue broached by the Special Rapporteur. The Special Rapporteur began his work by studying mercenary aggression against the exercise of the right to self-determination of peoples, particularly in countries in transition, countries consolidating their status as fully sovereign and independent States. These were criminal activities carried out against national liberation movements by mercenaries in the service of third Powers, mercenaries who promoted secession, conducted destabilizing activities and committed acts of terrorism. Soon the Special Rapporteur had to concern himself with new mercenary activities and the appearance of a type of mercenary that behaves as a criminal offering multiple services in multiple roles. The mercenary has become a functional element in the crime, hired by unscrupulous agents who make the crime or offence a means of attaining their objectives and combating those who oppose them.

57. Mercenaries are used by drug cartels, terrorist organizations, organized criminal gangs and organizations engaging in trafficking in persons, weapons, diamonds and precious stones, among other things. They are also used by legally constituted private companies offering

military security and assistance services on the international market. The Special Rapporteur has noted the growth and diversification of these companies, which are today active on the five continents. Their publicity and propaganda services even go so far as to represent them as alternatives to regular armed forces, and the Special Rapporteur is aware of treatises that propose the replacement of government forces in international peacekeeping operations by such private companies.

58. The complexity of the mandate has been clearly demonstrated over these 16 years. The Special Rapporteur must discharge his mandate with objectivity, impartiality, independence, scientific knowledge of the subject matter and the capacity to carry out an interdisciplinary analysis. Unlike other thematic mandates of the Commission on Human Rights, this mandate is not confined to the study of specific human rights violations, but also includes the study of political decision-making processes, analysis of international policies and the functioning of power structures with regard to human rights and the right of peoples, in particular, to self-determination.

59. A mandate such as that described requires clear support, based on the consensus of all States and regional groups in the Commission on Human Rights. However, the resolutions adopted by the Commission show that in various votes the Western countries have generally voted against or have abstained. The support of the Group of Western States, beyond possible differences with the focus of the reports by the Special Rapporteur or his wish to reduce the topic to legal analysis and submit it to the Sixth Committee of the General Assembly, is absolutely essential if there is a genuine desire to put an end to the scourge of mercenary activities.

B. Suggestions as to the future of the mandate

60. On concluding his mandate after 16 years and in the light of the experience he has acquired, the Special Rapporteur believes that the mandate should be kept up and renewed by the Commission on Human Rights. Clearly, the mandate has grown over the years in terms of its analytical scope and its status as a thematic mandate of the Commission should reflect this broad perspective.

61. At the conclusion of his mandate the Special Rapporteur leaves pending a visit on mission, planned at the express invitation of the Government of the United States of America. It would be desirable for the visit to be conducted when the mandate is extended. At a time when the world is taking firm action to combat international terrorism and mercenaries linked to terrorist activities cross international borders to carry out their crimes, information and analysis from various United States organizations that gather and classify information on mercenaries are extremely useful for the work of the Special Rapporteur. Similarly, the Special Rapporteur is awaiting replies from the Governments of Côte d'Ivoire and Sierra Leone to his requests to visit those countries. The presence of mercenaries in Africa is and must remain a high priority among the various issues covered by the mandate.

62. Lastly, also pending is follow-up to the resolution adopted by the General Assembly on 22 December 2003, in terms of seeking the views of Member States in connection with the proposal for a new legal definition of a mercenary formulated by the Special Rapporteur.

VIII. CONCLUSIONS

63. At the conclusion of 16 years and in submitting his final report to the Commission on Human Rights, the Special Rapporteur notes that despite efforts by the United Nations and inter-State regional organizations to combat mercenary activities and curtail them as far as possible, such activities have not disappeared. On the one hand, the traditional type of mercenary intervention which impedes the exercise of the right of peoples to self-determination remains; on the other hand, there are the beginnings of a process of change, in which the mercenary becomes a multi-role, multi-purpose professional, recruited, hired and trained to commit criminal acts and violate human rights.

64. Mercenary activity contravenes international law and involves a transaction that can affect persons, people and countries in terms of their fundamental rights. Whatever the modality, the use of mercenaries and mercenary activities themselves must be prohibited. Such prohibition must include effective sanctions against those who recruit, hire, train, finance and allow the gathering, assembly or transit of mercenaries.

65. Over his mandate the Special Rapporteur has observed that the international legal instruments are deficient or have lacunae that impede their application. For this reason the Special Rapporteur is of the view that there is a need for amendment of the international legislation in this area and has proposed a new, more precise legal definition of a mercenary.

66. The definition proposed by the Special Rapporteur reflects the multi-purpose criminal characteristics of mercenary activity. It is linked to participation in armed conflicts and attacks against the self-determination of peoples. It includes other illicit activities such as trafficking in persons and migrants, trafficking in arms and ammunition, drug trafficking, terrorism, destabilization of legitimate Governments, taking forcible control of valuable natural resources, and organized crime. The definition considers mercenaries who participate directly in the crime to be criminally responsible and extends such responsibility to anyone who recruits, finances, employs or trains mercenaries to participate in an activity defined as criminal.

67. The Special Rapporteur suggests that private companies offering military assistance, consultancy and security services on the international market should be regulated and placed under international supervision. They should be warned that the recruitment of mercenaries constitutes a violation of international law. Accordingly the legal instruments that allow effective legal prosecution of both the mercenary agent and of the company that hires and employs him must be refined. A particular concern must be for the crimes and offences committed by employees of such companies not to go unpunished, as is usually the case.

68. In view of the persistent use of mercenaries for the commission of terrorist acts and various criminal activities, the mechanisms and procedures existing in various United Nations bodies and in regional organizations to combat the presence and use of mercenaries must be strengthened. This strengthening must include such aspects as the link between mercenaries and terrorism, and the participation of mercenaries in organized crime and illicit trafficking.

69. Maintenance and renewal of this thematic mandate is in the interest of peace, international security and respect for human rights. The Special Rapporteur trusts that in future the mandate will enjoy firm support and broad consensus among all member States.

IX. RECOMMENDATIONS

70. The Special Rapporteur recommends that the Commission on Human Rights, cognizant of the persistence of mercenarism and its expansion and spread, reaffirm its vigorous condemnation of the use, recruitment, financing, training, assembly and transit of mercenaries. There is an urgent need to regulate private military assistance, consultancy and security companies and establish criminal liability for members of such companies.

71. It is recommended that the Commission reaffirm its concern at the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination. The Commission should reaffirm that this subject falls clearly and unambiguously within its competence.

72. The Commission should reiterate its appeal to all States to take appropriate measures and to exercise the maximum vigilance against the threat posed by mercenary activities.

73. It is recommended that in renewing the mandate, should the Commission so decide, the questions currently under consideration should remain so, so that outstanding issues, such as the proposal for a new legal definition of a mercenary and the pending visits, may be successfully concluded.

74. Consideration should be given to participation by the Special Rapporteur on the question of the use of mercenaries in United Nations working groups and missions, particularly to countries affected by problems of political instability, where the presence of mercenaries in their territory has been observed.

75. It is recommended that the Commission reiterate its appeal to all States to consider the possibility of taking the necessary steps to ratify or accede to the 1989 International Convention.

76. The Commission should support the decision to circulate among States the new proposal for a legal definition of a mercenary, formulated by the Special Rapporteur, with the suggestion that it be studied by States and that they formulate positions thereon.

77. The States parties to the Convention and any other State Member of the United Nations interested in understanding the nature and scope of the amendment to the legal definition of a mercenary proposed by the Special Rapporteur should maintain cooperation with the Special Rapporteur. The new Special Rapporteur should remain seized of this matter with a view to strengthening efforts to counter mercenary activities.
