UNITED
NATIONS

E

Economic and Social
Council

Distr.
GENERAL

E/CN.4/2005/23
18 January 2005

Original: ENGLISH

COMMISSION ON HUMAN RIGHTS
Sixty-first session
Item 5 of the provisional agenda

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 third meeting of experts on 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 6 to 10 December 2004.

GE.05-10364 (E) 030205

Summary

The third expert meeting on mercenaries was held from 6 to 10 December in Geneva. The meeting was convened pursuant to paragraph 16 of Commission on Human Rights resolution 2004/5.

Ten experts attended the meeting. An eleventh expert who had been invited was not able to participate, but submitted a paper for consideration. The International Committee of the Red Cross attended the meeting as an observer.

The following are the principal agreed conclusions/recommendations in terms of the meeting's objectives.

With respect to the objective "To give further consideration to the proposed new legal definition of a mercenary as contained in paragraph 47 of the report of the Special Rapporteur":

- From a legal perspective, there is some difficulty with the notion of self-determination as contained in the preamble to the International Convention against the Recruitment, Use, Financing and Training of Mercenaries, insofar as there may be a contradiction by defining a mercenary as a person recruited for the purpose of denying self-determination in and also undermining the territorial integrity of a State. Instead of referring to self-determination, reference could be made to acts which violate fundamental rights, which would include the right to self-determination;

- The words "or legal personality" should be added in order to attach liability to private companies engaging in these activities as well as persons;

- The illegal acts mentioned in article 3 of the proposal should be redrafted so that all the illegal acts performed by mercenaries would be covered. This could be done by adding the words "or other nefarious activities" to the clause.

With respect to the objective "To make proposals on possible means of regulation and international supervision of the activities of private companies offering military assistance, consultancy and security services on the international market":

- An important way to regulate private military companies is to set thresholds for permissible activity, systems of registration and oversight mechanisms;

- Professional codes of conduct for military and security companies should be encouraged and these efforts linked other initiatives in regard to the behaviour of the private sector generally;

- Any structures of international supervision of such companies would have to be instituted under the Economic and Social Council. They could provide oversight on legislation and serve as a basis for collating information, and scrutinizing and recording contracts between companies and host and receiving States on the basis of international human rights and humanitarian law standards.

With respect to the objective "To study and evaluate recent activities of mercenaries in Africa":

- To counter mercenarism on the continent, a combination of international, regional and national legislation is required which specifically target mercenarism. In particular, regional mechanisms should be explored further as ways of controlling and monitoring mercenary activity. The United Nations could tap into these to reinforce the international legal structures against mercenary activity;

- Legislation on mercenaries should not just be punitive but must also attempt to close the loopholes in regard to how mercenaries acquire arms. Any legislation on mercenaries must incorporate more of the progressive features of international legislation and seek to improve the current definition in the Convention. There is a need to look at how emerging legislation in Africa, e.g. on terrorism, can relate to combating mercenarism.

CONTENTS

CONTENTS (*continued*)

Introduction

1. The third expert meeting on traditional and new forms of mercenary activities was convened by the Office of the United Nations High Commissioner for Human Rights upon the request of the Commission on Human Rights in resolution 2004/5, with the following primary objectives:

- To give further consideration to the proposed new legal definition of a mercenary as contained in paragraph 47 of the report of the Special Rapporteur (E/CN.4/2004/15);

- To make proposals on possible means of regulation and international supervision of the activities of private companies offering military assistance, consultancy and security services on the international market; and

- To study and evaluate recent activities of mercenaries in Africa.

2. This meeting continues the work of two previous expert meetings which were convened by the Commission at the request of the General Assembly to study and update the 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.

3. An invitation was extended to 11 experts from different geographical regions to attend the meeting. Ms. Shaista Shameem, Special Rapporteur on the use of mercenaries as a means of impeding the exercise of the right of peoples to self-determination since July 2004 was also invited. The following experts attended: Ms. Deborah Avant (United States), Ms. Amada Benavides de Perez (Colombia), Mr. Enrique Bernales Ballesteros (Peru), Mr. Chaloka Beyani (Zambia); Mr. Vojin Dimitrijevic (Serbia and Montenegro); Mr. Len Le Roux (South Africa); Mr. Abdel-Fatau Musah (Ghana); Mr. Ravi Nair (India); Mr. Alexander Ivanovich Nikitin (Russian Federation); Ms. Ayesha Siddiqa (Pakistan). An eleventh expert who had been invited was not able to participate.

4. The International Committee of the Red Cross (ICRC) attended the meeting as an observer.

5. The present report contains a thematic discussion of the issues analysed by the experts as well as their recommendations, due account having been taken of the content of the reports of the first (E/CN.4/2001/18) and second meetings (E/CN.4/2003/4).

I. MERCENARIES AND HUMAN RIGHTS: POSSIBLE MEANS OF REGULATION OF THE NEW FORMS OF MERCENARY ACTIVITIES

6. An expert noted that there were various human rights concerns associated with new forms of mercenarism, including: (i) a lack of accountability for violations; (ii) threats to sovereignty, both in the traditional sense of self-determination and in the more modern understanding in regard to failing or weak States which may mortgage natural resources in

exchange for military security; (iii) human rights atrocities; (iv) the problem of parties with vested interests, especially where private military firms agree to work for rival parties; (v) the possible prolongation of conflicts, sometimes owing to resentment of political players over the control of conflicts by foreign intervenors; and (vi) the increased militarization of crisis zones.

7. The legal framework governing the activities of mercenaries, inter alia the customary prohibition of the unilateral use of force against the territorial integrity and political independence of States and non-interference, the International Convention against the Recruitment, Use, Financing and Training of Mercenaries of 1989, the Convention for the Elimination of Mercenaries in Africa of the Organization of African Unity of 1977 and Additional Protocol I to the Geneva Conventions of 12 August 1949 failed adequately to prohibit and criminalize traditional and new forms of mercenarism, nor did it give sufficient clarity as to the dividing line between the legal activities of private companies offering military or security services and illegal acts of mercenarism. Another expert observed that the legal framework did not deal with the problem of sub-State military structures or transnational alliances, which are often present in newly independent States. The Rome Statute of the International Criminal Court did not include the crime of mercenarism, although "the sending by or on behalf of a State of … mercenaries, which carry out acts of armed force against another State …" could serve to prohibit mercenarism indirectly when the crime of aggression is eventually defined.

8. Despite mixed opinions regarding extensive amendment of the 1989 Convention, the experts agreed that:

- A monitoring mechanism of the Convention should be established, as recommended by the first expert meeting;

- Existing treaty bodies should be used as a means of monitoring the accountability of States with respect to human rights violations by mercenaries or private security companies (PSCs);

- It was important to develop international standards for national legislation under which mercenaries could be prosecuted and private military companies (PMCs) regulated and monitored; and

- There was a need for pragmatic model legislation that would reflect a clear and relevant definition of mercenaries.

9. In addressing the current context, effective efforts to combat mercenarism ultimately needed to address the root causes of the problem - on both the supply and demand sides. The experts group observed that exponential growth in mercenarism and other private security activity might be due as much to a lack of legislation as to a lack of political will to properly combat the phenomenon. Though the Foreign Military Assistance Act of South Africa was often cited as a good example of anti-mercenary legislation, it had had limited effect owing to its restricted focus on participation in armed conflict, on the one hand, and lack of international coordination to restrict the activities of private military and security companies, on the other.

10. The experts considered a code of conduct for the private military and security industry to be a worthwhile additional measure, although not sufficient alone to ensure the accountability of individuals working for those companies. Activity on the part of non-State actors could also create a support network for the Special Rapporteur. Non-governmental organizations could aid in efforts to promote transparency by gathering and compiling relevant data about mercenary activities, monitoring the activities of private military/security companies, contributing to civic education, and "naming and shaming".

11. One way to combat mercenarism was for Governments to retain the monopoly of public security functions. However, a lack of capacity on the part of some Governments to discharge public security responsibilities provided a market for mercenaries and PSCs.

II. OVERVIEW OF CURRENT GLOBAL MANIFESTATIONS OF THE MERCENARY PHENOMENON

12. "Marketization", i.e. the growing role of the private sector in the outsourcing of security and military services, had become a new trend in mercenary activity, leading to a blurring of the distinction between mercenaries and those individuals working for legal PSCs. The private industry's projections estimate that the market is worth close to US$ 100 billion and growing. United States outsourcing alone had grown from 2 per cent of civilians deployed in the first Gulf War to 10 per cent in the Balkans, and 17 per cent in combating the Iraqi insurgency. It was thus important to recognize and deal with the features of the security market. It was important to establish regulatory standards and procedures against which activity on the part of individuals or companies could be measured to determine if they were illegal.

13. The experts recognized difficulties in that regard. The market was transnational, with companies registered in one country recruiting in another, and providing services in a host of States under contract to both States and non-State actors. The specific global reach and transnational nature of the industry meant that uncoordinated national efforts alone would not suffice in regulating the industry, but also made coordinated effort more difficult. Some companies claimed to work legally while others deliberately avoided legal strictures or took advantage of the legal confusion to make money. Similarly, some States used private security to bolster their forces while others used it to avoid legal obligations. Furthermore, the use of PSCs in conflict zones, such as in Iraq, had served to blur the boundaries between internal and external security, as well as military and security roles.

14. In addition, the structure of the industry, where individuals were recruited for specific contracts, made it difficult to attribute responsibility for offences either to individuals or to companies, or to both. The jobs for which those companies were contracted, often in remote and conflict-ridden areas, made oversight costly and complex. Also, in some respects the legal structure for holding those who committed illegal acts accountable was varied and unclear. Nevertheless, the experts were agreed that all individuals who took part in hostilities were obliged to respect, and at a minimum are protected by the fundamental guarantees of international humanitarian law, irrespective of whether they were considered mercenaries or members of private companies.

III. RECENT ACTIVITIES OF MERCENARIES IN AFRICA

15. The African continent continued to experience some of the most extensive and destructive mercenarism in recent history. The characteristics of the "new mercenarism" which was prevalent in Africa included the interrelation of traditional mercenary activity with big business, often involved in the extraction of valuable natural resources (e.g. in Sierra Leone and Equatorial Guinea). This characteristic was often linked to the weakness of many State structures in Africa, which had led to the private sector encroaching on the key security functions of States. It had become almost impossible clearly to distinguish between traditional soldiers of fortune and personnel of PMCs, owing to the new marketization of security.

16. Another new form of mercenarism in Africa was the phenomenon of commercialized national army units associated with regionalized internal conflicts, i.e. where countries neighbouring the State undergoing internal conflict had an interest in supporting one of the parties involved for private gain (e.g. Sierra Leone, the Democratic Republic of the Congo). Pools of "floating indigenous mercenaries" continued to offer their services for a variety of causes. At the same time, soldiers of fortune recruited from outside Africa remained numerous and in demand, as illustrated by Cote d'Ivoire, where the desire for air supremacy had led to the high number of foreign fighters recruited from developed countries and those of the former Soviet Union. The militarized situation, exacerbated by the presence of mercenaries, serves to undermine peace accords and reinforce the idea that a military solution is the only way to end conflicts.

17. Mercenaries from Africa had also been recruited to work in countries outside the region, such as Iraq. Here, it should be noted that unpopular wars, such as that in Iraq, where State parties to the conflict had a limited number of military personnel in non-combat operations, made it more difficult to control the use of mercenaries.

IV. EXISTING LEGISLATION AND MEASURES TO COMBAT MERCENARISM IN AFRICA

18. Africa's experience with mercenarism had been and continued to be an unhappy one. The most recent publicized episode in Equatorial Guinea was alarming in that it demonstrated that traditional mercenarism, such as that blatant attempt by armed groups to overthrow a Government to gain control over its natural resources, continued to be alive and well, belying the belief, prevalent in the 1990s, that traditional mercenaries were a dying breed.

19. Most States did not have specific legislation on mercenaries (as, for example, existed in the United States, Australia, the United Kingdom, Belgium, South Africa and, more recently, New Zealand). Three basic approaches to legislative measures in regard to combating mercenarism in Africa were evident:

20. Firstly, most African States dealt with mercenary activities under their criminal codes. For example, in Angola in 1976, a small number of mercenaries from the United States and the United Kingdom were sentenced to death for their participation in the civil war. The charges included murder, being a danger to the security of the State, and membership of an organized

group “on the fringe of the law”. The Ethiopian Penal Code contained elements of international humanitarian law, and included the prohibition of nationals fighting in wars abroad as well as allowing for the prosecution of foreign nationals taking part in armed conflict in Ethiopia. Resort to a range of offences for which mercenaries could be held liable under criminal law codes pointed to the absence of specific legal measures on mercenaries.

21. The second approach was to prosecute mercenaries under a number of combined laws such as those pertaining to State security, immigration, aviation and arms control. For example, in Equatorial Guinea, the accused mercenaries from Armenia and South Africa were charged with crimes against the Head of State; crimes against the Government; crimes against the peace and independence of the State; possession and storage of arms and ammunition; treason; possession of explosives; and terrorism. In Zimbabwe, charges had been brought against mercenaries for attempting to procure weapons in breach of the law, as well as lesser charges of entering into a State’s territory unlawfully or breaching civil aviation rules.

22. Thirdly, there had been attempts to prohibit mercenary activity in the operational context of armed conflict, such as the Operational Code of Conduct for the Nigerian Army of July 1967, which contained directives to the Nigerian military during the civil war in 1967 and which provided that while foreign nationals should generally not be harmed, “mercenaries will not be spared”. The Defence Act 1912 (as amended) of South Africa prohibits members of the South African armed forces from serving as mercenaries.

23. The Regulation of Foreign Military Assistance Act 1998 in South Africa, by contrast, prohibited engagement in mercenary activity within and outside the State. The Act defined mercenary activity as direct participation as a combatant in armed conflict for private gain and drew a distinction between mercenary activity and the legitimate provision of military assistance.

24. African States must deal with the fact that their own nationals are participating in acts of mercenarism abroad. In this regard, it should be recalled that the second expert meeting identified the legislation of Belgium as an example of best legislative practice that implemented Security Council resolutions regarding the involvement of Belgium mercenaries in the Congo in the 1960s, and domestically coded specific provisions of the 1989 Convention. The Belgian legislation failed to define mercenaries, but it prohibited the recruitment of Belgians for military services given to foreign armies or irregular troops, both in Belgium and abroad. It also prohibited Belgian nationals from engaging in recruitment abroad. Exceptions to this rule relate to the participation of Belgians in peacekeeping operations on the basis of agreements between Belgium and other States.

25. Legislation on mercenaries should not just be punitive, but must also attempt to close the loopholes in regard to how mercenaries acquire arms. The United States system of arms export control schemes, which set up a system of licensing of companies that want to obtain arms, could also be regarded as a model. In particular, it could be related to the processes of the Economic Community of West African States (ECOWAS) regarding small arms.

26. Any legislation on mercenaries must incorporate more of the progressive features of international conventions, and should seek to improve the definition of a mercenary as it stands in article 1 of the 1989 Convention. In terms of the criminalization of mercenary activity, there

was a need to distinguish between those acts that were already crimes under international law and those that required criminalization. For example, a number of African States were currently drafting legislation on terrorism. There was a need to look at how emerging legislation in Africa could relate to combating mercenarism.

V. ACTIVITIES OF PRIVATE COMPANIES OFFERING MILITARY ASSISTANCE, CONSULTANCY AND SECURITY SERVICES ON THE INTERNATIONAL MARKET

A. The experience of the African Region

27. The new trend in the security and defence sector in African States was the outsourcing to private companies offering military assistance, consultancy and security services on the international market. A high level of instability and conflict on the continent, coupled with the general state of underdevelopment, had created fertile ground for polarization, warlordism, terrorism and crime, all of which created the space for mercenaries and the services of PSCs, both to combat these phenomena and to perpetuate them. The effect of structural adjustment programmes had also led to increasing privatization in general and the growing tendency to outsource tasks which had been the prerogative of the State. The failure of police forces to cope with crime, for example, had led to the privatization of security and the proliferation of security companies, a trend which thrived on insecurity and fear. There was generally a simplistic approach about security sector reform on the African continent, which had led to an overriding focus on downsizing and not enough analysis of what kinds of military forces were necessary in Africa. There was often a deficit of democratic oversight over both State military and private military capabilities.

28. Major factors which had led many Africans to choose to be mercenaries relate to military downsizing, coupled with poor disarmament, demobilization and reintegration (DDR) processes, set against a background of a low level of development and employment opportunities. The success of DDR programmes depended on a clear political will, a credible central authority to guide and secure the process, a broad process of national reconciliation, a comprehensive management process and sufficient skilled resources to support the process.

29. The OAU Convention on Mercenaries was outdated for Africa and did not deal properly with PMCs. The South African Foreign Military Assistance Act did not anticipate the need to regulate private security such as was being carried out in Iraq by South Africans.

30. Private military and security companies offered a diverse range of services, from military advice and training to arms procurement, intelligence gathering, logistical and medical support, and combat and operational support. When deciding on the key difference between mercenarism and private security activities, it was important to bear in mind that there was a legitimate demand for certain acts to be considered legal and useful (e.g. mine clearance). Where the private sector could improve the efficiency and responsiveness of the military, that should be encouraged, provided there was transparency, accountability and regulation.

B. The experience of the Asian and Pacific Region

31. An expert framed the issue of mercenaries from a structural perspective concerning the position of the military vis-à-vis the State. It was generally agreed that strong institutional subordination to the State in the Asian and Pacific Region was a factor that had helped to contain the threat of mercenarism. Consequently, the region, comprised of many States with strong State structures and heavily institutionalized military capacities, faced different challenges with regard to the mercenary phenomenon.

32. Given the diversity of conflicts and State structures in the region, the privatization of war machinery in the Asian-Pacific Region had several distinct manifestations:

- Firstly, there were traditional forms of mercenarism, whereby foreign nationals intervened on the side of one of the parties to a conflict for payment. That might sometimes engender covert support by regional or extraregional powers in the operations of these non-State actors;

- Secondly, recent years had seen the introduction of private military/security companies offering their services (especially training) to Governments fighting insurgencies (e.g. Sri Lanka, Papua New Guinea, Nepal);

- Thirdly, a private security "fad" had surfaced in the region, largely due to the restructuring and readjustment of the military sector generally which had led to large numbers of unemployed former soldiers who naturally picked up work in this sector. Private citizens had also proved more willing and able to pay for security when they doubted their Government's ability to provide adequate protection;

- Fourthly, there were many private individuals participating in armed conflicts who fought for both payment and for ideological reasons (e.g. Kashmir). For those persons, it should be noted that the low salary levels indicated that motivation was primarily ideological. One expert pointed out that ideologically driven private engagement in warfare was problematic and dangerous, but it did not necessarily have to be regulated under the legal framework combating mercenary activities.

33. The cases of Iraq and Afghanistan, with extremely high levels of private security and mercenary activity, were somewhat exceptional. With particular regard to Afghanistan, mercenaries fell into several categories, including those working for private companies, those in the pay of warlords, and those involved in drug trafficking in the highly lucrative illegal poppy cultivation market.

34. The United States played a key role in bringing about the level of privatization in the two territories, as it was keen to deploy contractors in order to lessen its liability, avoid the risk of high military casualties, which would undermine domestic support for the wars, and to use its military forces to best effect in active combat operations. In light of its inability to raise troops from Asia to support the Iraq campaign, the United States was now making efforts to bring in private people from the region indirectly, principally in order to supply support services.

35. In Iraq and Afghanistan, private military and security companies were not usually recruited for direct combat duties, although it was also difficult to identify the exact activities undertaken by these companies, or to draw a clear distinction between support services and combat operations in highly volatile situations where, for example, those persons guarding particularly strategic sites might be the object of attacks from insurgents. The legal grey area surrounding private security created possibilities for "human flotsam" to be used as mercenaries in Iraq. In addition, the recruitment of nationals from the region might contribute to socio-political tensions between States.

C. The experience of the Eastern European Region, in particular with regard to the Yugoslav succession

36. Prior to its dissolution, the Socialist Federal Republic of Yugoslavia used to be a strong State with strong State structures; however, even that did not impede mercenarism in the region. Following the dissolution of the country, there was a dangerous mix of State-sanctioned violence, the use of security services, the involvement of organized criminal groups and the financing of conflict by ethnic diasporas, which facilitated a devastating set of conflicts. The traditional concept of a mercenary, though, was inadequate to an understanding of the different types of military forces employed during the wars.

37. Various paramilitary groups supported each of the ethno-national causes. While the members of those groups generally shared the ideological objective of the group, they often also used their position to gain material advantage and gratification, resulting in a high number of serious violations of the laws of war. The other notable characteristic of these paramilitary groups was their connections with the security apparatuses of States overtly or covertly involved in the conflicts. For example, the Serb volunteer army earned its income from looting, despite the fact that it had some vague, higher objectives. This highlighted the problem that such forces could use the cover of political or ideological causes to camouflage illegally acquiring a source of wealth as a noble enterprise. This raised the question: At what point did making money from war go from normal human enterprise to mercenarism?

38. The United States-based company Military Professional Resources Inc. provided training and command and logistical support to the armed forces and, later, to insurgent forces in Kosovo and Macedonia, in return for money. Notably, it provided training and support to the Croatian armed forces in 1995, despite being aware of the planned expulsion of the Serb population in Croatia. This raised issues of State responsibility, both of the State where the violations took place and of the State where the company was registered.

39. The wars of the former Yugoslavia indicate that mercenarism might not only constitute a threat to a peoples' right to self-determination, as would seem to be assumed in the OAU Convention on Mercenaries and the 1989 Convention, but could also be used by movements claiming the right to self-determination. To avoid this problem, recourse to international legal principles such as *uti possedetis* (acceptance of colonial borders) was applied by international courts and arbitration commissions. However, contested claims to self-determination challenged the standard definition of mercenarism.

D. The experience of the Latin American and Caribbean Region

40. An expert noted that the proliferation and characteristics of private groups and companies exercising force in Latin America was set against the consolidation of the new world order of unipolar hegemony, which was being entrenched by means of war, commercial control of natural resources, manipulation of the media, and free trade agreements skewed in favour of liberal economies with limited State apparatus. The historical and socio-political context of the region linked mercenary activity to counter-insurgency policies, the war on drugs, and the control of natural resources.

41. The use of mercenaries, often as part of paramilitary groups existing outside legal or official channels, to combat insurgency against the State posed the question of whether mercenaries should not only be defined in regard to the purpose of destabilizing the State, but also in relation to the purpose of maintaining the status quo by violently repressing opposition to political regimes. Irregular forces had been used to cover up the responsibility of the State for violations of human rights and atrocities (in particular, torture and forced disappearances) committed by those groups against individuals suspected of being linked to insurgents. Furthermore, evidence points to involvement of such groups in illegal activities such as trafficking in arms, drugs and humans. That indicated a need to link mercenary activity with other crimes under international law.

42. Mercenary activity in relation to the war on drugs was largely financed and supported by the United States, which perceived drugs as a threat to its national security. At the same time, the drug cartels set up their own paramilitary groups to protect themselves. More recently, the "war on terror" had replaced drugs as the main threat and that had affected policies adopted with regard to the region, resulting in an increased presence of United States military personnel and advisers, especially in Colombia. The trend towards privatization of means to carry out foreign policy was linked to military downsizing in the United States and linked with the need to send troops to more active combat zones (e.g. Iraq), thus opening up more opportunities for private companies to carry out anti-drug and anti-terrorist operations in Latin America. More generally, United States interests in Latin America had led to both direct military intervention (as in Panama, with the seizing of Manuel Noriega) and covert intervention in the form of support given to certain military groups (Nicaragua) and the financing of mercenaries (Guatemala).

43. Members of private military and security companies in Latin America had been found to have been involved in the drug trade, trafficking in persons, extrajudicial killings and money laundering. Without a clear line of authority to the State and without regulatory mechanisms, questions of accountability for offences arose.

44. Mercenaries had also been recruited by the military and private companies to ensure control over natural resources throughout Latin America. The interest of great powers in those natural resources had also led to an increased military presence in those areas. The result was that the main hotbeds of armed conflict were concentrated in geo-strategically important areas. The fact that private contractors had been solicited to protect such resources as oil wells and water reserves both demonstrated how private military and security companies could find entry points into geo-strategic structures and invited a blurring between legitimate and illegitimate activity which such contractors might carry out in conflict zones.

45. In the light of the experience of mercenarism in this region, a redefinition of the term "mercenary" would seem appropriate. Furthermore, the use of children for mercenary activities must be seen as an aggravating factor.

VI. EXISTING LEGISLATION AND MEASURES TO COMBAT MERCENARISM: RUSSIA AND NEWLY INDEPENDENT STATES

46. A number of factors had led to the proliferation and spread of incoming, local, and outgoing mercenarism in the region, namely: (i) those associated with specific conflicts, including on the ideological level and in regard to separatist aspirations, and lack of State control over some parts of territory; (ii) the post-Soviet context, which facilitated communication, ensured common military standards and created porous borders; (iii) legal factors, including that half the States in the region had not ratified the 1989 Convention, together with inconsistent and insufficient national legislation; and (iv) socio-economic factors such as joblessness and insufficient reintegration of former soldiers.

47. On the "outgoing" side of mercenarism, many nationals of the newly independent States (NIS) had participated as mercenaries, including in Côte d'Ivoire and Afghanistan. In terms of "incoming" mercenaries, there were a high number of foreign nationals involved in conflicts occurring on the territories of the region, such as Chechnya.

48. A particular manifestation of non-State participation in armed conflict by nationals from and outside the region is through membership of militant Islamic organizations such as Al-Qaida, Al-Wafa and the military wing of the Taliban. Members of such groups hailed from different ethnic backgrounds and geographical parts of the Russian Federation and NIS. That factor had influenced the States' interests in drafting legislation to combat mercenarism and the particular view taken in regard to the definition of a mercenary.[1]

49. However, identifying the legal framework was complicated by four different legal categories to which the 15 NIS belonged: (i) three Baltic States (Estonia, Latvia, Lithuania), which had entered the European Union and the North Atlantic Treaty Organization and thereby complied with requirements under the European legal regime; (ii) twelve countries belonging to the Commonwealth of Independent States (CIS), which had attempted to unify legal norms through "model laws" adopted by the CIS Inter-Parliamentary Assembly; (iii) six countries (Russia, Belarus, Armenia, Kazakhstan, Kyrgyzstan, Tajikistan) which formed part of the Collective Security Treaty Organization, which coordinated policies and measures in counter-terrorism; and (iv) five countries (Georgia, Azerbaijan, Uzbekistan, Ukraine, Republic of Moldova), which were part of the interregional alliance GUUAM.

50. National legislation in the NIS was inconsistent with regard to mercenarism. Some States had clear and elaborate legal definitions of mercenarism in their criminal codes. In several States, the definition of a mercenary adopted the formulation in article 47 of

[1] It is notable that half of the 26 States parties to the 1989 Convention are from this region.

Additional Protocol I. The crime was defined as "participation of a mercenary in armed conflict or military actions". Other legislation added to the elements of the crime the specific types and aims of military operations, such as the "overthrowing of the State authorities in violation of territorial integrity" (Ukraine). Some legislation also criminalized the participation of nationals in the military conflicts of other States without permission. Notably, laws regulating mercenary activity in the NIS were regularly applied in practice. Many trials had taken place, prosecuting persons accused of illegal participation as foreign persons in armed conflict as mercenaries (e.g. Kyrgyzstan, Ukraine, Azerbaijan).

51 Russia's Criminal Code, however, contained the offence of "mercenarism", defined in article 359, under the chapter dealing with serious crimes under international law, as "participation in armed conflict or military actions", and criminalized the recruitment, training, financing and provision of material assistance to mercenaries. A draft amendment to the article was currently before the Legislative Assembly, which sought to allow the prosecution of persons who committed mercenary acts outside the territory of Russia. The draft amendment also proposed to broaden the motive requirement to include those persons who were motivated to participate in armed conflicts by reason of religious conviction, such as jihad. Mercenary-like activities were also regulated under laws dealing with terrorist organizations.

52. In 2003 Russian authorities proposed to offer nationals of other CIS States the chance to be recruited into the Russian armed forces in exchange for citizenship after three years of service. To avoid accusations of mercenarism in that regard, it was suggested that Russia should conclude inter-State agreements with relevant States. However, the constitutions of some CIS States did not allow their nationals to serve in the armies of foreign States on a contractual basis, casting doubt on the legality of such agreements.

53. The CIS was in the process of drafting a model law on mercenarism, which would serve as a regional convention on mercenaries, although it would be structured and worded as a national law. In that context, a regional agreement on the regulation of mercenarism had also been proposed. The idea would be to legislate on the basis of the international framework, while including certain elements which were important to the CIS States. It was suggested that the mandate of the Special Rapporteur should include the role of monitoring the work of the 12 CIS countries in that endeavour.

54. In light of the mercenary phenomenon in Russia and the NIS, the experts proposed that the 1989 Convention should:

- Contain an obligation on States to prosecute the recruiters of mercenaries (national and foreign) as well as individual mercenaries (with the exception of members of PMCs and PSCs who are licensed by the State);

- Contain an inter-State complaint or investigation mechanism;

- Require States parties to introduce as soon as possible national legislation on mercenaries (both "exported" and "imported");

- Contain regulations concerning the activities of PMCs and PSCs. Some of the experts dissented on this point, arguing that the multifaceted nature of such companies did not obviously place them in the mercenary legal regime;

- Contain an explicit "prosecute or extradite" clause, thereby setting up a system of mandatory universal jurisdiction. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was cited as a possible model in this regard;

- Define the norms for regulating PMCs and PSCs.

55. Concern was expressed as to how best to exclude the following categories of persons from the definition of a mercenary: military advisers; participants of peacekeeping and peace-enforcement missions operating without a United Nations mandate (from regional organizations or inter-State alliances); armed forces of non-recognized "semi-States"; the nationals of one State recruited to the army of another State for material in kind or citizenship. It was pointed out that persons whose activities resulted from inter-State arrangements were beyond the purview of the legal regime against mercenaries.

56. Certain experts considered that extending the definition to religious or ideologically motivated militant groups would be problematic and suggested that the activities of those entities were already sufficiently regulated under other regimes of international law, particularly that pertaining to the prohibition of terrorist acts and terrorist groups. Furthermore, the concept of nationality was not the definitive legal element that it once represented. Recent trends in globalization and the dynamics of conflicts had shown that allegiance might lie elsewhere than in the State of nationality. Provided a person had not committed any war crimes, should international law condemn a person who is fighting for an extra-national cause?

VII. ROOT CAUSES, GENERAL MANIFESTATIONS AND REGIONAL DIFFERENCES IN MERCENARISM

57. The most effective solution to mercenarism would address its underlying causes and introduce measures to take into account the context of the problem, including the privatization of war, the need to maintain legitimate ownership over natural resources, and globalization. Alternatives to privatization of violence as a means of overcoming institutional inefficiencies in regard to ensuring security do exist, such as the proposal by the United Nations Development Programme of the concept of "human security". Though some experts endorsed that approach, others felt that root causes did not fit easily within the parameters of the meeting. The 1989 Convention dealt with the consequences of the activity, not the reasons for it.

58. The globalized nature of mercenarism had also led to connections between regions, however. For example, some mercenaries from Colombia had later transferred to Africa (Mano River Union), or had been involved in the transfer of arms from conflict zone to conflict zone through transnational networks of mercenaries. Similarly, mercenaries exported from the former Soviet States haunted many parts of Africa and the Middle East. Another expert suggested that there should be parallel initiatives on all levels of the international system, to

avoid fragmentation. The report and the proposed legal definition of a mercenary should encapsulate the general problem of mercenarism as well as its more specific regional aspects. Further, it was pointed out that although different regions of the world had their own specific problems in regard to the security industry, the same private companies operated across the world. It might be useful, therefore, when regulating the private security industry, to have a framework that worked uniformly across the board. The question was how to extrapolate a general framework for regulation that incorporated a minimum universal set of standards from all the regional perspectives. At the same time, regional mechanisms and national legislation could go beyond those standards to produce more regionally targeted strategies.

VIII. MERCENARISM IN THE HUMAN RIGHTS CONTEXT AND THE PROPOSED NEW LEGAL DEFINITION OF A MERCENARY

59. New forms of mercenarism had emerged in the 1990s in different parts of the world, which prompted a change in attitude in the international community towards the problem and led to the recognition that measures to combat the problem had to look beyond "traditional" mercenarism to "new" forms of mercenarism which posed a threat to a broad range of human rights. It was important to recall that the concepts of "traditional" and "new" forms of mercenarism only referred to the mode, and possibly the mentality, of mercenary work, but the nature of the activity remained the same.

60. The proposed amendments to the 1989 Convention as contained in paragraph 47 of the last Special Rapporteur's report was based on the same structure used in articles 1, 2 and 3 of the 1989 Convention. The decision to keep to this format was based on the consideration that it was good to improve the basic model, but not to disregard it.

61. In general, the proposed amendment sought to broaden the current definition and to make it more comprehensive, while simplifying the requirements for proof in a court of law. It was not intended to affect the definition, status or treatment of mercenaries under international humanitarian law. The main rationales for the proposed changes were the following:

(a) In article 1:

- To widen the scope of activity in which a mercenary might be involved and for which responsibility could be attributed in an armed conflict, beyond direct fighting;

- To link mercenarism to crimes committed by mercenaries which had become prevalent;

- To simplify the requirements for motive, while preserving the nature of mercenarism;

- To clarify the nationality requirement, and to prevent the condition being abused by those wishing to avoid accountability by hiring nationals of the country where the crime would be committed. It was noted that the nationality requirement might need to be revised in order to focus the definition on the nature and purpose of the unlawful activity;

- To clarify that those individuals who formed part of the police forces were not considered as mercenaries and in addition to ensure that individuals who were members of the armed forces of another State and on official duty would be considered mercenaries only if they were sent by a State which was not a party to the conflict;

- To expand the reasons for which mercenaries might be recruited to commit acts of violence against a State, contained in paragraph 2 (a), by including undermining a State's legal, economic or financial order or its valuable natural resources in subparagraph (i); undermining basic territorial infrastructure in subparagraph (ii); and introduce two additional subparagraphs. The first adds "committing an attack against the life, integrity or security of persons or committing terrorist acts"; the second adds "denying of self-determination or maintaining racist regimes or foreign occupation";

(b) In article 3:

- To replace the word "offence" with "international crime", in order to attach individual criminal responsibility to a person who fits the expanded definition of a mercenary in article 1, provided that person participates directly in hostilities or in a concerted act of violence;

- To criminalize certain specific acts which have been identified by the Special Rapporteur in his reports as illegal acts in which mercenaries are commonly involved and thereby confers international criminal status to those acts and extends over them the punitive system established by the 1989 Convention;

- To suggest that judges should view mercenary motive as an aggravating factor when sentencing an offender.

62. Notably, the proposed amendments did not directly address the regulation of PMCs, although any activities carried out by members of those organizations which fell into the definition proposed would incur the criminal responsibility of the individual.

IX. MANDATE OF THE SPECIAL RAPPORTEUR: KEY RESPONSIBILITIES

63. The Special Rapporteur, Ms. Shaista Shameem, who was appointed in July 2004, set out the following as the key activities of her mandate:

(a) To circulate the definition proposed by the former Special Representative and to receive the views of States;

(b) To create and maintain a database on mercenary activities and national legislation;

(c) To consult widely with intergovernmental actors and NGOs on the new definition;

(d) To consider the implications for private companies with respect to mercenary activities.

64. The Special Rapporteur stated that the definition of mercenaries should contain certain core elements of mercenarism derived from the traditional definition that were still applicable:

(a) Existence of a contract or contractual obligation with elements of offer, acceptance and compensation in the relationship. "Compensation" normally means some form of material transaction, although there could be difficulty in obtaining evidence of a formal contract;

(b) Engagement in armed conflict. The new definition proposed replacing the word "fight" (art. 1 (a) (i)) with "participate". But the word "participate" should be treated with caution because it might include those participating in armed conflict in roles such as cooks employed to feed the mercenaries. Any serious criminal offence of mercenary activity required a specific intention to commit or knowledge of the criminal activity. It might be desirable to add the word "knowingly" and/or "actively" to make intention clear, so that innocent workers are not prosecuted;

(c) The 1989 definition of mercenary activity has two parts: the first refers to individual (or traditional) mercenaries fighting in any armed conflict; the second refers to mercenaries engaged in armed conflict specifically to overthrow a constitutional order (political element). Both types of mercenaries should be prosecuted if they intentionally and knowingly participate in armed conflict;

(d) In the traditional definition, one of the core identifiers of a mercenary was that he was not a national of a party to the conflict. However, in the modern era, when people can hold more than one nationality or where there is no nation State and the concept of nationality is fluid, that requirement could be problematic and should be reviewed;

(e) "Denying self-determination or maintaining racist regimes" (art. 1 (a) (iv)) in the proposed new definition should also be reviewed as retaining this would permit mercenaries to use toppling racist regimes or assisting peoples' right to "self-determination" as an excuse for carrying out mercenary activities. The term "self-determination" no longer has the same uniform meaning as when the Convention was first drafted;

(f) A new element to the new definition should be "mercenary company".

65. In summary, the core elements of the new definition should be: (i) the existence of a contract of service, with the element of compensation (material gain) being a key factor; (ii) the mercenary must have knowingly and with that intention agreed to participate in armed conflict; (iii) usually, but not always, the mercenary must be engaged in armed conflict in a country/countries of which he himself is not a national, or where the company is

not registered; (iv) a mercenary (person) or mercenary company (legal personality) must have engaged in armed conflict for its own sake and/or to topple the constitutional order of a State.

66. The Secretary-General had circulated the draft definition to States and three States had responded with their views: Cuba and Qatar both agreeing with the proposed draft, and Azerbaijan wishing to add the word "extremism" after the word "terrorism" (art. 3 (i)) in the proposed new definition.

67. It was the view of the Special Rapporteur that national legislation needed to be strengthened, and she was working on model legislation, as well as drawing up a code of conduct for bona fide private companies working in areas of conflict who wished to avoid being prosecuted as mercenary companies.

68. The experts expressed support for the continued mandate of the Special Rapporteur as well as the consultative process with States and other entities such as private companies, and the creation of a database on national legislation regulating mercenary activity.

X. VIEWS OF THE EXPERTS ON THE PROPOSED NEW LEGAL DEFINITION OF A MERCENARY AS CONTAINED IN PARAGRAPH 47 OF THE REPORT OF THE SPECIAL RAPPORTEUR

69. The experts expressed the following views in regard to the proposed new legal definition of a mercenary contained in paragraph 47 of the former Special Rapporteur's report. It was generally agreed that any amendments to the 1989 Convention should be minimal so as to encourage States to ratify it and not to withdraw existing ratifications.

Article 1

Paragraph 1

70. The definition identified a mercenary, but did not refer to companies which were mercenary in nature. Referring only to mercenary individuals allowed a mercenary company to operate without liability. That could be amended by including a reference to a "legal person or a legal personality". Another possibility would be to introduce a separate clause on mercenary companies.

71. One expert highlighted the fact that the words "specially recruited" (para. 1 (a)) might exclude those members of private companies who had permanent contracts and therefore did not have specific terms of reference to a particular conflict.

72. Many experts raised concerns about the exact meaning and scope of the term "participate in an armed conflict". It was noted that the change of wording from "fight" to "participate" was intended to broaden the criminal liability to include possible joint criminal enterprise or conspiracy. The other advantage of the change was that it broadened the scope of activity beyond direct combat activity and therefore closed a loophole. That meant that those involved in

preparation activities would also be covered. The disadvantage was that "participate" could potentially include people who were innocent. A solution would be to add "knowingly" before "participate". Another suggestion was to qualify the word "participate" by a phrase such as "with intent to carry out a criminal activity".

73. One expert questioned whether participation in armed conflict was sufficient to incur individual criminal responsibility, or whether it needed to be accompanied by an illegal act. If participation of a foreign national in an armed conflict for payment was sufficient to be considered mercenary, then the reality was that almost all the support services of the armed forces that many Western countries employed should be considered mercenary and criminal. Other experts felt that that was a fair characterization of mercenary activity. It was suggested, as a way of resolving this problem, that subparagraph (d) could include an exception for those providing services to armed forces.

74. Experts were of two minds over what was essential to the motive requirement of the definition. What characterized a mercenary was the private gain that motivated him to participate, even though what constituted private gain might change according to time and really depended on whether compensation was part of a contract.

75. In proposed section (d), several experts felt that the term "regular armed forces or police forces" is too narrow. One suggestion was to replace the term with "regular security forces", which would include other State apparatus such as border guards, intelligence service members, etc. One expert pointed out that the word "regular" might be restrictive as that normally referred to uniformed forces, thereby excluding reservist forces. Furthermore, peace missions could be constituted by a range of forces and other disciplines and they should be included in the exception. The terms "armed or security forces" or "peace support forces/elements" were put forward as suggestions. Another expert cautioned against using a vague term like "security forces" which could be broadly interpreted.

76. The observer for the ICRC emphasized that any definition of mercenary should be without prejudice to and not undermine international humanitarian law (IHL) standards. In particular, he expressed the concern that by referring only to regular armed forces, article 1 (d) as amended might undermine combatant status and privileges as laid down in IHL. Limiting the exception to regular armed forces could confer mercenary status on all other combatants and persons not forming part of the regular forces of the State, such as members of militias and other volunteer corps belonging to a party to the conflict, and persons who accompanied the armed forces without being members thereof, all of whom benefited from prisoner-of-war status, if captured. The ICRC thus recommended the deletion of the word "regular" in the clause.

77. The whole subparagraph would benefit from redrafting. In particular, the words "at whose side the person fights" were unnecessary.

78. One expert considered that the term "official duty" in the subparagraph could be manipulated by offenders and required further explanation.

Paragraph 2

79. From a legal perspective, there was some difficulty with the notion of self-determination as contained in paragraph (a) (iv). The 1989 Convention mentioned self-determination in the preamble. There might be a contradiction in the text by defining a mercenary as a person recruited for the purpose of denying self-determination in (iv), and also undermining the territorial integrity of a State in (ii). Clearly, a self-determination movement could also undermine territorial integrity. That could provide a loophole for mercenaries. It was suggested that, instead of referring to self-determination, a reference could be made to acts which violated fundamental rights, which would include the right to self-determination.

80. One expert suggested that subparagraph (iv) should refer to all discriminatory regimes, not just to racist regimes.

81. The words "and/or" should be added at the end of all subparagraphs of paragraph 2 to show that they were not cumulative.

82. In paragraph 2 (c), the words "concerted act of violence" should be added after "armed conflict" to ensure consistency within the article.

Article 2

83. It was suggested to add, after the word "person", the words "or legal personality" in order to attach liability to private companies engaging in those activities as well as persons.

Article 3

Paragraph 1

84. The word "directly" should be deleted in order to be consistent with amended article 1. Moreover, if the element of "knowingly participates" were added to article 1, it would remove the need for "direct" participation.

85. It was suggested that the list of illegal acts mentioned in article 3 of the proposal should be redrafted so as to include all the illegal acts performed by mercenaries. That could be done by adding the words "or other nefarious activities".

86. The word "hostilities" should be changed to "armed conflict" to broaden the scope and to be consistent with amended article 1.

87. Experts thought that it was necessary to make a distinction between those acts which are already prohibited acts and acts which required criminalization. That could be done by separating the paragraph into two sections.

88. It was suggested that aggravating elements such as the use of children and refugees to carry out mercenary activity should be added.

89. Experts generally agreed that there should be a specific “without prejudice” clause in regard to article 47 of Additional Protocol I.

XI. PROPOSALS ON POSSIBLE MEANS OF REGULATION AND INTERNATIONAL SUPERVISION OF THE ACTIVITIES OF PRIVATE COMPANIES OFFERING MILITARY ASSISTANCE, CONSULTANCY AND SECURITY SERVICES ON THE INTERNATIONAL MARKET

90. One expert suggested that the legal threshold of PMCs should be drawn at combat activities, which should be categorically banned. That would require identifying those activities of private companies that did not further destabilize weak States. Also, the context might affect the acceptability of particular services. For example, it might be reasonable to outsource training an armed force to a PMC in peacetime, whereas the same activity during conflict might qualify as participation in the conflict and, under some definitions, therefore considered mercenary.

91. It was noted that the first expert meeting had recommended that companies should be prohibited from the following activities:

- Participating in armed conflicts;
- Creating private armies;
- Engaging in illicit arms trafficking;
- Recruiting mercenaries;
- Being involved in the illegal extraction of natural resources.

92. The third expert group felt that the term “private armies” was ambiguous and should be clarified so that it referred to all armed groups.

93. The experts generally agreed that an important way to regulate PMCs was by setting thresholds for permissible activity, systems of registration in the host States and oversight mechanisms that included prior approval by host States of PMCs’ contractual arrangements. Model legislation could be suggested which drew upon existing registration processes for security companies in many countries such as the United States.

94. Under international human rights treaties, States had an obligation to protect the human rights of all persons under their jurisdiction and this extended to events under their control in the territories of other States. The Human Rights Committee and the European Court of Human Rights had recognized that in principle, a State might be responsible for the human rights violations of its agents committed outside its territory. Those obligations should encourage States to undertake registration and licensing procedures for the military and security services it exported.

95. Procedural steps might need to be taken to sensitize the existing treaty monitoring bodies if they are to be used in this context. A role for OHCHR could also be envisaged here. The role of the Commission on Human Rights should also be explored. In particular, this issue should be on its agenda and an analysis should be undertaken of how that would fit into the 1235 and 1503 procedures.

96. Where the activities of a company constituted international crimes, both the command structure and the offender should be held criminally responsible and possibly referred to the International Criminal Court.

97. Certain experts raised concerns that the regulation of private companies could lead to further legitimization of the trend towards private security. One expert emphasized that the primary motive of PSCs was profit, not humanitarian in nature and that humanitarian activities often provided a cloak of legitimacy for otherwise doubtful activities. The problem of the blurring of legal and illegal activity of private security or military companies in highly volatile environments was highlighted by one expert, as was the problem of the shadow economy, competing with the formal economy which led to illegal appropriation of resources, and a lack of transparency in the work of private security companies, which often operated in-between the informal and formal markets.

XII. RECOMMENDATIONS

98. **The following were the main recommendations put forward by the experts:**

- **Establishment of a monitoring mechanism by the Economic and Social Council, as recommended at the first expert meeting. Such a mechanism should be simple and user-friendly to States, but should nevertheless be able to procure information from States on mercenary activities and the activities of PMCs and PSCs on or registered to their territory; seek to monitor the implementation of the 1989 Convention, including oversight of legislation; and serve as a basis for collating information, and scrutinizing and recording contracts between companies and host and receiving States, on the basis of international human rights and humanitarian law standards;**

- **Use of existing monitoring mechanisms of human rights treaties (e.g. the Human Rights Committee in the context of self-determination) as a means of monitoring human rights violations by mercenaries or PSCs through State reporting obligations. The monitoring and supervisory role of State reporting would usefully incorporate State responsibility to provide information on PMCs both from sending and receiving States;**

- **Additional use of other existing agencies and monitoring mechanisms to provide monitoring of criminal and other activities in which mercenaries are frequently involved. These are:**

  - **The United Nations Office on Drugs and Crime, in relation to drug trafficking and other crimes;**

- **The International Atomic Energy Agency, in relation to trafficking in nuclear materials; and**

- **The conventional arms transfer regime in relation to trafficking in arms;**

- **Establishing national regulatory mechanisms that ensure transparency in the industry;**

- **Developing registration systems of PMC firms, declaring State expenditure on services procured from PMCs, and instituting processes of "naming and shaming" of erring PMCs;**

- **Information-sharing on PMCs as well as informing PMCs of individuals employed by them who have committed violations of human rights and international criminal law;**

- **Encouraging professional standards for PMCs, such as voluntary standards of conduct for private companies as one way to begin regulation;**

- **Promoting legal standards and legal frameworks that apply to those providing private military and security services;**

- **Application of a combination of international, regional and national legislation that specifically targets mercenarism, as well as related laws, such as those prohibiting treason and terrorism;**

- **Exploring regional mechanisms as a way of controlling and monitoring mercenary activity, such as the Special Court for Sierra Leone and the systems of control and monitoring set up by ECOWAS in regard to small arms. The regime in regard to curbing the proliferation of arms, in particular, may provide lessons. These processes should reinforce each other. The United Nations should tap into these mechanisms, as well as related regimes, to reinforce the international legal structures against mercenary activity;**

- **An additional legislative framework is required to regulate the private military and security sector, drawing the line between legal and illegal activity. To this end, an international conference should be convened at which States, representatives of some private military/security companies and experts on the mercenary phenomenon could determine an acceptable regulatory framework;**

- **It was also recommended that a strong public information campaign on education for peace and peace culture be instituted to support initiatives to combat mercenarism in the regions and globally.**
