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

**Report on the question of the use of mercenaries as a means of violating
human rights and impeding the exercise of the right of peoples to
self-determination, submitted by Mr. Enrique Bernales Ballesteros,
Special Rapporteur, pursuant to Commission resolution 2002/5**

Executive summary

In this report the Special Rapporteur relates his activities and indicates the correspondence he received in 2002. The Special Rapporteur makes particular mention of the second meeting of experts on mercenaries, organized by the Office of the United Nations High Commissioner for Human Rights, which took place in Geneva from 13 to 17 May 2002. He then goes on to review the current status of mercenary activities, in particular on the African continent. He draws attention to positive developments, such as the ceasefire agreement signed in Angola on 5 April 2002 between the Chief of Staff of the Angolan armed forces and the Chief of Staff of the União Nacional para a Independência Total de Angola (UNITA); the concluding in Pretoria on 30 July 2002 of the Peace Agreement between the Democratic Republic of the Congo and Rwanda; the ceasefire in the Sudan; and the holding of presidential and legislative elections in Sierra Leone on 14 May 2002.

Matters that he continues to view with concern include the prolongation of the war in the Democratic Republic of the Congo and the massacres reported in Kisangani in May 2002; the recent aggression by bands of mercenaries in the Comoros; the presence of mercenaries in Côte d'Ivoire; the recent armed confrontations in Brazzaville in the Republic of the Congo; reports from the Government of Equatorial Guinea concerning recruitment of mercenaries; and the recent recruitment of mercenaries for operations in Madagascar.

The report includes an analysis of the Special Rapporteur's visits on official mission to El Salvador and Panama. The Special Rapporteur thanks the Governments of those countries for their full cooperation and their transparency, which contributed to the success of the visits. He reports that he was able to talk with the executive and judicial authorities concerning the International Convention against the Recruitment, Use, Financing and Training of Mercenaries, and the connection between mercenary activities and terrorism. He also describes the private interviews he had with four persons who are being held in Panama on charges of trying to assassinate, in their country, the Head of State of Cuba, in November 2000, and who are believed to be connected with the recruitment of mercenaries to place explosives at tourist facilities in Havana in 1997.

Finally, regarding the International Convention, the report refers to the recent deposit of the instruments of accession of Costa Rica, Mali and Belgium, which brings the number of States parties to 24; the Convention entered into force on 20 October 2001.

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Introduction

1. On 12 April 2002, at its fifty-eighth session, the Commission on Human Rights adopted resolution 2002/5 whereby, inter alia, it reaffirmed 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; recognized that armed conflicts, terrorism, arms trafficking and covert operations by third Powers, inter alia, encouraged the demand for mercenaries on the global market; called upon all States to consider taking the necessary action to sign or ratify the International Convention against the Recruitment, Use, Financing and Training of Mercenaries, and invited them to investigate the possibility of mercenary involvement whenever and wherever criminal acts of a terrorist nature occurred.

2. The Commission welcomed the entry into force of the International Convention and the efforts being made by the Office of the High Commissioner in the preparation of the second meeting of experts on traditional and new forms of mercenary activities. It requested the Special Rapporteur to consult States and intergovernmental and non-governmental organizations in the implementation of the resolution and to report, with specific recommendations, to the Commission at its fifty-ninth session his findings on the use of mercenaries to undermine the right of peoples to self-determination.

3. It should be pointed out that the Commission requested the Special Rapporteur to continue taking into account in the discharge of his mandate the fact that mercenary activities are continuing to occur in many parts of the world and are assuming new forms, manifestations and modalities. It requested the United Nations High Commissioner for Human Rights to provide the Special Rapporteur with all the necessary assistance and support for the fulfilment of his mandate, including through the promotion of cooperation between the Special Rapporteur and other components of the United Nations system that deal with countering mercenary-related activities, and requested the Office of the High Commissioner, when requested and where necessary, to render advisory services to States affected by the activities of mercenaries.

4. Accordingly, and further to Commission resolution 2002/5, the Special Rapporteur has the honour to submit this report to the Commission for its consideration at its fifty-ninth session.

I. ACTIVITIES OF THE SPECIAL RAPPORTEUR

A. Implementation of the programme of activities

5. The Special Rapporteur made five trips to Geneva: from 25 to 29 March 2002 to attend the fifty-eighth session of the Commission on Human Rights; from 13 to 17 May to attend the second meeting of experts on the question of mercenaries; from 24 to 28 June to chair the ninth meeting of special rapporteurs/representatives, experts and chairpersons of working groups of the Commission; from 23 to 26 September to participate in the Commission's informal meeting; and from 14 to 17 November to draft this report.

6. While in Geneva the Special Rapporteur held consultations with representatives of various States and met with members of non-governmental organizations. He also held coordination meetings with the Thematic Mechanisms section of the Activities and Programmes Branch of the Office of the United Nations High Commissioner for Human Rights.

7. At the invitation of the Government, he visited El Salvador on official mission from 5 to 8 May 2002. He also visited Panama on official mission from 8 to 10 May 2002, at the invitation of that country. An account of these visits may be found in section V of this report.

B. Correspondence

8. Pursuant to resolutions 56/232 of the General Assembly and 2002/5 of the Commission on Human Rights, the Special Rapporteur sent a communication on 2 May 2002 to all States Members of the Organization, 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 mercenaries; and (g) information and views on private security services and military consultancy and training companies, and on the connection between mercenarism and terrorism.

9. The replies from the Governments of Guatemala, Kuwait, Malawi and the Republic of Moldova have been transcribed in the report of the Special Rapporteur on the question of the use of mercenaries to the General Assembly (A/57/178). The Special Rapporteur subsequently received replies from the Governments of Canada, Cuba, the Democratic Republic of the Congo, Greece, Ireland and Lebanon. He regrets that it was not possible to reproduce them owing to the 10,700-word limit on the length of reports of Special Rapporteurs. Nevertheless, he recommends that States request circulation of the replies as official documents of the Commission under the appropriate agenda item.

10. A note verbale dated 28 June 2002 from the Permanent Mission of Cuba to the United Nations Office at Geneva contains extensive and important information as well as valuable comments that represent a significant contribution to the mandate of the Special Rapporteur. The Government of Cuba reports that mercenarism was made a crime in Cuba under the 1979 Penal Code, and that the definition of mercenarism is reproduced in article 119 of the 1998 Penal Code, which is currently in force. The Government also provides comprehensive information on the measures it has adopted to contribute to the prevention and elimination of international terrorism, and provides a systematic account of the terrorist acts committed against

Cuba since 1959 in which mercenaries have been involved. Terrorist activities have cost the lives of 3,478 innocent people, a further 2,099 have suffered permanent disability; in addition there has been enormous material damage.

11. In a communication dated 27 June 2002, the Government of Ireland stated, inter alia, the following:

“Ireland shares many of the concerns about the dangers of mercenary activity expressed in the most recent report of the Special Rapporteur. Ireland is concerned about the impact on the duration and nature of armed conflicts and strongly condemns the involvement of mercenaries in terrorist activities wherever it occurs. Ireland will continue to participate actively in the appropriate fora with interested States on ways to curb the threats posed by mercenary activity.”

12. In a letter dated 30 August 2002, Sir Christopher Westdal, Deputy Permanent Representative of Canada to the United Nations Office at Geneva, provided valuable information and comments, including the following:

“Although the International Convention against the Recruitment, Use, Financing and Training of Mercenaries recently entered into force, it suffers from a number of weaknesses, some of which have been profiled in your reports to the Commission on Human Rights. Among these are a highly restrictive definition of ‘mercenary’ and ‘mercenarism’, and the absence of adequate safeguards for the rights of the accused. The low number of States that have ratified the Convention suggests that Canada is not alone in its concerns regarding this instrument.

“Given the significant human rights dimensions of this issue, we believe the Commission on Human Rights to be the logical forum to develop a more effective international response, which could include, as you have previously suggested, seeking improvements to the Convention As you have indicated in a number of your reports, the activities of private military companies have broad implications across the spectrum of human rights.”

13. In a letter dated 23 May 2002, Ms. Cheryl J. Sim, political adviser at the Permanent Mission of the United States of America to the United Nations Office at Geneva, informed the Special Rapporteur that her Government was again inviting him to visit the United States and proposed that the visit should be scheduled for the end of January 2003. The Special Rapporteur again expressed his gratitude for the invitation and said that he hoped to be able to visit the United States, in particular Washington, DC, and the States of Florida and New York, at the end of May 2003. Such a visit would enable him to speak with government authorities and representatives of the academic and non-governmental communities concerning the connection between mercenaries and terrorism and between mercenary activities and trafficking in persons, arms and drugs, and concerning the use of mercenaries by organizations of exiles seeking to overthrow the Governments of their own countries.

II. SECOND MEETING OF EXPERTS

14. In compliance with General Assembly resolution 56/232 and Commission on Human Rights resolution 2002/5, the Office of the United Nations High Commissioner for Human Rights organized the second meeting of experts on the subject of mercenaries with the aim of considering the various forms of present-day mercenary activity and making a contribution to the formulation of an updated legal definition of the concept of mercenary.

15. The meeting was held from 13 to 17 May 2002 in Geneva with the participation of nine invited experts, representing the various geographical regions and legal systems, and the Special Rapporteur. The meeting was attended by experts Chaloka Beyani (Zambia), Eric David (Belgium), Vojin Dimitrijevic (Yugoslavia), Silvia Fernández de Gurmendi (Argentina), Françoise Hampson (United Kingdom of Great Britain and Northern Ireland), Olga Miranda Bravo (Cuba), Arpad Prandler (Hungary), I.A. Rehman (Pakistan) and Martin Schönsteich (South Africa). The meeting was chaired by Silvia Fernández de Gurmendi, and Chaloka Beyani acted as rapporteur. A representative of the International Committee of the Red Cross (ICRC) participated as an observer. The analysis covered matters relating to recent events connected with mercenary activities; the mandate of the Special Rapporteur; the criminalization or penalization of mercenary activities; the definition of a mercenary; the responsibility of States for mercenary activities; the relationship between mercenary activities and terrorism; and the regulation of private companies offering military assistance and consultancy services. A detailed analysis was made of the legislation of Belgium and South Africa as well as of article 47 of Additional Protocol I to the Geneva Conventions of 1949 relating to the protection of victims of international armed conflicts and of the International Convention against the Recruitment, Use, Financing and Training of Mercenaries.

16. Particular emphasis was placed on analysis of the definition of a mercenary, bearing in mind also aspects relating to the legal framework of the question and the difficulties of taking into consideration the various forms taken by mercenary activities. The richness of the discussion and the controversial nature of the topic meant that no consensus emerged on the legal definition of a mercenary, particularly with regard to the constituent elements, international treatment of the question, and the various types of conduct already considered in classifying offences committed by mercenaries. The Special Rapporteur will, however, consider these elements in his own formulation and proposal for the legal definition of a mercenary, to be submitted to the Commission at its sixtieth session.

III. PROGRESS TOWARDS A LEGAL DEFINITION OF A MERCENARY

17. The Special Rapporteur is engaged on this matter at the express will of the General Assembly and the Commission on Human Rights, which have entrusted him with studying a more precise legal definition of mercenaries that is more comprehensive and that embraces the multiple aspects of mercenary criminal conduct. The Special Rapporteur, in pursuing his mandate, has made reference to mercenary activities in armed conflicts, but has also included in his research a wide range of criminal activities in which the use of mercenaries constitutes the common element.

18. It was this reality of various manifestations of mercenarism, and the severe defects in definitions that failed to capture fully the complex nature of the phenomenon, which resulted in changes in the mandate of the Special Rapporteur, as may be observed in the sequence of reports, which have progressively included new mercenary activities as dangerous in their capacity to inflict harm as the more traditional activities recorded in the 1950s and 1960s.

19. As noted on separate occasions in the reports of the Special Rapporteur, mercenaries are involved in the following: internal and international armed conflict; assassination attempts against political leaders; acts of sabotage and creation of internal disorder; covert operations conducted on behalf of their paymasters or in the service of Powers which in this way cover up their intervention in States whose Governments they wish to destabilize; activities undermining the constitutional order of States; participation in terrorist attacks; participation in all kinds of illicit trafficking, particularly in people, arms, drugs, gems and minerals; participation in military training activities; acts undermining the security and economies of States; and, lastly, enlistment in private companies engaged in various activities but which essentially offer security and military assistance services. This lengthy list goes far beyond the use of mercenaries as a means of impeding exercise of the right of peoples to self-determination.

20. The variety and diversity of mercenary activities are the expression of an international demand for such activities, but they also reflect the lack of an adequate legal definition of mercenaries and of adequate legal treatment, in both international instruments and national legislation. Impunity is an element common to many mercenary acts as there are no specific offences that would allow their prosecution for what they are: mercenaries hired to commit various crimes.

21. In this connection the Special Rapporteur has referred in previous reports to the problems raised by the definition contained in article 47 of Additional Protocol I to the Geneva Conventions of 1949. It should be noted, however, that the aim of this provision is not to provide a legal definition of mercenaries but to specify them as excluded from treatment reserved for prisoners of war.

22. The Special Rapporteur urges the inclusion of the following elements in any new definition of a mercenary:

(a) Financial considerations, the desire for profit, benefit or material private gain as motivation for participating in an armed conflict or concerted act of violence. This element excludes conscripts, recruited to perform compulsory military service, and those who are called up; nationals who enlist as volunteers to defend or fight for their country as members of the regular armed forces without being compelled to do so; and also foreign nationals who act out of humanitarian, ideological, political or religious convictions. The foreign nationals who went to Spain to defend the Government of the Republic against the coup d'état without any personal or material interest or those who joined the allied forces against the fascist regimes in Europe in the Second World War cannot properly be termed mercenaries;

(b) Not forming part of the regular armed forces at whose side the person fights or of those of the State in whose territory the concerted act of violence is perpetrated. This aspect excludes foreign nationals who are members of special vanguard units or foreign legions which have formally agreed to form part of a regular army as regular elements, in an act which may be assimilated to that of a foreign national who applies for and acquires the nationality of another country;

(c) Having been recruited and contracted for, and having effectively participated in, armed conflict as a combatant, or in armed, subversive or terrorist action, as an active participant. This excludes military advisers or counsellors;

(d) Traditionally, being a foreign national, that is not a national of the party being fought for; a criterion extended to not being resident in a territory controlled by a party to the conflict or of the State against which a concerted act of violence is perpetrated; and

(e) Payment, an objective and verifiable element defining the nature and status of the action. However, under international instruments currently in force the pay must be substantially in excess of that promised or paid to regular military personnel of similar rank and functions.

23. In general these elements were reflected in article 47 of Additional Protocol I to the Geneva Conventions and the International Convention. It will be appreciated that these elements are, of necessity, cumulative; that is, it is not sufficient for one only to be present, all must apply. This makes it difficult to categorize someone as a mercenary. This difficulty makes it hard to implement the legitimate right to punish mercenaries.

24. From the standpoint of finding a formulation that would permit broad consensus, it appears that purpose, motivation and motive are the most readily identifiable elements in the conduct of persons engaging in mercenary activities and that these are present in the various types of criminal conduct in which mercenaries are commonly involved. They are present in particular in the wrongful acts for which the mercenary lends his services. The mercenary is a skilled professional, but whose skills are used for criminal purposes.

25. Another aspect to be considered is whether being a foreign national is a necessary element in the legal definition of a mercenary. This has been intensively discussed. The problem arises of nationals of a country that act against their own country in return for payment from a foreign Power or organization. If nationals are hired with the clear purpose of employing them as mercenaries and then hiding their use as such behind their status as nationals, the legal definition should take no account of nationality but should emphasize the mercenary nature of the act. Accordingly the question of the requirement for the mercenary to be a non-national of the country affected by his activity should be reviewed and analysed more deeply so as to give greater weight in the definition to the nature and aim of the wrongful act with which an agent is connected. In any event if being a foreign national is a requirement or sine qua non for being considered a mercenary, an individual could cease to be considered a mercenary simply by acquiring the nationality of the country for which he was fighting. The Special Rapporteur has verified this phenomenon during his visits to the successor States to the former Yugoslavia.

26. At the two meetings of experts on the question of mercenaries attended by the Special Rapporteur important proposals were made for a legal definition of a mercenary that should be taken into account when a new definition is formulated and formally adopted. The International Convention against the Recruitment, Use, Financing and Training of Mercenaries should necessarily contain the definition. The definition contained in article 1 of the International Convention, while expanding on that contained in article 47 of Additional Protocol I to the Geneva Conventions of 1949, is not fully satisfactory, and does not contain the elements that would allow the unfailing identification of a mercenary. In this connection the report of the second meeting of experts to the Commission on Human Rights contains in an annex proposed amendments to the definition contained in the International Convention. The text, while it does not reflect consensus within the group of experts and is not a formal proposal by the group, contains various elements suggested by one of the experts participating in the meeting which may provide a basis for discussion and further refinement.

27. The inclusion of categories such as those relating to organized crime, illicit trafficking, hostage-taking and attacks on internationally protected persons is suggested. The debate on whether or not the nationality or foreign nature of a mercenary must necessarily be included is also important. There are two clear positions: one holds that being a foreign national is a significant element in the definition of a mercenary; the other maintains that it is irrelevant, since the central factors of much greater importance are the determination of motive and the element of personal gain. In addition it was proposed at the meeting to classify as offences certain mercenary activities prohibited under international law. A discussion took place in parallel as to whether mercenary activities should be combated through a definition of the agent, that is, the mercenary, or whether unlawful activities as such should simply be classed as offences.

28. As is apparent from the foregoing, there has been significant progress in formulating a new legal definition of a mercenary, in the forefront of which are the considerations of various forums and leading figures aimed at advancing discussion, encompassing primarily the views of States, with a view to amending the definition contained in the International Convention. The basis of the revision and updating could be the critical weight of the studies provided by the Rapporteur, the reports of the two expert meetings and other national and international forums.

IV. CURRENT STATUS OF MERCENARY ACTIVITIES

29. There has been no fall-off in mercenary activities during the course of 2002. Participation by mercenaries in armed conflict in various scenarios has continued or increased. Also apparent is a greater, multifaceted spread of activities comprising various criminal acts. The hoped-for international effectiveness in combating mercenary activities has yet to materialize. This chapter focuses on the problems represented by the presence of mercenaries in Africa, and the criminal links existing between mercenary activities and terrorism.

A. Mercenary activities in Africa

30. Fifteen years after the creation of the function of Special Rapporteur on the use of mercenaries as a means of violating human rights and hindering the exercise of the right of peoples to self-determination, peace is still an unknown for many peoples of Africa. In many places on the continent armed conflicts, including conflicts of regional scope, cause the death of

hundreds or thousands of Africans. Many of these conflicts include a mercenary component, either by virtue of contracts for recruitment, training or participation in direct action in combat, or through the different forms of illicit trafficking that flourish in areas affected by armed conflicts.

31. Although there have been positive signs, such as the recent ceasefire agreement in Angola, the Peace Agreement concluded in Pretoria on 30 July 2002 between the Governments of the Democratic Republic of the Congo and of Rwanda, the signing of ceasefire agreements in the Sudan, and the holding of presidential and legislative elections in Sierra Leone, elsewhere on the continent the processes of social and political breakdown accompanied by armed tension have continued. Serious problems, including deep crises of government stability and tenacious struggles for control of oilfields and mineral deposits and other valuable natural resources, still impede the precarious emergence of nation States. Wars are waged for the control of diamond deposits.

32. The exercise by African peoples of the right to self-determination is beset by a whole series of armed conflicts involving mercenaries. The sovereignty of the peoples concerned over their natural resources and their rational exploitation is also impaired.

33. The Special Rapporteur is particularly concerned by the presence of mercenaries fighting alongside rebel forces in Côte d'Ivoire. As is generally known, the rebellion began on 19 September 2002, when some 750 soldiers mutinied in Abidjan, Bouaké and Korhogo, firing their weapons in protest at plans by the Government of President Laurent Gbagbo to overhaul the armed forces and demobilize thousands of troops to create a more efficient army. The Minister of the Interior, Emile Boga, died in the attacks, and the Minister for Sports was kidnapped in Bouaké. Immigrants from Bukina Faso were accused of supporting the rebels, and their houses were torched. On 1 October 2002 the rebels occupied the city of Bouna, on the border with Ghana and Bukina Faso. They had previously taken Kong. At the time of writing, the rebellion has left at least 300 dead and hundreds wounded.

34. In April 2002 there were renewed armed incidents in the Comoros, in the south-west Indian Ocean. The President, Colonel Azali Assoumani, quelled the outbreak and deployed military personnel in major public buildings, in the port, at the airport and in the customs buildings in the capital, Moroni. Four months earlier, in December 2001, a group of white mercenaries, wearing hoods, had disembarked on the island of Mwali, and distributed pamphlets in which they accused the President of collaborating with terrorists and claiming that they had come to carry out a coup d'état and protect the people. In its 26 years of sovereign independence the Comoros has suffered aggression by bands of mercenaries on several occasions, one of which resulted in the death of a president, as well as 19 coups d'état.

35. Forty-two years after the Democratic Republic of the Congo gained its independence, the civil war besetting the country, in which other African States have intervened, is costing it 80 per cent of its resources. Large-scale massacres were reported in March 2002 in the east and north-east of the country. Troops from Angola, Namibia and Zimbabwe have supported the Government of President Joseph Kabila, while forces from Rwanda and Uganda have supported the rebels. The four years of warfare have led to organized, systematic pillaging of the wealth of the country, mainly diamonds, gold, cobalt, tin, tantalum, columbite and manganese. Known

mercenaries, including various former intelligence service agents and military personnel from various countries, and mining, diamond, and oil companies as well as Western banks and financial enterprises, some well known, have been mentioned as beneficiaries of this traffic. It is reported, for example, that coltan, a short form for columbite - tantalite, extracted by children and prisoners in Masisi, to the north of Kivu, a region invaded by Rwanda, is being sold locally for US\$ 5 per kilogram. It is quoted on the London market at US\$ 400.

36. In north-east Rwanda 150 Hutu rebels were recently killed in clashes with the Rwandese Patriotic Army. On 21 March 2002 in Equatorial Guinea, the Minister of the Interior, Clemente Engonga Nguema, and the Minister and Spokesman for the Government, Antonio Fernando Nué Ngu, accused the former speaker of the Parliament and leader of the Republican Democratic Force party, Felipe Ondo Obiang Alogo, together with other political leaders, of trying to recruit mercenaries in order to destabilize the country.

37. The Special Rapporteur must draw attention to one particularly encouraging fact for peace on the continent, namely the signing of the ceasefire agreement in Angola on 5 April 2002 between General Armando da Cruz Neto, Chief of Staff of the Angolan armed forces, and the Chief of Staff of UNITA, Abreu Muengo. The agreement will revive the processes of peace, reconstruction and democratization in Angola which began with the Lusaka Protocol of 1994. It provides for the holding of elections within two years, the reintegration of 50,000 members of UNITA, and an emergency plan for internally displaced persons. The long civil war in Angola, which has lasted 27 years, leaves in its wake a million dead, 50,000 orphans, 100,000 persons mutilated by anti-personnel mines, and a third of the population, in other words 4 million people, displaced.

38. Another positive event was the holding of presidential and legislative elections in Sierra Leone on 14 May 2002, marking the end of a bloody 10-year civil war which left hundreds of thousands of dead, wounded and mutilated.

39. The Special Rapporteur has continued to study the nature of the conflicts which have affected and continue to affect Africa, and to propose a global policy for the defence of life, personal integrity, freedom and security of the individual and respect for the sovereignty of African States. He notes with concern the recent accusations that have been made concerning the recruitment and hiring of mercenaries for operations in Madagascar, a country that is going through a serious political crisis which the Special Rapporteur hopes it will be able to overcome through the good offices of the United Nations and of the Organization of African Unity. He also notes with concern the recent armed clashes in Brazzaville, in the Republic of the Congo, between government and rebel forces, which have caused dozens of deaths. Lastly, he must draw attention to the situation in Liberia, where, on 13 May 2002, rebels in the Liberians United for Reconciliation and Democracy (LURD) movement, based in Guinea, attacked the cities of Kle and Arthington, 35 and 25 kilometres, respectively, from Monrovia.

B. Mercenary activities and terrorism

40. In his previous report to the Commission on Human Rights (E/CN.4/2002/20, paras. 63-81), the Special Rapporteur considered the serious problems confronting humanity as a result of acts of terrorism. These attained their most dramatic and horrible intensity in the

attacks of 11 September 2001 against the United States of America. The Special Rapporteur, in his first reports at the end of the 1980s, dealt with covert operations in which the functional utility of mercenaries for the commission of terrorist attacks had become evident. Today it is apparent that political groups that identify with absolutist ideological views and a fundamentalist conception of the world and social relationships have established secret cells in various countries and that these cells do not hesitate to resort to terror. They employ a de facto cynicism that allows them to resort to and make use of all that the civilized world rejects: financial havens, money laundering, illicit trafficking, purchase of sophisticated weaponry, and the hiring and use of mercenaries.

41. Notwithstanding the adoption of Security Council resolutions 1373 (2001) and 1377 (2001), the preparation of multilateral plans, and military operations such as those against the Al Qaeda organization in Afghanistan, terrorism has not been eradicated. Groups engaging in terrorism remain, financial and logistical support circles and networks are still in place, and threats of further attacks, which cannot be discounted or minimized, continue to be issued. In 2002 terrorist attacks have taken place in Afghanistan, Colombia, Finland, France, India, Indonesia, Israel, Malaysia, Nepal, Peru, Pakistan, the Russian Federation, Spain, Sri Lanka, the United Kingdom and Yemen, as well as in other parts of the world, thus confirming that terrorism is today's most lethal form of expression and the most difficult scourge to eradicate from contemporary society. The United Nations must shoulder the burden for combating terrorism in the name of human rights and the common values that make a single human civilization, rich in nuances and diversity, but with a single identity. The deterrent capabilities of intelligence must be applied and police action by States must be conducted efficiently, in anticipation of terrorist acts. States must ensure that terrorist organizations, understood as those that resort to criminal acts to cause indiscriminate damage and impose a climate of intimidation and collective fear, do not make use of, or organize or operate unpunished in, their territories.

42. But in combating terrorism, terrorist organizations and the mercenaries they recruit, the defence of human rights must always be uppermost; civil society must be involved in the formulation and execution of anti-terrorist plans, and the use of military or police action to the exclusion of other means must be avoided. To do otherwise would be to fall into a restriction of civil and political rights, human rights violations, militarization of society and, ultimately, State terrorism.

V. VISITS TO EL SALVADOR AND PANAMA

A. Reports on visits

43. The Special Rapporteur wishes to convey his appreciation to the Governments of El Salvador and Panama for inviting him to visit their countries in compliance with his mandate, and for the collaboration and openness displayed during his visits, from 5 to 10 May 2002.

44. The official mission of the Special Rapporteur to those countries enabled him to continue his investigations concerning mercenary activities, reported at the time, and the use of countries in Central America for the recruitment, financing and training of mercenaries for subsequent

participation in criminal acts, in particular against Cuba, its political leadership, its population and its infrastructure. The account of these visits is contained in chapter V of the report of the Special Rapporteur to the General Assembly (A/57/178, paras. 34-53).

45. In the interview in Panama, Luis Posada Carriles told the Special Rapporteur that his detention was unjust since he had travelled to Panama with the intention of protesting peacefully against the presence of President Fidel Castro at the tenth Ibero-American summit and of offering logistical support for the supposed desertion of the head of the intelligence services of Cuba, General Delgado. He also stated that the desertion had been a ploy by the Cuban intelligence services aimed at inducing him to travel to Panama and, once there, having him arrested for an alleged criminal attack and possibly extradited to Cuba. Neither he nor his companions had planned to assassinate President Fidel Castro. Part of the strategy, according to him, had been the intention to link them to plastic explosives: 8 pounds of C-4 plastic explosive and 50 packets containing 32 pounds of Semtex, which were found buried in the Mañanitas district on the outskirts of the city.

46. Asked about bombings of tourist facilities in Havana, Posada Carriles disclaimed any connection with those events. He denied knowing Otto René Rodríguez Llerena and also denied having planned the attacks and hired and trained the individuals who travelled to Havana to place the bombs that exploded at various tourist locations around the city. Although he was told that persons held in Cuba in connection with the bombings had identified him as the person who, under an alias, had contacted them for that purpose, Posada Carriles flatly denied it.

47. Concerning the use of false identity documents and passports, he said that that had been a necessity because using his true name would have meant putting his life in danger. His differences with the Head of State of Cuba had begun in the years when they were both students at Havana University. He had emigrated to the United States of America, where he later worked for the CIA. After leaving the CIA he had travelled to Venezuela, where he had worked with the police of that country. He had been under arrest for several months without charge in connection with the 1976 explosion of an aircraft belonging to Cubana de Aviación, but stated that, because of the total lack of evidence linking him to that attack, the prison guards had left him at liberty to leave the prison. He again categorically denied being a mercenary and defined himself as an anti-Castro combatant involved in the political and military struggle for the freedom of his country.

48. On being questioned concerning the interviews he had given in 1998 to the New York Times and to the Telenoticias network in Miami, Florida, in which he had provided specific details implicating the Cuban-American National Foundation in the financing of the 1997 campaign of bombings of Havana hotels, interviews in which he had not denied his involvement, he replied that he had denied such reports and that the New York Times had published a correction, although in small print. Throughout the interview Posada Carriles repeated that he had fought and would continue to fight to put an end to the Government of Fidel Castro in Cuba. He stated that he had participated in military activities, but categorically denied that they had included criminal attacks.

49. Pedro Ramón Rodríguez corroborated what Posada Carriles had said. He added that he had never believed in the supposed desertion of the head of Cuban intelligence but had agreed to travel to Panama as a calculated risk. It was not the first time that they had had to cover the desertion of a prominent Cuban. He did not accept being regarded as a mercenary, but admitted being prepared to act against the Government of Cuba, although only through political and military action, without recourse to terrorism. He had never participated in placing an explosive device causing the death of innocent people. He added that, contrary to popular belief, the opponents of the Cuban Government lived a hard-working life in Miami and were in straitened financial circumstances.

50. Similar views were expressed by Guillermo Novo Sampoll and Gaspar Jiménez Escobedo, interviewed by the Special Rapporteur in El Renacer prison. They both stated that they had travelled to Panama at the request of Posada Carriles to assist in the desertion of General Delgado. In response to questions from the Special Rapporteur, they said that they had no knowledge of any predetermined plan and that at the time of their arrest they had not made up their minds how to take the General out of the country. One possibility would have been to have crossed the land frontier with Costa Rica and put him on a plane for the United States. Another would have been to have taken him out of Panama directly by plane. Both of them denied having taken part in terrorist acts, although they admitted the possibility of engaging in military action against the Government of Cuba. They also stated that they had no connection with the explosives found, for which the detonators had not been found. Nor had any plan of the site or facilities of Panama University, where the attack was allegedly to have been perpetrated, been found in their possession.

51. Both Posada Carriles and Novo Sampoll seemed to be suffering from more or less serious health problems to which they specifically referred. Both had suffered emergencies requiring their hospitalization. The four prisoners were apparently being well treated in detention as far as physical conditions were concerned, but they did complain of the slowness of the judicial proceedings and expressed the hope that they would soon return to Miami.

52. The Special Rapporteur asked the Government of Panama for further information which he regards as essential to his consideration of the procedure followed by the police and courts, and for a copy of the affidavit or police report concerning the arrest of these people in the Coral Suites Hotel to the east of the capital, a copy of the affidavit or police report relating to the seizure of the explosives, and a copy of the charge or announcement by the Head of State of Cuba or his security services concerning the preparations for an attack on him. The Special Rapporteur wishes to know: whether other people entered the country on the dates mentioned in connection with the acts attributed to the four accused; what part, if any, was played by César Matamoros, the Honduran citizen Carlos Vicente López Sánchez, and the driver engaged by Posada Carriles, the Panamanian citizen José Manuel Hurtado Viveros; and how likely it is that a cell of persons of Cuban origin is present in Panama to provide support and cover to the prisoners. At the time of writing - November 2002 - the information requested had not been received.

53. It is necessary to establish whether the possibility that the supposed attack on President Fidel Castro might have occurred at a location other than the auditorium of Panama University or the expressway to Tocumen Airport has been ruled out; where, how and

under what circumstances the explosives were seized; who else was arrested in connection with this matter and what their present legal situation is; how and by whom the equipment was brought into the country and whether the detonators were found.

B. Analysis

54. Although the visits to El Salvador and Panama provided interesting data, the need to compare accounts, process the information and analyse the evidence collected has compelled the Special Rapporteur to raise thematic issues and to ask the Salvadoran and Panamanian authorities to clarify matters where clarification is needed.

55. Regrettably, the clarifications and additional information requested had not been provided at the time of writing this report (November 2002). The basic information provided during the visit proved inadequate; with regard to the bombings of tourist facilities in Havana, there are contradictions between the judicial investigation in Cuba, the evidence presented and the statements by the parties charged as perpetrators of the crimes, and the denials by Posada Carriles of involvement in the bombings, although he offers no evidence to counter the statements made against him. As a result the Special Rapporteur, notwithstanding his visits in situ, is not in a position to reach a definitive conclusion regarding reports of mercenary activities against Cuba; some activities took place, having been planned by terrorist cells presumably operating from El Salvador and Miami, whereas others, such as the alleged plot against the life of the President of Cuba, were neutralized before they could be carried out.

56. There are too many gaps and loose ends in the information provided by the officials interviewed in El Salvador and Panama, the information obtained is inadequate, and the laxness and tolerance towards individuals who seem to have been involved in the unlawful acts reported requires an explanation. Posada Carriles seems to have enjoyed considerable freedom of movement over many years in El Salvador and other Central American countries. For example, it is astonishing that no one can give an account of his professional and business activities, the acquisitions he made, the income he earned, payments of taxes, bank transfers, etc., or that there is no knowledge of his circle of acquaintances or the false names he used or the 50-plus arrivals in and departures from Salvadoran territory. Was he never under surveillance? Did his previous involvement in conspiracies not lead to any presumption that he might be linked to some unlawful international plan?

57. The statements made to the Special Rapporteur by the four detainees certainly constitute testimony on their part, and the Special Rapporteur has sought to reflect them as objectively as possible in the account of his visits. He notes, however, that the testimony was not accompanied by any material evidence in support of the assertions made.

58. In any event it is to be hoped that the judicial process in this case will be based on an impartial investigation and respect for due process. It would thus provide convincing proof of their guilt, or lead to their release. In any event the Special Rapporteur must point out that the requests for extradition have not been complied with and that the four accused have been in preventive detention for almost two years, a period which could be considered excessive in terms

of the reasonable period referred to by international human rights instruments. The Special Rapporteur urges prompt action on the Panamanian judicial authorities so as to pre-empt any criticism in that regard.

59. The Special Rapporteur, in the discharge of his obligations, insists on the need to secure the documentation requested, so as to compare it with the testimony received. As stated in his report to the General Assembly, it seems unlikely that persons experienced in political and military struggle against a Government - which is how the persons in detention in Panama making the statements identified themselves - would have entered a country to assist in the desertion and flight of a prominent visitor without having any plan in place. The individuals stated that they did not have a predetermined plan for the kidnapping and escape, neither did they have a network and a local support infrastructure. Moreover they were arrested while quietly waiting in their hotel.

60. This confession of naivety, whereby experienced persons with a long proven record of engaging in conspiracy acknowledge that they were in a hotel waiting passively to be notified in order to act, seems improbable and it does not provide a good alibi. Indeed, it suggests that information is being withheld and that other persons are being protected or, worse, that they had something else in mind when they went to Panama as the tenth Ibero-American summit was being held. These individuals must provide additional and more specific information regarding their motives and intentions.

61. Moreover, the detainees do not seem to perceive or to make any ethical distinction between a political and military struggle against a regime, which position they support, and the commission of crimes against political figures who are the target of their anger and opposition. The vehemence of their gestures and expressions, and the record of conspiratorial acts, which they do not deny but reinterpret as part of a commitment to liberate their country of origin, could lead to a clouding of judgement and slippage into conduct in contravention of international human rights norms. The logic of political and military activism, which they admit to embracing on a personal basis, carries the risk of contemplating or carrying out acts that can only be considered offences.

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

62. The International Convention against the Recruitment, Use, Financing and Training of Mercenaries, which the General Assembly adopted by resolution 44/34, of 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 already 24 States that are party to the Convention. Costa Rica deposited its instrument of accession on 20 September 2001, Mali on 12 April 2002 and Belgium on 31 May 2002.

63. Notwithstanding the debate regarding the definition contained in article 1, the Special Rapporteur believes that the entry into force of the International Convention is a very positive step which will make it easier to improve this important instrument by the most appropriate

means. This could be the starting point for efforts to update the text and introduce a criterion to address recent mercenary activities that have remained unpunished. The Convention will also facilitate preventive cooperation among States, better identification of situations involving mercenaries and the clear determination of jurisdiction in each case and will facilitate procedures for the extradition of mercenaries and the effective prosecution and punishment of offenders.

64. As noted above, 24 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, 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.

65. 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. CONCLUSIONS

66. In accordance with Commission on Human Rights resolution 2002/5, the Special Rapporteur has undertaken consultations with States, intergovernmental bodies and non-governmental organizations with the aim of keeping information on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination up to date and of monitoring situations in which mercenaries are involved. These consultations and observations lead to the conclusion that the measures taken by the international community to combat mercenary activities have proven inadequate. Mercenary activities have not only continued but increased. There have even been recent studies and statements by government spokespersons that suggest the possible legalization of mercenary activities by allowing and formalizing their recruitment, hiring and use by private security and military consultancy companies.

67. The ceasefire agreement concluded in Angola on 5 April 2002 ends a cruel conflict in which UNITA made repeated use of mercenaries. In the territories under its control UNITA has mined and marketed diamonds without restraint despite the United Nations prohibition, and has conducted illegal trafficking in precious stones on European markets, in particular Antwerp, using mercenaries for this purpose. Today, as a result of the agreement, elections are scheduled,

as are the reinsertion and reintegration of 50,000 members of UNITA and implementation of an emergency plan for internally displaced persons. Also of note are the conclusion on 30 July 2002 in Pretoria of the Peace Agreement between the Democratic Republic of the Congo and Rwanda, the ceasefires in the Sudan and the holding of presidential and legislative elections in Sierra Leone, which has suffered the presence of mercenaries during a long and cruel civil war.

68. Regrettably, elsewhere in Africa there has been no change regarding the presence of mercenaries. On the contrary there has been some regression, as in Côte d'Ivoire, Madagascar and the Comoros. The armed conflicts in West Africa have resulted in a concentration of mercenaries willing to fight for the highest bidder, together with a heavy concentration of weaponry.

69. Groups and organizations engaging in terrorism, with their shifting operational links to mercenaries, remain active. These groups resort to the recruitment, hiring and use of mercenaries. States must make greater efforts to prevent and suppress the presence of such groups in their territories as well as the financial and logistical support networks, channels, circles and systems providing them with assistance. The fight against terrorism must, however, be conducted in full respect for human rights and with the participation of civil society in the formulation and implementation of policies and plans to prevent terrorism.

70. The visits by the Special Rapporteur to El Salvador and Panama have allowed the furthering of his investigation into alleged mercenary activities in which the territory of those and other countries in Central America was used to plan mercenary activities and some of whose nationals were employed to organize criminal activities. The main target of those activities was Cuba, with attacks on its hotels, tourist centres and public places intended to sow terror and cause serious economic harm to the country. The investigations in connection with the visits have not concluded, and the Special Rapporteur is awaiting the supplementary documentation requested. The Special Rapporteur can state that the testimony received from individuals detained in Panamanian jails is inadequate, contradicts the findings of the investigations conducted by the judicial authorities of Panama and would require further proof to be accepted as valid. At present it does not constitute a rebuttal of the events attributed to them. The investigations conducted in the two countries also appear inadequate. Meanwhile the four individuals held in Panamanian prisons have already spent more than two years in preventive detention.

71. The second meeting of experts on mercenaries has led to considerable progress in aspects relating to understanding, defining and classifying the phenomenon of mercenarism. This progress must contribute to increased international effectiveness in combating mercenary activities and mercenarism.

72. The Special Rapporteur has continued his research with a view to proposing to the Commission on Human Rights, at its sixtieth session, an updated proposal for a legal definition of a mercenary. He has considered some conceptual elements of the definition in chapter III of this report.

73. While the International Convention against the Recruitment, Use, Financing and Training of Mercenaries entered into force on 20 October 2001, to date only 24 States are parties to it. In view of the spread, expansion and range of mercenary activities, an increase in the number of States parties is necessary for efforts to prevent and eliminate such activities to become more effective.

VIII. RECOMMENDATIONS

74. It is recommended that the Commission on Human Rights, as indicated, should reaffirm its categorical condemnation of mercenary activities; give notice of the new forms and connections making their appearance and the context in which they occur; and reaffirm that mercenary activities are contrary to the purposes and principles of the United Nations and are incompatible with human rights.

75. Similarly, the Commission should call on all States to unequivocally signal their rejection of mercenary activities to ensure that there is zero tolerance of attempts to make use of their territory to organize, plan, prepare, support or finance mercenary activities. Domestic law must expressly prohibit and punish any kind of recruitment, use, financing, assembling or training of mercenaries. This must include any kind of recruitment, training, hiring or financing of mercenaries by private companies offering international military consultancy and security services, as well as a specific ban on such companies' intervening in armed conflicts or actions to destabilize constitutional regimes.

76. Since mercenaries are also employed in acts of terrorism, it is also recommended that the mercenary aspect should be reflected in United Nations analysis, follow-up and resolutions on terrorism. The same concern should be reflected in national legislation. The Special Rapporteur will keep abreast of developments in combating terrorism and coordinate with the United Nations bodies dealing with terrorism.

77. It is further recommended that special attention should be paid to combating the involvement of mercenaries in illicit arms trafficking, which serves to fuel and prolong armed conflicts. With his experience the mercenary agent facilitates more frequent and bigger illicit arms deals. That being the case, more effort must be put into developing legal instruments to facilitate prosecution of illicit trafficking and into mobilizing the political will of States to suppress it effectively.

78. The Commission should pay particular attention to the recent concentration of mercenaries in Africa, especially in West Africa; reiterate its full support for the right to self-determination of the peoples of the continent; and condemn the abusive exploitation of their resources by entities from outside the continent and the serious violation of the human rights of the African peoples engendered by such despoilment and its implications for current and future generations of Africans.

79. It is recommended that the Special Rapporteur should continue his investigations into the allegations concerning the existence of political groups working with mercenary networks operating from various territories in North America, Central America and the Caribbean, in

direct violation of national and international law, for the purpose of undermining the stability of constitutional Governments and, in particular, that of the Government of Cuba. None of these aims is consistent with the Charter of the United Nations. The Commission must therefore reaffirm the need not only to fully respect human rights, but also to safeguard the principles concerning the right of peoples to self-determination and non-intervention in the internal affairs of States.

80. Now that the International Convention against the Recruitment, Use, Financing and Training of Mercenaries has come into force, it is recommended that the Commission should reiterate its invitation to States that are not yet parties thereto to ratify or accede to the Convention, so that it will be more representative of the common interest of States in preventing, punishing and eliminating mercenary activities. It should, at the same time, invite member States to review their national legislation so as to bring it into line with the Convention.
