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

Noted 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 second 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 13 to 17 May 2002.

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REPORT OF THE SECOND 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

Geneva, 13-17 May 2002

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Introduction

1. General Assembly resolution 56/232 of 24 December 2001, entitled "Use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination", in its operative paragraph 10:

> "*Requests* the United Nations High Commissioner for Human Rights to convene, before the fifty-ninth session of the Commission on Human Rights, a second meeting of experts, pursuant to General Assembly resolution 54/151 of 17 December 1999, to continue studying and updating the international legislation and to make recommendations for a clearer legal definition of mercenaries that would make more efficient the prevention and punishment of mercenary activities."

2. Commission on Human Rights resolution 2002/5 of 12 April 2002, in its paragraph 10:

> "*Welcomes* the efforts being made by the Office of the United Nations High Commissioner for Human Rights in the preparation of the second 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, as requested by the General Assembly in resolution 56/232."

3. In accordance with these resolutions, the Office of the High Commissioner for Human Rights (OHCHR) extended an invitation to 10 experts from different geographical regions to attend an expert meeting from 13 to 17 May 2002 on the traditional and new forms of mercenary activities as a means of violating human rights and impeding the exercise of the right of peoples to self-determination. The Special Rapporteur of the Commission on Human Rights on the issue since the inception of the mandate in 1987, Mr. Enrique Bernales Ballesteros, was also invited to attend.

4. The following experts attended the meeting: Mr. Chaloka Beyani (Zambia); Mr. Eric David (Belgium); Mr. Vojin Dimitrijevic (Federal Republic of Yugoslavia); Ms. Silvia Fernández de Gurmendi (Argentina); Ms. Françoise Hampson (United Kingdom of Great Britain and Northern Ireland); Ms. Olga Miranda Bravo (Cuba); Mr. Arpad Prandler (Hungary); Mr. I. A. Rehman (Pakistan); Mr. Martin Schönteich (South Africa). A tenth expert who had been invited was not able to participate.

5. The Office of Legal Affairs and the Office for Drug Control and Crime Prevention were invited to send representatives to attend the meeting of experts; both bodies replied that they could not participate. The International Committee of the Red Cross (ICRC) attended the meeting as observer.

6. On 13 May 2002, the meeting was opened by Mr. Kevin Boyle, Special Adviser to the High Commissioner for Human Rights. Subsequently, the experts decided that Ms. Fernández de Gurmendi would act as Chair. Mr. Beyani agreed to act as Rapporteur. The meeting proceeded to adopt the agenda.

7. The present report contains a thematic consideration of the issues discussed and analysed by the experts at their second meeting, as well as conclusions and recommendations, having taken into account the contents of the report of the first meeting (E/CN.4/2001/18) as well as new developments such as the coming into force of the 1989 International Convention against the Recruitment, Use, Financing and Training of Mercenaries (hereinafter "the 1989 Convention") and of the Rome Statute of the International Criminal Court.

I. DEVELOPMENTS IN THE ISSUE OF MERCENARY ACTIVITIES AND THE MANDATE OF THE SPECIAL RAPPORTEUR

8. In resolution 2002/5, the Commission on Human Rights requested the Special Rapporteur to continue taking into account in the discharge of his mandate that mercenary activities are continuing to occur in many parts of the world and are taking on new forms, manifestations and modalities. At the meeting, the Special Rapporteur reaffirmed his commitment to examine this problem further and to help advance the legal definition of the phenomenon of mercenaries in a way which would elicit a precise and more comprehensive resolution from the Commission on Human Rights, based on the outcome of the meeting of experts.

9. The recruitment, financing and use of mercenaries affect States, life, as well as the principles and aims embodied in the Charter of the United Nations. Principally, although not exclusively, the first part of the Special Rapporteur's mandate is to study the subject of mercenaries in connection with armed conflict. However, it was subsequently realized that the exclusive study of mercenaries in armed conflict left out the study of the involvement of mercenaries in criminal activities that were harmful to people, and the mandate of the Special Rapporteur has evolved accordingly.

10. At present, the subject of mercenaries has many facets which include the involvement of mercenaries in armed conflict; sabotage and participation in covert activities that undermine the constitutional order of a State; interference in the internal affairs of States calculated to bring about political instability by violent attacks on political leaders; unlawful trafficking of weapons, precious stones, oil and drugs; mercenaries hired by authoritarian regimes as professional military experts to carry out military training; participation by mercenaries in terrorist activities; participation by mercenaries in crimes against State security and economic well-being; mercenary operations carried out by private security companies; and impunity aided by the absence of enabling national legislation to punish mercenaries. A specific call was made to examine the problem of mercenaries in Kashmir. The experts stressed in particular the linkage between mercenary activities and terrorism.

II. REDEFINING MERCENARIES

11. Mercenaries are frequently active in places where there is a market for their activities. The problem remains that there is no appropriate legal definition or legislation under which they can be prosecuted. In accordance with the mandate entrusted to them by the General Assembly in resolution 56/232, the experts saw it fit to examine the question of redefining mercenaries, noting that the current definition in article 1 of the 1989 Convention, as well as article 47 of Protocol I Additional to the Geneva Conventions of 1949, was unworkable and deficient as a basis for effectively criminalizing mercenary activity.

12. The first meeting of experts recommended that a systematic and comprehensive review of the legal definition of the term "mercenary" should be considered as a matter of urgency and should include, inter alia, the elements of motive, purpose, payment, type of action and nationality (E/CN.4/2001/18, para. 110). At their second meeting, the experts considered specific elements and categories that are of importance in seeking to redefine the concept of mercenary.

13. The approach taken by the experts was practical: they sought to build on and improve the existing definition while cautioning that it was important to identify the nature of mercenary activity that needed to be criminalized as distinct from those activities in which mercenaries were involved and which were already criminalized under international law. An increase in the varieties of mercenary activity signified that any reformulated definition should cover mercenaries in whatever conduct they were engaged so that they could be prosecuted accordingly.

14. Three specific propositions concerning the redefinition of mercenaries were laid out. The first reiterated the definition of mercenaries under article 47 of Additional Protocol 1, with the modification that the requirement of direct participation in armed conflict by mercenaries be removed and that additional categories of internationally prohibited activities in which mercenaries were involved should be enumerated under article 1 (2). Such additional categories would include: organized crime, terrorism, trafficking, hostage-taking, and attacks on internationally protected persons.

15. The second proposition laid emphasis on the element of foreign involvement as a characteristic of the definition of a mercenary on the grounds that the participation of foreign nationals in non-international armed conflicts bred internal instability and led to the deterioration and prolongation of conflicts because such foreigners had no actual stake in the conflict. Exceptions to this were individuals who voluntarily joined the armed forces of a State other than their own and were subject to an existing command structure, and groups of foreign individuals serving in armed forces under the normal control of a State, e.g. the British and Indian Ghurkha regiments and the French Foreign Legion. This formulation sought to remove from the existing definition the elements of motive and private substantial gain since these remain difficult to establish in criminal proceedings which require proof of mercenarism. Nevertheless, the element of motive could be a factor to be taken into account when sentencing a mercenary upon criminal conviction. In the context of this discussion, some experts considered the possibility of broadening the concept of nationality to encompass the wider concept of "ethnicity" and "national identity across borders".

16. The third proposition supported a definition that would criminalize certain activities in which mercenaries were involved and which were prohibited under international law. To this effect, four categories of such activity were identified, namely:

(a) Ordinary crimes elevated to crimes under international law, e.g. terrorism, theft of nuclear materials, drug trafficking and organized transnational crime;

(b) Offences under international law, e.g. war crimes, crimes against humanity, genocide, torture and serious violations of human rights;

(c) Acts of mercenarism mostly covered under the 1989 Convention, e.g. acts of interference in internal affairs, attacks on the sovereignty of a State, undermining the right to self-determination, subversive acts, intervention by foreign individuals in internal armed conflicts, as in the case of individuals in Al Qaeda in Afghanistan in 2001 and Belgian mercenaries in the Congo in the 1960s; and

(d) Hiring and recruitment of mercenaries in foreign forces, having regard to the fact that States are concerned not with the engagement of mercenaries per se, but with their actual use to commit the crimes under the first two categories above.

With respect to these proposals, two schools of thought developed during discussions. One sought to capture mercenary activities by reaching a clear definition of the persons involved, that is of "mercenaries". The other concentrated mainly on criminalizing the illicit activities themselves.

17. On other issues, some experts took the position that the element of motive and private gain could not be dispensed with as it expressed the quintessential nature of a mercenary. Other experts held the view that it was difficult to separate those mercenaries who had an "impure motive" from those who had a "pure motive" and that private gain was difficult to establish in determining the element of motive. On the question of foreign nationality, a variety of opinions indicated that this was an insignificant factor and that the real problem lay in the consequences of the acts perpetrated by mercenaries, irrespective of whether they were foreign nationals.

18. In its capacity as an observer, the representative of the ICRC observed that the significance of the element of nationality in mercenarism could neither be discounted nor made, per se, the main element of an international crime. The participation in an armed conflict of someone who is not a national or a longtime resident of a State should not, in itself, be an international offence. The element of nationality could, however, be retained as an aggravating factor of an existing or prospective international crime. For one expert, crimes against peace were linked to self-determination and on that account, foreign participation by mercenaries in such crimes would be contrary to that principle.

19. The experts related these strands of opinion to the categories of activity for which mercenarism could be punishable in any event and whatever its form. Two important points emerged from this perspective. In the first place, that mercenarism per se was a difficult crime to punish and that concept did not, by itself, contribute to the determination of actual crimes for which a mercenary could be convicted. In the second place, identifying acts for which mercenaries could be held criminally responsible was in practical terms more useful than trying to untangle the reasons for being a mercenary. To that end, a new definition based on the existing one was drafted and the group modified the draft as contained in the annex.

20. However, it was important to maintain as separate issues the criminalization of mercenary activity on the one hand, and the responsibility of States for mercenary activities on the other hand.

III. CRIMINALIZATION OF MERCENARY ACTIVITY

21. According to the experts, criminalization of mercenary activity should distinguish between those activities that already constituted crimes under international law and those which required to be criminalized. To that end, the experts referred to the four categories of activity described in paragraph 16 above.

22. Experts recognized that mercenaries frequently participated in other internationally prohibited acts, such as drug trafficking, trafficking in arms, illicit trafficking, organized transnational crime, unlawful possession of nuclear materials and terrorist acts, for which they were already punishable under existing conventions. Therefore, some experts considered that the definition should focus on criminalizing those activities that were illicit under international law but did not constitute crimes for the purpose of individual responsibility. For instance, experts underlined that certain violations of human rights would not be crimes unless they reached a certain threshold. In particular, experts underlined the need for criminalizing participation in conflicts involving the illegal use of armed force.

23. In the context of this discussion, it was pointed out that when criminalizing certain illicit acts of violence, it would be necessary to take into account the work done in other forums, such as the Working Group on the Crime of Aggression of the Preparatory Commission for the International Criminal Court.

24. The use of children by mercenaries to commit crimes connected with mercenary activity should be regarded as constituting an aggravating element in determining the appropriate sentence wherever a mercenary is convicted of an offence under the 1989 Convention.

IV. STATE RESPONSIBILITY FOR MERCENARY ACTIVITIES

25. Patterns of State responsibility normally evolve from obligations arising from conduct prohibited by international law. In the case of mercenaries, there are analogies with the obligations of States under neutrality law (e.g. The Hague Convention No. V of 1907). In examining the issue of State responsibility, the experts made a number of observations. A State should be responsible for its failure to prevent the recruitment, training or financing of mercenaries on its territory and for allowing a person to leave its territory or jurisdiction when the authorities know that such person was departing with intent to participate in an armed conflict in a territory of which he was neither a national nor a long-term resident.

26. Furthermore a State should have the obligation to prosecute or extradite those in its jurisdiction who have participated in an armed conflict in a territory of which they are neither nationals nor long-term residents. The offence of unlawful participation in an armed conflict should not be regarded as a political offence for the purposes of extradition. However, the experts noted that a key problem in the area of State responsibility for acts of mercenaries lay in the failure of States to implement existing international law.

V. BEST LEGISLATIVE PRACTICE ON MERCENARIES: THE CASE OF BELGIUM

27. Belgian legislation omits to define the term mercenaries, but its substance covers mercenaries in the context of military services given to foreign armies or irregular troops. It prohibits the recruitment of Belgians for such services both in Belgium and abroad in such a way that the scope of application of the law is both internal and external. The law also prohibits Belgian nationals from engaging in the recruitment of mercenaries abroad. However, there are exceptions relating to the participation of Belgians in peacekeeping operations on the basis of agreements between Belgium and other States, and the recruitment in Belgium by a foreign State of its own nationals. Prohibitions on the engagement of Belgian nationals for mercenary activities reinforce existing laws in the penal codes.

VI. REGULATION OF PRIVATE SECURITY AND MILITARY FIRMS

28. The first meeting of experts (ibid., para. 114) examined the issue of private security/military companies and the issues connected with their regulation. At their second meeting, the experts examined this issue from the point of view of contractual arrangements between the companies, the host or sending State, and the receiving State, and the necessity of prohibiting the use of mercenaries by private military companies. Because of the thin line dividing the activities of private security companies and the use of mercenaries, it was important for the Special Rapporteur to continue to examine the activities of private military companies as part of his mandate.

29. Security companies had, in practice, been used by authorities claiming to be the lawful Government of a territory and by multinational corporations with resource exploitation rights in situations in which the domestic authorities are believed not to have been able to provide the requisite protection. In order for the use of foreign security companies or foreign armed personnel to be lawful, there must be a formal agreement between the Government and the corporation and between the corporation and the security company (or one agreement between all three parties).

30. The agreement between the Government and the corporation should stipulate the number of personnel to be thus employed; the area in which they can operate; whether or not they can be armed; and the circumstances in which they can open fire in defence of property and/or in defence of life, which circumstances must take into account the obligations of the State under human rights law and the law of armed conflict and should require the State to investigate any allegation of the unlawful use of force, and the corporation and security company to cooperate with any such investigation, and to enforce its criminal law.

31. The agreement between the corporation and the security company should address the same issues and should require the security company to provide training for its personnel in the relevant domestic law and to stipulate in its contracts with personnel that they will be subject to the domestic criminal law in which they operate. Some experts called for the establishment of a system of registration for private military companies and the creation of a working group to oversee their activities, while others held the view that this would not be necessary. The experts agreed that it was appropriate for the issue of private military companies to be considered within

the organs of the human rights machinery of the United Nations at the level of the Office of the High Commissioner, the Sub-Commission for the Promotion and Protection of Human Rights, and the Commission on Human Rights.

VII. BEST LEGISLATIVE PRACTICE ON REGULATING PRIVATE SECURITY AND MILITARY FIRMS: THE CASE OF SOUTH AFRICA

32. South Africa has two strands of legislation which deal with private security companies and private military companies separately. These are the Private Security Regulations Act, 2001, and the Regulation of Foreign Military Assistance Act, 1998, respectively. Both pieces of legislation contain a range of permitted and prohibited activities and establish regulatory bodies and procedures for monitoring the implementation of the legislation concerned, and operate on the basis of a registry and licensing system for private security and private military companies offering foreign military assistance. Moreover, the regulatory bodies are themselves subject to ministerial accountability in the performance of their functions.

33. The experts noted that South African legislation represented a unique model for regulating private security and military companies. The discussion emphasized the need for drafting model legislation or an international code of conduct for the regulation and accountability of private military companies. In addition, it was thought that the possibility should be examined of extending to private military companies the application of the provisions of the 1989 Convention (arts. 6-9) which deal with measures of international cooperation with regard to mercenary activity.

VIII. STATE RESPONSIBILITY FOR REGULATING PRIVATE MILITARY COMPANIES

34. The involvement of private military companies in internal armed conflicts may be perceived as representing intervention by the State of incorporation of the security company, whether or not that is the case. In these circumstances, the only way in which the security company's host State can avoid the perception of intervention is by requiring any arrangement between an alleged Government and a security company to pass through another Government, or to receive the consent of the receiving State.

35. The request for assistance would therefore need to be made of both the security company and its host State. Whilst initial negotiations would be likely to be bilateral - between the requesting State and the security company - no agreement could be finalized without the agreement of the company's host State. The bilateral agreement would need to indicate the number of personnel and the quantity and type of equipment to be used; the purpose for which they are to be used; the area in which they are to operate; the relationship, if any, with the governmental armed forces; and the circumstances in which they can open fire, and should stipulate that the company's personnel are required to comply with domestic and international law and will be subject to the criminal law of the territory in question.

36. The state of incorporation of the company would be required to satisfy itself that the party requesting assistance was entitled to receive such assistance under international law and that the requesting authority would in fact exercise criminal jurisdiction over any personnel allegedly violating domestic or international law. In view of the fact that governmental authorities and other bodies clearly wish to make use of the services of security companies, it would be necessary to provide that it would be a defence to a charge of unlawful participation in a conflict to show that the defendant was serving under such an arrangement. The function of the arrangements is to ensure that an authority is responsible for the conduct of such foreign personnel and, in the case of participation in a conflict between two parties in the territory, that the State of incorporation of the company is satisfied that the form of the assistance is consistent with international law

IX. FORWARD PERSPECTIVES: CONCLUSIONS AND RECOMMENDATIONS

A. Conclusions

37. The experts concluded that in order to increase the effectiveness of the legal framework against mercenary activities it was necessary to amend the 1989 Convention. Amendments would concern in particular, but not exclusively, article 1 on the definition of a mercenary.

38. Experts discussed which would be the most suitable forum for such amendment process to take place. Some experts suggested that the item on mercenary activity could be referred to the Sixth Committee of the General Assembly. Others considered that in light of the subject matter, it was preferable to keep consideration of mercenary activity within the Commission of Human Rights. However, it was agreed that at this stage it would be necessary to obtain the views of States on the proposed amendments before making a final decision in that respect.

39. The experts further concluded that it would also be necessary to take steps to promote the regulation and supervision of activities that, although not themselves prohibited, could lead to mercenary activity. In this regard, experts stressed the need for appropriate national and international legislation and, eventually, the possibility of establishing a mechanism for monitoring and follow-up that would improve the accountability of private security or military companies and would strengthen parameters of State responsibility.

40. In light of these conclusions, the experts agreed on a set of proposals which is contained below.

B. Recommendations

41 The group recommended that consideration should be given to improving the effectiveness of the 1989 Convention and other mechanisms dealing with the problem of mercenaries by:

(a) Considering its proposals for the amendment of the 1989 Convention (annex);

(b) Requesting States to submit their views on the proposed amendments to the Special Rapporteur on the question of the use of mercenaries before the next session of the Commission on Human Rights; and

(c) The creation by the Special Rapporteur of a database of national legislation and implementation on mercenary activity which would be available to all States and the Special Rapporteur to facilitate reporting to the Commission on these developments.

42. The group recommended that because the problems posed by the activities of private military/security companies might, in some circumstances, give rise to problems analogous to those raised by mercenaries, it would be desirable that:

(a) The Commission on Human Rights request the Sub-Commission to set up an in-sessional working group to consider the issues raised by the existence of private military/security companies and to consider how their activities could best be regulated, taking into account work which has been undertaken by the Special Rapporteur and in other forums on the question of mercenaries;

(b) OHCHR consider establishing a system of information flow to facilitate access by States to existing national legislation and implementation mechanisms for regulating private military/security companies. Where possible, the High Commissioner might consider exercising her mandate to provide technical assistance and advisory services in the drafting of appropriate national legislation on private military/security companies to those States in need of such assistance.

43. Noting that the current definition in article 1 of the 1989 Convention was unworkable and deficient as a basis for effectively criminalizing mercenary activity, and in accordance with the mandate entrusted to it by General Assembly resolution 56/232, the experts saw fit to examine the question of redefining mercenaries. The experts concluded that, in order to increase the effectiveness of the legal framework against mercenary activities, it was necessary to amend the Convention. Proposed amendments are contained in the annex.

Annex

Proposed amendments to the United Nations International Convention against the Recruitment, Use, Financing and Training of Mercenaries of 1989

Article 1

For the purposes of the present Convention,

1. A mercenary is any person who:

(a) Is specially recruited locally or abroad in order to fight or who participates in an armed conflict;

(b) Is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict;

(c) Is not a member of the armed forces of a party to the conflict; and

(d) Has not been sent by a State which is not a party to the conflict on official duty as a member of its armed forces.

2. A mercenary is also any person who, in any other situation:

(a) Is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at:

(i) Overthrowing a Government or otherwise undermining the constitutional order of a State; or

(ii) Undermining the territorial integrity of a State;

(iii) Denying self-determination, or maintaining racist regimes or foreign occupation;

(b) Is neither a national nor a resident of the State against which such an act is directed;

(c) Has not been sent by a State on official duty; and

(d) Is not a member of the armed forces of the State on whose territory the act is undertaken.

3. The definition of a mercenary in article 1 of this Convention is without prejudice to the constituent elements of the definition of a mercenary, including private material gain, as defined under article 47 of Protocol I Additional to the Geneva Conventions of 1949. Nothing in this Convention shall affect the status, treatment or obligations of mercenaries and of the parties to the conflict under international humanitarian law.

Article 2

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

Article 3

1. A mercenary, as defined in article 1 of the present Convention, who participates directly in hostilities or in a concerted act of violence, as the case may be, commits an international crime for the purposes of the Convention. A mercenary who also participates in internationally prohibited acts, such as drug trafficking, illicit forms of trafficking, trafficking in arms, organized transnational crime, unlawful possession of nuclear materials and terrorist acts, shall commit an offence under this Convention.

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

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

4. Where a person is convicted of an offence under article 1 of the Convention and the perpetrator used or sought to use children in the commission of the offence, that act shall constitute an aggravating element in determining the appropriate sentence.
