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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 1995/5 and Commission decision 1996/113

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Introduction

1. In resolution 1995/5 of 17 February 1995, the Commission on Human Rights, inter alia, reaffirmed that the recruitment, use, financing and training of mercenaries should be considered offences of grave concern to all States. The Commission urged all States to prevent mercenaries from using any part of their territory to destabilize any sovereign State and called upon all States that had not yet done so to consider taking early action to accede to or ratify the International Convention against the Recruitment, Use, Financing and Training of Mercenaries. The Commission decided to extend the mandate of the Special Rapporteur for three years. The Commission also urged all States to cooperate with the Special Rapporteur in the fulfilment of his mandate, in particular by providing credible and reliable information.

2. In decision 1995/254 of 25 July 1995, the Economic and Social Council approved the Commission's decision to extend for three years the mandate of the Special Rapporteur and requested the Secretary-General to provide him with all necessary assistance.

3. At its fifty-second session the Commission on Human Rights decided, without a vote, that all continuing thematic or country-oriented mandates established by the Commission and entrusted to special rapporteurs, special representatives, independent experts and working groups are expected to report to the fifty-third session (decision 1996/113).

4. At its fifty-first session, the General Assembly adopted resolution 51/83, in which, inter alia, it urged all States to take the necessary steps and to exercise the utmost vigilance against the menace posed by the activities of mercenaries and to take necessary legislative measures to ensure that their territories and other territories under their control, as well as their nationals, were not used for the recruitment, assembly, financing, training and transit of mercenaries for the planning of activities designed to destabilize or overthrow the Government of any State or threaten the territorial integrity and political unity of sovereign States, or to promote secession or fight the national liberation movements struggling against colonial or other forms of alien domination or occupation. The Assembly called upon all States that had not yet done so to consider taking necessary action to sign or to ratify the International Convention against the Recruitment, Use, Financing and Training of Mercenaries and urged them to cooperate with the Special Rapporteur in the fulfilment of his mandate.

5. The General Assembly 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; requested the Centre for Human Rights of the Secretariat, as a matter of priority to publicize the adverse effects of mercenary activities on the right to self-determination and, when requested where necessary, to render advisory services to States that are affected by the activities of mercenaries; and requested the Special Rapporteur to report, with specific recommendations, his findings on the use of mercenaries to undermine the right of peoples to self-determination to the General Assembly at its fifty-second session.

6. In accordance with these provisions, therefore, the Special Rapporteur has the honour to submit, for the consideration of the Commission on Human Rights at its fifty-third session, his report on activities in 1996, with special emphasis on his visit to South Africa.

I. ACTIVITIES OF THE SPECIAL RAPPORTEUR

A. Implementation of the programme of activities

7. The Special Rapporteur travelled to Geneva on 25 March 1996 to submit his seventeenth report to the Commission on Human Rights (E/CN.4/1996/27). While in Geneva, the Special Rapporteur had consultations with representatives of various States and held meetings with members of non-governmental organizations.

8. The Special Rapporteur returned to Geneva on three occasions, from 28 to 31 May 1996, from 29 July to 5 August 1996 and from 17 to 19 October 1996, to participate in the third meeting of special rapporteurs and special representatives, independent experts and chairmen of working groups of the Commission on Human Rights, to hold a number of consultations and meetings and to draft his report to the General Assembly. His last visit took place from 17 to 19 October 1996, for the purpose of preparing his visit to South Africa.

9. Of particular importance during this period were the meetings which the Special Rapporteur had with Ambassador Jacob S. Selebi, Permanent Representative of South Africa to the United Nations Office at Geneva, on 26 March and 31 July 1996. The Special Rapporteur recalled that, in a number of previous reports, he had made reference to mercenary activities originating in South Africa whose purpose had been to perpetuate and reinforce the apartheid regime. That regime had been abrogated and dismantled and the country was now on the way to building a modern, multiparty and multiracial democracy. However, the Special Rapporteur had recently received reports that a private company registered in Pretoria as a security firm, Executive Outcomes, and its subsidiaries had allegedly been sending mercenaries to Angola and Sierra Leone under contracts concluded with the Governments of those countries in exchange for substantial cash payments and mining concessions. The directors of the conglomerate were said to be connected with former members of Battalion 32, which had fought in Angola under the name of Buffalo Battalion, and erstwhile members of racist and extreme right-wing paramilitary organizations in South Africa. The Special Rapporteur expressed his interest in visiting South Africa on an official mission in order to investigate these allegations in situ.

10. Ambassador Selebi said that his Government was firmly opposed to any use of mercenaries, particularly in Africa. Mercenaries were being used in the context of domestic armed conflicts which, unfortunately, continued to take place in certain African countries. Although many aspects of mercenary activity were punishable under South African law, enforcement was difficult, since the bulk of such activities took place abroad or were agreed to by Governments which hired the services of organizations which were probably using mercenaries. New draft legislation was being considered. Regarding the allegation that a security firm or association of firms registered in South Africa was being hired by foreign Governments, he said that the terms

agreed in such contracts were the responsibility of those Governments. He went on to say that he would inform his Government that the Special Rapporteur had expressed an interest in visiting South Africa. Subsequently, in a letter dated 24 June 1996, he transmitted his Government's official invitation to the Special Rapporteur to visit the country (see para. 18).

11. The Special Rapporteur also met on 27 March 1996 with Ambassador Mustafa Bijedi, Permanent Representative of the Republic of Bosnia and Herzegovina to the United Nations Office at Geneva. He recalled that he had received and examined allegations about the presence of mercenaries in the territory of the former Yugoslavia since the time of his tenth report (A/47/412, annex), which had been submitted to the General Assembly at its forty-seventh session. At the invitation of the Governments of the Republic of Croatia and the Federal Republic of Yugoslavia, he had visited both countries on an official mission in September 1994, but had been unable to visit Bosnia and Herzegovina. He considered it important to do so in order to look into allegations he had received about the presence of foreigners, mercenaries, volunteers and Islamic fighters or mujahidin in the armed conflicts which had recently ravaged that country.

12. Ambassador Bijedi said that no member of, or individual associated with, his country's armed forces could be described as a mercenary. Some years previously, the Ministry of Defence had reported the presence of a certain number of foreigners, mainly volunteers, who served alongside the Fifth Army Corps and who subsequently left the country. His Government was prepared to continue cooperating with the Special Rapporteur and would examine the latter's request to make an official visit. At the same time, it hoped that the Special Rapporteur would carry out his mandate in such a way as to help strengthen the democratic forces that were fighting to preserve the multi-ethnic and multicultural character of Bosnia and Herzegovina and to ensure that war criminals and those responsible for acts of genocide against the people of his country were brought to trial and punished.

13. The Special Rapporteur visited the Republic of South Africa at the invitation of the South African Government from 20 to 30 October 1996. A summary of the visit appears in chapter II of this report.

14. The Special Rapporteur travelled to New York on 4 November 1996 to submit his report (A/51/392, annex) to the Third Committee of the General Assembly. He then returned to Geneva from 7 to 13 January 1997 to draft this report.

B. Correspondence

15. In reply to a letter from the Special Rapporteur dated 12 November 1995, Mr. Nigel C.R. Williams, Ambassador and Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations Office at Geneva, sent the following letter, dated 31 January 1996, to the Special Rapporteur:

> "You ask for details about Executive Outcomes (EO) and its activities in Sierra Leone. We understand that it is a British and South African-registered security company. It has its British office in

Alton, Hampshire. Branch Energy, a company affiliated to EO, has been contracted to work the Koidu diamond mines. Other EO-affiliated companies are Heritage Oil and Gas, GJW Government Relations, Capricorn Air and Ibis Airline. There are about 150 EO employees in Sierra Leone. But we know of no evidence that they are engaged in activities designed to spread terror among the civilian population.

The Government of Sierra Leone has contracted Executive Outcomes to provide their army with assistance and training. We note that the United Nations Secretary-General's report on Sierra Leone of 21 November refers to the use by the Sierra Leonean Government of advisers to improve the fighting skills of its troops, instil discipline and upgrade command and control. The details of contracts signed with foreign companies are, of course, a matter between the Sierra Leonean Government and them. Armed forces from Nigeria, Guinea and Ghana are also stationed in Sierra Leone.

The recruitment of mercenaries in the United Kingdom is only illegal in certain very limited cases (namely, when British citizens would serve in the forces of a foreign State at war with another foreign State which is at peace with the United Kingdom). Legislation to give effect to the United Nations Convention on Mercenaries has been considered, but, from a legal point of view, would be very difficult to implement."

16. Pursuant to General Assembly resolution 50/138 of 21 December 1995, the Special Rapporteur sent a communication on 10 June 1996 to all States Members of the Organization requesting the following:

(a) Information on the possible existence of any recent mercenary activities (recruitment, financing, training, assembly, transit or use of mercenaries);

(b) Information available to their Government on participation by nationals of their country as mercenaries in committing acts against the sovereignty of other States, against the exercise of the right of other peoples to self-determination and in human rights violations;

(c) Information on the possible existence of mercenary activities in the territory of another country from which actions were carried out that affected or potentially affected the sovereignty of their country and the exercise of the right of their people to self-determination;

(d) Information on the possible existence of mercenary activities in committing internationally wrongful acts such as terrorist attacks, forming and supporting death squads, trafficking in and abduction of persons, drug trafficking, the arms traffic and contraband;

(e) Information on domestic legislation currently in force and on international treaties to which their country was a party, outlawing mercenary activities and the use of mercenaries as a means to impede the exercise of the

right of peoples to self-determination, together with observations on their Government's position regarding the International Convention against the Recruitment, Use, Financing and Training of Mercenaries, adopted by the General Assembly on 4 December 1989 (resolution 44/34);

(f) Suggestions which, in their Government's view, might be of use in enhancing the international treatment of the topic of the use of mercenaries as a means to violate human rights and to impede the exercise of the right of peoples to self-determination;

(g) Information and views on the existence of security service companies offering their services to Governments in order to intervene in internal armed conflicts with the assistance of mercenarized military professionals, for the purpose of improving the military effectiveness of government forces, in exchange for cash benefits and shares in the country's investments and economic ventures.

17. In reply to this communication, the Special Rapporteur received official information from the Governments of the Slovak Republic, Ukraine and Angola, which replied to the questionnaire in general terms, reaffirming their condemnation of mercenarism and providing additional information on national legislation on mercenaries.

18. On 24 June 1996, Mr. Jacob S. Selebi, Ambassador and Permanent Representative of South Africa to the United Nations Office at Geneva, sent a letter to the Special Rapporteur, which read as follows:

> "I have the honour to refer to your letter of 1 April 1996 regarding the possibility of your visiting South Africa and to inform you that the South African Government hereby wishes to extend an invitation to you to visit South Africa, in your capacity as Special Rapporteur on the question of mercenaries, at a mutually convenient time."

19. The Special Rapporteur accepted that invitation and, in coordination with the Permanent Mission of South Africa to the United Nations Office at Geneva, set 20 October 1996 as the date for the visit. An account of the visit is contained in chapter II of this report.

20. By means of a note verbale of 8 July 1996, the Permanent Mission of the Slovak Republic to the United Nations Office at Geneva replied to the Special Rapporteur's request for information as follows:

> "The legal system of the Slovak Republic and general binding legal regulations do not permit either existence of mercenary units on the territory of the Slovak Republic or any activities related to operation of this type of armed forces abroad. Paragraph 115, subparagraph 1, of the Penal Code prohibits service in foreign armed forces in the following ways: A citizen of the Slovak Republic who without permission serves in the armed forces of a foreign power or in a foreign armed corps, shall be sentenced to imprisonment for a period from three to eight years.

The term 'armed forces of a foreign power' is defined as regular armed forces or légion étrangère.

No activities related to recruitment into foreign armed forces or corps were registered on the territory of the Slovak Republic."

21. The Permanent Mission of Germany to the United Nations Office at Geneva, by means of a note verbale of 16 July 1996, replied to the Special Rapporteur's letter of 18 March 1996 as follows:

"It is correct that the two persons named in the note dated 18 March 1996 were both given life sentences by Memmingen Regional Court on 14 December 1995 for two instances of joint murder. The sentences do not yet have the force of law because both of the accused have filed appeals on points of law only against them. The criminal court (sitting with three professional and two lay judges) based the convictions on the following circumstances: At the times of the offences, the accused Mrachacz and Simang were members of 'Kasnizka Boijna' unit which was under the command of Mladen Naletilic, known as General Tuta (hereafter: General Tuta), Mrachacz since the beginning of 1992 and Simang since February 1993. Tuta had previously lived for several years as a Croatian exile in Germany.

The accused Mrachacz was initially a mercenary, was promoted to captain after being wounded and lastly received DM 500.00 in pay. His task was to prepare the recruitment of further mercenaries on whom General Tuta then took a decision. Otherwise, he only had the power to give orders in as far as members of the troop were assigned to him to use certain weapons in specific cases.

The accused Simang initially received DM 80.00 per month as a mercenary, later increased to DM 300.00 per month. While the accused Mrachacz, who spoke Croat, felt closer to the Croatian part of the troop, Simang felt himself to be the leader of the German-speaking group. In July 1993, the German-speaking group also included the Austrian nationals Harald Stefan Trupp and, from about 10 August 1993 onwards, Wolfgang Niederreiter. Both are on remand detention in Austria on suspicion of being accomplices to the crime against Constantin Bieske which is to be adjudicated here.

The accused Mrachacz was in Sirokij-Brijek until the beginning of June 1995. After he had heard about the proceedings pending against him from Croatian agencies and from Freilassing border police, he decided to give himself up to the German authorities in the knowledge that an arrest warrant for murder had been issued against him. Having announced his intention, he flew from Split to Frankfurt on 5 July 1995. He was detained there and since then has been on remand detention without interruption on the basis of the warrant of arrest issued by Neu-Ulm Local Court dated 12 August 1994.

The accused Simang left Bosnia in March 1994 and reached South Africa, where he was recruited as a mercenary for an underground movement. He was arrested in that country on suspicion of committing

offences as well as because he did not have a residence permit, and on 2 August 1994 was deported by air to Germany after consultation with the German criminal prosecution authorities. He was arrested on arrival in Frankfurt on 3 August 1994 on the basis of an arrest warrant issued by Neu-Ulm Local Court dated 14 July 1994 and has been on remand detention since then.

The two cases of murder concern the killing of a German of between 30 and 35 years of age who was applying for recruitment to the mercenary unit, and the killing of another German mercenary. The convictions were primarily based on the testimony of two criminal police officers who had accompanied the accused Simang to Germany with the approval of the South African authorities. During this flight, the accused Simang expressed himself voluntarily and without being asked by the police officers, who were recognizable as such. The accused Simang was then questioned by the police in Frankfurt am Main. The criminal police officer from the Federal Criminal Office who was present during the questioning and the investigating judge who carried out the questioning were also heard as witnesses at the main trial.

With regard to the first killing, the accused Mrachacz submitted a full confession at the main trial, at which the accused Simang also at least admitted that he had been involved in the killing. With regard to the second killing, the accused did not admit participating or did not admit this in full. Because of the other evidence available, the court also found them guilty of joint murder in this case. The court further ascertained that the guilt of the accused Simang was particularly serious."

22. The Permanent Mission of Ukraine to the United Nations Office at Geneva replied to the Special Rapporteur's request for information in a note verbale dated 9 October 1996, which read as follows:

"The criminal legislation currently in force in Ukraine makes mercenary activity a criminal offence.

For example, article 63-1 of the Criminal Code of Ukraine stipulates the following:

'Article 63-1: Mercenary activity

The recruitment, financing, maintenance and training of mercenaries for use in the armed conflicts of other States or in violent acts directed at the overthrow of State power or violation of territorial integrity, and the use of mercenaries, shall be punished by deprivation of liberty for a period of from 3 to 10 years.

Participation without permission from the appropriate State authorities in the armed conflicts of other countries with the objective of receiving material reward or other personal gain shall be punished by deprivation of liberty for a period of from 5 to 12 years.'

Article 187-7 of the Criminal Code of Ukraine makes participation by Ukrainian citizens in armed conflicts an offence:

> 'Article 187-7: Participation in armed conflicts of other States
>
> Participation without permission from the appropriate State authorities in the armed conflicts of other States without the objective of receiving material reward or other personal gain shall be punished by deprivation of freedom for a period of up to five years.'

Ukraine has taken measures to forestall the emergence of mercenary activities. For example, article 17.6.1 of the Ukrainian Citizenship Act states that citizenship of Ukraine shall not be granted to persons who have carried out crimes against humanity or genocide, or perpetrated acts of violence against national statehood; article 21.1.1 stipulates that citizenship of Ukraine shall be forfeited by any person entering military service, the security service or the police without the agreement of the Ukrainian authorities."

23. In a letter dated 25 November 1996 to the Assistant Secretary-General for Human Rights, Mr. Adriano Parreira, Permanent Representative of Angola to the United Nations Office at Geneva, stated the following:

> "On behalf of the Government of Angola, I present my compliments to the United Nations Assistant Secretary-General for Human Rights and have the honour to reply to your letter No. G/SO 214 (18-13) of 10 June 1996, transmitting the letter from the Special Rapporteur, Mr. Enrique Bernales Ballesteros.
>
> I have the honour to inform you, Sir, that as far as the Government is concerned, the question of mercenaries is no longer a problem in Angola. Where UNITA is concerned, it is for UNAVEM III to verify and inform you of the situation."

24. While in Geneva to draft this report, the Special Rapporteur received reports that over 300 European (mainly French and Serb) and African mercenaries were serving alongside the Zairian armed forces in the armed conflict between them and the Banyamulenges guerrilla fighters, Tutsi secessionists who control part of the territory of eastern Zaire. In view of the reports received, the Special Rapporteur, together with the Special Rapporteur on the situation of human rights in Zaire, Mr. Roberto Garretón Merino, sent the following urgent communication to the Minister for Foreign Affairs of Zaire on 9 January 1996. At the time of the final drafting of this report, no reply had been received from the Zairian authorities. The text of the urgent communication from the two Special Rapporteurs reads as follows:

> "We have the honour to address this message to you in our capacity as Special Rapporteur on the situation of human rights in Zaire and Special Rapporteur on the use of mercenaries as a means of impeding the exercise of the right of peoples to self-determination.

In this connection, we would like to draw your attention to information we have received on the presence and participation in the armed conflict in eastern Zaire of foreign mercenaries serving alongside the regular Zairian troops. According to disturbing information that we have received from several sources, several hundred European and African mercenaries are currently in eastern Zaire, particularly in Kisangani, to help the Zairian army prepare and launch a counter-offensive against the rebels.

While we do not wish at this point to take any decision on the information that has been brought to our attention, we would appreciate your sending us as soon as convenient any specific information from your Government confirming or refuting the presence of mercenaries serving together with the Zairian army."

II. VISIT TO THE REPUBLIC OF SOUTH AFRICA

A. Description of the visit

25. This chapter contains an account by the Special Rapporteur of his visit to the Republic of South Africa from 20 to 30 October 1996, in response to an invitation from the South African Government. The Special Rapporteur wishes to express his gratitude to the South African authorities, particularly the authorities and officials of the Department of Foreign Affairs, for having provided him with all the facilities he needed to fulfil his mandate and make his visit a success.

26. The paragraphs below contain brief summaries of the Special Rapporteur's main conversations with South African authorities. Some meetings were omitted for lack of space. The Special Rapporteur also held meetings with representatives of the following non-governmental organizations, for whose cooperation he would also like to express his appreciation: Black Lawyers Association; Ceasefire Campaign; Centre for Conflict Resolution (associated with the University of Cape Town); Centre for South African Studies (University of the Western Cape); Institute for Defence Policy (IDP); Lawyers for Human Rights; National Association of Democratic Lawyers (NADEL); and the Social Department of the University of Wits.

27. On 25 October 1996, the Special Rapporteur held a meeting with Mr. Eeben Barlow, President of Executive Outcomes (PTY) Ltd., and with Mr. Nico Palm, its Financial Director (see infra., paras. 50-55).

1. Meeting with the Deputy Minister for Foreign Affairs

28. The Special Rapporteur held a meeting with Mr. Aziz Pahad, Deputy Minister for Foreign Affairs, on 23 October 1996. The Deputy Minister said that the Government of South Africa strongly condemned the use, training, financing and recruitment of mercenaries wherever they occurred and particularly in Africa. There was, however, a paradox in that the African continent, which had suffered greatly in the past from the presence of mercenaries, now had Governments that were recruiting and hiring mercenaries to deal with problems and conflicts of an armed nature. The Government of South Africa was dealing diplomatically with those Governments at the

bilateral level and in the framework of the Organization of African Unity (OAU) at the regional level in order to solve that problem. The Governments in question, however, denied that they were recruiting mercenaries or justified the recruitment and hiring of foreigners on the grounds of national interest or for reasons of State.

29. Mr. Pahad said that, at the domestic level, his Government was preparing a draft bill governing the activities of private security service companies offering their services abroad and providing military assistance. Care had to be taken in drafting the instrument, however, to avoid any objections on the ground of unconstitutionality. The new Constitution of South Africa gave considerable attention to the protection and promotion of human rights and fundamental freedoms. Any restrictions on the issuance of passports or on the right to leave and return to the country, for example, would immediately be challenged on the ground of unconstitutionality before the Constitutional Court.

30. He added that the presence of private security companies in other countries was the result of a security vacuum resulting from the armed conflicts they had sustained and even to the fact that those conflicts had ended. The demobilized members of the various warring forces numbered in the hundreds of thousands. Most were people who did not know how to do anything but make war, and they represented a definite potential for destabilization. Some of them were experts in the handling of sophisticated weapons.

31. The Special Rapporteur said that it was paradoxical that so much money was available outside of Africa to provide the various warring forces in Africa with sophisticated weapons, while no money was available to train the police and security forces of some countries. The presence of mercenaries in Africa at the present time might thus be partly the result of the international community's failure to provide for solutions to the problems created by the armed conflicts.

2. Meeting with Mr. Vusi Pikoli, Special Adviser to the Minister of Justice

32. On 22 October 1996, the Special Rapporteur held a meeting with Mr. Vusi Pikoli, Special Adviser to the Minister of Justice, as the Minister was in New York. Mr. Pikoli said that the problem of mercenaries and mercenary activities was an international problem that had to be solved at the universal and regional and at the domestic level. At the domestic level, South African legislation contained section 121 A of the 1957 Defence Act (Act No. 44 of 1957), which prohibited members of the South African Defence Force, the reserves or auxiliary members of the Force from serving as mercenaries or providing mercenary services. He added that a draft bill extending that prohibition to all South African citizens was being prepared. The prohibition was also assumed to extend to the provision of any military assistance outside the country without prior approval by the Government, for example, by the Ministry of Defence.

33. Mr. Pikoli said that the draft bill had been prepared by the Ministry of Justice, which was coordinating its drafting with the Ministries of Foreign Affairs and Defence. Problems had arisen, however, in defining what was to be

understood by “military assistance services”. The definition would ultimately be decided by the Ministry of Defence, in consultation with the Ministry of Justice. The lack of a precise definition of that concept might, however, make the draft bill inapplicable once it was adopted.

3. Meeting with the Chief Executive Officer of the Truth and Reconciliation Commission

34. On 21 October 1996, the Special Rapporteur held a meeting with Mr. Biki S.V. Minyuku, Chief Executive Officer of the Truth and Reconciliation Commission, who described the Commission's goals and work and explained its similarities and differences to the commissions established in Chile and El Salvador and the one shortly to be established in Guatemala. He stressed that it was from a standpoint of reconciliation that the Commission was trying to help the victims of the human rights violations that had occurred during the period 1960-1993 to exercise their right to know the truth. To that end, the Commission had been holding public hearings since April 1996 with victims of and witnesses to human rights violations and, since October 1996, with those allegedly responsible for such violations. The Commission's main objective was to promote national unity and reconciliation by identifying the human rights violations that took place from 1 March 1960 onwards and granting amnesties to the people who committed such violations provided that they told all they knew, with specific and detailed information, about what happened. The Commission also recommended measures to compensate the victims, helped to restore their dignity by entitling them to speak at public hearings and made general recommendations aimed at preventing future violations of human rights.

35. Mr. Minyuku said that, to his knowledge, no mercenaries of South African nationality or foreign mercenaries residing in South Africa had appeared or testified before the Commission or requested an amnesty. Former members of the South African Police (SAP) had, however, done so.

4. Meeting with senior officials of the Ministry of Security

36. On 25 October 1996, the Special Rapporteur held a meeting with a team of senior officials and advisers from the Ministry of Safety and Security in Pretoria. They replied to the Special Rapporteur's questions by stating that the growth of private security service companies was partly the result of the fact that, for economic reasons, there were few policemen in proportion to the population. The small number of policemen led those socio-economic sectors that could afford to do so to purchase private security services. The Second Amendment to the Penal Code (Act No. 126 of 1992), adopted in 1992, prior to the promulgation of the new Constitution, the 1987 Security Officers Act and the National Keypoints Act (Act No. 102 of 1980) contained provisions applicable to security service companies operating in South Africa. For example, such companies were prohibited from using firearms and explosives, training their personnel in certain types of military or paramilitary operations, etc.

37. The case was different for security service companies which operated outside South Africa and were much more difficult to regulate because of the lack of precise knowledge of their activities abroad, their customary lack of transparency and their use of different countries for the different phases of

their activities. The primary goal was to avoid the territory of South Africa being used for the recruitment, training or financing of mercenaries. To that end, the Ministry of Justice was preparing a draft bill in consultation with the Ministries of Foreign Affairs and Defence.

5. Meeting with members of the Intelligence Department

38. On 24 October 1996, the Special Rapporteur held a meeting with Major General Coetzee and Colonel Nolan, members of the Intelligence Department of the South African Defence Force, and asked them for information on the existence of international security service companies registered in South Africa. General Coetzee said that companies of that nature were formed in response to a demand for security services in many unstable or potentially unstable countries, whose armed forces and police forces were not able adequately to guarantee the security of a country's infrastructure and facilities or public order. That was the situation in some countries in central and southern Africa. Those companies had the experience and knowledge to meet such demands.

39. Mercenaries were not, however, an exclusively African phenomenon. Although Executive Outcomes was registered in Pretoria, its holding company, Strategic Resources Corporation (SRC), was also registered in London. The United States of America had its Military Professional Resource Institute, made up of at least 7 retired army generals and 140 former officers; France its Crofras company; and Great Britain, the British Defence Systems Limited (DSL). These companies were able to operate normally because of gaps and lack of precision in the legislation at both the international and internal levels. They had always worked for foreign Governments and under contract so far, but could become a real threat if they decided to work for armed opposition movements attempting to destabilize Governments.

40. By training armed forces and security forces, they raised a country's security level and degree of stability and enabled it to develop its economy. Once the country had been stabilized, there were enormous opportunities for those companies to make money. Another demand for such companies came from Governments that did not wish to use their armed forces or security forces against their own people in order not to tarnish their image or increase the opposition's hatred of them.

41. Such companies had not been shown to have broken South African laws to date. They did create two types of problems: one was the fact that they could offer serving members of the South African armed forces wages five times higher than what they were earning. It should be borne in mind, for example, that 8 to 10 years might be needed to train an air force pilot. The other problem was that such companies might gain access to classified information or armed forces training manuals or equipment. The presence of such companies in other countries could also cause confusion between their activities and official activities being conducted by Government agencies or the South African armed forces in those countries.

6. Meeting with the Deputy Director-General of the Pretoria Attorney-General's Office

42. The Special Rapporteur held a meeting on 25 October 1996 with the Deputy Director-General of the Pretoria Attorney-General's Office, Mr. B.J. Bredenkamp, and the Adviser, Mr. J.I. Welch, who informed him that the Attorney-General, Mr. D'Oliviera, was on mission abroad. The Special Rapporteur asked how the international security service companies registered in Pretoria were regulated. Mr. Bredenkamp said that only one company was registered in Pretoria: Executive Outcomes, which was registered as a company providing security advisory services and technical assistance abroad, something that was in principle entirely legal. The company had been investigated in August 1994 and would be investigated again by the Attorney-General's Office only if there were indications that its members were carrying out some kind of unlawful activities. The fact that it carried out its activities abroad made any investigation difficult. In addition, the South African legal system places some limitations on recognition of evidence produced abroad. Thus, testimony given abroad is not legally valid in South Africa: a witness has to come to South Africa to testify.

43. Mr. Welch also said that a provision of South African law on the prohibition of mercenary activities was contained in section 121 A of the 1957 Defence Act (Act No. 44 of 1957) which prohibits the members of the South African Defence Force and reserve and auxiliary members of that Force from serving as mercenaries or providing services as mercenaries. It says nothing about members of the South African police or South African citizens in general. Mr. Welch also indicated that South Africa was not a party to any international instrument on mercenaries. A member of the South African Defence Force found guilty of serving or providing services as a mercenary would be sentenced, under the 1957 Defence Act, to up to two years' imprisonment and/or a fine of up to 5,000 South African rands.

7. Meeting with the Minister of Water Affairs and Forestry and President of the Arms Control Commission

44. On 25 October 1996, the Special Rapporteur met with the Minister of Water Affairs and Forestry and President of the Arms Control Commission, Mr. Kader Asmal, who informed him that the South African Government was preparing a draft bill on international security service companies registered in South Africa. Mr. Asmal, an expert on the activities of mercenaries who has studied article 47 of Additional Protocol I to the 1949 Geneva Conventions, drew attention to the ambiguities and shortcomings of the definition of mercenaries contained in that Protocol and in the 1989 International Convention and the OAU Convention. In his opinion, an abolitionist attitude which simply proscribed or prohibited the provision of international security services would be ineffective and unhelpful. What should be done is to regulate the provision and export of such services and make them subject to prior approval by the State, as in the case of arms sales abroad. Before undertaking an activity abroad or concluding a contract with a foreign Government, security service companies registered in South Africa should apply to have such activity or contract approved by the Government. Any export of security, military or intelligence services would be subject to prior approval, as is now the case with arms exports. Such approval would be

subject to a number of conditions that would have to be met. For example, such services could not be provided to a country which was in a situation of civil war or to a non-democratic Government. If a company provided security, military or intelligence services without prior approval, it would be legally prosecutable.

45. Mr. Asmal also said that the licensing system for arms exports had yielded good results and was in any case better than the gap in the law that existed now. The proposed South African legislation might serve as a basis for a new set of African regional standards. At the international level, efforts should be made to solve technical and legislative problems relating to mercenaries, starting with the limitations of the definition of "mercenary".

8. Meeting with the Deputy Director-General of Multilateral Affairs in the Department of Foreign Affairs

46. On 26 October 1996, the Special Rapporteur met with the Deputy Director-General of Multilateral Affairs in the Department of Foreign Affairs, Mr. Abdul S. Minty, who said that the South African Government was making efforts to deal with the problems of mercenary activities, new companies which offered international security services and trade and traffic in light weapons.

47. Efforts to deal with these closely related problems were being made at the internal level and at the African and international levels. He recalled that, at the internal level, a draft bill on the international provision of security services by private companies was being discussed by the Ministries of Foreign Affairs, Defence and Justice. Special attention must, however, be paid to preventing any inconsistency with the relatively liberal provisions of the Constitution relating to the protection of human rights, fundamental freedoms and individual guarantees, including freedom of association and freedom to establish companies. In the South African constitutional context, consideration was being given to foreign legislation, particularly Australian legislation, which might serve as a basis for the drafting of South African legislation. At the regional level, he referred to the Harare Commonwealth Declaration and his Government's initiatives at the African regional level in the Organization of African Unity and the Commonwealth of Nations.

48. Those initiatives were being taken with a view to the preparation of a legal instrument to deal with the new phenomenon of the provision by private companies of international security services and to prevent any possible political destabilization. At the bilateral level, conversations had been held with representatives of the Governments of Angola and Sierra Leone about the contracts concluded with a security service company registered in South Africa. The Government of Sierra Leone had recently extended the contract with that company. In his opinion, the problem must be solved through regional cooperation. Internal South African legislative work was important, but not enough. Concerted action had to be taken by the Governments of the region. In that connection, technical assistance by international organizations was welcome, particularly with regard to the technical problems involved in the definition of mercenaries contained in international instruments and in the incorporation of the definition into national legislation.

49. He considered that, in the present circumstances, the Special Rapporteur's mandate was particularly important and appropriate as far as the study of this new problem and possible suggestions for dealing with it were concerned. His Government would continue working at the internal and regional levels to draft provisions regulating and dealing with the new problem.

9. Interview with the directors of Executive Outcomes (PTY) Ltd.

50. As a result of the various complaints received, the Special Rapporteur requested an interview with the directors of Executive Outcomes (PTY) Ltd. On 25 October 1996, he was received by Mr. Eeben Barlow and Mr. Nico Palm, President and Financial Director of the company, respectively. Mr. Barlow said that his company had been established in 1989 and was officially registered in Pretoria as a security service company. It was, however, part of a holding company, Strategic Resources Corporation (SRC), which included companies with various social purposes that provided different economic services. He said that the activities carried out by his company were all entirely legal. Executive Outcomes concluded contracts only with lawfully constituted and lawfully established Governments, not with armed opposition movements or groups of rebels or insurgents.

51. He said that Executive Outcomes had first concluded contracts with the Government of South Africa in order to provide military training for the South African Army and had then concluded contracts with the Angolan State-run oil company, Sonangol, to protect its oil wells. In July 1993, the high command of the Angolan Armed Forces requested Executive Outcomes to provide military training services for its troops. His company had concluded the contract because it considered that it would be dealing with the armed forces of a Government which had been legalized in the 1992 elections. It had nevertheless been subjected to a great deal of pressure to leave Angola and the company's last military instructor left the country on 14 January 1996. Company employees had sometimes had to open fire in self defence and when they were attacked. Other companies in the holding company were still in the country, but involved in exclusively economic activities. One year after Executive Outcomes' entry into Angola, in 1994, the Angolan Armed Forces had regained control of much of Angolan territory. The company had trained 159 Angolan “instructors' instructors”, who had received special instruction trained in mine detection. The victory by the Angolan Government forces had marked the end of various kinds of illicit traffic in the country, such as traffic in marble, diamonds, weapons and munitions. It had earned Executive Outcomes many new enemies, especially among arms dealers interested in keeping wars going.

52. Mr. Barlow said that Executive Outcomes had then been called in by the Government of Sierra Leone to train the army of that country. It had agreed on condition, that the Government should hold talks with the armed opposition to achieve peace and that, once peace had been achieved, it should hold democratic elections. In reply to a question by the Special Rapporteur, he admitted that his men had taken part in some military action in Sierra Leone, but had done so at the request of humanitarian agencies which wanted food aid to reach the interior of the country. The accusations that they had received mining concessions in exchange for their presence in Sierra Leone

were absurd: mines were a long-term investment that called for a great deal of capital that they did not have, just as they also had no knowledge of mining.

53. He also indicated that, during the peace negotiations in Sierra Leone, the armed opposition had said that Executive Outcomes had to leave the country. Strong pressure had been exerted against the company by sectors which included arms dealers' lobbies; non-African and even South African intelligence services; foreign companies which see Executive Outcomes as a difficult competitor; and all kinds of traffickers in illicit goods. Inside the Government of South Africa itself, die-hard elements in the Ministries of Defence and Foreign Affairs had constantly put pressure on his company. In the circumstances, the company had proposed to the Government of Sierra Leone that it should reduce its presence in the country by 50 per cent. The Government had agreed to 30 per cent only. The company had nevertheless been prepared to leave the country if the Government so wished.

54. Mr. Barlow also said that Strategic Resources Corporation has so far received requests for services from 34 Governments, including the Governments of some central Asian countries, and from one armed opposition movement. The latter request was rejected by the company, in accordance with its criteria. Executive Outcomes needs 12 months to train an army and make it effective and efficient in combat. He also said that his company does not sell or supply weapons: it instructs in the use of what it finds in the country concerned. The other firms in the holding company provide various services, including medical and pharmaceutical services, hospital construction and equipment, civil engineering, water purification, drinking water supplies, transport, etc. As far as Executive Outcomes is concerned, all its logistical support is made available to the people of the country where it works. It is also involved in development and humanitarian work.

55. In this connection, he gave the Special Rapporteur a photocopy of a diploma of recognition awarded by the Sierra Leone association “Children Associated with the War” to thank his company for its work on behalf of the child victims of the war. The Special Rapporteur asked Mr. Barlow why he thought he, his employees and his company were regarded as mercenaries. He answered that his men never saw themselves as mercenaries: “We see ourselves more as soldiers and as Africans, out to help other Africans.” Lastly, he gave the Special Rapporteur other documents containing advertising for his company's activities.

B. Evaluation of the visit

56. Before going on to specific aspects of his mandate, the Special Rapporteur wishes to refer to the political and socio-economic context in which his visit took place. The many interviews he held during his visit to South Africa with political and judicial authorities, officials and members of the military, academicians, experts in South African history and political analysis, members of non-governmental human rights organizations, lawyers, businessmen, journalists and citizens living in Cape Town, Pretoria and Johannesburg were of great significance in enabling him to have a well-informed idea of the ongoing process of building a sound multiracial democracy in South Africa and the importance attached to legality, the rule of

law, political and economic freedoms and efforts to bring about national reconciliation to give South Africa political stability and sustained development. It was also an opportunity for him to understand the South African people's views on the period of the apartheid regime and collective awareness of South Africa's African identity and its responsibilities as a member of the African continent.

57. It must be made clear that the visit took place during a relatively recent period as compared to the time when long years of struggle successfully crowned the South African population's efforts to put an end to the odious apartheid regime, eliminate all traces of racial segregation and establish a multiracial, just, serene and progressive democracy. President Nelson Mandela rightly symbolizes national unity and the promise of a democracy in which every South African may freely exercise his rights and have an opportunity for well-being that was formerly reserved for the white minority.

58. Another important finding is that the long years of struggle against the apartheid regime under the leadership of the African National Congress have not made the Government of this political front want to take revenge against the authorities of the previous regime. The South African political climate is fortunately relaxed and there is no persecution of any sector of opinion; the rules in force are those of a State subject to the rule of law in which institutions such as the Parliament and the judiciary are respected and one of the main concerns is the solidity of the legal edifice, starting with the new Constitution, on the basis of which democracy is a stable system that is appreciated by all and capable of making South Africa a model country.

59. From this point of view, as shown by the many interviews held, South Africa stands out as a result of its political stability and the reasonable efforts being made by political and ethnic sectors to integrate and recognize one another in a multiracial democracy. Efforts to reach consensus and sensible attempts to find out the truth and do justice without going to extremes that might be interpreted as indiscriminate persecution against one sector is what characterizes the work of the Truth and Reconciliation Commission, which is regarded as a bridge between a past of racial division, conflict, suffering and injustice and a future to be based on recognition of human rights, democracy, peaceful coexistence and development with opportunities for advancement and respect for all South Africans without distinction as to colour, race, class, social status or sex.

60. These elements do not mean that there are no problems. There is a direct link between political issues and a country's social and economic situation. The Special Rapporteur draws attention to these factors, which may be crucial for the continuity of democracy, and so that sectors which do not believe in it will think about it. In this connection, he also draws attention to a complex situation which will call for an effort by society and the South African Government. He is referring to the interrelationship between three problems: growing unemployment, which affects the poorest sectors and might lead to dangerous marginalization; urban crime, which has very high rates and is prejudicial to substantive human rights such as the right to life and the right to physical integrity; and security, which involves serious defects and alarming contrasts. Private security firms

are growing at the expense of State security bodies. As action by the public sector weakens, the private sector steps in, but the only beneficiaries are large companies and people who live in high-income areas.

61. In this broad political and socio-economic context, the Special Rapporteur focused the specific aspects of his visit on the various elements of his mandate.

62. The South African authorities have taken a firm stand in prohibiting South African territory and South African nationals from being involved in mercenary activities. It is clear to the Special Rapporteur that the South African Government has not only disconnected the State from activities and operations which employ mercenaries, but also does not allow them in any sector of society. Article 198 of the new Constitution adopted in 1996 provides:

> "The following principles govern national security in the Republic:
>
> (a) National security must reflect the resolve of South Africans, as individuals and as a nation, to live as equals, to live in peace and harmony, to be free from fear and want, and to seek a better life.
>
> (b) The resolve to live in peace and harmony precludes any South African citizen from participating in armed conflict, nationally or internationally, except as provided for in terms of the Constitution or national legislation.
>
> (c) National security must be pursued in compliance with the law, including international law.
>
> (d) National security is subject to the authority of Parliament and the national executive."

63. Former South African mercenaries and mercenaries of other nationalities who were incorporated into specialized battalions, such as Battalions 31 and 32, which fought in Angola, ended up out of work when democracy was established. However, extreme-right racist organizations initially organized paramilitary squads to which some mercenaries moved. The Special Rapporteur has not had evidence that such squads continue to exist or carried out any major activity in 1996, but he did receive information and expressions of concern about the increase in the number of private security companies to which persons who are experts in the use of repressive violence and mercenaries have moved. Most of these companies provide services in South Africa and are subject to the general laws relating to services, but, in view of the nature of the problem and its elements, their area of activity should be defined more carefully and the requirements for employment in these companies and the activities of their personnel should be more strictly regulated.

64. The greatest concern the Special Rapporteur heard was about private companies which offer advice, military training and security services on the

international market. In this connection, he held talks, as stated, with political, military and judicial officials of the South African Government and with the directors of Executive Outcomes, the company which has taken off the fastest in this line of business which, in a way, rivals a function traditionally assigned to the State, namely, security, not only that involving police functions, but also national security, which includes the organization of the armed forces and the maintenance of public order, the sovereign exercise of the authority of the State and the integrity of the national territory.

65. In view of its importance and implications, the Special Rapporteur analyses this question separately in chapter III.C. of this report. He nevertheless states in advance that the South African authorities expressed concern about such businesses because of the problems they can create for the South African Government itself and because of the suspicion that, by taking advantage of gaps in the law, they are using the territory of South Africa to send mercenaries to foreign countries. For some of the authorities interviewed, the existence and registration in South Africa of companies which offer security services internationally are not in keeping with South African positions or interests and they refuse to accept what may be seen from the outside as South African intervention. At the same time, they consider that some countries call on the skilled services offered by private companies because they have problems of instability and serious security shortcomings. The security companies registered in South Africa include Combat Force, Investment Surveys, Honey Badger Arms and Ammunition, Shield Security, Kas Enterprises and Longreach Security. The latter allegedly provided military intelligence assistance services in Seychelles in 1986.

66. Are such companies legal? The authorities interviewed agreed that, in principle, they may operate normally in view of serious gaps and inaccuracies in national and international legal rules and regulations. However, the authorities warned that, as they developed, they could become a real threat because of the area where they operate, because they have highly trained experts, sophisticated weapons and classified intelligence information, because they operate not only with legitimate Governments, but also with armed opposition movements, because they interfere in the economy of the countries they help and because they use violence and destabilizing tactics with other similar companies. Executive Outcomes, whose views the Special Rapporteur also analyses below, does not share the Government's opinion and there is noticeable tension between it and the Government. Its President's statement to the Special Rapporteur, the documentation he turned over and his account of the company's background in the countries where it has concluded specialized service contracts offer an alternate way of looking at things in which military sciences are likely to be taken out of the State context and to move into the private sector where they offer skilled professional services in a free and global market.

67. They maintain that the establishment of Executive Outcomes as a company is thus entirely legal, as is the establishment of the holding company, Strategic Resources Corporation, and the services it offers, and that, according to what the company says, it has never gone beyond advisory services and the training of national personnel or beyond the protection of facilities in its contracts with mining and oil companies. Participation in military

activities is vehemently denied and it admits only to the occasional use of weapons in self-defence. Of course, the directors of Executive Outcomes strongly deny that they qualify as mercenaries and it is a well-known fact that they are spending time and money on a campaign to create a business image that will get them out from under the disparaging shadow of mercenary activity. In any event, the long list of countries which are said to use its services would indicate efficiency, although that is not why it has managed to fend off the warnings and labels that some Governments, human rights non-governmental organizations and the international press have given it about mercenary activities.

68. The South African authorities' anger about companies which offer security internationally, even though South Africa is not the only country in which they exist, has been a decisive factor in the consideration of a draft bill which places tighter restrictions on and defines the requirements for the establishment and registration of such companies and their characteristics so that they might be legally constituted in South Africa. In view of the existing gaps in the law and because these companies are a kind of new model whose implications and ramifications still have to be determined, the Special Rapporteur shares the concern of the South African authorities. In addition, however, he considers that more substantive studies need to be carried out with a view to the protection of human rights and the right to self-determination of peoples, as well as the obligations and responsibilities of States in this regard, without prejudice to the possibility of accepting cooperation for this purpose by civil society and its academic, humanitarian and business organizations, thereby paving the way for changes in national and international legislation to allow these companies to exist as expressions of freely adopted, but regulated initiatives.

III. MERCENARY ACTIVITIES

A. Current situation

69. Throughout the 1980s and well into the 1990s, armed conflicts have occurred that have affected people’s lives, safety and right to self-determination. In some of these conflicts the participation of persons of a nationality other than that of the parties to the conflict was alleged, under conditions similar to those indicated in article 47 of the 1977 Additional Protocol I to the Geneva Conventions of 1949, which sets forth the requirements for a person to be classified as a mercenary.

70. In order to verify the allegations made regarding the presence of mercenaries in armed conflicts, the Special Rapporteur studied the variety of cases and forms taken by mercenary activity in greater depth. The seriousness of some of the allegations compelled him to undertake several on-site missions. As indicated in the reports submitted to the General Assembly and the Commission on Human Rights, most of the allegations were confirmed. Information had been gathered from authorities, victims' families and non-governmental organizations, from investigations done by specialized agencies and the press, and by reviewing judicial documentation and ascertaining the open and public existence of organizations devoted to the recruitment of soldiers of fortune. The evidence was that armed conflicts arising in regions as disparate as southern Africa, Central America and the

former Yugoslavia nevertheless had one common feature - contingents of mercenaries were almost always associated with the most vicious aspects of the conflicts.

71. Based on his experience, the Special Rapporteur has maintained that armed conflicts, terrorism, arms trafficking, covert operations relating to the interest of a third party acting to harm one or more parties to an armed conflict and violence linked to extremist intolerance foster or create the market for mercenaries, defined as foreign experts whose “skilled” services are sought because of their proven experience in producing destructive and deadly effective violence.

72. The Special Rapporteur refers to all the reports submitted to the Commission on Human Rights since 1988, which contain ample evidence that has never been denied or contradicted of the participation - in more than one instance, open and even publicized - of mercenaries who violated the right of peoples to self-determination and human rights. Beyond formal resistance or the adoption of a stance of denying or minimizing the number of mercenaries and shared responsibility for their use, it is a fact that they are a resource used with a pragmatism that is morally and legally unacceptable because of what “mercenary” means and what a mercenary is worth as a professional of war and violence. Despite the condemnations contained in the resolutions of several United Nations bodies, Governments whose power is illegitimate, armed insurgent groups and Powers acting through covert operations have been responsible for the existence of mercenary activities, with a heavy toll on the peoples whose lives they affect.

73. Criminal activities are turned over to mercenaries for various reasons: military professionalism; criminal experience; concealment of the real mastermind; greater safety in acting without directly assuming the consequences; the comparatively low cost, in terms both of money and of endangering the lives of one's own military personnel; and so on. The reality is that there are people disposed to become mercenaries and that, ultimately, they are so disposed because of the pay they receive for conducting unlawful activities in a country other than their own; their intervention is directly motivated by financial gain.

74. Even though mercenary activities have been changing in recent years and taking on the particular characteristics outlined in part C of this chapter, there are usually two circumstances that determine the actual use of mercenaries: on the one hand, the existence of a body, organization, State or party to a conflict which, in order to carry out operations that are not in conformity with the law or with international obligations of non-interference, resorts to hiring mercenaries as a way of achieving its goals. On the other hand, there are organizations that recruit and people who, for high pay, will agree to serve as mercenaries in the knowledge that they will be performing acts prohibited by national laws and international treaties protecting human rights, State sovereignty and the right of peoples to self-determination. Thus, a criminal alliance is established between recruiter and recruit.

75. In his earlier reports, the Special Rapporteur pointed out that there is a tendency among those who take part in this criminal alliance to deny its existence or at least to deny that its purpose is to carry out mercenary

activities. They even use gaps or ambiguities in legal texts to avoid classification as mercenaries. Legal ploys are also used to conceal the nature of the assignment or to make the mercenary appear to be a national of the country in whose armed conflict he is involved. These ploys must be identified and situations in which it is presumed that attempts are being made to disguise the mercenary's true status studied carefully. When there are accusations that criminal acts have been committed by mercenaries, the investigation into the actual identity and nationality of a person has to go through the files, rule out altruistic voluntary enlistment, compile information on recruitment and training centres for soldiers of fortune, follow the trail of covert operations, obtain reliable data on aspects relating to the payment and other benefits agreed upon and detect the simultaneous use of other nationalities and passports; when a new nationality is granted to foreigners taking part in an armed conflict, the length of time, circumstances and legal grounds for the good faith and legitimacy of the new nationality have to be established.

76. There are thus signs and leads that must be followed to establish the real status of persons justifiably suspected of being mercenaries. The issue of mercenary activity has so many ramifications nowadays that attention must focus on the matter of nationality, which hitherto has been considered as a means of differentiation and a determining factor in deciding whether an act that impedes the enjoyment of human rights and the self-determination of a people is a mercenary act. Indeed, a foreign Power can avail itself of nationals of another country to do serious harm to that country or its Government. In such a case, the rules of international law as they now stand would not allow the act to be defined as mercenary, even if there was evidence of recruitment and payment. The matter would have to be prosecuted as an offence under the provisions of ordinary criminal law in the country in question. Nevertheless, if existing international law is excessively rigid, inadequate and full of gaps or lends itself to an interpretation too difficult to apply for the purpose of defining mercenary acts, it would be wrong to invoke the existing rules as justifying acts and behaviour which are intrinsically mercenary.

77. Without obviating the need to clarify, refine and expand the rules of customary internatioanl and treaty law to combat mercenary activity, it should be established as a principle that, in essence, the aim of such rules is to condemn a mercenary act as the buying and selling of criminal services in order to interfere with the enjoyment of human rights, sovereignty or the self-determination of peoples; and that there is international jurisprudence condemning interference by one State, not to speak of individual organizations, in the internal affairs of another State and in the lives of its people. It is an aggravating factor if nationals of the latter country are employed for that purpose. Such nationals would not strictly speaking be considered mercenaries, but, on the part of those recruiting them, the aim of using them as mercenaries is objectively undeniable.

78. The Special Rapporteur believes that unlawful activities in which nationality is used to mask their mercenary nature by a Power that recruits, prepares and pays an individual to commit a criminal act against another country should be analysed and debated with a view to revising current international provisions on the subject. Since the General Assembly has

repeatedly condemned mercenary activities, as have such other United Nations organs as the Economic and Social Council and the Commission on Human Rights, and since in addition Member States have condemned such activities and some countries have national laws making the use of mercenaries a crime, where there are no laws or only inadequate laws, a case can be made for the existence of customary international law that rejects, condemns and prohibits mercenary activities based on the nature of the acts and not on the fact of having a different nationality.

79. However, it must be added that the persistence of such acts, the range and variety of the forms in which they are carried out, the intrigues and covert operations engaged in by intelligence services, the recruitment of mercenaries for acts of terrorism and the employment of nationals of a country by third States in order to harm that country, in practice making mercenaries of those nationals, all prove that the international community and the peoples of the world are inadequately protected against the manifold uses of mercenaries. It would therefore be appropriate to revise the existing legal texts and find criteria that in this respect best reinforce the observance of human rights, State sovereignty and the self-determination of peoples.

B. International legislation and changes in mercenary activities

80. In the face of situations that jeopardize the enjoyment of human rights and self-determination and that concern acts such as criminal behaviour, payment, involvement in an armed conflict or in a terrorist attack on behalf of a third party, those affected and the entire international community inevitably wonder whether mercenaries are not involved, regardless of the issue of nationality. In such cases, the acts must be deemed to be unlawful and deserving of punishment.

81. In the same vein, this report reiterates questions to which so far no definitive answers have been given and on which the relevant United Nations bodies must take a stand: what is the status of a foreigner who enters a country and acquires its nationality to conceal the fact that he is a mercenary in the service of a third State or the other side in an armed conflict? What is the status of a non-resident national who is paid by a third State to carry out criminal activities against his own country of origin? And what about a dual national, one of whose nationalities is that of the State against which he is acting, while he is being paid by the State of his other nationality or by a third party? What are the limits of *jus sanguinis* in an armed conflict when it is invoked by persons who are paid and sent to fight in a domestic or international armed conflict taking place in the country of their forebears? These questions are not just casuistic or imaginary. The Special Rapporteur's preceding reports contain specific references to situations such as those just described and, even though the evidence pointed to mercenary activities, legal inadequacies and gaps made it difficult accurately to classify the act and the person who committed it.

82. It is regrettable that the General Assembly’s repeated recommendations that a meeting of experts should be convened further to consider the issue of mercenaries and to make proposals on a clearer legal definition in order to assist in the prevention and punishment of mercenary activities have not been taken up as yet, owing to lack of financial resources. The continued failure

to adopt criteria to promote a common and strong position against mercenary activities clearly encourages the existence of mercenaries and their activities, despite isolated action taken by individual countries. Contradictions are thus likely to arise between declarative statements formally condemning mercenary activities and practical concessions to the provision of efficient services by persons or groups of persons and businesses with a mercenary past and strong suspicion about and mistrust of the activities they are carrying out at present.

83. Even though influential sectors in the corridors of power of important States insist on denying or minimizing the existence of mercenaries in contemporary society, mercenaries are a phenomenon which is an obstacle to peace and the exercise of the right of peoples to self-determination and which must not be overlooked as it recurs or takes on different forms with an apparently legal basis. The Special Rapporteur, who has been following conflicts and situations with a mercenary component for 10 years, is compelled to reiterate his viewpoint to the Commission on Human Rights and to maintain that, no matter how they are used or what form they take to acquire some semblance of legitimacy, mercenary activities are a threat to the self-determination of peoples and an obstacle to the enjoyment of human rights by peoples who have to endure their presence.

84. An analysis of the factors behind the recurrence of the phenomenon must consider the problems caused by gaps in existing legislation and by flexibility with regard to classification as a mercenary. The persistence of mercenary activities, the range and variety of the forms in which they are carried out and the hidden networks of complicity behind these activities suggest that States, particularly the smallest and weakest ones, are not adequately protected against the use of mercenaries in its different forms. The international legal instruments that serve as a framework for the consideration of the question are imperfect and contain gaps, inaccuracies, technical defects and obsolete terms that allow overly broad interpretations to be made in order to prevent persons who are in fact nothing but mercenaries from being classified as such.

85. Article 47 of Protocol Additional I to the Geneva Conventions of 1949 is the only universal international provision in force that contains a definition of mercenaries; paragraph 1 punishes the mercenary by excluding him from the category of combatant or prisoner of war, which amounts to condemning him for his participation in armed conflicts; and paragraph 2 then states the definition. The first question is whether, because of its placement and contents, article 47 of the Protocol does not legislate on mercenary activities, but, rather, limits itself, from the standpoint of international humanitarian law, to providing for the possibility and defining the legal status of the mercenary if he takes part in an armed conflict. As may be seen, it does not legally define the act; hence the above-mentioned gaps.

86. Furthermore, the definition of a mercenary contained in article 47 lists the cumulative and concurrent requirements that must be met in order to determine who is a mercenary and who is not. Given the variety and complexity of the armed conflicts of the past three decades, however, the wording of this provision has not always been suitable for classifying mercenary activities.

The point made by the Special Rapporteur in one of his first reports (E/CN.4/1988/14, para. 43) has turned out to be true: "One important element for the understanding and application of article 47 of Additional Protocol I is that no single requirement set forth in subparagraphs (a) to (f) is sufficient in itself for a person to be classified as a mercenary. The requirements are cumulative and concurrent, and all must be met for a person to be described as a mercenary. This is also one of the aspects that has raised the most objections to the application of article 47, since many have pointed out that these requirements are in fact very difficult to prove and that they make it easy for the mercenary to avoid being classified as such, while the party that has been attacked loses its legitimate right to have him punished and obtain redress."

87. This gap is also not filled in the internal legislation of most countries. According to the information provided directly to the Special Rapporteur by Governments, the laws of most countries do not make mercenary activities a criminal offence. Although it has been seven years since the adoption of the International Convention against the Recruitment, Use, Financing and Training of Mercenaries by the General Assembly, it still has not entered into force, as barely 11 countries have ratified or acceded to it. Its provisions do contain measures which are a step forward towards the eradication of this reprehensible activity, but it should be noted that article 1, paragraph 1, almost literally repeats the text of article 47 of Additional Protocol I on the definition of a mercenary. The addition to paragraph 2 relates to mercenary violence against the constitutional order or territorial integrity of a State. No progress has therefore been made with regard to a better and simpler definition of the concept of mercenary, which would allow quicker and more direct action to be taken against mercenary activities.

88. In this context of the gaps in and limitations of universal international legislation, Africa enjoys better legal protection thanks to the Convention on the Elimination of Mercenarism in Africa, which was adopted by the Organization of African Unity at its 1977 meeting in Libreville and entered into force in 1985. But "better legal protection" does not mean protection against all the varieties and forms of, and possible changes that may take place in, mercenary activities. Even though it is more complete than article 47 of Additional Protocol I, it does not differ much from that text as far as the definition of a mercenary is concerned and it lends itself to different and perhaps contradictory interpretations, when it is States themselves that, on the initiative of their Governments, hire private firms to perform services connected with public order and security. This ploy, which is a recent development in some African States, will be analysed below. In any case, the OAU Convention is regional in nature; compliance with it may be required only of those African States that have ratified or acceded to it; and it is applicable, in the territory of States parties to the Convention, to all legal or natural persons covered by its provisions.

89. The situation is one that involves a vacuum in treaty law, the inadequacy of existing provisions and ambiguity in their legal interpretation. This results in loopholes, which make it easier for the presence of mercenaries, or their recruitment, without reference to their status, to appear to be within the law. Reference is again made to the existence of

front organizations that freely offer contracts to people who want to work as mercenaries, without the act of recruiting, promoting or signing such a contract being regarded as illegal and subject to prosecution per se.

90. Some of these organizations are quite old; have publications in which they promote the use of, and advertise for, mercenaries; and have participated with their recruits in armed conflicts that took place in earlier decades. International and regional organizations working for peace, security and respect for human rights must pay closer and more systematic attention to these organizations and their activities. It will thus be easier to regulate, internationally and nationally, market activities related to the recruitment of persons for services suspected of being part of a business which is aimed at inflicting criminal damage in a territory other than that in which the contract was concluded, which jeopardizes the sovereignty of a third State and which affects its people's lives, its economy and its self-determination. It must be said that unlawful acts with serious international repercussions, such as drug trafficking, terrorism and arms trafficking, are in many cases linked to the activities of mercenaries recruited specifically to commit those acts.

91. The Special Rapporteur is firmly convinced that the relevant international legal instruments are but imperfect tools for dealing with the issue of mercenaries. There are difficulties in applying article 47 of Additional Protocol I to the Geneva Conventions of 1949 to various cases of mercenary activities; mercenary activities are not classified as an offence under the internal criminal law of many countries; and the International Convention against the Recruitment, Use, Financing and Training of Mercenaries has yet to enter into force.

C. A new operational model

92. One issue that warrants special attention relates to the new firms which have been operating in several countries and whose formal lawfulness, in the light of the relevant national and international legislation, is not open to question, as they are covered by the gaps and loopholes that would prevent their activities from being classified as mercenary stricto sensu. None the less, international allegations about their operations, the concern and alarm of some Governments and the expansion of these firms as a kind of alternative security model for countries with internal conflicts that are practically unmanageable for the Governments concerned make it essential to give some thought to the problem.

93. Mercenaries were a scourge and one of the worst blights on the nations of Africa in their brave struggle against colonialism and neo-colonialism, for self-determination and for the right to stable, effective and democratic government. Can it be that the mercenaries' behaviour is changing so profoundly that they now constitute the rank and file of the personnel recruited by private companies to contract with African Governments to provide internal security services, safeguard public order and even put an end to internal armed conflicts? If such contracts are, indeed, being concluded, the Governments signing them must be doing so on the basis of a sovereign decision; but is not responsibility for a country's internal order and security an inalienable obligation that a State fulfils through its police and armed forces? Is it not a grave infringement of that State's sovereignty to

hand over such responsibilities to companies registered in third countries which sell security services staffed by foreigners, presumably mercenaries? Who will be responsible for any repressive excesses that the security companies may commit against the civilian population, especially where representatives of the political opposition are concerned? Who will take responsibility for any violations of international humanitarian law or human rights they may commit? Assuming that suspicions about the nature of these companies which sell security in return for money, concessions or profits from natural resources prove justified, does the international community consider as lawful the existence of a free market for selling security operations, if, in practical terms, that means that paramilitary forces which incorporate mercenaries can be expected to intervene in a country's internal affairs? What will be the human rights consequences of entrusting internal order and control over the exercise of civil rights in a country to an international private security firm? Is the international community willing to accept and concur with the idea that the recruitment of mercenaries is illegal only in a few very limited cases? When, and in what circumstances, should the recruitment, financing or use of mercenaries be considered legal and legitimate?

94. The Special Rapporteur should point out that attitudes appear to be changing towards the mercenary issue, which, it should be noted, has been vigorously and repeatedly condemned by the United Nations. In any case, the Special Rapporteur is raising questions and issues which need to be resolved in the light of greater knowledge of the facts and specific reports and on the basis of a systematic analysis that will produce suggestions and proposals for the adoption of political, legal and operational criteria relating to new types of mercenary activities.

95. This new operational model, with which the Special Rapporteur became acquainted through Executive Outcomes (PTY) Ltd. during his mission to South Africa in October 1996, consists of offering skilled military training, protection and internal security services internationally in return for large amounts of money and profits from the development of the natural resources of the place where the services are provided. Foreign firms investing in countries with significant natural resources are reportedly demanding that the security of the areas where their investment is concentrated should be provided by personnel recruited, trained and made available by the companies that sell security internationally. These companies generally organize the services they offer by recruiting foreign staff with military and police experience and, in some cases, links to mercenary activities. This has naturally given rise to a great deal of concern and mistrust, since what is mainly offered is security, which, in the modern State drawing its inspiration from eighteenth and nineteenth century liberalism, is exclusively the responsibility of the State and an expression of its sovereignty.

96. At least 34 countries are currently interested in hiring the services of Strategic Resources Corporation and its subsidiary, Executive Outcomes. Executive Outcomes was founded in Pretoria in 1989 by former members of the special forces of the South African Defence Force (SADF) with experience in the repressive activities of the apartheid regime. Executive Outcomes operated under formally concluded contracts, according to company sources, providing military advice and training to the army of President Dos Santos of

Angola, from which country it withdrew in January 1996. It also provided security to mining and oil companies. It was later active in Sierra Leone, whose former Government had brought it in to provide military and police assistance.

97. Is Executive Outcomes a legally constituted private company behind whose façade are hidden mercenary activities, which have been changed and modernized in the legal configuration of its operations without really ceasing to be essentially mercenary in nature? The answer to this question is intrinsically complex and must be the subject of a study that goes beyond the scope of this report. However, some questions should at least be raised for consideration by the Commission on Human Rights in developing the outlines for an ad hoc report that, using this company as an example, would deal with, or focus on, the model it suggests and on the implications which the international sale of security would have on State sovereignty, self-determination and human rights.

98. It should first of all be established that, although Executive Outcomes operates from Pretoria and is legally constituted, it is not a company with links to, or which is close to, the current Government of South Africa. In the past, various governmental authorities distanced themselves from, and condemned the activities of, Executive Outcomes, as indicated in their decision to adopt legislation that closed the loopholes which made it possible for this type of company to exist legally in its territory. The rejection by the South African authorities is explained, inter alia, by the fact that some of the personnel selected and recruited by Executive Outcomes are former members of the special apartheid forces who not only practised violent racial repression, but were also a part of forces that had been turned into mercenaries, such as Battalions 31 and 32, which were active in other African countries. It is also, however, due to other complex factors, such as what the company might know about the South African intelligence services or the possible implications for that country's policy towards the rest of Africa of a private security company providing highly classified assistance, such as military aid, to countries which are in the throes of armed conflicts, but with which South Africa maintained relations.

99. By its own definition, Executive Outcomes is a company devoted to "providing highly skilled and confidential military advisor services" and to furnishing personnel, mainly military and highly skilled, to provide strategic and tactical training services in countries requiring sophisticated, effective support for the adequate control of their socio-political reality, to put an end to internal conflicts and to encourage the development of economic activities related to natural and mineral resource development. Underlying these services is the fact that they are offered because there are States in such crisis that they are no longer capable, constitutionally or at the military or police level, of safeguarding their borders, public order and the security of the population. In this context of crisis, which also involves distrustful, precarious relations with other States, a vacuum is created which is precisely what leads to the establishment of private companies selling security services. This is the case of Executive Outcomes and its holding company, Strategic Resources Corporation, which is working in several countries with a profile similar to that described earlier. It is also

the case of Keeni Mini Services; of the British firm British Defence Systems (Ltd.); the United States firm Military Professional Resource Institute; and French and Israeli firms.

100. According to its description, Executive Outcomes is a “security company” which provides technical advisers whose area of specialization is basically military. Its personnel provides training for situations such as: low-grade armed conflicts with counter-insurgency preparation, enemy infiltration, intelligence, sabotage, protection of the population and the territory; infantry training, including motorized and parachute infantries; use of tanks; artillery and anti-aircraft artillery defence; combat engineering training; intelligence; military police; medical support services; communications; special rapid reaction forces; officer and support staff training; logistics; air force; navy; and technical support.

101. As stated, Executive Outcomes is not the only company of this kind in the world, but it is the most important of those operating in Africa, although its range extends to eight non-African countries in the Middle East, Asia and Eastern Europe. The risk that several companies of this kind may be competing in the market and may come into confrontation over unlawful resources is a potential danger which the case analysis must not overlook. Companies such as Executive Outcomes recruit highly qualified military personnel to provide their services. In Executive Outcomes, they are mainly former members of the South African and foreign security forces. According to the information obtained, about 700 persons are regularly employed by this company (soldiers, police, doctors, pilots, engineers, technicians, etc.), with high salaries; the salaries of every rank from general to non-commissioned officer may be 5 times higher than in an army such as that of South Africa and definitely 10 times higher or more than in other African States.

102. With regard to weapons and logistics, Executive Outcomes uses equipment purchased from companies in South Africa and various European countries. Part of the equipment includes planes, helicopters and aerial photography aircraft; Strategic Resources Corporation has an airline, Ibis Air (charter flights), which it uses to transport personnel and logistical consignments to various countries in which it is active. Executive Outcomes' tendency is, naturally, to grow and expand its interests, and this leads to its involvement in armed conflicts in the countries it assists and to its participation in internal affairs, such as the economy, resource development and capital investment. Although this is a matter of a private company being involved in intrinsically complex military services, the company is determined to prove that its activities are above board and that it is professionally efficient.

103. Are the personnel recruited by Executive Outcomes mercenaries? There is no simple and straightforward answer to this question. For most of the South African authorities consulted, human rights experts in South Africa and international human rights NGOs, Executive Outcomes is a mercenary company which works with mercenaries and carries out mercenary activities. Its executives vehemently deny this, claiming that they are “Africans” who have decided to work for the viability and development of Africa, doing so from the military standpoint with which they are most familiar and which is why they work in the security field. They also insist that, formally speaking, Executive Outcomes is a commercial security company whose registration and

operation are not contrary to internal and international law. They also argue that they conclude contracts only with legitimately constituted Governments and always in order to do work designed to strengthen the self-determination of peoples, their internal stability and thus the possibility of putting economic development policies into practice.

104. The topic is very complex. The legal framework for mercenary activities, is of course, not clear and specific enough. Executive Outcomes' arguments about the lawfulness of its activities are therefore not to be ignored and the Government of South Africa itself, concerned about resistance to and constant complaints about this company, has drawn attention to the need for the adoption of binding legislation to curb such companies and define their scope more precisely. The South African minister, Kader Asmal, who is the President of the National Arms Control Commission, was also in favour of statutory control and regulations requiring such activities to have prior Government approval and authorization. He said that “The recruitment of personnel to train a military force should be regulated in the same way as arms sales. If a company wants to sell its services to the official Government of another country, we will make approval contingent on the legitimacy of the foreign Government in question and its record of respect for human rights and democratic rights”.

105. The open debate on companies such as Executive Outcomes nevertheless involves the interpretation of legal provisions such as article 47 of Additional Protocol I to the Geneva Conventions. Persons who object to Executive Outcomes say that its personnel are mercenaries because they meet all the requirements for classification as mercenaries under that provision: they are military personnel recruited in South Africa or abroad in order to fight in an armed conflict; those who object also say that this was indeed the case in Angola and in Sierra Leone, where they not only trained personnel for the armed forces of these countries, but took part in the hostilities for personal gain and for sums substantially in excess of what the military personnel of the countries they assisted received; and that they are not nationals of those countries, but foreigners, and were not sent on official duty as members of the armed forces of South Africa or any other State which was not a party to the conflict.

106. These are convincing arguments, but, in the light of other provisions relating to mercenaries and the restrictive approach adopted in various United Nations resolutions which link mercenaries with concerted acts of violence aimed at violating the right of peoples to self-determination and undermining the constitutional order of a State or its territorial integrity, while seeking to obtain substantial gain and material compensation, the contracts which private military advisory, training and security companies conclude with States and the personnel working for them, even when they have a military background and are highly paid, cannot be strictly considered as coming within the legal scope of mercenary status as defined in the reference material.

107. It is obvious that the ambiguity of existing provisions, the gaps in national legislation and the insecurity which prevails in many countries, as well as the end-of-century tendency to privatize everything in sight, have created the conditions for the establishment of this new type of company,

which is organized to sell security in the international market to client countries from which it obtains contracts worth millions, protection and links to powerful companies dealing in oil, minerals and precious stones; the results are the growth and expansion of these companies and their presence in the countries with which the contractual relationship has been established. This report does not claim that all kinds of military and police advisory assistance provided by foreigners or private foreign companies are illegal and contrary to the sovereignty of a State. Although military assistance is always a sensitive issue, such advisory services do exist and, when clearly demarcated, are not contrary to international law or national constitutional provisions. What this report does want to draw attention to are the dangerous grey areas and the limits which need legal safeguards in order to prohibit such advisory services from becoming active armed participation in internal conflicts or in matters of the internal security of citizens that are connected with the exercise of the rights and political freedoms provided for in international human rights instruments.

108. In view of the complexity and the implications of the issue, it is better not to hurry to reach any definite conclusions. The point is that there is now a type of company which offers full security services on the free and globalized international market that have till now been the exclusive responsibility of each State's own internal security system. If States are prepared to give up an intrinsic element of their sovereignty, this is something which should be clearly stated and which the United Nations should analyse in depth because it really would affect and change the nature, structure and functions of the State, while, at the same time changing the nature of international relations.

109. A non-exhaustive list of topics which require further and more detailed investigation should include possible changes in the conduct of mercenaries, as defined since the establishment and organization of national armies, because it is undeniable that large numbers of them have been joining private companies which provide security internationally. It should also be borne in mind that responsibility for a country's internal order and security are peremptory obligations which a State fulfils through its police and armed forces. Turning these responsibilities over to private companies registered in third countries would be to restrict the sovereignty of the State whose Government signed such a contract or to cede part of that sovereignty to a company, in return for which it would exercise the rights of the State police or those involved in defending territorial integrity or the population. Sovereignty would thus continue to be exercised by the State, but it might be dangerous and destabilizing for the State to assume responsibility for any abuses that the security companies might commit against the civilian population when pursuing and hunting down representatives of the political opposition, when violations of human rights and international humanitarian law occur or when, in various situations which theoretically cannot be ruled out, these private companies take advantage of their relations with multinational oil, mineral, chemical and other companies, to the extent of allowing their interests to dominate and using their military resources to establish the political, economic and financial hegemony of their business partners. If such a situation should arise, the weak countries, which might, become of their institutional problems, be tempted to become clients of these powerful companies, may simply have given the first <u>coup de grâce</u> to their own State

and have paved the way for the multinational neocolonialism of the twenty-first century. There is, of course, no question of raising the alarm unnecessarily, but the risks involved in a problem that may have far-reaching implications cannot be overlooked.

110. In view of the concerns expressed in the preceding paragraphs, it would also be appropriate for the Commission on Human Rights and other United Nations bodies to discuss the international lawfulness of allowing the free market to include completely unrestricted competition from companies selling security services and the risk of interference in internal affairs by agents who, claiming to be experts, might actually be intelligence agents from third States, mercenaries, saboteurs or other elements whose assignment is to dominate, dissociate and weaken the receiving State. Of course, these are hypothetical situations arising out of the changing reality of traditional mercenary activities and their partial replacement by private security companies specializing in military matters. The problem cannot be dealt with exhaustively in a single report because it even goes beyond the scope of the Special Rapporteur's original mandate. However, it is something that the Commission on Human Rights must not overlook and it has to be solved on the basis of more in-depth knowledge of the facts, specific references and a systematic analysis concluding with suggestions and proposals for the adoption of political, legal and operational standards relating to mercenary activities and to companies which sell security internationally.

111. Mercenary activities are not only continuing, but they are reported to be evolving and acquiring characteristics that make them far more of a threat to the enjoyment of human rights and the right of peoples to self-determination. In the first few months of 1997, there has been a persistent rumour that the Government of Zaire may have resorted to the services of security companies which have provided it with a large number of mercenaries, mainly Belgians, French and Serbs, who are reportedly acting as military instructors for its troops in Kisangani and Moba.

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

112. By resolution 44/34 of 4 December 1989, the General Assembly adopted the International Convention against the Recruitment, Use, Financing and Training of Mercenaries. In accordance with article 19, the International Convention is to enter into force on the thirtieth day following the date of deposit of the twenty-second instrument of ratification or accession with the Secretary-General. At the time this report was written, only 11 States had completed the process of expressing their willingness to be bound by the International Convention (Barbados, Cameroon, Cyprus, Georgia, Italy, Maldives, Seychelles, Suriname, Togo, Turkmenistan and Ukraine). The following 11 States have signed it: Angola, Belarus, Congo, Germany, Morocco, Nigeria, Poland, Romania, Uruguay, Yugoslavia and Zaire.

113. The International Convention confirms the judicial nature of the resolutions and declarations of United Nations bodies condemning mercenary activities and expands international regulation of the question, such regulation being at present essentially limited to article 47 of the 1977 Additional Protocol I to the Geneva Conventions of 1949 and the

1977 Organization of African Unity Convention for the Elimination of Mercenarism in Africa. Its entry into force will contribute to the precise characterization of situations involving mercenaries, the effective prosecution and punishment of offenders, the clear determination of jurisdiction in each case and to facilitating extradition procedures and preventive cooperation among States.

V. CONCLUSIONS

114. Mercenary activities are a form of violence which has been used in the last 40 years to hamper the exercise of the right to self-determination of peoples and to violate human rights. Mercenaries tend to be present mainly in armed conflicts, where they offer their services to one or more parties to the conflict in exchange for payment, causing serious damage to the people and territories that are victims of their actions.

115. It is also true that mercenary activities are not restricted to the context of what affects the right of peoples to self determination. Going beyond the scope of his mandate, the Special Rapporteur has detected an expansion in mercenary activities, observing that mercenaries are involved in serious crimes, such as terrorist attacks and drug and arms trafficking, in which they are usually the perpetrators of serious violations of human rights.

116. Various forms of terrorist attacks are carried out by highly specialized criminal agents who are hired to blow up aircraft, mine ports, destroy buildings and industrial complexes, assassinate and kidnap persons, etc. While in many cases the terrorist agent comes from fanatic groups espousing extremist ideologies, it must be remembered that terrorism is also a criminal activity in which mercenaries participate in exchange for payment, disregarding the most basic considerations of respect for human life and a country's legal order and security.

117. Because mercenary activities and the conduct of the mercenary himself can seriously impair the enjoyment of human rights, the self-determination of peoples, the stability of constitutionally established Governments and international peace and security, mercenary activities and the mercenary career must be clearly and unequivocally banned. To suggest that some mercenary activities are illegal and others are legal is to make a dangerous distinction which could affect international relations of peace and respect among States.

118. In their current state, international provisions relating to mercenaries contain gaps or are inadequate and ambiguous and give rise to problems of contradictory interpretation. This situation is compounded by the fact that, in the legislation of most countries, mercenary activity is not characterized as a separate crime and by the fact that there are no extradition agreements guaranteeing punishment in all cases, thereby facilitating the perpetration of criminal acts and, very often, their impunity.

119. The Special Rapporteur's visit to South Africa gave him an opportunity to see that the elimination of apartheid and the establishment of a multiracial democratic republic have put an end to repressive violence and the existence of specialized State, bodies for the violation of human rights. In

this context, mercenaries, whose activities were linked to apartheid, are no longer present. President Mandela's democratic Government has taken an explicit stand against the use of mercenaries and mercenary activities.

120. There has been a broad-based revision of legislation in South Africa and the new recently adopted democratic Constitution contains provisions on rights and freedoms and guarantees for their use and for the protection of citizens. Throughout the process of legislative revision, in order to ensure that there are no gaps which might facilitate the existence, operation or concealment of mercenary activities, the South African authorities are studying legal means of prohibiting the presence of individual mercenaries in South Africa, such as the registration in the country of organizations, associations and companies whose objectives might include the use of South African territory, human resources, property and legality to carry out activities which national and international provisions classify as mercenary, as well as means of regulating the provision of military assistance to foreign Governments by private service companies.

121. Some events which have taken place in Africa in recent years and, which the Special Rapporteur is still studying indicate that mercenary activities not only still exist, but are changing. The establishment of companies to sell countries military advisory and training services and security services in return for money and mining and energy concessions, in particular, may involve the recruitment of mercenaries not only for military advisory and training tasks in the countries which conclude contracts with them, but also for assistance to the conventional forces of order and public security in combating armed opposition movements and carrying out tasks which should be performed by the police. Where such direct participation does exist, these companies come to take control of the country's security and have considerable influence over production and economic, financial and commercial activities. Companies of this kind which market security internationally may acquire a significant, if not hegemonic, presence in the economic life of the country in which they operate. The special relationship they establish with the country concerned creates an environment in which corruption can thrive.

122. While the characteristics of the type of company described in the preceding paragraph have been confirmed and its model is becoming widespread, the concept of security which the international community has had until now and the responsibility of each State to be accountable for and to guarantee, through its police forces, that each individual is able to exercise his rights and freedoms as a citizen would seem to have been superseded by a new concept. According to this new concept, it would appear that any State is at liberty to buy security services on the international market from organizations composed of persons of various nationalities, united by their function and their ability to control, punish and impose the order desired by the Government which hires them, regardless of the cost in lives, in exchange for money and the delivery of a portion of its natural resources. Naturally, if this hypothesis is confirmed, mercenary activity would no longer be considered as necessarily illicit, illegitimate or illegal; however, concepts such as that of State sovereignty and the obligations of States to respect and guarantee the enjoyment of human rights would be tremendously relativized.

123. Despite the fact that more than seven years have passed since its adoption by the General Assembly, the International Convention against the Recruitment, Use, Financing and Training of Mercenaries has been ratified by only 11 countries. The delay in its entry into force clearly encourages the continuation of this criminal activity.

VI. RECOMMENDATIONS

124. Considering that mercenary activities have become diversified and are undergoing a transformation and acquiring characteristics that make them far more of a threat for the enjoyment of human rights, the Commission on Human Rights should reaffirm its condemnation of these activities and, additionally, suggest to all States that they should incorporate practical measures in their national legislation to prohibit the use of their territory for the recruitment, training, assembly, transit, financing and use of mercenaries.

125. The international community must take into account the connection existing between terrorism and mercenary activities and the participation of mercenaries in criminal acts of a terrorist nature. It is suggested that commissions and working and study groups for the prevention and punishment of terrorism should be recommended to include mercenary activities in their analyses and conclusions.

126. The united front presented by the action taken by the international community against mercenary activities is affected by the toleration of legal gaps and inadequacies which are used to conceal mercenary activities and even to endorse the recruitment and employment of mercenaries, on the grounds that, in some cases, it is not illegal to make use of such means. It is therefore recommended that dangerous statements of this kind should be avoided and that mercenary activity should be treated in every respect as an unlawful and prosecutable act and a continuing offence. Given the legal gaps and inadequacies which allow the existence of mercenaries whose activities could be passed off as normal, it is recommended that the Commission should propose that the Member States of the United Nations should consider adopting legislation to prohibit mercenary activity and the use of the national territory for such unlawful acts. The Special Rapporteur intends to put forward some conceptual proposals in this regard, for which he requires the support of the High Commissioner for Human Rights in order to organize such activities as may be necessary.

127. In view of the harm which the delay in the entry into force of the International Convention against the Recruitment, Use, Financing and Training of Mercenaries is causing at the regulatory level, it is recommended that the Commission on Human Rights should appeal to States for understanding so that they will decide to ratify or accede to the Convention and bring it rapidly into force.

128. In what appears to be a new international trend, legally registered companies are providing security, advisory and military training services to the armed forces and police of legitimate Governments. There have been complaints that some of these companies recruit mercenaries and go beyond advisory and instruction work to become involved in military combat and taking over political, economic and financial matters in the country served. If this

trend is confirmed, the concept of security and the nature of international relations based on the principle of State sovereignty which have characterized the twentieth century and the international system for the protection and promotion of human rights would be greatly altered. It is therefore recommended that the Commission should closely monitor the evolution of these companies, developments in national legislation and the conditions under which some States agree to conclude contracts with such companies. It needs to be assessed whether the security and internal order of a State which has lost its ability to keep order should henceforth be left to the action of specialized companies will take charge of its security.

129. The Republic of South Africa has expressed its willingness to adopt legislation to regulate the activity of companies registered in its territory which supply military advisory services and training and security internationally. These regulations would also cover the provision of military assistance and the selection of South African and foreign personnel within the country and measures to prevent such companies from organizing mercenary activities. It is recommended that the Commission and the Office of the High Commissioner for Human Rights/Centre for Human Rights should follow closely the drafting of the above-mentioned legislation and be ready to collaborate with the Government of South Africa - at its own request - and with any other Government which may want to amend its legislation along similar lines.

130. In view of the circumstances described in this report, the Commission on Human Rights and the Special Rapporteur should investigate more closely any mercenary implications of the international sale of military assistance and security, with a view to making proposals for a better legal classification of private companies which offer these services internationally, ensuring that they do not involve mercenaries and defining, together with States, the technical assistance that the Office of the High Commissioner for Human Rights/Centre for Human Rights can provide to prevent any deterioration in the human rights situation of the countries in which such companies are operating.
