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Rights of peoples to self-determination

Use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination

Note by the Secretary-General

The Secretary-General has the honour to transmit to the members of the General Assembly the report of Shaista Shameen, Special Rapporteur of the Commission on Human Rights on the question of the use of mercenaries, submitted in accordance with Assembly resolution 59/178.

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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

Summary

At its sixty-first session, the Commission on Human Rights decided to end the mandate of the Special Rapporteur on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination. The Special Rapporteur will be replaced by a working group.

In the present report, submitted in accordance with General Assembly resolution 59/178, the Special Rapporteur provides an overview of her activities, the direction her work has taken and proposals on how it can be developed further under the mandate of the working group. She underlines that her somewhat practical approach represents a point of departure from the efforts of the former Special Rapporteur, and has paved the way for a fundamental rethinking of the issue of mercenarism and its relation to the promotion and protection of human rights. With respect to a definition of mercenary, the Special Rapporteur recommends a substantive and comprehensive review of the legal definition of mercenaries and their activities and calls for an international debate on the International Convention against the Recruitment, Use, Financing and Training of Mercenaries.

In fulfilment of her mandate, the Special Rapporteur reports on her contacts with private military and security companies and her efforts to encourage the development of a code of conduct for that sector, including through consultations with representatives of the relevant organizations. A statement issued at a meeting she held with representatives of military and security companies in London in June 2005 is reproduced in annex II to the present report. She also reports on the current status of the International Convention and on the development of national legislation against mercenarism.

Contents

I. Introduction

1. In its resolution 59/178 of 20 December 2004, the General Assembly requested the Special Rapporteur 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 to consult States and intergovernmental and non-governmental organizations in the implementation of the resolution and to report on her findings, with specific recommendations, to the Assembly at its sixtieth session. It also requested her to circulate to States and consult with them on the new proposal for a legal definition of a mercenary drafted by the former Special Rapporteur (see E/CN.4/2004/15, para. 47) and to report her findings to the Commission on Human Rights and the Assembly. It further requested her to continue to take into account, in the discharge of her mandate, the fact that mercenary activities continue to occur in many parts of the world and are taking on new forms, manifestations and modalities, and, in this regard, requested her to pay particular attention to the impact of the activities of private companies offering military assistance, consultancy and security services on the international market on the exercise of the right of peoples to self-determination. The present report is submitted in accordance with that request.

2. At its sixty-first session, the Commission on Human Rights, in its resolution 2005/2 of 7 April 2005, decided to end the mandate of the Special Rapporteur on the use of mercenaries and to establish a working group 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, made up of five independent experts, one from each regional group, for a period of three years. This decision was endorsed by the Economic and Social Council in its decision 2005/255 of 25 July 2005.

3. In the present report, the Special Rapporteur provides an overview of her activities in the fulfilment of her mandate, a description of the direction her work has taken and proposals for ways it can be developed further under the mandate of the working group. She underlines that her somewhat practical approach departs from that of the former Special Rapporteur and has paved the way for a fundamental rethinking of the issue of mercenarism and its relation to the promotion and protection of human rights.

II. Activities of the Special Rapporteur

A. Implementation of the programme of activities

4. The Special Rapporteur visited Geneva from 5 to 10 December 2004 to attend the third meeting of experts on traditional and new forms of mercenary activities (see E/CN.4/2005/23).

5. The Special Rapporteur also visited Geneva from 16 to 19 April 2005 to attend the sixty-first session of the Commission on Human Rights. During her visit, she held a meeting with States parties to the International Convention against the Recruitment, Use, Financing and Training of Mercenaries, during which she briefed participants on the progress of the mandate and updated them on the proposed new legal definition of a mercenary and how she intended to take it forward. During that visit, she also met with representatives of the International Committee of the Red

Cross, and held working meetings with the Special Procedures Branch of the Office of the United Nations High Commissioner for Human Rights (OHCHR).

6. In 2004, the Special Rapporteur attended the annual meeting of the Special Rapporteurs/representatives, independent experts and chairpersons of working groups of the special procedures of the Commission on Human Rights and of the advisory services programme in Geneva (20-24 June) and a meeting of private military and security companies in London (25-29 June).

B. Correspondence on the definition of mercenary

7. Pursuant to Commission on Human Rights resolution 2004/5, on 3 August 2004 OHCHR sent a note verbale to Member States on the new proposal for a legal definition of a mercenary drafted by the former Special Rapporteur. As at December 2004, replies had been received from the Governments of Mauritius, Namibia and Cuba (see E/CN.4/2005/14, paras. 20-24). On 8, 11 and 12 October 2004, the Special Rapporteur sent letters to the States parties to the International Convention against the Recruitment, Use, Financing and Training of Mercenaries, requesting their reactions to the proposed new legal definition of mercenary. In October, responses thereto were received from Qatar and Azerbaijan, which were summarized in the Special Rapporteur's report to the Commission at its sixtieth session (E/CN.4/2005/14, paras. 26 and 27).

8. On 24 February 2005, a reply was received from the Government of Togo, in which it stated, inter alia, that Togo adhered totally to the common action led by the international community to combat mercenarism in all its forms. It affirmed that the adoption of the Protocol to the African Union Convention on the Prevention and Combating of Terrorism and the creation in Algiers of an African centre for the study of and research on terrorism were strong signs of the determination of African heads of State to achieve that end. The Government of Togo also called for a firm commitment from States to coordinate their efforts in the area of the exchange of information on mercenary activities and movements, the provision of mutual legal assistance and the sharing of know-how, with a view to enhancing mutual technical and operational capacities. In the same vein, joint action should be undertaken at the international level to coordinate the surveillance of borders and to prevent the illegal transborder movements of weapons, ammunition and explosives.

9. Further to the request of the General Assembly in its resolution 59/178, a note verbale was sent to Member States on 2 May 2005. On 30 May 2005, a reply was received from the Government of South Africa. While largely agreeing with the wording of the new definition, it proposed a change to the second sentence of article 1, paragraph 1 (b) which would read as follows: "However, an exception is made where a national of a country affected by the crime is hired to commit the crime in his country of nationality and uses his status as national to conceal the fact that he is being used as a mercenary by the State or organization that hires him". It also stated that it agreed with the mention, in article 1, paragraph 2 (a) (i), of undermining the "legal, economic or financial order or the valuable natural resources of a State", since the last was particularly important given the situation in some African countries where valuable natural resources were targeted, as illustrated by the example of South African-based mercenaries allegedly recruited to unseat President Obiang Mbasogo of Equatorial Guinea.

10. The Government of Mexico responded on 31 May 2005, stating that the new definition was not entirely appropriate and could represent a threat to the legitimate activities of a democratic regime, such as the defence of human rights by civil society organizations or political opposition to the regime.

11. In its reply received on 1 June 2005, the Government of Liechtenstein expressed the view that the draft articles proposed by the former Special Rapporteur added confusion to the question of the definition of a mercenary by using a number of unclear terms and by broadening the definition to an extent that appeared to include any person who expected to receive money for one of the crimes listed, as well as any person who provided contractual services to armed forces. The outsourcing of military activities being a reality of contemporary warfare, it seemed inappropriate to address this reality by expanding almost without limit the scope of application of a convention that had hitherto found little support in the international community. The real challenge consisted of ensuring the applicability of international legal standards to any person clearly acting on behalf of a party to an armed conflict to ensure accountability, including criminal responsibility, in accordance with the relevant human rights and humanitarian law instruments, and to put an end to the legal vacuum in which those persons and entities currently operated. Liechtenstein considered that it was necessary to undertake a thorough legal analysis of the relationship of the activities of private military firms and their employees to international law, and in particular, international humanitarian law, and that this analysis should best be undertaken within the framework of the Sixth Committee of the General Assembly, or possibly the International Law Commission.

12. The Government of Lebanon replied on 16 May 2005. It explained that in the absence of a legal definition of the word “mercenary”, Lebanon relied on the dictionary definition, which reads: “Mercenaries are soldiers who earn their living by offering themselves for hire (i.e. by hiring out themselves or their services) to a foreign State”.[1] The proposed new definition of the word “mercenary” was consistent with the conventional dictionary definition of the term, which was regarded as a legal definition, and went beyond that definition by categorizing the acts of concerted violence as international crimes. The proposed definition therefore succeeded in providing a broader definition of the term.

13. In its reply dated 22 June 2005, the Government of the Philippines stated that while there was no recorded information on the existence of mercenaries in the Philippines, there had been reports on alleged foreign terrorists. Although the amendment proposed to article 3, paragraph 1, had broadened the terms of the definition contained in the Convention and corresponded better to the current situation of national and international peace and security, there was no proof that the new definition would allow for such alleged terrorists to be categorized as mercenaries.

14. In its reply dated 23 June 2005, the Government of Namibia pointed out that some of the wording of the new definition was unclear. In particular, as concerns article 1, it was important that the primary, grammatical and ordinary meanings of the term “mercenary” be included in the definition; at present the relationship between the subparagraphs was unclear and the definition would be weak and meaningless if it was not clearly stated that the subparagraphs were to be read together.

C. Other correspondence

15. In March 2005, the Special Rapporteur wrote to the Government of Equatorial Guinea, expressing her appreciation to the Government for having transmitted to her a copy of the verdict in the trial of alleged mercenaries. She noted, however, that, notwithstanding the usefulness of the information received, she would be in a much better position to determine the relevance of an official mission to the country if she were able to review the full transcripts of the trial proceedings, and requested that they be made available to her. She also proposed possible mission dates and indicated her openness to other suggestions for dates of an official visit.

16. The Special Rapporteur was also in communication with the Government of the United States of America with a view to following through on a preliminary invitation that had been made to the former Special Rapporteur to undertake a fact-finding mission to that country. She had initially proposed that the visit take place in November 2004. In September 2004, the Government welcomed the proposed visit but stated that it was not in a position to provide precise dates or a schedule of appointments. The Special Rapporteur proposed new dates in February 2005 and provided a provisional itinerary. In December 2004, the Government replied that it was necessary to consolidate the meetings to the extent possible. In that letter, the Government noted that while the use of private military companies and contractors was distinct from the use of mercenaries, it would be pleased to provide information that would be helpful to the Special Rapporteur. The plans for the country mission were dropped following the adoption of the resolution by the Commission on Human Rights ending the mandate of the Special Rapporteur.

17. In February 2005, the Special Rapporteur wrote to the Executive Director of the Institute for Security Studies in South Africa, endorsing the project proposed by the Institute for the regulation of the private sector in Africa. She expressed the belief that a project of the nature and scope outlined would usefully add to current knowledge and provide a more fully informed approach to the issue, especially through the use of action-oriented research methodologies that could yield more concrete understanding and dialogue among relevant actors.

18. In March 2005, the Special Rapporteur wrote to the Director of the Centre for Political and International Studies in the Russian Federation, expressing her regret at not being able to attend the inter-parliamentary assembly of the Commonwealth of Independent States (CIS) in St. Petersburg in April. She was looking forward to receiving the English versions of the draft of the CIS model law on the fight against mercenarism and the regional agreement on regulating mercenarism drafted by the Collective Security Treaty Organization, believing these processes to be significant for setting precedents in addressing mercenarism at the regional level.

19. On 14 February 2005, the Special Rapporteur addressed a letter to the Minister of Human Rights of Côte d'Ivoire, noting that in paragraph 12 of its resolution 1584 (2005) of 1 February 2005, the Security Council had expressed its grave concern at the use of mercenaries by both Ivorian parties, and had urged both sides immediately to desist from this practice. She urged the Government to consider signing and ratifying the International Convention, and to ratify the African Union Convention for the Elimination of Mercenarism in Africa, which it had signed on 27 February 2004. She also referred to the response to a request by the former Special Rapporteur to visit the country, in which the Government had recommended

that the visit be undertaken at a more propitious time; she expressed the wish to undertake a mission in the near future.

20. The Minister of Human Rights of Côte d'Ivoire, in her reply of 14 March 2005, asserted that according to current information available to her, the Government of Côte d'Ivoire had never had recourse to the use of mercenaries. Also, given the current situation in the country, the same terms would apply to a mission by the new Special Rapporteur as to the one by the former Special Rapporteur.

21. In a letter dated 17 February 2005 addressed to the Forces nouvelles movement in Côte d'Ivoire, the Special Rapporteur drew attention to Security Council resolution 1584 (2005), and expressed concern about the threat posed by the use of mercenaries to respect for and the protection of human rights, especially the right to life and to the integrity of the person, and to the protection of the civilian population.

22. On 24 February 2005, the Special Rapporteur wrote to the States parties to the African Union Convention for the Elimination of Mercenarism in Africa (Benin, Burkina Faso, Cameroon, the Comoros, the Congo, the Democratic Republic of the Congo, Egypt, Equatorial Guinea, Ethiopia, Ghana, Guinea, Lesotho, Liberia, Mali, the Niger, Nigeria, Rwanda, Senegal, Seychelles, the Sudan, Togo, Tunisia, the United Republic of Tanzania, Zambia and Zimbabwe), commending their Governments for having ratified the Convention. She also urged them to consider signing and ratifying the International Convention against the Recruitment, Use, Financing and Training of Mercenaries, expressing the belief that this would add to their authority on the issue of mercenarism and further strengthen the regulation of this phenomenon at a global level, thereby safeguarding the integrity of States.

23. The Government of the Sudan replied on 2 March 2005, assuring the Special Rapporteur that her request to consider signing or ratifying relevant instruments on combating mercenarism would be duly attended to, and noted that it had embarked on a thorough study of all regional and international conventions related to peace, security and disarmament.

24. In fulfilment of her mandate, the Special Rapporteur has also been in communication with a number of private military companies, seeking their participation in the development of an international code of conduct and a possible national or international registration and licensing mechanism. The details of this correspondence are given in section V below.

III. Definition of a mercenary

25. In her report to the Commission on Human Rights at its sixtieth session, the Special Rapporteur declared that it was her intention to formulate procedures for the incorporation of a new definition into the International Convention in keeping with paragraph 11 of General Assembly resolution 56/232, in which the Assembly requested the Special Rapporteur to propose a clearer definition of mercenaries, including clear nationality criteria, based on her findings, proposals by States and outcomes of meetings of experts (see E/CN.4/2005/14, para. 55).

26. In keeping with this method of work, the Special Rapporteur participated in the third meeting of experts on traditional and new forms of mercenary activities,

held in December 2004, at which she presented her approach to the proposed new definition (see E/CN.4/2005/23, paras. 64-67).

27. As she stated at that meeting, the proposed definition should contain certain core elements of mercenarism derived from the traditional definition that were still applicable. These include the existence of a contract or contractual obligation with elements of offer, acceptance and compensation in the relationship, and engagement in armed conflict. Concerning the latter, the new definition proposed replacing, in article 1, paragraph 1 (a), the verb "to fight" with the verb "to participate". However, the phrase "to participate" should be treated with caution, because it might include those participating in armed conflict in roles such as cooks employed to feed the mercenaries; any serious criminal offence of mercenary activity required a specific intention to commit or knowledge of the criminal activity. It might therefore be desirable to add the word "knowingly" and/or the word "actively".

28. In addition, the separation in the Convention of the definition of a mercenary into two parts — the first referring to individual (or traditional) mercenaries fighting in any armed conflict, the second to mercenaries engaged in armed conflict with the specific purpose of overthrowing a constitutional order (political element) — was another core element that was still applicable.

29. However, there were a number of fundamental problems that still had to be addressed in the proposal for a new definition, which had to include specific elements reflecting current international realities. In the traditional definition, one of the core identifiers of a mercenary was that he was not a national of a party to the conflict. However, in the modern era, when people could hold more than one nationality or where there was no nation-State and the concept of nationality was fluid, that requirement could be problematic and should be reviewed. In addition, article 1, paragraph 2 (a) (iv), of the proposed new definition ("Denying self-determination or maintaining racist regimes") should be reviewed, since the definition as it stood would permit mercenaries to use toppling racist regimes or assisting peoples in their right to "self-determination" as an excuse for carrying out mercenary activities. The term "self-determination" no longer had the same uniform meaning as when the Convention was first drafted. Another new element that should be included in the new definition should be that of a "mercenary company".

30. The Special Rapporteur stresses that the new definition must demonstrate that mercenarism is a human rights issue, with implications for violations of, inter alia, the right to life and the integrity of the person and to national security, as well as for the right to self-determination. It must make a distinction between mercenaries and terrorists, stressing the distinction between material and ideological motives. Lastly, it must be essentially politically feasible, i.e. the legal instrument containing the definition must be likely to attract signatures and ratifications.

31. The Special Rapporteur reiterates her view that the term "self-determination" no longer has the same uniform meaning as when the Convention was first drafted, reflecting the geopolitical realities of the time, in particular the situations that prevailed in southern Africa and Cuba in the 1970s. The only contemporary exception may be Cuba, whose contention that its nationals or former nationals who attempt to interfere with its right to self-determination are mercenaries within both the current and proposed new definitions needs to be supported by more concrete evidence than has been provided to the Special Rapporteur to date.

32. The working definition as proposed and the piecemeal approach thereto inevitably resulting from suggestions made by Member States during the sixtieth session of the Commission on Human Rights and in the Third Committee of the General Assembly limit its usefulness. The consultations held indicated that a substantive and comprehensive review of the definition of mercenaries and their activities was needed. Such a review should ideally be undertaken by the Sixth Committee or the International Law Commission, as recommended by Liechtenstein, and should include expertise on international humanitarian law.

IV. National legislation

33. As concerns legislation against mercenarism at the national level, countries that have developed laws on mercenarism include:

(a) Namibia and South Africa (legislation specifically on mercenaries);

(b) Azerbaijan, the Russian Federation and Uruguay (legislation as part of the Criminal Code);

(c) Cuba and France (legislation as part of the Penal Code);

(d) Australia, the United Kingdom of Great Britain and Northern Ireland and the United States of America (other legislation relating to security or activity abroad).

Of the countries that are parties to the International Convention on the Recruitment, Use, Financing and Training of Mercenaries, Croatia, Georgia and New Zealand have developed laws that are in compliance with obligations under the Convention.

34. The Special Rapporteur recommends that in any review of existing legislation or drafting of new legislation, serious consideration should be given to the following:

(a) That the definition of mercenary should have

currency in the specific context of conflict and post-conflict situations in the current geopolitical environment of deregulation of military activity and the changing role of peacekeeping operations, where a number of different actors are involved in security and logistics operations;

(b) Offences and penalties;

(c) Authorization or licensing regulations;

(d) Systems of measures and controls;

(e) International cooperation, extraterritoriality and extradition agreements;

(f) Development of and support for a national industry-wide and uniform code of conduct for private military or security operations.

V. Private military and security companies

35. Between February and April 2005, the Special Rapporteur addressed letters to three private military companies (Beni Tal — Israeli Security Company, Erinys

Africa, and Northbridge Services Group) with respect to the development of a code of conduct. She expressed the belief that promoting self-regulating initiatives, such as codes of conduct, was in the interest of advancing regulation of the private military sector, and the wish to promote the consideration of human rights in the drafting of such documents, urging that the various efforts be coordinated and consolidated. She asked for their views on the following:

(a) Whether a code of conduct would be useful;

(b) The methods by which a code of conduct could be developed;

(c) Elements to be included in such a code of conduct;

(d) The links that could be made in such a code of conduct to international human rights norms;

(e) The roles of various other actors, such as intergovernmental and civil society organizations, in the process;

(f) The mechanism that could be used for the implementation of such a code of conduct.

36. The Special Rapporteur also wrote to the International Peace Operations Association (IPOA), which has developed a code of conduct, and to three of its members: ArmorGroup International, Blackwater USA and Military Professional Resources Incorporated (MPRI). She requested that they share with her their experience and views on the issues cited above.

37. ArmorGroup replied that it was engaged with the Governments of the United States of America and the United Kingdom of Great Britain and Northern Ireland on matters of corporate standards, codes of conduct and regulation as applicable to private security companies. ArmorGroup was also engaged with selected academics, institutions and human rights organizations, with which it had adopted a policy of absolute transparency. It stated that it had lodged its comprehensive ethics policy with Governments and non-governmental organizations and in terms of human rights, recognized and pledged compliance with international law. In a second letter, ArmorGroup indicated that it was not in favour of using the word “mercenary” in relation to United Nations dealings with the commercial security industry.

38. Erinys Africa also responded in April, stating that it would in principle support such a code, provided it was not restricted to legitimate commercial activity and was internationally accepted. The best way of taking such an initiative forward for British companies would be through a trade organization/body that represented private military and private security companies based in the United Kingdom.

39. IPOA stated in its reply that it had indeed developed a code of conduct for private companies operating in conflict or post-conflict environments, and that human rights were the key concern in the original draft of the IPOA code of conduct. The President of IPOA noted that he had written the draft in coordination with several non-governmental and humanitarian organizations in Sierra Leone in 2000 and that the current version included improvements and additions made by legal experts, academics, human rights specialists and other organizations. IPOA expressed the belief that its code of conduct could provide the basis for international standardization and help ensure that services delivered by private companies in conflict or post-conflict environments were of the highest standard. While

international law and regulations might take years to implement, the IPOA code of conduct could be a standard framework in the meantime. Although adherence to the code of conduct was voluntary, companies publicly endorsing it expected greater scrutiny, and IPOA members that violated the code faced possible expulsion from the association. At the same time, IPOA supported improvements in international law and standardization of domestic laws that cover the industry. IPOA also asserted its belief that while the private sector could do much to support international peace operations — such as security sector reform projects and physical reconstruction efforts — there were many aspects of peace and stability operations that were better entrusted to the international community and non-governmental organizations.

40. In its reply, MPRI stated that, as a charter member of IPOA, it believed that a clear code of conduct and continuous dialogue among the international community, Governments, non-governmental and private sector organizations were essential to the protection of human rights at all levels and agreed that self-regulating mechanisms were an important part of the overall management solution. It noted that the current version of the code had been drawn up on the basis of recommendations made by IPOA members and staff, based on their individual corporate standards, and recognized issues and concerns raised by Governments, international organizations and the non-governmental organization community.

41. The Special Rapporteur was also in contact with the representatives of a number of private military companies to arrange a meeting to continue discussions on a code of conduct. In the interest of advancing regulation, notably self-regulation, of the private military sector in a manner consonant with the observance and protection of human rights, she advocates broad collective efforts in this process, which can contribute to a common understanding of the nature and scope of the activities of these entities.

42. At a meeting with representatives of private military and security companies held in London on 27 and 28 June 2005 and convened at her suggestion, the Special Rapporteur contributed towards the substantive incorporation of human rights in the evolving codes of conduct applied by that sector. The list of companies that attended and the statement issued at the conclusion of the meeting are reproduced in annexes I and II to the present report.

VI. Current status of the International Convention against the Recruitment, Use, Financing and Training of Mercenaries

43. The International Convention against the Recruitment, Use, Financing and Training of Mercenaries, adopted by the General Assembly by its resolution 44/34 of 4 December 1989, entered into force on 20 October 2001 when the twenty-second instrument of ratification or accession was deposited with the Secretary-General. On 22 September 2004, New Zealand became the twenty-sixth country to ratify the Convention, with the territorial exclusion of Tokelau.[2] The other 25 States parties are Azerbaijan, Barbados, Belarus, Belgium, Cameroon, Costa Rica, Croatia, Cyprus, Georgia, Guinea, Italy, the Libyan Arab Jamahiriya, Maldives, Mali, Mauritania, Qatar, Saudi Arabia, Senegal, Seychelles, Suriname, Togo, Turkmenistan, Ukraine, Uruguay and Uzbekistan. Nine other States have signed the International Convention, but have not yet ratified it: Angola, the Congo, the

Democratic Republic of the Congo, Germany, Morocco, Nigeria, Poland, Romania and Serbia and Montenegro.

44. The Special Rapporteur notes that the level of ratification of the Convention has been disappointing. A possible explanation may be the problems associated with the definition of the term “mercenary” in the Convention.

VII. Consideration of issues concerning mercenaries

45. The Special Rapporteur concludes that there is a need for a fundamental reconsideration of issues concerning mercenaries, in particular the responsibility of States and the United Nations with respect to the activities of actors currently legally defined as mercenaries. A paradigm shift needs to occur with respect to the mandate. She offers below her reflections on the issue, which she hopes will serve to inform future work undertaken by United Nations mechanisms.

46. The Special Rapporteur has identified a number of problems with regard to mercenarism in the present context. Firstly, it seems that the Convention does not enjoy the support or attract the particular interest of the international community, as demonstrated by the remarkably small number of signatures and ratifications and the fact that very few replies have been received to requests for feedback on the proposed new definition of a mercenary. Another possible explanation is that Member States and the United Nations itself employ entities that may be identified as mercenaries under the current definition.

47. Secondly, there is ambiguity with regard to the status of private military and security companies. In terms of the current definition of a mercenary, many of these companies can be classified as mercenaries or employing mercenaries, although they themselves do not define their activities in that way. Moreover, as noted above, such companies are under contract with Member States, non-governmental organizations and, increasingly, the United Nations, to provide security, logistical support and training in conflict and post-conflict contexts, for example, in Iraq and Afghanistan.

48. In that respect, the core issue revolves around the question of who is entitled to legitimacy in the use of force in the current political and security climate. Since the Middle Ages, and particularly in the nineteenth century, the nation-State has had a monopoly on the use of force. This prerogative has been closely guarded by States, which have criminalized the use of force by non-State actors or those involved in armed conflicts outside State sanction. The Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I) states, in its definition of a mercenary (art. 47), that “a mercenary shall not have right to be a combatant or a prisoner of war”, and therefore is not entitled to protection if captured. This is a good example of the contempt with which private soldiering responding to the need for large national armies, was regarded during the cold-war era. In this connection, the International Convention is also quite weak on the application of humanitarian law to captured mercenaries, even though it is an improvement over Additional Protocol I. Article 11 of the International Convention is ambiguous in scope and would need bolstering from a human rights perspective if the Convention were to be retained in its current form.

49. The contemporary climate of liberalization, globalization, military downsizing, privatization and outsourcing has resulted in a proliferation of private military and security companies, leading to questions regarding the legality of such companies under international law. States are increasingly faced with the challenge of having to decide to what extent they are willing to cede their traditional prerogative and monopoly of the use of force to non-State actors, and whether they should rethink the responsibilities of the modern nation-State with respect to security and the use of force. Linked to this is the conflicting role of the United Nations itself, in so far as it relies on the armed forces of its Member States to compose its peacekeeping troops and implement related mandates, often in situations in which States parties in conflict themselves may be unwilling or unable to supply regular peacekeeping personnel.

50. As such, the definition of mercenary in international law is highly problematic. The definition of a mercenary provided by the Geneva Conventions, which was incorporated into the Convention, and the additional provision contained in article 2 of the latter, were found to be sufficiently in need of reconsideration to warrant the drafting of a new proposed definition by the former Special Rapporteur, and for the Commission on Human Rights and the General Assembly to request the circulation of the proposed new definition among Member States for comment. The replies received from Member States show that the proposed new definition has not been well received, and does not fulfil the call for a definition that would optimally reflect present-day realities, including the downsizing of armies and the privatization of State services, including security services.

51. It is the Special Rapporteur's view that the conundrum currently facing the international community on the question of an appropriate and realistic definition of a mercenary first has to be resolved at the policy level at the United Nations. The legal definition of a mercenary can be decided only after a policy decision has been reached on the fundamental question of whether States wish to continue to be solely responsible for the use of force, for declaring war and for sanctioning the use of force within certain internationally acceptable rules of engagement. Issues such as self-determination are also relevant to this question. Many States have violated and continue to violate the human rights of their people as a matter of course, but the responsibility of the international community is not always clearly articulated in this regard, nor has the international community been able to deal promptly and adequately with gross human rights violations committed by some Member States. This reflects negatively on the United Nations, which often appears to be immobilized by its own procedures for receiving endorsement for action. The failure to develop an appropriate definition of a mercenary or the adoption of piecemeal amendments to the current definition is likely to result in quite serious problems for the international community, including ones concerning security.

52. As a possible starting point for developing policy on this issue, a round table should be convened by the United Nations to discuss such core questions as the following:

(a) Should States reclaim full responsibility for their armed forces, without the possibility of outsourcing any of the functions to private entities? If so, should any person or company engaged in armed conflict outside State control be considered a mercenary in terms of domestic and international humanitarian law and prosecuted? Does the Convention need to be amended to include a revised definition

of a mercenary to accommodate the proliferation of companies providing military and security services, and how can States that currently use these services be prohibited from doing so?

(b) Alternatively, should States consider privatizing and outsourcing all their military functions? Will there then be no such phenomenon as mercenary activity contrary to the law, because States will no longer have regular armies on permanent call? If armed forces are needed, they will be employed for the purposes of the task at hand. Their services would be paid for under a contract that would spell out the task to be undertaken and the methods to be used to accomplish it. Such contracts would include human rights and international humanitarian law principles on rules of engagement contained in the Geneva Conventions and United Nations instruments such as the International Covenant on Civil and Political Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and so on;[3]

(c) Should States consider retaining a small military force and outsource additional activities under contract when required? Contracts of this type should contain principles of international humanitarian law, and the contracting State would bear entire responsibility for the compliance of companies with international human rights law. If a company violated human rights law, the State employing its services would be held accountable. This third option would render the obsolete Convention superfluous. Should an entirely new convention be drafted to replace it, or only a set of principles on the use of private soldiers and private security companies, i.e., one that is not spatially or situationally specific? Should third parties that are non-State entities — for example, rebels — employing the services of a private military company be considered to have committed a crime and be prosecuted, along with the offending mercenaries or mercenary companies, by domestic courts or the International Criminal Court? Should the responsibility for bringing such criminals to justice be that of the injured party, in cooperation with the United Nations?

53. Another issue that could be discussed is the possible role of private companies providing security and military services within the reformed United Nations. Clearly, the peacekeeping role of the Organization has been under scrutiny, with the concept of peacebuilding proposed as an appropriate development by the Secretary-General in his report “In larger freedom: towards development, security and human rights for all” (A/59/2005). Questions on what the role of the United Nations should be in situations where serious human rights violations are taking place and the difficulty the Organization has faced in the past in trying to stop such widespread violations, including genocide, should also be considered in the light of the immediate assistance many private security companies can offer in such situations. Such assistance need not be at the expense of the contributions to peacekeeping or peacebuilding missions by Member States, but in addition to them, provided there is a properly registered vetting mechanism and guidelines for private companies put in place in advance. The proposal for a uniform and industry-wide code of conduct put forward by a number of private companies and their intention to consider this matter further in the near future should be seen as a relevant development for the consideration of options for the United Nations in this regard.

54. The Special Rapporteur is of the view that the question of the control or management of mercenary activity by the international community and the United Nations should initially be discussed at the policy level, because the conditions that

gave rise to the development of the Convention no longer prevail. The Convention was drafted against the backdrop of decolonization and cold-war polarization, and was developed within a conceptual framework dominated by the notion of hegemonic States. These conditions no longer exist. Without dismissing the need to prosecute those who take part in armed conflict to the detriment of human rights and the right to self-determination outside the limits set by international law, the parameters of the Convention should be reconsidered from the present-day perspective.

55. The first question to be determined, therefore, is what is to be considered as outside the law and criminalized, and what is to be considered acceptable within the new geopolitical environment and the deregulation of State military activity. Only then can the question of the definition of a mercenary, in the Special Rapporteur's view, respond to the realities facing the international community today. A new legal definition can then be drafted with ease and is likely to be more acceptable to Member States, which have provided such contradictory replies to the notes verbales on this issue.

VIII. Conclusions

56. **The Special Rapporteur has received a limited number of responses from Member States regarding the proposal for a new legal definition of a mercenary, and believes that the process towards the adoption of some version of the new definition is likely to be a long one if the present course is followed. She concludes that Member States are demonstrating their own ambiguous position and understanding with respect to the roles and duties of States in a fast-evolving climate of international security and peacekeeping efforts by the United Nations.**

57. **With respect to domestic laws against mercenarism, the Special Rapporteur notes that legislation at the national level is limited, and encourages the incorporation of a number of core elements into the review of existing or the drafting of new legislation, including the definition to be applied.**

58. **The Special Rapporteur has had encouraging communication with representatives of private military and security companies on the development of a code of conduct consonant with international human rights law and standards, and believes that efforts can usefully be applied to take this momentum forward, including with respect to questions of the usefulness of the current definition of mercenary.**

IX. Recommendations

59. **The Special Rapporteur recommends that the working group on the use of mercenaries as a means of violating human rights and impeding the exercise of the rights of peoples to self-determination consider taking forward the processes she has initiated, within the framework of its own mandate.**

60. **The Special Rapporteur recommends that a substantive and comprehensive review of the legal definition of mercenaries and their activities be undertaken. The core elements of a new definition should be: (a) the**

existence of a contract of service, with the element of compensation (material gain) being a key factor; (b) the condition that the mercenary have knowingly and with that intention agreed to participate in armed conflict; (c) the condition that, in general, the mercenary be engaged in armed conflict in a country/countries of which he himself is not a national, or where the company is not registered; and (d) the condition that the mercenary (person) or mercenary company (legal personality) have engaged in armed conflict for its own sake and/or to topple the constitutional order of a State. This study should be undertaken by the Sixth Committee of the General Assembly or the International Law Commission; in addition, a round table should be associated with the process, to examine issues related to security, the changing role of the nation-State, deregulation of military activities and international humanitarian and human rights law.

61. **In addition to elaborating a legal definition, the Special Rapporteur advocates that the United Nations undertake a debate on the fundamental question of the role of the State with respect to the use of force, so as to reach a common understanding on the respective duties and responsibilities of the different actors in the current context, and their respective obligations for the promotion and protection of human rights. Such a debate could conceivably yield different outcomes, including a fundamental revamping or the total revocation of the International Convention against the Recruitment, Use, Financing and Training of Mercenaries, and could yield a useful outcome for the United Nations itself with respect to effective maintenance of its peacekeeping and peacebuilding mandates.**

62. **As concerns private military companies, in the absence of a universally accepted and satisfactory definition of mercenaries and corresponding legislation, a pragmatic approach should be promoted in the interim. This should include encouraging company self-regulation rather than regulation imposed by external bodies, to promote a sense of ownership and sustainability in the implementation of agreed measures.**

63. **Consideration should also be given to identifying private military and security companies primarily as private-sector actors. This would imply that the corresponding principles and consultations should be extended to this group of companies, including the United Nations Global Compact, the draft "Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights" (E/CN.4/Sub.2/2003/12/Rev.2) and voluntary principles on security and human rights.**

64. **In terms of their legal status, the Special Rapporteur believes that private military companies may maintain the current status accorded them under international humanitarian law, and that there is inadequate justification for their criminalization under the Convention.**

65. **The Special Rapporteur recommends that the consultations with representatives of private military companies continue, with a view to ensuring the fundamental incorporation of international human rights law and standards in the development of an international code of conduct for this sector, and underlines that this task is also contained in the mandate of the working group.**

66. **The Special Rapporteur wishes to express her support and good will for the future efforts of the working group, and her sincere hope that its work will contribute to an understanding of mercenarism globally and to the elimination of violations of human rights by public and private entities alike.**

Notes

[1] Definition (in Arabic) given in *Al-Munjid fi al-Lughah wa al-Alam*.

[2] "Consistent with the constitutional status of Tokelau and taking into account the commitment of the Government of New Zealand to the development of self-government for Tokelau through an act of self-determination under the Charter of the United Nations, this ratification shall not extend to Tokelau unless and until a Declaration to this effect is lodged by the Government of New Zealand with the Depositary on the basis of appropriate consultation with that territory." Depositary notification CN.949.2004.TREATIES of 22 September 2004.

[3] The National Security and Human Rights Handbook drafted in partnership between the Fiji Human Rights Commission and the Disciplined Services in Fiji is a useful guide in this regard.

Annex I

List of members of the International Peace Operations Association supporting the communication of peace and security companies (London, 28 June 2005)

American Equipment Company (AMECO)
Greenville, SC
United States of America

Blackwater USA
Moyock, NC
United States of America

Demining Enterprises International
Wierda Park
South Africa

EarthWind Holding Corporation (Groupe EHC)
London
United Kingdom

Hart
London
United Kingdom

International Charters Incorporated (ICI) of Oregon
Salem, OR
United States of America

International Peace Operations Association (IPOA)
Washington, D.C.
United States of America

J-3 Global Solutions
Tulsa, OK
United States of America

Medical Support Solutions (MSS)
Hampshire
United Kingdom

MPRI
Alexandria, VA
United States of America

Pacific Architects and Engineers (PAE)
Los Angeles, CA
United States of America

Security Support Solutions (3S)
London
United Kingdom

Special Operations Consulting-Security Management Group (SOC-SMG)
Minden, NV
United States of America

Triple Canopy
Lincolnshire, IL
United States of America

AEGIS
London, UK

Annex II

Communication of peace and security companies at the conclusion of the meeting with the Special Rapporteur (London, 27-28 June 2005)

We the undersigned members of the peace and security industry look forward to working with the United Nations in examining the employment of the private sector in conflict/post conflict environments.

Peace and Security Companies (PSCs) within this industry fully support all appropriate international human rights instruments, norms and principles, and seek to engage the UN, NGOs and humanitarian organizations to see how we can best continue to support these norms.

In light of the fact that PSCs are frequently employed by UN Member States and the UN own entities, we strongly recommend that the UN re-examine the relevance of the term “mercenary”. This derogatory term is completely unacceptable and is too often used to describe fully legal and legitimate companies engaged in vital support operations for humanitarian peace and stability operations.

The industry is keen to engage with UN mechanisms and is willing to examine a wide variety of options to ensure that the private sector continues to be an increasing and positive presence in peace and stability operations.

In light of this we intend to convene a future industry conference to develop a unified international code of conduct related to private sector operations in conflict/post conflict environments.