

Human Rights

Human Rights



THE IMPACT OF MERCENARY ACTIVITIES ON THE RIGHT OF PEOPLES TO SELF-DETERMINATION



Fact Sheet No. **28**

*World Campaign for
Human Rights*

[T]he activities of mercenaries are contrary to fundamental principles of international law . . . and seriously impede the process of self-determination of peoples.

COMMISSION ON HUMAN RIGHTS RESOLUTION 1987/16
APPOINTING A SPECIAL RAPPORTEUR ON THE QUESTION OF MERCENARIES

INTRODUCTION

Over the past 20 years, the United Nations General Assembly, the Security Council, the Economic and Social Council and the Commission on Human Rights have adopted over a hundred resolutions condemning the activities of mercenaries and those who use them. A milestone was reached in 1989 with the adoption by the General Assembly of the International Convention against the Recruitment, Use, Financing and Training of Mercenaries (see annex I). The Organization of African Unity (OAU) has been equally active, adopting numerous resolutions on the subject and, in 1977, the OAU Convention for the Elimination of Mercenarism in Africa (see annex II).

It is a subject on which feelings run high in international forums, since the mercenary phenomenon raises fundamental issues that have absorbed the attention of the international community since the adoption of the Charter of the United Nations in 1945: the sovereign equality, political independence and territorial integrity of States, the non-use of force in international relations, the self-determination of peoples, human rights, and conduct in situations of armed conflict or organized violence. It therefore touches on the sensitivities of States at many levels and leaves no region of the world indifferent.

Mercenaries are also a media favourite and the subject of many popular misconceptions. This Fact Sheet presents an overview of the phenomenon, focusing on its impact on the right of peoples to self-determination, and examines efforts to bring international law to bear on mercenary activities.

I. The mercenary phenomenon

A. What is meant by the right of peoples to self-determination?

Article 1 of the Charter of the United Nations states that one of the purposes of the United Nations is to “develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples”. In 1966, the principle was incorporated as a human right in common article 1 of the two International Covenants on Human Rights (see annex IV). The precise scope and nature of the right of peoples to self-determination has been the subject of much debate, both academic and political, but its meaning in the context of mercenary activities has been clearly identified by the General Assembly and the Commission on Human Rights in resolutions on the 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States. The Declaration, which was adopted without a vote and thus carries special weight, stipulates that, by virtue of the principle of equal rights and self-determination of peoples:

all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.¹

B. What is a mercenary?

Mercenaries are not confined to any one region of the world. They come from a wide range of countries and operate wherever they are dispatched by their employers. Although they have been associated primarily with the African continent, mercenaries have plied their trade in recent years in such diverse locations as Asia, the Balkans, the Caucasus, Central America, and the South Pacific.

Attempts have been made to define mercenaries in legal terms (see chapter II, section A), but they may be described, in a nutshell, as soldiers for hire. Instead of fighting for their own country, they offer their services to Governments and groups in other countries for a substantial monetary reward. Many “soldiers of fortune” claim to be moti-

¹ General Assembly resolution 2625 (XXV), annex, of 24 October 1970.

vated not by profit but by altruistic, ideological or religious aims, but the fact remains that they are hired—for a fee—to fight or launch attacks in a country or conflict other than their own.

Historical background

Mercenaries are not a new phenomenon but have existed in a variety of forms from time immemorial. Their image has not always been as inglorious as that emerging from recent statements by the international community, not just because of a change in public or international opinion and the proscription of war-making by the Charter of the United Nations, but also because they have diversified into what may be characterized as criminal activities.

Changes in attitudes to mercenaries have tended to coincide broadly with changes in forms of governance and social organization and with the principles governing relations between sovereign powers. In the twelfth and thirteenth centuries, the armies of princes engaged in wars of defence or conquest were commonly composed of or included a complement of hired fighters. With the rise of monarchic rule in the fifteenth and sixteenth centuries, kings and noblemen relied on mercenaries to consolidate the State. In the seventeenth and eighteenth centuries, the advent of nationalism led to the formation of citizen armies and hence a decline in the need for mercenaries. Moreover, under the emerging law of neutrality, a State that was unwilling to become embroiled in conflicts among other States had a duty to discourage its nationals from assisting any of the belligerents. As a result, mercenary activities began to be frowned upon, an attitude reinforced by the adoption of the Charter of the United Nations, which made the waging of war unlawful.²

A new role for mercenaries evolved in the context of decolonization in the 1960s, when they were hired to fight against national liberation movements and prevent the exercise of the right to self-determination of peoples under colonial domination. They were also used in the period following independence to destabilize newly independent Governments, often fighting alongside armed opposition groups who were cultivated as allies. These practices were considered unacceptable and widely condemned by United Nations organs.

² Article 2, paragraph 4, of the Charter of the United Nations, 1945.

The post-cold war period has witnessed the emergence of new categories of mercenaries and new kinds of activities. Conflicts have been fuelled by the resurgence of extreme nationalism and ethnic and religious intolerance. Moreover, the waning of ideological discord has lessened the concern of powerful States to wield influence outside their own region and hence their willingness to mount operations abroad, especially involving their own armed forces. This has revitalized the market for mercenary services. A new and hotly debated phenomenon is that of private security and military assistance companies, which sell a variety of security services. While some of these are entirely unobjectionable, such as guard services for private or official premises, others may involve the hiring out of military professionals to engage in combat on behalf of the client.

Who uses them and why?

Mercenaries are prepared to fight on any side and for any cause, and may be recruited by Governments, opposition groups, domestic resistance movements or criminal organizations. They have increasingly been linked to groups engaged in trafficking in drugs, arms, minerals and human beings.

Mercenaries market themselves primarily as a fighting force of greater military effectiveness than regular troops—and one unbound or unlimited by the rules of international law, including respect for human rights and international humanitarian law. This is a valuable “asset” for the unscrupulous, because regular forces have a duty to disobey orders that are contrary to international humanitarian law. States and others employ mercenaries to preserve the lives of their own personnel, to exploit their military professionalism, efficiency, experience and lack of inhibitions, and to conceal their own involvement in conflicts.

A number of factors have been identified as tending to attract mercenaries to a country or region.³ Armed conflict, both international and internal, is the primary factor, but related elements include political instability, economic insecurity and third-party interests. Long-term political instability encourages the emergence of armed opposition groups and makes political parties and the armed forces more inclined to resort to military means for the settlement of disputes. It also prompts insecure rulers to surround themselves with personal militias. These

³ See, for example, United Nations document A/52/495 of 16 October 1997, para. 21.

factors are compounded by the pursuit of segregationist policies that reinforce divisions between social groups. On the economic front, poverty and financial insecurity, both in countries hiring mercenaries and in their countries of origin, fuel social violence, particularly among the young, and make mercenarism appear like an attractive employment option. Others drawn into the trade for economic reasons include career military personnel who find themselves unemployed as a result of demobilization and the downscaling of their country's armed forces. Third-party interests often figure prominently, particularly in financial terms. The mercenary business is lucrative for both recruiters and purveyors of manpower, including arms dealers, all of whom benefit from the perpetuation of conflict. Transnational companies, especially those engaged in exploiting natural resources, may also encourage the presence of mercenaries, using them either to protect their installations or to support the armed group that best serves the company's interests.

C. How do mercenary activities affect the right of self-determination?

Mercenaries operate in three types of situation: international armed conflicts, which include wars of national liberation, internal armed conflicts, and situations in which no armed conflict is taking place.

In situations of armed conflict

Mercenaries in international armed conflicts have tended either to fight for one of the belligerent parties, of which they are not nationals, or to intervene in support of a belligerent at the request of a third party. In the past, this occurred primarily in the context of decolonization but also where States fragmented along ethnic lines, leading to continued fighting after independence.

In the decolonization context, mercenaries were generally used by the colonial power to thwart the aspirations of national liberation movements to self-determination. Once independence was achieved, mercenaries continued to be used to support armed groups opposing the newly independent Government and to encourage secession. Mercenaries have also been hired in connection with apartheid and segregationist policies. Their missions have included interference with sovereignty, occupation of parts of a territory, and cooperation with armed groups seeking to overthrow legitimate independent Governments. The recruitment of mercenaries to prevent or delay

independence from colonial powers was often motivated by economic or strategic objectives or a desire to prevent the establishment of a Government with different ideological views. Whatever the reason, the result was significant obstruction of the right of peoples to self-determination in contravention of the principles of international law, including those based on the condemnation of colonialism, racism and foreign domination.

In internal conflicts, third States may resort to mercenary activities in pursuit of interventionist goals. Mercenaries may be employed to provoke or encourage armed conflict with a view to securing the overthrow of the existing Government. They may be paid to fight alongside opposition groups who do not represent the views of the majority of the population and therefore cannot claim the status of national liberation movements entitled to assert their right of self-determination. They may also be employed by Governments under threat from opposition groups or indeed by the opposition groups themselves.

Whatever the nature of the conflict, it has been observed that while mercenaries can prove effective in controlling opposition elements, their involvement tends to escalate or at least perpetuate the hostilities, thus not only maintaining a situation that is unlawful under the Charter of the United Nations but also, in some cases, undermining the territorial and political integrity of the State or States involved and hence the right to self-determination of its peoples.

In other situations

In non-conflict situations, mercenaries tend to be employed for the purpose of destabilizing a constitutional Government, often at the behest of a third power bent on furthering its own interests. This kind of intervention may take the form of a concerted campaign of violence over an extended period or an attempt to oust the Government in a one-off coup.

Campaigns of violence may include acts of sabotage, destruction of infrastructure, assassinations of public figures and intimidation of the population, activities which reduce the capacity of the State and its citizens to raise their level of development. Such terror tactics may also dissuade people from voting freely in exercise of their civil and political rights. Groups that spread terror in this way cannot be characterized as national liberation movements, since their aim is to destabilize legitimate Governments against the will of the population. Nor can members of national liberation movements defend their involvement in

mercenary activities in third States on the grounds that the prospective rewards will benefit the national cause. No such argument can justify the use of illegal means.

Attempted coups by mercenaries, even where they fail, can have a devastating effect on a State's infrastructure and economy as well as on its territorial integrity. For example, where the infrastructure of a small State dependent on tourism is destroyed, the entire economy is jeopardized not only by the cost of reconstruction but also by the drying up of its main source of income. Moreover, victim States that survive a failed coup tend to invest in their military capabilities, diverting resources from essential public services and further lowering the level of development.

Other mercenary activities in non-conflict situations may be conducted at the bidding of organized criminals, particularly traffickers in drugs and arms, or in women and minors. While the destabilization of a Government may not form part of the instigators' plans, in practice the rise of organized crime increases the level of violence in society and affects the constitutional order of the State. The General Assembly expressed alarm at this kind of collusion as early as 1989.⁴

Specific areas of concern

Small States

Both the General Assembly⁵ and the Special Rapporteur of the Commission on Human Rights on the question of mercenaries⁶ have expressed special concern about the situation of small States, particularly small island States that are physically most vulnerable to attack. The General Assembly considers that such States may have "special needs consonant with the right to sovereignty and territorial integrity that they share with all nations".⁷ States located close to areas of conflict or of strategic or economic importance to third parties are most at risk. Many are fledgling States and thus vulnerable to both expansionist policies and internal conspiracies involving the use of mercenaries

⁴ See, for example, General Assembly resolution 44/81 of 8 December 1989.

⁵ See, for example, General Assembly resolutions 44/51 of 8 December 1989 and 49/31 of 9 December 1994 on the protection and security of small States.

⁶ See, for example, United Nations documents A/45/488 of 24 September 1990, para. 122, and E/CN.4/1990/11 of 3 January 1990, para. 159.

⁷ See footnote 5 above.

to destabilize the Government. Their military resources are small or non-existent and many possess valuable natural resources coveted by third parties. Not only are small States most vulnerable to attack, but the expense of repairing any damage inflicted by mercenaries places their economies under severe strain because resources tend to be concentrated in one sector, such as tourism or mining, that are usually hard hit.

Private security and military assistance companies

Private security and military assistance companies can interfere with the right of self-determination essentially in two ways. Companies that agree to engage in combat intervene in a State's internal affairs in the same way as any mercenary but they can also place a heavy long-term financial burden on the Government that hires them, curtailing its capacity to promote development.

States with valuable natural resources have provided the setting for a significant proportion of the operations of private companies to date. In many cases, a State that has lost control of such resources or is unable to exploit them owing to internal conflict employs the private company to assist it in recovering control. But as the countries concerned are often small and economically underdeveloped, the State may agree to discharge at least part of its debt to the company in the form of concessions for the exploitation of its resources. Development aid or loans may also be diverted. The concessions are then exploited by subsidiary or affiliated companies, which assume a significant role in the country's economic life.

In terms of intervention, there is an extra sting in the tail when private security or military assistance companies are hired by the State to stamp out conflict within its territory. Such companies claim, as one of their selling points, that they can help to restore peace and security. While there is some evidence of their ability to quell a conflict in the short term, they are not really in a position to address the underlying causes and to provide a long-term solution. If they leave, the conflict may flare up again, particularly as their presence may have deflected efforts from the negotiating table. If they stay, they place an intolerable financial burden on the Government. In any case, it is not in the companies' interest to terminate the conflict since they would find themselves out of a job. Another possible side effect is their demoralizing impact on national forces, who see them as a constant reminder of their alleged inability to cope, further alienating them from the Government. Resentment in the armed forces may even prompt an internal coup.

The General Assembly remains convinced that:

notwithstanding the way in which mercenaries or mercenary-related activities are used or the form they take to acquire some semblance of legitimacy, they are a threat to peace, security and the self-determination of peoples and an obstacle to the enjoyment of human rights by peoples.⁸

II. Addressing the mercenary phenomenon

A. Legal issues

Attempts to address the mercenary phenomenon raise a number of difficult issues that have not all been conclusively resolved.

Defining mercenaries

In any area of law applicable to a category or group of persons, the persons concerned must be easily identifiable so that States know who is liable to prosecution. A definition is required to identify not only those who fall within the category but also those who are beyond its scope. But the more precise and complex the definition, the more difficult it will be to determine whether a person meets its requirements. Developing a workable and balanced definition of a mercenary thus presents a major challenge.

Prohibition or regulation?

Are mercenaries by definition unlawful, so that the mere fact of being a mercenary constitutes an offence, or does their lawfulness depend on the activities in which they engage? Could some types of mercenary activity conceivably be lawful? The decision on whether to prohibit mercenaries outright or to focus on regulating their activities depends on the answer to these and other similar questions.

Ordinary or special offences?

Should being a mercenary or engaging in mercenary activities constitute a specific offence, or is it sufficient to invoke existing criminal offences such as murder, assault, criminal damage, terrorism or misuse of firearms to punish unlawful behaviour by mercenaries?

⁸ General Assembly resolution 54/151 of 17 December 1999.

Attributing responsibility

Who should be held responsible for the activities of mercenaries—the mercenaries themselves or, in addition, those who recruit, use, finance and train them? The Special Rapporteur on the question of mercenaries identifies three forms of mercenarism: by an individual, by a private organization and by the State.⁹ How far does the responsibility of the State extend? Is it a negative obligation—to refrain from recruiting or supporting mercenary activities—or does it include a positive obligation to prevent them?

These and other complex questions are currently being discussed by State representatives and experts engaged in developing a legal framework to control mercenaries and their activities.

B. Legal framework

1. *The law of neutrality*

Where an armed conflict takes place between two or more States, other States may choose to support one belligerent party or may prefer to remain neutral. Neutral status entails very specific rights and duties that are governed by the law of neutrality.¹⁰ The basic premise of this law is that the neutral State must not take, or allow to be taken on its territory, any measure which provides support for one party to the conflict in return for immunity from hostile acts by the belligerents against its own territory or citizens.

Article 4 of the 1907 Hague Convention V respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land is of particular relevance to the question of mercenaries. It stipulates that “[c]orps of combatants cannot be formed nor recruiting agencies opened on the territory of a neutral Power to assist the belligerents”. The neutral Power thus has an obligation to prevent such activities from occurring on its territory. However, it cannot be held responsible where individuals cross the border of their own accord to offer their services to the belligerents.

The Hague Convention V is considered to represent customary law, which means that it is applicable to all States. Article 4 in effect

⁹ United Nations document E/CN.4/1988/14 of 20 January 1988, para. 108.

¹⁰ See, in particular, the 1907 Hague Convention V respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land and the 1907 Hague Convention XIII concerning the Rights and Duties of Neutral Powers in Naval War.

creates an obligation for States to prevent the formation of mercenary groups on their territory for the purpose of intervention in an armed conflict to which they have chosen to remain neutral. If they fail to do so, they are in violation of their obligations under international law.

2. The Charter of the United Nations

The 1945 Charter is the founding document of the United Nations. It describes the functions and powers of the principal organs and sets out the purposes and principles of the Organization as a whole. Article 2, paragraph 4, stipulates that:

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

This provision essentially outlaws the use of force by one State against another, except in very specific circumstances spelled out elsewhere in the Charter (self-defence and enforcement measures sanctioned by the Security Council). Employing mercenaries to use force against another State comes within the scope of this prohibition.

3. United Nations General Assembly and Security Council resolutions

The United Nations General Assembly and Security Council have adopted numerous resolutions condemning the use of mercenaries and setting out their position on the question. Although resolutions are not legally binding in the same way as treaties, States Members of the United Nations are required under Article 25 of the Charter to comply with Security Council resolutions. General Assembly resolutions are not formally binding but they are adopted by a vote of Member States and thus represent the views of the international community. They are also considered to constitute persuasive evidence of practice contributing to the formation of customary law.

Both organs have condemned the use of mercenaries as a form of external interference in the internal affairs of States in cases where the aim is to destabilize those States and to violate their territorial integrity, sovereignty and independence.¹¹ The General Assembly has

¹¹ See, for example, Security Council resolutions 405 (1977) and 419 (1977), and General Assembly resolution 36/103 of 9 December 1981.

strengthened the terms of its condemnation over time to include not only a negative duty to refrain from organizing or encouraging the organization of mercenaries for incursion into the territory of another State,¹² but also a positive duty to “prevent on its territory the training, financing and recruitment of mercenaries, or the sending of such mercenaries into the territory of another State and to deny facilities, including financing, for the equipping and transit of mercenaries”.¹³ The Assembly has condemned both the use of mercenaries and their conduct, characterizing the use of mercenaries against national liberation movements as a criminal act and describing mercenaries as criminals who should be punished as such.¹⁴ It has further called on States to adopt legislation making the recruitment, financing and training of mercenaries in their territories and the transit of mercenaries through their territories punishable offences, and prohibiting their nationals from serving as mercenaries.¹⁵

4. *The international law of armed conflict*

The international law of armed conflict, often referred to as humanitarian law, is the body of law that regulates behaviour in situations of armed conflict.¹⁶ As its motive is to reduce the suffering of those affected, its application is not dependent on the cause, purpose or legality of the conflict. It is divided into two major streams of law: rules concerning the conduct of operations and rules establishing protection for non-combatants and combatants who are captured or surrender. It applies only in situations of armed conflict.

¹² Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, General Assembly resolution 2625 (XXV) of 24 October 1970.

¹³ Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States, General Assembly resolution 36/103 of 9 December 1981.

¹⁴ See, for example, the Declaration on the Granting of Independence to Colonial Countries and Peoples, General Assembly resolution 2465 (XXIII) of 20 December 1968; Basic principles of the legal status of combatants struggling against colonial and alien domination, and racist régimes, General Assembly resolution 3103 (XXVIII) of 12 December 1973, para. 5, and General Assembly resolutions 2548 (XXIV) (1969), 2708 (XXV) (1970) and 33/24 (1978).

¹⁵ See, for example, the Declaration on the Granting of Independence to Colonial Countries and Peoples, General Assembly resolution 2465 (XXIII) of 20 December 1968, and General Assembly resolution 40/25 of 29 November 1985.

¹⁶ See, in particular, the four Geneva Convention, of 1949 and the two Additional Protocols of 1977 relating to the protection of victims of armed conflicts.

Prior to 1977, the law of armed conflict made no formal distinction between mercenaries and other fighters. Article 47 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), adopted in June 1977 contains a specific provision on mercenaries (see annex III). Owing to its special nature, the law of armed conflict does not address the legality of mercenary activities or establish the responsibility for mercenarism of those who participate in mercenary activities. Instead, it defines the status of a mercenary and its implications in the event of capture. Whereas combatants in an international conflict who are regular members of the armed forces of a belligerent are entitled, if they are captured, to special protection and treatment as prisoners of war, article 47 stipulates that mercenaries are not entitled to that status. However, the Protocol does not prevent a State from granting them equivalent treatment if it so wishes. In any conflict, whether international or non-international, persons who do not enjoy the right to more favourable treatment under the law of armed conflict are entitled, as a minimum, to certain fundamental guarantees, in particular humane treatment and non-discrimination.¹⁷

As the purpose of the law of armed conflict is to extend rather than restrict protection, the scope of the definition of a mercenary contained in article 47 is narrow in order to ensure that the loss of special protection occurs only in limited circumstances. A mercenary is any person who:

- (a) Is specially recruited locally or abroad in order to fight in an armed conflict;
- (b) Does, in fact, take a direct part in hostilities;
- (c) Is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
- (d) Is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;

¹⁷ These minimum guarantees are set forth in article 75 of Protocol I relating to international conflicts, article 3 common to the four 1949 Geneva Conventions, and article 4 of Protocol II relating to non-international conflicts.

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- (e) Is not a member of the armed forces of a Party to the conflict;
and
 - (f) Has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.

These requirements are cumulative, which means that they must all be applicable for an individual to be categorized as a mercenary.

5. The OAU Convention for the Elimination of Mercenarism in Africa

The Organization of African Unity, after expressing concern in a number of resolutions about the threat to African stability presented by mercenary activities, adopted the OAU Convention for the Elimination of Mercenarism in Africa in July 1977 in Libreville (see annex II). It was drafted by a Committee of Experts and came into force in 1985. As a regional convention, it is applicable only to States in the African region that have completed the ratification procedure.

The OAU Convention prohibits both mercenaries and mercenarism, which is characterized as a crime against peace and security in Africa, whether committed by an individual, a group, an association, a State or a State representative.

A mercenary is defined in article 1 as any person who:

- (a) Is specially recruited locally or abroad in order to fight in an armed conflict;
- (b) Does in fact take a direct part in the hostilities;
- (c) Is motivated to take part in the hostilities essentially by the desire for private gain and in fact is promised by or on behalf of a party to the conflict material compensation;
- (e) Is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict;
- (f) Is not a member of the armed forces of a party to the conflict;
and
- (g) Is not sent by a State other than a party to the conflict on official mission as a member of the armed forces of the said State.

The crime of mercenarism is committed when individuals enlist, enroll or try to enroll as mercenaries, when mercenaries are employed or supported in any way, and when a State allows mercenary activities to be carried out in its territory or in any place under its control with the aim of “opposing by armed violence a process of self-determination, stability or the territorial integrity of another State”.¹⁸

In addition to creating a specific offence of mercenarism, the OAU Convention contains a series of related obligations. States must take measures to eradicate mercenary activity by enacting legislation making the crime of mercenarism punishable by the severest penalties and by exchanging information on any mercenary activities that come to their attention. States undertake either to prosecute or to extradite any person committing an offence under the Convention, and to afford mutual assistance in connection with any investigations and proceedings initiated in respect of the offence. States may be accused of breaches of the Convention before any competent OAU or international tribunal, and their representatives may be punished. Lastly, the OAU Convention stipulates that persons on trial for the crime of mercenarism are entitled to all the judicial guarantees normally granted by the State in whose territory they are being tried.

6. *The International Convention against the Recruitment, Use, Financing and Training of Mercenaries*

The International Convention against the Recruitment, Use, Financing and Training of Mercenaries was adopted in 1989¹⁹ after nine years of discussion (see annex I). It was drafted by the Ad Hoc Committee on the Drafting of an International Convention against the Recruitment, Use, Financing and Training of Mercenaries, established under General Assembly resolution 35/48.²⁰ The Convention entered into force on 20 October 2001. It constitutes a binding instrument of international law and a practical tool for addressing the mercenary phenomenon.

Before starting work, the Ad Hoc Committee identified a number of priorities for the drafting process such as: emphasis on the prevention of mercenarism and clarification of the role of States in prevention;

¹⁸ Organization of African Unity, 1977, Convention for the Elimination of Mercenarism in Africa art. 1, para. 2 (see annex 9).

¹⁹ General Assembly resolution 44/34 of 4 December 1989.

²⁰ Adopted on 4 December 1980.

extension of prohibition beyond the acts of mercenaries themselves; adoption of a definition that was not limited to situations of international conflict; highlighting the need for legislation at the national level; encouragement of mutual assistance and judicial cooperation in the elimination of mercenarism; and establishment of fair-trial guarantees for captured mercenaries. It considered that a key issue was the most appropriate and effective target of any prohibition. Should the Convention focus on the punishment of mercenaries themselves or on the unlawful conduct of those who promote, organize and tolerate such activities? Ultimately, the Ad Hoc Committee decided to combine the two approaches. The Convention establishes a range of offences that may be committed by individual mercenaries, persons recruiting, using, financing or training mercenaries, and States parties, and imposes on States parties a number of related obligations.

Article 1 of the Convention keeps the definition of a mercenary contained in article 47 of the Protocol Additional to the Geneva Conventions (Protocol I) (see page 15 above), but expands it to cover situations other than armed conflicts, in which persons are recruited for the purpose of participating in a concerted act of violence aimed at overthrowing a Government or otherwise undermining the constitutional order of a State, or undermining the territorial integrity of a State. In such a situation, a mercenary is a person who:

- (a) Is motivated to take part essentially by the desire for significant private gain, and is prompted by the promise or payment of material compensation;
- (b) Is neither a national nor a resident of the State against which such an act is directed;
- (c) Has not been sent by a State on official duty; and
- (d) Is not a member of the armed forces of the State on whose territory the act is undertaken.

To commit an offence under the Convention, a mercenary must not only fall within the definition contained in article 1 but also participate directly in hostilities or in a concerted act of violence, or have attempted to do so.

An offence is also committed by any person who recruits, uses, finances or trains mercenaries, attempts to do so, or is the accomplice of a person who commits or attempts to commit an offence set forth in the Convention. This indirect offence is deemed to have been committed even where the mercenaries in question have not yet taken part in

hostilities.²¹ States parties have both positive and negative obligations in this regard. They should not only refrain from engaging in any of the designated activities but also take appropriate measures to prevent such activities by others. This applies in particular to activities whose purpose is to oppose the legitimate exercise of the right of peoples to self-determination. Furthermore, the offences established by the Convention should be made punishable by appropriate penalties reflecting their serious nature.

In addition to creating offences, the Convention sets out a framework to facilitate the prosecution of offenders at the national level. It requires States to ensure that their legislation makes prosecution possible. Any alleged offender present on their territory should be taken into custody and a preliminary inquiry opened. If the person concerned is not extradited to another State for trial, the case should be submitted to the competent national authorities. Throughout the proceedings, the alleged offender should benefit from fair treatment and judicial guarantees. States should cooperate with one another in both the prevention and prosecution of offences, including through the exchange of information. Lastly, the Convention establishes a procedure for the settlement of disputes between States parties concerning the interpretation or application of the instrument.

7. General international law

(a) Work of the International Law Commission

The International Law Commission (ILC) was set up in 1947 by General Assembly resolution 174 (II). It is composed of “persons of recognized competence in international law” and is charged with the development and codification of international law. The ILC has been working on a draft Code of Offences against the Peace and Security of Mankind since its infancy and has considered the question of mercenary activities in that context from a number of angles.

The ILC made it clear at an early point in its deliberations that, when referring to mercenaries, it meant the recruitment of foreigners with no connection to the national army for the purpose of attacking a

²¹ The purpose of the direct combat requirement is to distinguish a mercenary from a military adviser. It is deliberately not included in the definition of a mercenary in order to ensure that those involved in the recruitment and other forms of facilitation are not immune prior to direct participation by the mercenaries. Report of the Ad Hoc Committee on the Drafting of an International Convention against the Recruitment, Use, Financing and Training of Mercenaries, *Official Records of the General Assembly, Twenty-third Session, Supplement No. 43 (A/36/43)*, 1981.

country in order to destabilize or overthrow the established authorities, especially for acts of subversion against small and newly independent States or to obstruct the actions of national liberation movements.²² It was initially decided to include the sending of mercenaries to carry out acts of armed force against another State in the definition of aggression within the draft Code itself. In this context, the responsibility of the State was invoked rather than the individual criminal responsibility of the mercenary.²³ The 1991 draft Code introduced a separate rubric providing for the criminal responsibility of individuals representing the State and made it an offence to recruit, use, finance or train mercenaries.

The 1996 draft Code, which is the current version at the time of writing, does not address the issue of mercenaries as such. However, article 16 deals with the crime of aggression, but only insofar as it concerns individual criminal responsibility. In this respect, the ILC commentary to article 16 expressly states that the article does not address the question of the definition of aggression by a State, as this is beyond the scope of the present draft Code.²⁴ In other words, the article limits itself to a reaffirmation of the criminal responsibility of individuals participating in a crime of aggression. At the same time, however, the draft Code is predicated on the accepted definition of aggression contained in the resolution on the Definition of Aggression adopted by the General Assembly in 1974.²⁵ Since this definition includes the sending of mercenaries by a State to carry out acts of armed force against another State, it may be argued that, although the definition of aggression by a State is declared by the ILC itself to be beyond the scope of the present draft Code, the question of the criminal responsibility of States for mercenary activities nevertheless remains potentially relevant in the overall scheme of the draft Code.

(b) *Specific offence treaties*

A number of treaties have been drafted for the purpose of prohibiting a particular type of conduct, regardless of the nature or iden-

²² *Yearbook of the International Law Commission 1985*, vol. II (Part One), p. 63. Third report on the draft Code of Offences against the Peace and Security of Mankind, United Nations document A/CN.4/387 of 8 April 1985, para. 160.

²³ *Ibid.*, para. 163.

²⁴ ILC Commentary to article 16, www.un.org/law/ilc/reports/1996/chap02.htm.

²⁵ General Assembly resolution 3314 (XXIX) of 14 December 1974 on the Definition of Aggression.

tity of the perpetrator. They include the 1963 Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft, the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft, the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, the 1979 International Convention against the Taking of Hostages and the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation. Many of these treaties establish universal jurisdiction over offenders, which means that every State has the authority to prosecute them and, indeed, has an obligation to do so if it does not extradite them to another State. As such treaties prohibit the outcome regardless of who commits the offence, they are applicable to mercenaries who engage in any of the proscribed acts.

(c) *The International Criminal Court*

After many years of negotiation, the Statute of the International Criminal Court (ICC) was finally adopted in 1998. Steady progress is being made at the time of writing towards achieving the number of ratifications needed for the Court to begin its work. ICC will have jurisdiction to prosecute individuals responsible for crimes contained in its Statute, and although no specific mention is made of mercenary activities, the individuals concerned should be subject to prosecution in the same way as any other perpetrators of a designated crime. Mercenary status may also prove to be an aggravating factor when an offender is sentenced.

8. Domestic legislation

The most direct and effective way of addressing the mercenary phenomenon would be to facilitate the prosecution of perpetrators at the national level. The United Nations Special Rapporteur on the question of mercenaries has repeatedly encouraged States to adopt legislation dealing specifically with mercenary activities,²⁶ but although there has been no shortage of condemnatory statements in international forums, few States have acted on the recommendation.

²⁶ See, for example, United Nations document E/CN.4/1999/11 of 13 January 1999, paras. 94 and 95; United Nations document A/54/326 of 7 September 1999, paras. 87 and 88; and United Nations document E/CN.4/2000/14 of 21 December 1999, paras. 86 and 87.

In most jurisdictions, perpetrators could be prosecuted under legislation penalizing ordinary offences such as assault, murder, criminal damage, misuse of firearms or terrorism. It might also be possible to invoke regulations on arms exports and trading, which affect the tools of the trade, or laws prohibiting the enlistment of citizens into foreign armed forces without the consent of the State of citizenship, a facet of the neutrality issue discussed earlier. Some new forms of mercenarism might be punishable under regulations governing the provision of foreign military assistance, which place strict limits on assistance provided abroad from within the territory of a State.

C. The work of the Special Rapporteur of the United Nations Commission on Human Rights

The United Nations Commission on Human Rights has consistently condemned the use of mercenaries against developing countries and as a means of destabilizing Governments. In 1987, it adopted resolution 1987/16 appointing a special rapporteur to study the question, a step that was firmly endorsed by the Economic and Social Council²⁷ and by subsequent General Assembly resolutions. The expert appointed was Mr. Enrique Bernales Ballesteros of Peru.

Under the original mandate, which has been repeatedly renewed, the Special Rapporteur was to examine the question of the use of mercenaries as a means of violating human rights and of impeding the exercise of the right of peoples to self-determination. To carry out this task, he was authorized to seek and receive credible and reliable information from Governments, as well as specialized agencies, and intergovernmental and non-governmental organizations.

As emphasized by the Special Rapporteur in his initial consultations with States, his basic mandate is to “identify the characteristics and methods of mercenarism as a means of violating human rights and impeding the exercise of the right of peoples to self-determination.”²⁸ He has gradually developed a conceptual framework for use in analysing existing and potential new forms of mercenary activity, and maintains regular contacts with States and other sources, including institutions and individuals engaged in research on the subject, to obtain information on actual or potential mercenary activities and rel-

²⁷ Economic and Social Council resolution 1987/61 of 29 May 1987.

²⁸ United Nations document E/CN.4/1988/14 of 20 January 1988, para. 16.

evant national legislation. In his fact-finding role, he visits parts of the world where mercenary activities have taken place. He also seeks to promote the ratification and entry into force of the International Convention against the Recruitment, Use, Financing and Training of Mercenaries, as well as the adoption of national legislation specifically targeting mercenary activities.

D. Some unresolved issues

The nationality requirement

A hotly debated aspect of the definition of a mercenary is the requirement that the person concerned should not be a national or resident of the State in which the activities are carried out. Its purpose is to distinguish a mercenary from a member of a national liberation or opposition movement that legitimately challenges a country's Government. The distinction becomes somewhat clouded, however, where nationals are employed by foreign Powers or opposition groups receive foreign funding for political purposes such as destabilization of the Government. Additional complications arise where a State grants citizenship to persons solely for the purpose of employing them as mercenaries or where individuals legally possess dual or multiple citizenship. The Special Rapporteur on the question of mercenaries suggests that the process of granting nationality might be examined in individual cases to identify signs that the sole object is to avoid categorization as a mercenary.²⁹

Private security and military assistance companies

A major recent challenge consists in developing an appropriate method of addressing the activities of private security and military assistance companies. Much of the discussion revolves around the problem of distinguishing between legitimate services and those that might be categorized as mercenary activities. Other issues include the extent to which States can and should delegate responsibility for law and order to private companies, and who can be held accountable for abuses or violations of human rights and humanitarian law by representatives or employees of such companies. It is essential to keep abreast of changes in mercenary practices, to adopt a uniform approach and to encourage the development of appropriate national legislation.

²⁹ See, for example, United Nations document A/48/385 of 23 September 1993, para. 76.

CONCLUSION

Addressing the mercenary phenomenon is a complex task. While condemnation of mercenary activities by the international community has been consistent and unequivocal, efforts to regulate such activities have been marred by differences of approach and competing concerns. A number of key issues remain unresolved and the situation has been further complicated by the emergence of new forms of mercenarism.

The challenge facing the international community is to translate its statements of condemnation into concrete measures that can effectively address the negative effects of mercenary activities. A first and necessary step has been the adoption and entry into force of the International Convention against the Recruitment, Use, Financing and Training of Mercenaries. Although not without its detractors, the Convention provides a useful framework for the prosecution of offenders and the establishment of channels of cooperation between States. In particular, it makes participation in mercenary activities an offence of mandatory universal jurisdiction, which means that an offender must, unless extradited, be tried by any State in which he or she is found.

There is a clear need for further discussion of the issues that remain unresolved, a need that the General Assembly has continued to recognize in recent resolutions. It would be a pity, however, if this fact were to impede the early implementation of measures already in existence. The sooner the machinery is set in motion, the sooner the results can be turned to account in addressing the negative impact of mercenary activities on the right of peoples to self-determination.

ANNEX I

**International Convention against the Recruitment, Use, Financing
and Training of Mercenaries, adopted on 4 December 1989**

The States Parties to the present Convention,

Reaffirming the purposes and principles enshrined in the Charter of the United Nations and in the Declaration on the Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,

Being aware of the recruitment, use, financing and training of mercenaries for activities which violate principles of international law such as those of sovereign equality, political independence, territorial integrity of States and self-determination of peoples,

Affirming that the recruitment, use, financing and training of mercenaries should be considered as offences of grave concern to all States and that any person committing any of these offences should either be prosecuted or extradited,

Convinced of the necessity to develop and enhance international co-operation among States for the prevention, prosecution and punishment of such offences,

Expressing concern at new unlawful international activities linking drug traffickers and mercenaries in the perpetration of violent actions which undermine the constitutional order of States,

Also convinced that the adoption of a convention against the recruitment, use, financing and training of mercenaries would contribute to the eradication of these nefarious activities and thereby to the observance of the purposes and principles enshrined in the Charter of the United Nations,

Cognizant that matters not regulated by such a convention continue to be governed by the rules and principles of international law,

Have agreed as follows:

Article 1

For the purposes of the present Convention,

1. A mercenary is any person who:

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

(b) Is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar rank and functions in the armed forces of that party;

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

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

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

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

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

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

(ii) Undermining the territorial integrity of a State;

(b) Is motivated to take part therein essentially by the desire for significant private gain and is prompted by the promise or payment of material compensation;

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

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

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

Article 2

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

Article 3

1. A mercenary, as defined in article 1 of the present Convention, who participates directly in hostilities or in a concerted act of violence, as the case may be, commits an offence for the purposes of the Convention.
2. Nothing in this article limits the scope of application of article 4 of the present Convention.

Article 4

An offence is committed by any person who:

- (a) Attempts to commit one of the offences set forth in the present Convention;
- (b) Is the accomplice of a person who commits or attempts to commit any of the offences set forth in the present Convention.

Article 5

1. States Parties shall not recruit, use, finance or train mercenaries and shall prohibit such activities in accordance with the provisions of the present Convention.
2. States Parties shall not recruit, use, finance or train mercenaries for the purpose of opposing the legitimate exercise of the inalienable right of peoples to self-determination, as recognized by international law, and shall take, in conformity with international law, the appropriate measures to prevent the recruitment, use, financing or training of mercenaries for that purpose.
3. They shall make the offences set forth in the present Convention punishable by appropriate penalties which take into account the grave nature of those offences.

Article 6

States Parties shall co-operate in the prevention of the offences set forth in the present Convention, particularly by :

- (a) Taking all practicable measures to prevent preparations in their respective territories for the commission of those offences within or outside their territories, including the prohibition of illegal activities

of persons, groups and organizations that encourage, instigate, organize or engage in the perpetration of such offences;

(b) Co-ordinating the taking of administrative and other measures as appropriate to prevent the commission of those offences.

Article 7

States Parties shall co-operate in taking the necessary measures for the implementation of the present Convention.

Article 8

Any State Party having reason to believe that one of the offences set forth in the present Convention has been, is being or will be committed shall, in accordance with its national law, communicate the relevant information, as soon as it comes to its knowledge, directly or through the Secretary-General of the United Nations, to the States Parties affected.

Article 9

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over any of the offences set forth in the present Convention which are committed:

(a) In its territory or on board a ship or aircraft registered in that State;

(b) By any of its nationals or, if that State considers it appropriate, by those stateless persons who have their habitual residence in that territory.

2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over the offences set forth in articles 2, 3 and 4 of the present Convention in cases where the alleged offender is present in its territory and it does not extradite him to any of the States mentioned in paragraph 1 of this article.

3. The present Convention does not exclude any criminal jurisdiction exercised in accordance with national law.

Article 10

1. Upon being satisfied that the circumstances so warrant, any State Party in whose territory the alleged offender is present shall, in accor-

dance with its laws, take him into custody or take such other measures to ensure his presence for such time as is necessary to enable any criminal or extradition proceedings to be instituted. The State Party shall immediately make a preliminary inquiry into the facts.

2. When a State Party, pursuant to this article, has taken a person into custody or has taken such other measures referred to in paragraph 1 of this article, it shall notify without delay either directly or through the Secretary-General of the United Nations:

(a) The State Party where the offence was committed;

(b) The State Party against which the offence has been directed or attempted;

(c) The State Party of which the natural or juridical person against whom the offence has been directed or attempted is a national;

(d) The State Party of which the alleged offender is a national or, if he is a stateless person, in whose territory he has his habitual residence;

(e) Any other interested State Party which it considers it appropriate to notify.

3. Any person regarding whom the measures referred to in paragraph 1 of this article are being taken shall be entitled:

(a) To communicate without delay with the nearest appropriate representative of the State of which he is a national or which is otherwise entitled to protect his rights or, if he is a stateless person, the State in whose territory he has his habitual residence;

(b) To be visited by a representative of that State.

4. The provisions of paragraph 3 of this article shall be without prejudice to the right of any State Party having a claim to jurisdiction in accordance with article 9, paragraph 1 (b), to invite the International Committee of the Red Cross to communicate with and visit the alleged offender.

5. The State which makes the preliminary inquiry contemplated in paragraph 1 of this article shall promptly report its findings to the States referred to in paragraph 2 of this article and indicate whether it intends to exercise jurisdiction.

Article 11

Any person regarding whom proceedings are being carried out in connection with any of the offences set forth in the present Convention shall be guaranteed at all stages of the proceedings fair treatment and all the rights and guarantees provided for in the law of the State in question. Applicable norms of international law should be taken into account.

Article 12

The State Party in whose territory the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State.

Article 13

1. States Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of the offences set forth in the present Convention, including the supply of all evidence at their disposal necessary for the proceedings. The law of the State whose assistance is requested shall apply in all cases.
2. The provisions of paragraph 1 of this article shall not affect obligations concerning mutual judicial assistance embodied in any other treaty.

Article 14

The State Party where the alleged offender is prosecuted shall in accordance with its laws communicate the final outcome of the proceedings to the Secretary-General of the United Nations, who shall transmit the information to the other States concerned.

Article 15

1. The offences set forth in articles 2, 3 and 4 of the present Convention shall be deemed to be included as extraditable offences in any extradition treaty existing between States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.
2. If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State

Party with which it has no extradition treaty, it may at its option consider the present Convention as the legal basis for extradition in respect of those offences. Extradition shall be subject to the other conditions provided by the law of the requested State.

3. States Parties which do not make extradition conditional on the existence of a treaty shall recognize those offences as extraditable offences between themselves, subject to the conditions provided by the law of the requested State.

4. The offences shall be treated, for the purpose of extradition between States Parties, as if they had been committed not only in the place in which they occurred but also in the territories of the States required to establish their jurisdiction in accordance with article 9 of the present Convention.

Article 16

The present Convention shall be applied without prejudice to:

(a) The rules relating to the international responsibility of States;

(b) The law of armed conflict and international humanitarian law, including the provisions relating to the status of combatant or of prisoner of war.

Article 17

1. Any dispute between two or more States Parties concerning the interpretation or application of the present Convention which is not settled by negotiation shall, at the request of one of them, be submitted to arbitration. If, within six months from the date of the request for arbitration, the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice by a request in conformity with the Statute of the Court.

2. Each State may, at the time of signature or ratification of the present Convention or accession thereto, declare that it does not consider itself bound by paragraph 1 of this article. The other States Parties shall not be bound by paragraph 1 of this article with respect to any State party which has made such a reservation.

3. Any State Party which has made a reservation in accordance with paragraph 2 of this article may at any time withdraw that reservation by notification to the Secretary-General of the United Nations.

Article 18

1. The present Convention shall be open for signature by all States until 31 December 1990 at United Nations Headquarters in New York.
2. The present Convention shall be subject to ratification. The instruments of ratification shall be deposited with the Secretary-General of the United Nations.
3. The present Convention shall remain open for accession by any State. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 19

1. The present Convention shall 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 of the United Nations.
2. For each State ratifying or acceding to the Convention after the deposit of the twenty-second instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after deposit by such State of its instrument of ratification or accession.

Article 20

1. Any State Party may denounce the present Convention by written notification to the Secretary-General of the United Nations.
2. Denunciation shall take effect one year after the date on which the notification is received by the Secretary-General of the United Nations.

Article 21

The original of the present Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations, who shall send certified copies thereof to all States.

IN WITNESS WHEREOF the undersigned, being duly authorized thereto by their respective Governments, have signed the present Convention.

ANNEX II

Organization of African Unity Convention for the Elimination of Mercenarism in Africa. Concluded at Libreville, Gabon, on 3 July 1977

PREAMBLE

We, the Heads of State and Government of the Member States of the Organization of African Unity;

Considering the grave threat which the activities of mercenaries present to the independence, sovereignty, security, territorial integrity and harmonious development of Member States of the Organization of African Unity;

Concerned with the threat which the activities of mercenaries pose to the legitimate exercise of the right of African People under colonial and racist domination to their independence and freedom;

Convinced that total solidarity and co-operation between Member States are indispensable for putting an end to the subversive activities of mercenaries in Africa;

Considering that the resolutions of the United Nations and the OAU, the statements of attitude and the practice of a great number of States are indicative of the development of new rules of international law making mercenarism an international crime;

Determined to take all necessary measures to eliminate from the African continent the scourge that mercenarism represents;

Have agreed as follows:

Article 1. Definition

1. A mercenary is any person who:

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

(b) Does in fact take a direct part in the hostilities;

(c) Is motivated to take part in the hostilities essentially by the desire for private gain and in fact is promised by or on behalf of a party to the conflict material compensation;

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

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

(f) Is not sent by a State other than a party to the conflict on official mission as a member of the armed forces of the said State.

2. The crime of mercenarism is committed by the individual, group or association, representative of a State or the State itself who, with the aim of opposing by armed violence a process of self-determination, stability or the territorial integrity of another State, practises any of the following acts:

(a) Shelters, organizes, finances, assists, equips, trains, promotes, supports or in any manner employs bands of mercenaries;

(b) Enlists, enrolls or tries to enroll in the said bands;

(c) Allows the activities mentioned in paragraph (a) to be carried out in any territory under its jurisdiction or in any place under its control or affords facilities for transit, transport or other operations of the above-mentioned forces.

3. Any person, natural or juridical, who commits the crime of mercenarism as defined in paragraph 1 of this Article commits an offence considered as a crime against peace and security in Africa and shall be punished as such.

Article 2. Aggravating circumstance

The fact of assuming command over or giving orders to mercenaries shall be considered as an aggravating circumstance.

Article 3. Status of mercenaries

Mercenaries shall not enjoy the status of combatants and shall not be entitled to the prisoners of war status.

Article 4. Scope of criminal responsibility

A mercenary is responsible both for the crime of mercenarism and all related offences, without prejudice to any other offences for which he may be prosecuted.

*Article 5. General Responsibility of States
and their Representatives*

1. When the representative of a State is accused by virtue of the provisions of Article 1 of this Convention for acts or omissions declared by the aforesaid article to be criminal, he shall be punished for such an act or omission.

2. When a State is accused by virtue of the provisions of Article 1 of this Convention for acts or omissions declared by the aforesaid article to be criminal, any other party to the present Convention may invoke the provisions of this Convention in its relations with the offending State and before any competent OAU or International Organization tribunal or body.

Article 6. Obligations of States

The contracting parties shall take all necessary measures to eradicate all mercenary activities in Africa.

To this end, each contracting State shall undertake to:

(a) Prevent its nationals or foreigners on its territory from engaging in any of the acts mentioned in Article 1 of this Convention;

(b) Prevent entry into or passage through its territory of any mercenary or any equipment destined for mercenary use;

(c) Prohibit on its territory any activities by persons or organizations who use mercenaries against any African State member of the Organization of African Unity or the people of Africa in their struggle for liberation;

(d) Communicate to the other Member States of the Organization of African Unity either directly or through the Secretariat of the OAU any information related to the activities of mercenaries as soon as it comes to its knowledge;

(e) Forbid on its territory the recruitment, training, financing and equipment of mercenaries and any other form of activities likely to promote mercenarism;

(f) Take all the necessary legislative and other measures to ensure the immediate entry into force of this Convention.

Article 7. Penalties

Each contracting State shall undertake to make the offence defined in Article 1 of this Convention punishable by severest penalties under its laws, including capital punishment.

Article 8. Jurisdiction

Each contracting State shall undertake to take such measures as may be necessary to punish, in accordance with the provisions of Article 7, any person who commits an offence under Article 1 of this Convention and who is found on its territory if it does not extradite him to the State against which the offence has been committed.

Article 9. Extradition

1. The crimes defined in Article 1 of this Convention are not covered by national legislation excluding extradition for political offences.

2. A request for extradition shall not be refused unless the requested State undertakes to exercise jurisdiction over the offender in accordance with the provisions of Article 8.

3. Where a national is involved in the request for extradition, the requested State shall take proceedings against him for the offence committed if extradition is refused.

4. Where proceedings have been initiated in accordance with paragraphs 2 and 3 of this Article, the requested State shall inform the requesting State or any other State member of the OAU interested in the proceedings, of the result thereof.

5. A State shall be deemed interested in the proceedings within the meaning of paragraph 4 of this Article if the offence is linked in any way with its territory or is directed against its interests.

Article 10. Mutual assistance

The contracting States shall afford one another the greatest measures of assistance in connection with the investigation and criminal proceedings brought in respect of the offence and other acts connected with the activities of the offender.

Article 11. Judicial guarantee

Any person or group of persons on trial for the crime defined in Article 1 of this Convention shall be entitled to all the guarantees normally granted to any ordinary person by the State on whose territory he is being tried.

Article 12. Settlement of disputes

Any dispute regarding the interpretation and application of the provisions of this Convention shall be settled by the interested parties in accordance with the principles of the Charter of the Organization of African Unity and the Charter of the United Nations.

Article 13. Signature, ratification and entry into force

1. This Convention shall be open for signature by the Members of the Organization of African Unity. It shall be ratified. The instruments of ratification shall be deposited with the Administrative Secretary-General of the Organization.

2. This Convention shall come into force 30 days after the date of the deposit of the seventeenth instrument of ratification.

3. As regards any signatory subsequently ratifying the Convention, it shall come into force 30 days after the date of the deposit of its instrument of ratification.

Article 14. Accession

1. Any Member State of the Organization of African Unity may accede to this Convention.

2. Accession shall be by deposit with the Administrative Secretary-General of the Organization of an instrument of accession, which shall take effect 30 days after the date of its deposit.

Article 15. Notification and registration

1. The Administrative Secretary-General of the Organization of African Unity shall notify the Member States of the Organization of:

- (a) The deposit of any instrument of ratification or accession;
- (b) The date of entry into force of this Convention.

2. The Administrative Secretary-General of the Organization of African Unity shall transmit certified copies of the Convention to all Member States of the Organization.

3. The Administrative Secretary-General of the Organization of African Unity shall, as soon as this Convention comes into force, register it pursuant to Article 102 of the Charter of the United Nations.

IN WITNESS WHEREOF, We, the Heads of State and Government of the Member States of the Organization of African Unity have appended our signatures to this Convention.

DONE at Libreville (Gabon), this 3rd day of July 1977 in the Arabic, English, and French languages, all texts being equally authoritative, in a single original copy which shall be deposited in the archives of the Organization of African Unity.

ANNEX III

**Protocol Additional to the Geneva Conventions of
12 August 1949, and relating to the Protection of Victims of
International Armed Conflicts
(Protocol I), adopted on 8 June 1977**

Article 47. MERCENARIES

1. A mercenary shall not have the right to be a combatant or a prisoner of war.
1. A mercenary is any person who:
 - (a) Is specially recruited locally or abroad in order to fight in an armed conflict;
 - (b) Does, in fact, take a direct part in the hostilities;
 - (c) Is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
 - (d) Is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;

(e) Is not a member of the armed forces of a Party to the conflict;
and

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

ANNEX IV

**International Covenant on Civil and Political Rights and
International Covenant on Economic, Social and Cultural Rights,
adopted on 16 December 1966**

Common article 1

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

Human Rights Fact Sheets:

- No. 1 *Human Rights Machinery*
- No. 2 *The International Bill of Human (Rev.1)*
- No. 3 *Advisory Services and Technical Cooperation in the Field of Human Rights (Rev.1)*
- No. 4 *Methods of Combating Torture*
- No. 5 *Programme of Action for the Second Decade to Combat Racism and Racial Discrimination*
- No. 6 *Enforced or Involuntary Disappearance (Rev.2)*
- No. 7 *Communications Procedures*
- No. 8 *World Public Information Campaign for Human Rights*
- No. 9 *The Rights of Indigenous Peoples (Rev.2)*
- No. 10 *The Rights of the Child (Rev.1)*
- No. 11 *Summary or Arbitrary Executions (Rev.1)*
- No. 12 *The Committee on the Elimination of Racial Discrimination*
- No. 13 *International Humanitarian Law and Human Rights*
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- No. 15 *Civil and Political Rights: The Human Rights Committee*
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