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IMPORTANCE OF THE UNIVERSAL REALIZATION OF THE RIGHT OF PEOPLES TO SELF-DETERMINATION AND OF THE SPEEDY GRANTING OF INDEPENDENCE TO COLONIAL COUNTRIES AND PEOPLES FOR THE EFFECTIVE GUARANTEE AND OBSERVANCE OF HUMAN RIGHTS

Question of the use of mercenaries

Note by the Secretary-General

1. In accordance with paragraph 8 of General Assembly resolution 42/96 of 7 December 1987, the Secretary-General has the honour to transmit herewith the report of the Special Rapporteur of the Commission on Human Rights on the question of the use of mercenaries as a means of impeding the exercise of the right of peoples to self-determination, which was submitted to the Commission at its forty-fourth session (see annex).

2. By its decisions 1988/126 and 1988/129 of 27 May 1988, the Economic and Social Council approved Commission on Human Rights resolution 1987/7 of 22 February 1988, concerning the mandate of the Special Rapporteur.

ANNEX

Report on the question of the use of mercenaries as a means of impeding the exercise of the right of peoples to self-determination, submitted by the Special Rapporteur, Mr. Enrique Bernales Ballesteros (Peru)*

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* Previously issued in document E/CN.4/1988/14

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I. INTRODUCTION

1. The Commission on Human Rights, decided at its forty-third session, to appoint a Special Rapporteur on the question of mercenaries. Commission resolution 1987/16, adopted on 9 January 1987, provided in paragraph 1 that the Commission would "... appoint for one year a special rapporteur 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". This resolution also requests the Special Rapporteur to submit to the Commission at its forty-fourth session a report on his activities regarding this question (para. 6).

2. The immediate precursors of this resolution are to be found in Economic and Social Council resolution 1986/43 of 23 May 1986 and General Assembly resolution 41/102 of 4 December 1986. Paragraph 6 of both the former and the latter urge the Commission on Human Rights to appoint a special rapporteur on this subject with a view to preparing a report for consideration at the forty-fourth session of the Commission.

3. By its decision 1987/144 of 29 May 1987, the Economic and Social Council approved the Commission's decision to appoint a special rapporteur. On the same date, the Council also adopted resolution 1987/61, in which, inter alia, it endorsed "... the decision of the Commission on Human Rights to appoint a Special Rapporteur" (para. 5).

4. Press release HR/2062 of 3 September 1987 announced the appointment of the Special Rapporteur by the Chairman of the Commission on Human Rights at its forty-third session. Following consultation with the officers of the Commission, the Chairman decided to appoint Mr. Enrique Bernales Ballesteros (Peru) as Special Rapporteur of the Commission on the question of mercenaries.

5. On 7 December 1987, the General Assembly adopted resolution 42/96, which "welcomes with satisfaction the recent appointment by the Commission on Human Rights of a special rapporteur ..." (para. 8), who will report to the Commission at its forty-fourth session. This resolution also requests "... that the report be transmitted to the General Assembly at its forty-third session".

6. Pursuant to the requests contained in the above-mentioned resolutions, the Special Rapporteur has the honour to submit the present document, for the consideration of the Commission on Human Rights, as his first report on the 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. In view of the short time between the date of his appointment (September 1987) and the date by which the text had to be ready (January 1988), this report is necessarily preliminary in nature. Thus, the survey of mercenary activities in the past, the review of the current state of international law on the subject, the development of a typology of mercenary activities and the resulting conclusions and recommendations submitted at the end of the report are formulated with a view to informing the members of the Commission about the problems in relation to mercenary activities identified by the Special Rapporteur at the beginning of his work, although he will have to pursue his analysis further in the future.

7. Despite the preliminary nature of the report, the Special Rapporteur has undertaken from the beginning to adopt a rigorous working method which involves more than can be done in a few months, in the expectation that this work can be continued with the staff and material assistance that the project requires. Thus, in complying with a mandate formulated in Commission resolution 1987/16, the Special Rapporteur has felt it necessary to make an exhaustive analysis of cases of mercenary activities reported in the past and of the way they have been dealt with in the various international forums, together with a review of current international law on the subject (chapter III of the report). Chapter IV then summarizes the information received from the various sources consulted, in accordance with paragraph 3 of Commission resolution 1987/16. On the basis of the information received, chapter V attempts to deal with the difficult problem of defining the term "mercenary" by developing a typology of such activities. Finally, chapters VI and VII offer some preliminary conclusions and recommendations with a view to continuing the analysis of the problem until final proposals can be made.

II. ACTIVITIES OF THE SPECIAL RAPPORTEUR

8. The Special Rapporteur accepted his appointment, announced in press release HR/2062 of 3 September 1987, with the sole aim of contributing to the analysis and better understanding of the complex phenomenon of mercenary activities throughout the world, thereby facilitating the work of the Commission on Human Rights.

9. In carrying out his mandate, the Special Rapporteur visited Geneva during the first week of October 1987 and held consultations with the Centre for Human Rights to establish his programme of work. Pursuant to paragraph 3 of Commission resolution 1987/16, the Special Rapporteur sent letters to the Governments of the States Members of the United Nations, to international organizations and United Nations specialized agencies and bodies, and to non-governmental organizations in consultative status with the Economic and Social Council, to obtain credible information relating to his mandate.

10. On 7 October 1987, the Special Rapporteur received two members of the International Commission of Jurists, a non-governmental organization, who referred to alleged mercenary activities connected with the "Contras" waging an armed struggle against the Government of Nicaragua. According to their sources, such activities were resulting in major violations of human rights and serious damage to the economic and social infrastructure of Nicaragua. They also reported that the financing of these unlawful activities came from public and private funds raised in the United States of America and other countries.

11. On 8 October 1987, the Special Rapporteur received two representatives from the Permanent Mission of the United States to the United Nations Office at Geneva. Both representatives expressed their country's view that the term "mercenary" was frequently misused, although the definition contained in Protocol I of 1977 to the Geneva Conventions of 1949 was the only one which the United States considered to enjoy international consensus.

12. On the same day, the Special Rapporteur received the Secretary-General of the International Commission of Jurists. On that occasion, a discussion was held about problems relating to the definition of "mercenary" and the practice of mercenary activities in places such as Nicaragua and Angola. Reference was also made, as a comparison, to the activities of the so-called "Foreign Legion" in both France and Spain.

13. On 9 October 1987, the Special Rapporteur had a meeting with a representative of the International Committee of the Red Cross (ICRC), who referred to the characteristics of the "mercenary" as defined in article 47 of Protocol I to the Geneva Conventions of 1949, concerning international armed conflicts. He also noted that, in ius ad bellum, the idea of a "mercenary" was a political one and therefore differed from the one put forward for strictly humanitarian purposes in article 47. Moreover, alleged mercenary activities which were being carried on outside the context of an international armed conflict would not be regarded as such under international humanitarian law. In any case, any person, whether he was considered a mercenary or not, deserved humanitarian treatment in accordance with article 75 of Protocol I ("Fundamental guarantees") to the Geneva Convention of 12 August 1949 relative to the Protection of Civilian Persons in Time of War, and article 4 of Protocol II relating to non-international armed conflicts.

14. On the same day, the Special Rapporteur received a representative of the United Republic of Tanzania. The African diplomat expressed his country's concern at the situation in Namibia. According to him, mercenaries from all over the world had joined the South African armed forces and were causing numerous casualties in Namibia. He also reported that the guerrilla movements RENAMO in Mozambique and UNITA in Angola were using mercenaries paid by South Africa. Lastly, he referred to past mercenary activities in countries such as Zaire, Seychelles, Guinea, Sierre Leone and Comoros.

15. The Special Rapporteur visited New York from 17 to 22 November 1987. During this visit, on 18 November, he met the Secretary-General of the United Nations, who reaffirmed his willingness to give the Special Rapporteur full support in fulfilling his mandate and offered to provide him with the staff and resources needed to bring it to a successful conclusion.

16. The Special Rapporteur held a meeting on 19 November 1987 with representatives of 12 of the countries which had sponsored the draft resolution on mercenarism in the Third Committee of the General Assembly. The representatives referred to the various mercenary activities frequently reported in Africa. Later the Special Rapporteur was invited to address the Third Committee, where he stated that the frame of reference for his study comprised the mandate received by the Commission on Human Rights and the guidelines contained in the resolutions adopted by the General Assembly on the recommendation of the Third Committee. He also called upon all States to collaborate wholeheartedly in the fulfilment of his mandate, whose essential purpose was 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. Finally, the Special Rapporteur met the Under-Secretary-General for Human Rights, who reaffirmed the willingness of the Centre for Human Rights to provide the assistance necessary for the complete fulfilment of the Special Rapporteur's duties.

17. On 20 November 1987, the Special Rapporteur also met members of the delegations of Botswana, Nicaragua, Nigeria and Peru to the Third Committee. Lastly, on 21 November 1987, he met the Deputy Minister for Foreign Affairs of Angola, who reported on the military occupation of two southern provinces in his country by the South African armed forces and the Angolan armed movement UNITA. He said that UNITA had recruited mercenaries from the United States and South Africa, some of whom had been captured and convicted of being mercenaries and were serving sentences in Angolan prisons. The Deputy Minister also extended an official invitation to the Special Rapporteur to visit Angola. The Special Rapporteur thanked him for the invitation and accepted it in principle, it being agreed that the Government of Angola would make a proposal concerning the dates and tentative programme for the visit at a later stage. At the time of writing, the Special Rapporteur had not yet received this proposal.

18. On his return to Lima, the Special Rapporteur spent a week working with the Secretariat from 30 November to 5 December 1987. During that time he evaluated the information received from the various sources consulted, further analysed the information concerning past mercenary activities and began to establish the general outlines of this report. He also held individual working meetings with the official responsible for human rights in the

Peruvian Ministry of Foreign Affairs and with three representatives of the Andean Commission of Jurists, a non-governmental organization, who outlined the salient points of the written information they were contributing in response to the Special Rapporteur's general request to provide information relating to his mandate, as called for in paragraph 3 of Commission on Human Rights resolution 1987/16.

19. Finally, the Special Rapporteur visited Geneva from 7 to 17 January 1988 to resume his consultations with the Secretariat and finish drafting this report.

III. BACKGROUND

A. Mercenary practices

20. The historical sources consulted by the Special Rapporteur show that mercenary practices go far back in time and were relatively frequent in wartime, tolerated and even encouraged by States themselves or the political organizations out of which they grew, as part of a widespread feeling that the phenomenon was acceptable and its use perfectly legal. Thus when mercenaries were captured, they were treated as prisoners of war.

21. This situation began to change in the 1960s, during the early years of the process of decolonizing the peoples under colonial domination, especially in Africa. The States in question were concerned at the use of foreign mercenary forces to prevent or hinder the exercise of the right to self-determination of some of the peoples under colonial domination, giving rise to painful colonial wars. At a later stage, it was found that mercenary forces were being used in an attempt to overthrow or destabilize some of the Governments of States that had recently won their independence as the end result of the decolonization process, when for ideological, political, economic or strategic reasons the States did not meet the interests or expectations that the colonial Powers had built up in the immediate past.

22. Under these circumstances, mercenaries quickly came to be considered acceptable. For the States most seriously affected it became the practice to treat mercenaries as common criminals, denying them the status of prisoners of war. That was what happened in the crisis in the Congo (1966) and Nigeria. In States' subsequent practice we find that, in the absence of international and even domestic legislation making mercenarism a punishable offence in itself, mercenaries are punished for the ordinary offences they have committed (killings, lootings, assaults, etc.). With no attempt to be exhaustive, we may cite the well-known case of Rolf Steiner, who was arrested in the Sudan in 1971 and accused of being a mercenary; he was ultimately sentenced to a 20-year prison term for committing various ordinary offences listed in the Sudanese Criminal Code.

23. In a similar case, 13 mercenaries of British and United States nationality were captured in Angola in 1976. Four of them were sentenced to death and the other nine to prison terms. In this case they were convicted as mercenaries, in accordance with the terms of two resolutions of the Organization of African Unity (OAU) and four of the United Nations General Assembly. Formally, however, they were tried under a domestic Angolan law, which is said to have been enacted after the accused had been captued. The sentences are also alleged to have been handed down by an ad hoc court.

24. On the other hand, seven mercenaries who were tried in Seychelles in 1981 were not accused of the offence of mercenarism as such, since there was no such offence in the domestic Criminal Code. They were therefore sentenced to various prison terms for the offences of treason and illegal use of firearms. They were later pardoned and expelled from the country.

B. International handling of complaints

25. In the international sphere, complaints have been made about mercenary practices in three different contexts: relations between States, threats to

international peace and security, and the exercise of the right to self-determination and other human rights. The three contain a common factor: the complaints are channelled through international organizations, and especially the United Nations.

26. In the first case, it has quite often happened that one State, through a letter or note verbale of protest addressed to the Secretary-General of the United Nations, accuses another State of using mercenary forces to carry out activities that might endanger the sovereignty or territorial integrity of the State making the complaint. To cite merely the latest of these complaints noted by the Special Rapporteur, the Permanent Representative of Nicaragua to United Nations Headquarters in New York sent the Secretary-General a letter dated 8 December 1986 (A/41/962, S/18514) protesting against the continued presence in Honduran territory of mercenary forces in the service of the United States, in open violation of the International Court of Justice's decision of 27 June 1986. It accordingly requested that the Government of Honduras should take the necessary measures to capture and disarm the mercenary forces.

27. Along similar lines, the Permanent Mission of Suriname to the United Nations Headquarters in New York sent the Secretary-General a letter on 13 July 1987 (document A/42/398, of 13 July 1987), in which it complained of an armed combat that occurred on 9 July 1987 between armed forces of its army and "a band of terrorists", about 125 km from the border with French Guiana. The combat led to the death of two white mercenaries, whose bodies were found dressed in uniforms of the French Foreign Legion. According to the letter, an identification card in the name of Laurent Takacs, of Swiss origin, issued by the French Foreign Legion, was found on one of the bodies.

28. In the second case mentioned above, the subject is dealt with in the United Nations Security Council, which on several occasions has adopted unanimous resolutions condemning mercenary activities against the interests of the complainant States, in so far as they constitute interference in the internal affairs of those States and threaten their independence and territorial integrity. The Council has also referred in its resolutions to the loss of life and substantial damage to property frequently caused by mercenary activities. Mention should be made in this connection of Council resolution 239 (1967), of 10 July 1967, which calls upon Governments to ensure that their territory and their nationals are not used for the recruitment, training and transit of mercenaries designed to overthrow the Government of the Democratic Republic of the Congo (para. 3). Paragraph 2 of the resolution condemns any State which carries out or tolerates similar mercenary practices, with the objective of overthrowing the Governments of States Members of the United Nations.

29. Along the same lines, Council resolutions 405 (1977), of 14 April 1977, and 419 (1977), of 24 November 1977, condemn the mercenary activities of 16 January 1977 in the People's Republic of Benin, call upon States to take the necessary measures, under their respective domestic laws, to prohibit the recruitment, training and transit of mercenaries on their territory and condemn the armed aggression perpetrated against Benin and all forms of interference, including the use of international mercenaries to destabilize States and/or to violate their territorial integrity, sovereignty and independence.

30. In similar terms, Security Council resolutions 496 (1981), of 15 December 1981, and 507 (1982), of 28 May 1982, condemn the mercenary aggression against Seychelles on 25 November 1981; resolution 507 also reaffirms the Council's condemnation of any State which permits or tolerates the recruitment of mercenaries with the objective of overthrowing the Governments of Member States.

31. In the last two situations mentioned (Benin and Seychelles), the Security Council also decided in both cases to establish Commissions of Inquiry composed of representatives of member States of the Council, which would report their findings to the Council. Finally, in the case of Seychelles, the Council also decided to establish, by 5 June 1982, a special fund for the Republic of Seychelles, to be supplied by voluntary contributions, for the economic reconstruction of that country; the Fund was co-ordinated by an Ad Hoc Committee of four members of the Council, chaired by France.

32. The third case referred to above concerns the negative influence of mercenarism on the exercise of peoples' right to self-determination and other basic human rights. This approach has been adopted repeatedly by the Commission on Human Rights, the Economic and Social Council and the General Assembly itself. Limiting ourselves to the past two years, we might point out that the Commission on Human Rights, in resolution 1986/26 of 10 March 1986, condemned mercenary activities and the various forms of support to mercenaries, "... including so-called humanitarian aid for the purpose of destabilizing and overthrowing the Governments of southern African States and fighting against the national liberation movements of peoples struggling for the exercise of their right of self-determination" (para. 1). Paragraph 1 of Economic and Social Council resolution 1986/43, of 23 May 1986, contains the same wording. The General Assembly, in resolution 41/102 of 4 December 1986, also condemned "... the increased recruitment, financing, training, assembly, transit and use of mercenaries", for the purpose of "destabilizing and overthrowing the Governments of southern Africa and Central America and of other developing States and fighting against the national liberation movements of peoples struggling for the exercise of their right to self-determination" (para. 1); and called upon all States to "extend humanitarian assistance to victims of situations resulting from the use of mercenaries, as well as from colonial or alien domination or foreign occupation" (para. 5).

33. The Commission on Human Rights, for its part, in resolution 1987/16 of 9 March 1987, expressed its concern "... at the loss of life, the substantial damage to property and the long-term negative effects on the economy of southern African countries resulting from mercenary aggressions" (eleventh preambular paragraph). Following that, on 29 May 1987, the Economic and Social Council adopted resoltion 1987/61, in paragraph 1 of which it repeated its condemnation of mercenary activities, as well as all other forms of support to mercenaries for the purpose of destabilizing and overthrowing the Governments of southern African, Central American and other developing States; and called upon all States to ensure, by both administrative and legislative measures, that their territory and nationals were not used for such mercenary activities "... or the planning of such activities designed to destabilize or overthrow the Government of any State and to fight the national liberation movements struggling against racism, apartheid, colonial

domination, foreign intervention and occupation for their independence, territorial integrity and national unity" (para. 3). Finally, on 7 December 1987, the General Assembly adopted resolution 42/96, in which it again condemned the use of mercenaries to destabilize and overthrow the Governments of southern Africa and Central America and of other developing States (para. 1); again called upon all States to adopt administrative and legislative measures to ensure that their territories or nationals were not used for mercenary activities (para. 4); urged States to adopt legislative measures under their respective domestic laws "... to prohibit the recruitment, financing, training and transit of mercenaries on their territory" (para. 5); called upon States to extend "... humanitarian assistance to victims of situations resulting from the use of mercenaries, as well as from colonial or alien domination or foreign occupation" (para. 6); and considered it "inadmissible to use channels of humanitarian and other assistance to finance, train and arm mercenaries" (para. 7).

C. Current state of international law in the field

34. Efforts are currently under way in the area of international codification to identify mercenarism as an illegal act and classify it as an offence that is essentially a crime against humanity. This interest in developing international law basically appeared during the 1960s, in the context of the policy encouraged by the United Nations in the area of decolonization, recognition of national liberation movements and the affirmation of the right of peoples to self-determination. In other times mercenarism was tolerated as a phenomenon in keeping with the easy-going way in which armed forces were formed and recruited in the service of States. But such permissiveness began gradually to be restricted from the nineteenth century onwards, when the trend towards setting up national armed forces, governed by the constitutional statutes of each sovereign State become strengthened and the obligation was established for their citizens to participate exclusively in those forces, under certain conditions and for the purposes of national defence.

35. Pursuant to the Charter of the United Nations and in keeping with the progress made towards ending colonialism, racism and other forms of violations of human and peoples' rights, international rules are being developed to express new ways of treating mercenarism in international law. Some of the main sources are the Additional Protocol I of 1977 to the Geneva Conventions of 12 August 1949 (in the context of humanitarian law), the OAU Convention of 1977 and the preparatory work of the Ad Hoc Committee, currently in progress, on the drafting of a United Nations convention against mercenarism.

1. Additional Protocol I of 1977 to the Geneva Conventions

36. On 10 June 1977, the Diplomatic Conference in which many States had participated for four sessions beginning in 1974 signed the Final Act, to which the Additional Protocols to the Geneva Conventions of 1949 were attached. These Protocols are international treaties binding on States, six months after they have deposited the instruments of ratification or accession. Both Protocols reaffirm and develop international humanitarian law and their sphere of application is situations arising in international armed conflicts. As regards their nature and objective, the Preamble to Protocol I recalls that every State has the duty in conformity with the Charter of the United Nations, to refrain in its international relations from the threat or use of force against the sovereignty, territorial integrity or political

independence of any State. It goes on to state that it is nevertheless necessary to reaffirm and develop the provisions protecting the victims of armed conflicts, which cannot be construed as legitimizing or authorizing any act of aggression or any other use of force inconsistent with the Charter of the United Nations.

37. In chapter III, section II, under the heading "Status of combatant or prisoner of war", article 47 contains the Protocol's only mention of the question of mercenaries. This should be emphasized, because the Protocol does not apply specifically to mercenarism, but refers to this problem as an issue potentially arising in an international armed conflict, for which reason it is necessary to provide for that possibility and specify the legal status of the mercenary in international humanitarian law and the elements used to identify it.

38. Article 47 states the following:

> 1. A mercenary shall not have the right to be a combatant or a prisoner of war.
>
> 2. 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.

39. The article contains a definition of the concept of "mercenary", by identifying the elements which taken together determine when mercenaries are being used in cases of international armed conflict. As a background to this definition and the denial of combatant or prisoner-of-war status to mercenaries, it should be recalled that the United Nations began to condemn the use of mercenaries and to declare support for national liberation movements in the 1960s, in connection with the independence process occurring in various parts of Africa. Thus the Security Council demanded the withdrawal of mercenaries from the Congo and in 1967 agreed to request States to prevent the recruitment of mercenaries in their territories and the training of mercenaries for the purpose of overthrowing Governments of foreign States. In 1968, the General Assembly declared that: "The practice of using mercenaries against movements for national liberation is a criminal act" and classified

mercenaries as outlaws (resolution 2465 (XXIII) of 20 December 1968, confirmed by other resolutions: 2548 (1969), 2708 (1970), 3103 (1973), 33/24 (1978), etc.). Again in 1974, the General Assembly adopted resolution 3314, which contained a definition of aggression that included mercenarism as one of its forms, i.e., "The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State."

40. This background led to the inclusion of mercenaries in article 47 of Additional Protocol I, the wording being adopted as a compromise consensus, since the question raised in paragraph 1 as to whether or not mercenaries were prisoners of war and had combatant status was the subject of comment, by delegations which claimed that the Protocol should not go so far, given its essentially humanitarian nature and by other delegations which objected that paragraph 2 was ambiguous and difficult to apply in practice and referred exclusively to mercenaries (individuals) and not mercenarism, which was a broader concept, because it included the responsibilities of the States and organizations concerned in mercenary acts.

41. In any event, the basis for denying mercenaries the right to combatant or prisoner-of-war status lies in the condemnation of the use of mercenaries per se.

42. Leaving aside the objections to it, with which we will deal in chapter V of this report, the definition of "mercenary" contained in paragraph 2 is an effort at clarification which filled a gap in international legislation despite being limited to the sphere of international humanitarian law. The features of this definition in article 47 are the following: that money is the basic motive in the decision to enlist; that the recruitment and enlistment for the purpose of fighting in an armed conflict; and that the person does in fact participate in the combat. This excludes a volunteer who joins the armed forces of a State as a regular and permanent member, independently of whether the State becomes a participant in an armed conflict. The third feature is the need to be a non-resident foreigner; i.e. the specific exclusion from mercenary status of any one who is a national of a party to the conflict or who resides in a territory controlled by a party to the conflict.

43. The final feature of the definition is that no one may be termed a mercenary who is a member of the armed forces of a party to the conflict or who has been sent on official duty as a member of its armed forces by a State which is not a party to the conflict. One important element for the understanding and application of article 47 of Additional Protocol I is that no single requirement set forth in subparagraphs (a) to (f) is sufficient in itself for a person to be classified as a mercenary. The requirements are cumulative and concurrent, and all must be met for a person to be described as a mercenary. This is also one of the aspects that has raised the most objections to the application of article 47, since many have pointed out that these requirements are in fact very difficult to prove and that they make it easy for the mercenary to avoid being classifed as such, while the party that has been attacked loses its legitimate right to have him punished and obtain redress.

44. Article 47 of Additional Protocol I is accepted unreservedly by several Member States of the United Nations. Basic elements of the definition have been taken over in the OAU Convention for the Elimination of Mercenarism in Africa. Finally, the Ad hoc Committee on the Drafting of an International Convention against Mercenarism has incorporated the full text of article 47, paragraph 2, of Additional Protocol I into the first part of article 1 of the text of its second consolidated negotiating basis of the Convention.

2. OAU Convention of 1977

45. Africa is without doubt the continent most seriously affected by mercenarism. In the past, an attempt was made to paralyse the historical process by which it achieved independence through the use of mercenary forces linked in some cases to colonialist and racist Powers and in other times to private interests. Similarly, after independence, many countries were victims of mercenary aggression aimed at infringing their sovereignty, right to self-determination and territorial integrity.

46. These events justify the great effort made by the African States to gain international support for their cause and for the condemnation of mercenarism, a problem that still exists today in a number of African countries which report that they are victims of mercenary aggression. The Security Council and General Assembly resolutions condemning mercenarism were brought about by the result of strong pressure from African States. These States also participated in the meetings of the Diplomatic Conference which adopted the Protocols Additional to the Geneva Conventions of 1949. However, African efforts to arrive at an effective instrument for eliminating mercenary activities in the territories of Africa were aimed at harmonizing differing views in order to achieve a binding convention for all African States. A draft convention on the elimination of mercenaries in Africa was submitted to the Assembly of Heads of State and Government of the OAU held at Rabat in 1972. Ultimately, OAU adopted the Convention for the Elimination of Mercenarism in Africa at Libreville in 1977. This Convention entered into force in 1985.

47. The first point raised by this Convention is that it is a complete legal instrument on mercenarism and is therefore both broader and more specific than article 47 of Additional Protocol I. Secondly, it is a regional Convention, which must be complied with only by the African States that have ratified or acceded to it. Thirdly, it is an instrument of international criminal law which is applicable in the territory of the States parties to the Convention and to all persons, juridical or natural, covered by its provisions. Fourthly, it imposes precise obligations on each of the States parties, including the need to take appropriate measures in their domestic criminal law.

48. The Convention is composed of 14 articles and contains the following features:

(a) The definition covers both the mercenary as an identifiable individual and mercenarism as a wrongful act and a crime against peace and security in Africa, whether committed by an individual, group, association or State. The definition of "mercenary", in the first part of article 1 is similar to that found in article 47, paragraph 2, of the Additional Protocol.

However, the two texts differ with regard to the question of private gain, in that the OAU text eliminates the subjective assessment ("essentially") of the amount of material compensation promised and received.

(b) The article concerning the status of mercenaries eliminates any possibility of unilateral granting of prisoner-of-war or combatant status, by absolutely denying this right.

(c) States responsible for criminal acts or omissions relating to the crime of mercenarism may be accused before any competent OAU or international organization tribunal or body (article 5.2 of the Convention).

(d) The Convention establishes very specific obligations for States parties to the Convention with regard to the prevention of mercenarism; these include the prohibition of recruitment, passage through and use of the territory, and equipment, financing, training and any other form of activities likely to promote mercenarism. States are also required to communicate to the other member States any information related to the activities of mercenaries, take domestic legislative measures and punish the crime of mercenarism by the severest penalties, including capital punishment.

(e) The Convention makes provision for the jurisdiction of each State, extraditable cases, mutual assistance among States parties and rules for the settlement of disputes between States with regard to the interpretation and application of the provisions of the Convention.

(f) Finally, judicial guarantees are established for any person on trial for the crime of mercenarism. Such a person is entitled to all the guarantees normally granted to any ordinary person by the State on whose territory he is being tried.

3. Ad Hoc Committee on the drafting of a United Nations convention

49. In 1979, the United Nations General Assembly, in response to reports submitted by Member States and to increasing and very diverse mercenary activities, established the Ad Hoc Committee on the Drafting of an International Convention against the Recruitment, Use, Financing and Training of Mercenaries. The intention was to fill a gap in international legislation, which currently does not provide effective sanctions against mercenary activities, despite the repudiation and condemnation of such activities in numerous United Nations resolutions, which describe mercenarism as a crime against humanity.

50. The Ad Hoc Committee has worked for more than six years, after obtaining an extension of its mandate by the United Nations, in view of the complexity of its task and the differences still preventing a consensus which would allow a draft convention to be submitted to the General Assembly. The members of the Ad Hoc Committee are: Algeria, Angola, Bangladesh, Barbados, Benin, Bulgaria, Canada, Cuba, Democratic Yemen, Ethiopia, France, German Democratic Republic, Germany, Federal Republic of, Haiti, India, Italy, Jamaica, Japan, Mongolia, Nigeria, Portugal, Senegal, Seychelles, Spain, Suriname, Turkey, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, Viet Nam, Yugoslavia, Zaire and Zambia. The seventh session will be held from 25 January to 12 February 1988.

51. The discussion in the Ad Hoc Committee has brought out varying views about how to deal with the phenomenon of mercenarism and the factors underlying it, depending on the nature and type of conflict in which the mercenaries participate. This discussion has shown that there is a trend in favour of including the definition of a mercenary contained in article 47 of Additional Protocol I, but taking it further within a broader treatment extending beyond international armed conflict. In 1987 the discussion in the Ad Hoc Committee reached a stage where it was possible to submit a second revised consolidated negotiating basis of a convention against mercenarism, in view of the many disagreements which still prevented its being made into a draft convention. Of a total of 23 articles comprising the consolidated basis, only 4 have been fully accepted; 11 are the subject of partial objections and 8 are objected to in full.

52. The aims towards which discussion has been focused and on which consensus is being sought are as follows:

1. To propose a convention which emphasizes the prevention of mercenarism;

2. To provide a definition of the term "mercenary" which covers not only cases of international armed conflict but also situations in which there is mercenary activity even though there may be no armed conflict or the conflict may not be international;

3. The extension of the notion of mercenary to include those participating in the recruitment, use, financing or training of mercenaries;

4. The inclusion of States as having an obligation to abstain from any type of direct or indirect action in relation to mercenarism;

5. The drafting of domestic legislation in line with the relevant provisions of the convention;

6. Co-operation among States, on such matters as communication, the determination of jurisdiction and extradition;

7. Judicial guarantees for captured mercenaries;

8. Sanctions against States parties which fail to fulfil the obligations specified in the convention; such failure would constitute an international wrongful act engendering the international responsibility of that State.

4. Work of the International Law Commission

53. In the context of the work of the International Law Commission (ILC), the possibility is being studied of including mercenarism among acts constituting an offence against the peace and security of mankind. The third report of the Special Rapporteur, Mr. D. Thiam, on the draft Code of Offences against the Peace and Security of Mankind includes mercenarism among these offences. The Special Rapporteur specifies that he is concerned with mercenaries "... who have been specially recruited for the purpose of attacking a country in order to destabilize or overthrow the established authorities, for any number of

reasons, generally of an economic or political nature". Mercenarism therefore ranks "among the means of subversion used against small and newly independent States, or among the means of hampering the action of national liberation movements" (Yearbook of the International Law Commission, 1985, volume II, part 1, p. 80, para. 160). The Special Rapporteur adds that the draft code should focus on "... the responsibility of States which organized, equipped and trained mercenaries and provided them with transit facilities" (ibid., para. 163). Lastly, the Special Rapporteur refers to "... the use of armed bands to violate the territorial integrity of another State", which would constitute an act of aggression; and article 3, paragraph (g), of the Definition of Aggression, which "refers specifically to mercenaries as well as to armed bands" (ibid., para. 164).

IV. PRESENT STATUS OF THE QUESTION OF MERCENARIES IN THE LIGHT OF INFORMATION RECEIVED BY THE SPECIAL RAPPORTEUR

A. Information received from States

54. The Special Rapporteur's request for information, by which he began his work under resolution 87/16, was answered by 19 Member States: Algeria, Bangladesh, Barbados, Benin, Chad, Czechoslovakia, Dominican Republic, Guatemala, Kiribati, Libya, Monaco, Peru, Philippines, Portugal, Rwanda, Saudi Arabia, Togo, United States and Zimbabwe. To these replies should be added the oral communication received from Angola through its Deputy Minister for Foreign Affairs at a meeting with the Special Rapporteur in New York on 20 November 1987, referred to in chapter II of this report.

55. From the communications received it is evident that Member States are ready to collaborate with the Special Rapporteur in his task, although some of them have no precise information on situations involving the use of mercenaries. As regards the principles governing the international community, however, they agree in condemning mercenary practices, regarding them, in line with United Nations resolutions, as a crime against humanity and peace and a violation of State sovereignty and the right of peoples to self-determination. This unanimity is important, since it indicates a willingness to arrive at specific international agreements in order to eliminate mercenarism once and for all.

1. Complaints of mercenary activities

56. In the reports received from Member States, the Special Rapporteur distinguishes between, on the one hand, what he calls general denunciations of alleged mercenary activities and, on the other, specific complaints by Member States which report that mercenary forces are being used for aggression on their territory.

57. Among the general denunciations, Algeria says that "the use of mercenaries has resulted in massive and flagrant violations of the human rights of innocent populations, violated the security and stability of sovereign States, interfered in their internal affairs and threatened their independence and territorial integrity. Mercenarism has often been an obstacle to the exercise of the right of peoples to self-determination and a threat to the enjoyment by third world countries and peoples of their sovereign rights and natural wealth and resources. Mercenarism has also been at various times a weapon used against genuine national liberation movements in order to undermine them in their struggle for liberation or to discredit their cause as a legitimate fight for freedom".

58. Referring to the need to combat mercenarism by all means and in all regions, the Algerian contribution notes that Africa has suffered from this problem and still does so in the south, "particularly in Angola and Mozambique, because of the racist policy and expansionist aims of the Pretoria régime". According to the Algerian contribution, Africa's efforts to combat mercenarism won international recognition when OAU adopted a Convention for the Elimination of Mercenarism in Africa in 1977, when the United Nations General Assembly adopted a proposal that an international convention should be drafted on the subject in 1979 and when in resolution 34/140 it agreed that

mercenarism was "a threat to international peace and security" and "a universal crime against humanity". As part of its general denunciation, the Algerian communication observes, finally, that mercenary activities do not merely persist in Africa but have also appeared in other parts of the third world, particularly Central America, all of which "calls for a revival of international co-operation and a strengthening of efforts to eliminate the phenomenon".

59. Another communication which endorses the general condemnation of the use of mercenaries as an infringement of the rights of a people or country is the one from Czechoslovakia. According to that country, mercenarism is a serious obstacle to international peace and security, which has regrettably become ever more common in recent years. It goes on to say that "the people of Nicaragua, southern Africa, Afghanistan and Kampuchea and many other countries have their own experience of mercenaries bringing death, suffering and destruction to their fields and homes".

60. The reply from the Philippines also refers in general terms to the existence of mercenary forces which violate the sovereignty of vulnerable countries in Asia, Africa and Latin America with impunity.

61. As regards specific complaints, two cases should be mentioned, the reply from Chad and the oral communication from the Deputy Minister for Foreign Affairs of Angola. Chad states in its communication that "despite its rejection of mercenarism, its respect for the sovereignty and independence of States and its policy of peace and justice, Chad is the victim of continuing aggression, in which mercenaries are directly involved". It adds that "the forces sent by the Tripoli régime to conquer Chad consist in large part of mercenaries of all kinds, recruited, financed and trained on Libyan soil". It ends by saying that "from this point of view it is permissible to conclude that the legitimate struggle being waged by the Government and people of Chad against the Islamic legion comes under the heading of the application of specific measures to combat mercenarism".

62. The complaint from Angola contains many charges against the Pretoria Government, which it accuses of direct aggression through military occupation of two provinces in southern Angola on the border with Namibia and of recruiting, financing and training mercenaries who then join UNITA, an armed group which does not recognize the legitimate Government of Angola and in alliance with or under the protection of the Pretoria Government infringes the sovereign rights and right of self-determination of the Angolan people. According to the same source, this armed conflict has been stirred up from outside and has constituted serious interference in the consolidation and development of Angola from the very moment when it became independent in 1975. Because of this aggression, it continues, Angola is living in a state of war, which has substantially affected its security, life, economy and territorial integrity. Finally, the report refers to cases where mercenaries have been captured, proved to be such before the Angolan courts and punished accordingly.

63. The Special Rapporteur has thought it appopriate to reproduce these complaints for the information of the Commission on Human Rights in view of the short period of time that has elapsed between the date when he started work (September 1987) and the writing of this report (second week of January 1988), which has prevented him from requesting further details and

from organizing missions to verify the allegations on the spot. Nevertheless, without passing any value judgement, one can make the general observation that the phenomenon of mercenarism continues to be of concern to Member States. This is not simply for reasons of principle and out of respect for the United Nations agreements on the subject, but is also a response to the evident existence of mercenarism and what seems to be the growing use of it whenever any attempt is being made in some way for the sake of outside interests to infringe the sovereign rights, self-determination, security, peace and proper development of the peoples and countries of the third world.

2. Measures taken by States

64. As far as the measures taken by States are concerned, the replies from African countries agree on their commitment to the OAU Convention for the Elimination of Mercenarism in Africa, signed in 1977 and in force since 1985, considering it as a legal instrument binding on the States parties which would help in the struggle against mercenarism. All the replies likewise took a positive view of the work being done by the Ad Hoc Committee on the Drafting of a United Nations Convention against the Recruitment, Use, Financing and Training of Mercenaries.

65. Some States explained that they had domestic legislation condemning mercenarism in accordance with international principles. Thus, Algeria stated that article 76 of its Criminal Code prohibited the recruitment of volunteers or mercenaries on behalf of a foreign Power in Algeria and made it a punishable offence. Benin stated that Ordinance No. 78-34 of 19 October 1978 defined the offence of mercenarism and provided that it should be dealt with by a special court; under article 2 of the Ordinance, the offence of mercenarism was subject to the death penalty, while article 3 made accomplices or accessories liable to forced labour. The Libyan Arab Jamahiriya states that the use of mercenaries against sovereign States and national liberation movements is a criminal act and considers that all States should adopt legislation making the recruitment, financing, training and transit of mercenaries in their territory a punishable offence and prohibiting their citizens from serving as mercenaries. Such provisions have been included in the Libyan Criminal Code of 1956 through the amendments introduced by Act No. 80 of 1975, which refer to article 168 on recruitment for action or aggression against foreign States:

> "Any person who, without permission of the Government, recruits troops for action against a foreign State or performs aggressive acts thereby exposing the Libyan Arab Jamahiriya to the danger of war shall be punished by imprisonment. The penalty shall be life imprisonment if the act results in the severance of diplomatic relations or in retaliation against the Libyan Arab Jamahiriya or its citizens wherever they may be. If war breaks out, the offender shall be punished by death.
>
> "If a Libyan citizen obtains or is promised money or any other profit, even indirectly, from a foreigner for the purpose of performing acts harmful to the interests of the country, he shall be punished by imprisonment and a fine of approximately 1,000 dinars if the act is committed in time of peace. If the offence is committed in time of war it shall be punishable by life imprisonment. If actual damage occurs, the punishment shall be death. A foreigner who offers or promises money or any other inducement shall be liable to the same punishment."

66. Other provisions adopted are articles 184 and 185 of the Libyan Criminal Code, reading as follows:

"Article 184

"Aiding and abetting the aforementioned offences (Citation of excerpts concerning our topic)

"The following shall also be liable to the penalty laid down in article 168:

"1. Any person who, being aware of the intentions of an individual who has committed or attempted to commit one of the offences mentioned, provides him with sustenance, residence, shelter, a meeting place or any other assistance.

"2. Any person who knowingly conceals items or equipment used or prepared for use in committing one of the offences mentioned or materials or documents obtained as a result of the offence.

"3. Any person who knowingly carried letters of a person who has committed or attempted to commit one of the offences mentioned or assists him in any way in seeking, transporting or conveying the object of the offence."

"Article 185

"Aiding and abetting the commission of the aforementioned offences

"A penalty of imprisonment for a term not less than a year and a fine not exceeding 500 dinars shall be imposed on any person who mistakenly aids and abets the commission of one of the offences referred to in the preceding article. If the offence is committed in time of war, the penalty shall be imprisonment for a term not less than two years and a fine not exceeding 1,000 dinars."

67. The communication from Peru does not report any criminal provisions expressly condemning mercenarism, but describes its use as a "massive violation of human rights". It expresses its concern at the use of mercenaries in order to violate human rights and impede the exercise of the right of peoples to self-determination, pointing out that this position is enshrined in article 88 of its Constitution, which "rejects any form of imperialism, colonialism, neo-colonialism or racial discrimination. It is based on solidarity with the oppressed peoples of the world". The Peruvian communication states finally that the international instruments on human rights signed and ratified by Peru and, in the same way, any convention that the United Nations may arrive at against the recruitment, use, financing and training of mercenaries, if things continue along the same path, have for Peru the status of binding constitutional provisions, according to the express terms of article 105 of the Constitution.

68. Portugal states in its reply that the principles by which it is guided, and which are consistent with international law, are contained in its Constitution, and accordingly lead it to include provisions on mercenarism in its criminal law. Thus article 188 of its Criminal Code of 1982 states that:

"2. A crime against peace, punishable by two to six years' imprisonment, is constituted by the recruitment or attempted recruitment of mercenaries for military service on behalf of a foreign State or any domestic or foreign armed organization which proposes by violent means to overthrow the legitimate Government of another State or to infringe the independence, territorial integrity or normal operation of that State's institutions (article 188 of the Criminal Code at present in force, approved by Decree Law No. 400/82 of 23 September)."

69. Earlier forerunners of these Portuguese provisions were its Criminal Act of 1886 and article 156 of Act 24/81 of 20 August 1981.

70. The reply from Rwanda states that it has always disapproved of and condemned subversive activities by mercenaries wherever they may have occurred and has adopted legislation on the subject. It adds that in article 163, paragraph 1, Rwanda's Criminal Code establishes penalties for any person "who, by means of gifts, remuneration, promises, threats, or abuse of authority or power, recruits men or causes or accepts the recruitment of men on behalf of armed forces other than States' regular armies".

3. Proposals received

71. The States which replied to the Special Rapporteur declared themselves in favour of practical action to eliminate mercenarism. They showed marked interest in the work of the Ad Hoc Committee, in the hope of arriving in due course at a binding international legal instrument.

72. Some of the comments received suggest ways of dealing with the question of mercenarism, both as regards the present state of affairs and as regards the contribution to be expected from the Special Rapporteur. In this connection, the Commission ought to know the viewpoint put forward by the Government of the United States, which expressed its constant opposition to the recruitment, financing and use of mercenaries. The United States claims, however, that there cannot be more than a few hundred mercenaries in the world at the present time. It goes on to say that compared with the serious problems affecting various Member States, such as disappearances, arbitrary executions, torture and thousands of political prisoners, mercenary activity is on a fairly limited scale. The United States also suggests that the work of the Ad Hoc Committee established by General Assembly resolution 35/48 should be taken into account. The Committee has been working on an international convention against mercenaries and has gained a considerable knowledge of the subject.

73. In the United States' opinion, a precise definition of "mercenary" is essential for any constructive discussion of the subject. Draft resolution L.19/Rev.2, by which a special rapporteur was appointed, makes it clear, in that country's opinion, that the Commission on Human Rights had in mind the definition of the term "mercenary" contained in article 47 of Additional Protocol I to the Geneva Conventions of 1949. The United States therefore trusts that the Special Rapporteur's study will recognize the validity of that definition and take it as a basis. It goes on to say that the definition contained in article 47 is the product of an international compromise reached after lengthy negotiations and that the United States Government would consider any attempt to weaken the definition or alter the generally accepted notion of a mercenary unacceptable.

74. The United States further expresses the view that any study on mercenaries should focus on the prevention and punishment of specific acts of violence committed for private gain by individuals who have been specially recruited to fight in armed conflicts and take a direct part in the hostilities. Such persons cannot be considered mercenaries, however, if they are nationals of a party to the conflict or residents of territory controlled by a party to the conflict, or members of the armed forces of a party to the conflict or have been sent by a State which is not a party to the conflict on official duty as members of its armed forces.

75. With reference to the competence of the Special Rapporteur, the United States Government hopes in particular that he will bear in mind that under the United Nations Charter only the Security Council is authorized to determine whether the use of mercenaries constitutes a threat to international peace and security. Finally, it urges the Special Rapporteur to have regard to the fact that the human rights of persons accused of mercenarism, despite the gravity of the charge, must be protected in all cases.

76. In the reply from the Philippines, there are two proposals to be taken into account. The first is that the responsibility for mercenary activities should be attributed not just to the persons who act as mercenaries but also to the States, bodies or organizations that support such activities, so that it is necessary to establish the guilt both of those who act directly and those who facilitate the commission of such acts. The second is that an international convention against the recruitment, financing and training of mercenaries should contain provisions to protect the security of the developing countries and establish clearly States' international obligations and responsibilities.

77. The communication from Peru suggests that the subject of mercenarism should be approached on a multi-disciplinary basis, for the strict purpose of promoting human rights in all parts of the world. It states that the multi-disciplinary approach corresponds to the present level of development of the international law of human rights. It suggests, finally, that the action taken by States should take into account the effect of mercenarism on the enjoyment of civil and political rights and economic, social and cultural rights and cover all those rights as understood in the Declaration on the Right to Development adopted by the United Nations General Assembly on 4 December 1986.

78. In general, all the replies agree on the need for an international instrument for the elimination of mercenarism and make proposals for encouraging agreements on international co-operation along those lines, and particularly the work being done by the Ad Hoc Committee. In the same way, the Special Rapporteur must emphasize that the statements received were unanimous in encouraging his work, expressing the States' intention of co-operating in answering enquiries and giving the views requested and also pointing out that the Special Rapporteur's success in his mission should contribute to an international consensus on eliminating the problem of mercenarism and ensuring that the right of peoples to self-determination prevails, together with international peace and security.

B. Information received from international organizations

1. United Nations bodies

79. In order to fulfil the mandate set out in resolution 1987/16, the Special Rapporteur also requested relevant information from all United Nations bodies, in case they had directly or indirectly learned, been informed or received reports about the problem of mercenarism. Replies were received from the Office of the Commissioner for Namibia, the Office of the High Commissioner for Refugees, the Office of the Under-Secretary-General for Public Information, the Office of the Under-Secretary-General for Political and Security Council Affairs, the Office of the Under-Secretary-General for Special Political Questions, Regional Co-operation, Decolonization and Trusteeship, the Department of International Economic and Social Affairs, the Centre against Apartheid, the United Nations Relief and Works Agency for Palestine Refugees in the Near East and the United Nations University.

80. Unfortunately, these bodies did not supply any useful information, although they did offer to co-operate. However, the Office of the Commissioner for Namibia did not hesitate to refer to the South African racist régime illegally occupying the territory of Namibia as using mercenaries for its interventionist and racist ends. It made available to the Special Rapporteur a copy of the United Nations Council for Namibia's report to the General Assembly (A/42/24 (Part I)), submitted on 15 October 1987, drawing particular attention to chapter VII, section B, concerning the military situation in Namibia.

81. This chapter of the report describes in detail the use of mercenaries by South Africa both against the people of Namibia and to attack other independent African States from Namibia (paras. 331 and 333). Specific mention is made of Battalion 32, or the "Buffalo Battalion", made up largely of mercenaries, who engage in illegal military manoeuvres in northern Namibia and against Angola (para. 339). The report states that South Africa has carried out these manoeuvres against the freedom and sovereignty of the States of southern Africa - Angola, Botswana, Lesotho, Mozambique, Zambia and Zimbabwe - perpetrating acts of subversion, military aggression, incursions and other forms of destabilization. The report goes on to say that in order to attack a State, South Africa recruits, trains, finances and equips mercenaries to cause instability and strengthen groups such as UNITA in Angola and MNR in Mozambique, which harass and attack the legitimate Governments of the two States.

2. International and regional organizations

82. Replies were received by the Special Rapporteur from the International Labour Organisation (ILO), the United Nations Educational, Scientific and Cultural Organization (UNESCO), INTERPOL, the Organization of American States (OAS) and the Latin American Economic System (SELA). These organizations either stated that the topic fell outside their field of competence, or else alluded to the international principles and United Nations agreements which condemn the practices of mercenarism and the way it is known to be used in situations involving colonialism, neo-colonialism and racism and in violating State sovereignty or challenging the legitimacy of national liberation movements and the right of peoples to self-determination.

C. Information received from non-governmental organizations

83. The Special Rapporteur received important contributions to his work from non-governmental organizations in consultative status with the Economic and Social Council. These communications contain information which falls into two main categories: reports on cases of the use of mercenaries, and theoretical and methodological consideration concerning the present status of efforts to deal with the phenomenon of mercenarism.

84. Replies were received from the following: Inter-Parliamentary Union, Organization of African Trade Union Unity, International Commission of Jurists, Andean Commission of Jurists, Anti-Slavery Society for the Protection of Human Rights, Survival International, International Institute of Humanitarian Law, Christian Peace Conference, International Association of Democratic Lawyers, International Institute of Human Rights, International Union of Lawyers, International Movement A.T.D. Fourth World and International Committee of the Red Cross. The national liberation movement African National Congress also replied.

85. As regards the communications relating to Reports of the use of mercenaries, the Special Rapporteur wishes to mention the following. The Organization of African Trade Union Unity reports a continuous increase in the recruitment and use of mercenaries to strengthen the self-styled national resistance movements MNR and UNITA in Mozambique and Angola respectively, which are opposing the Governments and peoples of those countries and violating their territorial integrity and independence. The African National Congress states that the Government of South Africa is the principal recruiter, funder and user of mercenaries in Africa, and particularly in southern Africa, and that its armed forces include units made up of mercenaries of various nationalities: British, New Zealand, ex-Rhodesian and so on. It mentions that, following the victory of the national liberation movement of the people of Zimbabwe, the Rhodesian army unit which specialized in collective punishment, the Selous Scouts, was incorporated into the South African army and used to increase attacks against the African front-line States. Survival International refers to the case of the Bushmen whom South Africa recruits in Namibia and uses for mercenary practices, taking advantage of their neglect and extreme poverty. The case shows, as Survival points out, that in the regions occupied by South Africa the recruitment of mercenaries is made easier by harsh conditions, neglect and extreme poverty, which lead young people to enlist as mercenaries in order to escape from a wretched existence. The Special Rapporteur received comments giving greater details of the Bushmen's case from Professor Robert J. Gordon, an anthropologist who is director of the programme of African studies at the University of Vermont, in his capacity as a member of Survival International. Professor Gordon has studied the "Pretorianization" of the Bushmen and their use as soldiers by the South African armed forces, and describes the misuse of anthropology by South Africa to subjugate the peoples under its control and use them in its strategems of occupation and military domination.

86. The Andean Commission of Jurists refers in general to the phenomenon of mercenarism in southern Africa and relates it to practices running counter to the anti-colonial and anti-apartheid struggle. In the Commission's opinion, the existence of this phenomenon in Central America is linked with military practices designed to destabilize the region and lead to the overthrow of the

Government of one country. The Commission expresses its concern at the "frequent allegations of the existence of mercenaries in Central America" and puts forward the case of Nicaragua as a matter which might deserve special attention, bearing in mind that the International Court of Justice, which has already considered and reached a decision on the matter, noted the dependence of "Contra" activities on organizations in a country outside the region. The Commission proposes that foreigners having links with the "Contras" should be investigated in particular to determine whether the description of mercenaries is applicable in their case, as reports suggest.

87. The International Commission of Jurists referred to the specific case of Nicaragua, enclosing material which, in its view, highlights both the overt intervention of the United States in Nicaragua and the presence of mercenaries in the "Contra" camp. The documents enclosed include the following: a statement by Mr. Enrique Hansenfus to the Court of First Instance in Nicaragua; a partial chronology of United States intervention in Nicaragua, taken from Nicaragua's statement to the International Court of Justice; and copies of articles which appeared in Covert Action, an information bulletin reporting on mercenary activities in Africa and Latin America, and the part played in them by organizations in the United States, particularly "Soldier of Fortune", or individuals who, for financial reasons, sign up for short-term involvement in military actions in Central America. These articles suggest or supply evidence of a very extensive network of methods, systems and criteria used for recruiting mercenaries, as well as locations and types of conflict in which mercenaries are currently engaged. This information, and the discrepancies between it and information from official sources, will need to be checked and their scope and nature determined precisely, within the context of an extended mandate.

88. Several organizations, such as the International Commission of Jurists, the Andean Commission of Jurists, the International Association of Democratic Lawyers, the Christian Peace Conference and the International Committee of the Red Cross, made suggestions on substantive aspects of the phenomenon of mercenarism. The main topics covered are as follows: the scope of article 47 of Additional Protocol No. 1 to the Geneva Conventions; the evolution of the concept of mercenarism and the presence of this pehenomenon in the various types of conflict occurring at present; actions by mercenaries which violate the human rights of peoples; the state of discussions in the Ad hoc Committee on the Drafting of an International Convention against the Recruitment, Use, Financing and Training of Mercenaries; State responsibility regarding the existence of mercenarism; and respect for the rights of arrested mercenaries. All these topics have been put forward as matters which should be of relevance to the Special Rapporteur in his study of the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination.

89. The Special Rapporteur has taken due note of all the contributions and suggestions referred to above; they constitute a valuable stock of information, which he has taken into account in preparing this report.

V. TYPOLOGY OF MERCENARY ACTIVITIES

90. The information received, the study of the background and the analysis of the current status of mercenarism, from the standpoint of the theory of the subject and its treatment in international law, and also in respect of the actual situations where the active presence of the mercenary phenomenon has been recorded, have provided the Special Rapporteur with an adequate body of material, which has served as the basis for putting forward a number of preliminary considerations on the use of mercenaries and the classification of mercenarism as a phenomenon which violates human rights and impedes the right of peoples to self-determination. While it is true that the United Nations has devoted considerable attention to the problem of mercenarism since the 1960s, its efforts have unfortunately not led to the elimination of that reprehensible practice.

91. More specifically, the countries of southern Africa, which are struggling to assert their national independence and consolidate the territories on which they have established their sovereign States, are being subjected to colonial-type aggression by the racist régime in South Africa, which, either using its regular military forces directly or employing mercenaries, is interfering with the sovereignty of these countries, occupying parts of their territories and co-operating with armed groups such as UNITA in Angola and MNR in Mozambique, which seek to overthrow the legitimate Governments of those countries and to seize power in order to establish Governments subservient to the Pretoria régime. These events show that mercenarism is not dead and that it continues to pose a threat to international peace and security. Moreover, in the light of the reports received by the Special Rapporteur and the condemnation of mercenarism by the Economic and Social Council and by the General Assembly as a destabilizing factor used for the purpose of "overthrowing the Governments of southern Africa and Central America and of other developing States and fighting against the national liberation movements of peoples struggling for the exercise of their right to self-determination", it can be said that the phenomenon of mercenarism has grown, spread and become more complex. It has grown because it is more active than in the earlier decades; it has spread because its presence is recorded in regions such as Central America and countries which hitherto had never experienced this kind of aggression; it has become more complex because it has adopted a wide variety of forms, established more sophisticated organizational and operational machinery and involved itself in different kinds of conflicts, both international and domestic.

92. Mankind has unquestionably made considerable progress in reporting and condemning mercenary practices. There are plenty of United Nations declarations and resolutions which are highly interesting on the subject of mercenarism. These resolutions condemn the practice of using mercenaries to take action against national liberation movements, to impede the development of decolonized and sovereign States, to hamper the self-determination of peoples or to overthrow their legitimate Governments. They condemn mercenaries for their criminal acts, condemn the recruitment, financing, training, assembly, transit and use of mercenaries and also condemn those States which directly or indirectly, by action or omission, are implicated in mercenary operations or act as accomplices. Further, all this activity on the part of the United Nations points to an important distinction between

mercenarism undertaken on an individual basis and mercenarism viewed as a series of mercenary aggressions which may be the responsibility of a group of individuals, an organization, and also a State.

93. This means that mercenary activity is contrary to the principles of international law, since it is invariably associated with situations expressly prohibited by and incompatible with the tenets of international law, namely, non-interference in the internal affairs of States, territorial integrity and independence, self-determination of peoples, together with the condemnation of colonialism, racism, apartheid and all forms of foreign domination. In other words, mercenarism deliberately sets out to put into practice everything that the United Nations rejects and condemns. The international co-operation proclaimed in the Charter of the United Nations is founded on political independence, the territorial integrity of States and the self-determination of peoples; however, mercenaries, serving the most reactionary interests of groups or States, are organized in armed bands which seek to suppress freedom and subjugate peoples. To sum up, in terms of political principle, mercenarism already receives special attention from the international community. The same cannot, however, be said of positive international law, where there are still lacunae, and there is a need to promote an international convention encompassing, by preventive and punitive measures, all aspects of mercenarism today, as well as bilateral and multilateral agreements to act against mercenarism.

94. From this viewpoint, and bearing in mind that the use of mercenaries leads in effect to large-scale violations of human rights in all spheres, while at the same time it impedes the exercise of the right of peoples to self-determination, the Special Rapporteur has thought it appropriate to make a number of comments on the notion of the mercenary, in the light of the problems now arising and of the reports received, and also to make certain suggestions which might lead to the formulation of a typology of the phenomenon of mercenarism, by studying the various forms it takes at the present time. In any event, both the comments and the suggestions are tentative, but they would be helpful for the continuation of the task in hand and its ultimate culmination in proposals to safeguard international peace and security.

A. Definition of "mercenary"

95. Initially, the definition contained in article 47 of Additional Protocol I was a positive step towards international legislation on mercenarism. This article was the first provision to gain a consensus among States and to be incorporated in an international convention. It was also the first time that a criterion was formulated in international humanitarian law specifying the legal status of the mercenary and the requirements to be satisified for a person to be described as a mercenary and treated as such. Moreover, the criterion contained in article 47 can be said to have regulated cases involving mercenaries in international armed conflicts, in the context of international humanitarian law and the guidelines it provides.

1. Current status of the debate

96. Needless to say, this statement does not mean that article 47 of the Protocol is perfect and immutable. In point of fact, the debate on its substance and its applicability continues, and there is increasing support for

the political and legal schools of thought that are actively in favour of revising, developing and extending it. Thus, at the regional level, the OAU Convention on the Elimination of Mercenarism in Africa revises the formulation in article 47 and takes it further. Similarly, the second revised consolidated negotiating basis in the Ad Hoc Committee preparing a draft international convention against mercenarism deals with substantive proposals on the subject, which go beyond the definition in article 47 of Protocol I.

97. The positive elements in article 47 which make it compatible with the progress now being made on the subject are as follows:

(a) It is the first attempt to systematize in law and to specify in legislation the definition of a mercenary and is a basis for future legislative progress.

(b) It denies the mercenary the right to combatant or prisoner-of-war status. This is an established rule and should not be revised.

(c) It specifies that a mercenary is specially recruited in order to fight in an armed conflict, against one of the parties to the conflict and that he is motivated essentially and specifically by the material desire for gain.

(d) It clarifies the question of nationality in the definition of a mercenary, excluding nationals of a party to the conflict and residents of a territory controlled by a party to the conflict.

(e) It specifies the incompatibility between the status of mercenary and that of a regular and permanent member of the armed forces of a party to the conflict, or of a person sent on official duty by a State which is not a party to the conflict.

(f) It can remain a valid instrument for dealing with mercenarism in situations of international armed conflict, possibly with a further specification of its scope and the way it is to be applied by a party to a conflict which is the victim of mercenary aggression.

98. The Special Rapporteur's assessment is confirmed by the fact that the provisions of article 47 have been taken up in the OAU Convention and in the work being done by the Ad Hoc Committee on the drafting of an international convention against mercenarism. In both instances, article 47 was reproduced as an essential component of the definition of a mercenary, although, as is logical, minor changes have been introduced in the actual text of the OAU Convention and, most important, the definition has been extended and made applicable to other kinds of conflict.

99. The foregoing shows that despite its qualities, article 47 is by no means unchangeable and immutable. To leave this provision as international law's last word on mercenarism would be to take a static view of the situation. Historical processes, the growing complexity of social relationships, economic interests and the interplay between the internal policy of a country and the international scene may give rise to situations of conflict affecting fundamental principles and rights and leading to violations of human rights and infringements of the territorial integrity, sovereignty and independence of States, with mercenaries employed for these purposes. A study of a large

number of situations of conflict endangering international peace and security shows that, strictly speaking, they are not international armed conflicts. Many wars have not been officially declared at their outset; armed aggression and strategies corresponding to what are known as "low-intensity wars" are used to interfere with State sovereignty and the self-determination of peoples. Finally, internal conflicts occur which are armed, organized and supported from outside the country in conflict, because it suits the interests of the foreign Power which is thus intervening in the internal affairs of another country.

100. Because of the characteristics of these conflicts, as has been reported in a number of cases, the methods of aggression employed include the use of mercenaries. Their involvement in a situation in which, objectively, no international armed conflict exists is not covered by article 47 of Additional Protocol I. The Protocol refers throughout to international armed conflicts, and it might therefore be assumed that mercenaries are engaged only in conflicts of that kind. However, the same characteristics of recruitment, direct participation in hostilities, remuneration, etc. may apply in an internal conflict in the case of those who take part in it on behalf of a third party in order to overthrow the Government or to undermine its territorial integrity or independence. This mercenary activity will also have to be considered and punished by international law.

101. From this viewpoint, the study of the definition of "mercenary" has shown up problems and shortcomings in the definition contained in article 47. They call for a more detailed study leading to a broader, fuller and more easily applicable definition covering all the situations where mercenary practices occur.

102. The suggested study should take into account the following factors:

(a) The definition of the mercenary in article 47 refers to mercenaries in situations of international armed conflict. Nowadays, it is in non-international armed conflicts that mercenaries are most often to be found. Preventive and punitive legislative measures should be adopted for these mercenary practices.

(b) The current definition refers solely to the mercenary, rather than to the phenomenon of mercenarism, which is broader and more complex. The mercenary has an individual responsibility for his acts, but he takes part in a collective and complex offence involving the entity (group, organization or State) which sponsors it, the recruiter, the funder, the supplier of arms, the instructor, the carrier and, of course, the executing agent.

(c) The definition needs to be revised so that it recognizes different kinds of mercenary activity, depending on the nature of the armed conflict in which they occur. For example, the mercenary aggression to which the countries of southern Africa are subjected occurs in the context of the military expansionism and the colonialist and racist policy of the South African Government, which is seeking to impede the process of consolidation or self-determination in neighbouring countries. On the other hand, the mercenary aggression reported in Central America is of a different kind. It has been linked to the decisions of a foreign Power, outside the region, which, however, has apparently taken it upon itself to overthrow a

Government or to neutralize revolutionary popular uprisings which are not to its liking or which do not fit in with its view of the strategic security of the region as a whole.

(d) The motives for mercenarism should be reviewed and treated more flexibly, since material gain, i.e. money, is not necessarily the sole reason for enlisting. The possibility of other factors should be considered, such as ideological fanaticism, a desire for adventure, racism, an obsession with war and other forms of psychological pressure which are relieved by the exercise of violent military activity. It should be recognized that while money is probably always an inducement, it is not the decisive factor in all cases.

(e) It should be borne in mind that if article 47 is to be revised, or expanded and incorporated in an international convention on the subject, that should not have the effect of making it impossible in practice for the victim of aggression to prove the existence of mercenary practices despite evidence showing them to be an element in the situation. It is not desirable to make the definition of "mercenary" applicable to all and sundry, but it is also undesirable to go to the other extreme and set up requirements for proof that will in the end make it easy for mercenaries to disguise themselves as something else.

(f) The position that the mercenary shall not be entitled to the status of combatant or be considered as a prisoner of war should be maintained. At the same time, however, he should have all legal guarantees if he is arrested and his human rights should be respected.

2. The essence of mercenarism

103. The Special Rapporteur makes no claim that the points made above solve all the problems raised by the discussion on the definition of mercenarism. Neither has he been able to collect, in a preliminary study, all the information needed to be able to propose an alternative definition. However, bearing in mind that both the reports received and United Nations practice relate to mercenary operations that go beyond the framework of article 47, the Special Rapporteur has considered it appropriate to select a number of considerations which would be helpful in assessing the documentation received and the work to be undertaken in accordance with the mandate given in Commission on Human Rights resolution 1987/16 and in formulating a definition of mercenarism which might secure a consensus.

(a) The first consideration is the need to identify the dual nature of mercenary activity. In other words, the definition ought to take into account the question of the political, moral and legal responsibility of those who participate in the act, distinguishing between the originator and the executor. It should point out that the offence of mercenarism involves the responsibility of some State or organization, on the one hand, and of an individual on the other. In short, because of this dual nature, the definition should be concerned with mercenarism and, within that phenomenon, with mercenaries as individuals.

(b) The inherent unlawfulness of mercenary activity. The proposal is for an objective criterion that would link mercenary activity to the commission of an internationally unlawful act. Mercenarism will be such because it plans, organizes and involves itself in an internationally unlawful

act, such as international aggression, arbitrary interference in a country's internal affairs, occupation of its territory, encouragement of armed action against national liberation movements, destabilization or overthrow of a legitimate Government, or attempts to impede the right to self-determination.

(c) The voluntary nature of the decision to prepare or involve oneself in an international armed conflict, or to support or encourage an internal conflict, this willingness to provoke and participate in the military action being the objective feature that identifies the operation.

(d) With regard to the issue of nationality, the major consideration is that the conflict should be planned and prepared abroad, usually with the complicity of one of the parties to the conflict. Does this make a national a mercenary? The discussion remains open; however, the Special Rapporteur favours, for the moment, excluding from the definition of "mercenary" anyone having the nationality of the affected party. Obviously, there is nothing to prevent a third Power from employing and paying nationals to act against the self-determination and sovereignty of a State. To drop the requirement concerning foreign nationality, however, would be to run the risk that a member of the political opposition, who might, after all, receive funds from abroad, might be regarded as a mercenary.

104. It should be borne in mind, in connection with these considerations, that the OAU Convention for the Elimination of Mercenarism in Africa introduces some of these elements in article 1. Paragraph 1 restates and simplifies article 47 of the Additional Protocol. Paragraph 2 introduces the concept of mercenarism and paragraph 3 states that mercenarism is a crime against international peace and security. Similarly, article 1 of the second consolidated basis prepared by the Ad Hoc Committee reproduces article 47.2 of the Additional Protocol. However, it includes a second paragraph which broadens the definition to include situations where there is no international armed conflict and where the mercenary is recruited to participate in a concerted act of violence aimed at overthrowing a Government. There are other elements, however, on which there is as yet no consensus, as in subparagraph (d), which envisages the possibility that a national or resident of the State against which the aggression is directed may be regarded as a mercenary. This question, as we have already seen, is a very complex one, and it is difficult to reach agreement on it at the present time. However, we should say that there are those in Africa and Latin America who support this position and, on the basis of their own experience, point to the large-scale employment of nationals as mercenaries by foreigners for the purpose of carrying out activities directed from abroad against their country of origin. Because of its implications, this question deserves more careful and detailed study.

B. Outline of a typology

105. For the purposes of a more detailed and objective classification, the Special Rapporteur considered it worth while to draw up a typology of mercenaries, having observed that there were various forms of mercenarism, each with its own identifiable modus operandi, distinct from other types appropriate to situations requiring a specific and equally identifiable kind of mercenary action. The mass of information available indicates the existence of several types of mercenarism. Grouping them all in one category

or maintaining that they occur only in a given type of conflict would not reflect the current degree of variety in mercenary activities. It must therefore be accepted that mercenarism, has changed both in theory and in practice and that its evolution has of course reflected the greater complexity of international relations and the interaction between domestic situations and international power structures.

1. Mercenarism in international armed conflicts

106. This is the classic type, involving the sort of mercenaries who prompted the United Nations to look into the question of mercenarism and to condemn such activities, in the light of the acts of aggression perpetrated against the African peoples struggling for independence. This type of mercenarism is regarded as an internationally wrongful act involving the planning, recruitment, training, financing and use of mercenaries by one country which is in armed confict with another, or which intervenes on behalf of one party to a conflict and employs mercenary forces for this purpose. Armed conflicts of this type and acts of aggression by mercenaries usually occur in the context of decolonization and are directed against the efforts of national liberation movements to achieve self-determination. In its most general form, this type of mercenarism is an offence against international peace and security and its practical manifestations are offences against the rights of peoples to self-determination or against the territorial integrity, independence and sovereignty of the State.

2. Mercenaries in other conflicts

107. The existence of mercenary practices in non-international armed conflicts is an indication of the way in which this type of unlawful activity has evolved. The reasons for its use are to be found in the political, economic, ideological or strategic interests of a Power which, in the regions and countries under its influence or domination, pursues essentially interventionist policies, contrary to the rules of international law, which establishes the principle of non-intervention or interference in the internal affairs of States. This type of mercenary aggression is designed to provoke an internal armed conflict or unrest, or to encourage existing conflicts or unrest. It is not used to prevent decolonization or the formation of a State, since the State in question is already constituted and its form of government established. The interference is thus designed to impair the State's sovereignty, by bringing about the overthrow of the Government, undermining the consititutional order of the State, violating its territorial integrity and independence or preventing it from making a free decision as to the policies it considers appropriate for its social development and political system. The reports of mercenary aggression in Angola, Mozambique and other African countries, together with reports of mercenary practices in Central America, should be studied and analysed with a view to classifying this type of mercenarism as belonging to the sphere of internal conflict.

3. Mercenaries and other related figures

108. Mercenarism always implies the unlawful involvement of the person planning and preparing all the stages leading up to the mercenary act and the execution of the act itself. Hence those involved in recruiting and financing, either for their own account or for a third party, are also mercenaries, and from a preventive point of view, the chief culprits. The

mercenary agent is the last link in the chain, but legislation designed to prevent this crime should establish the primary responsibility of the person organizing the mercenaries and mercenary bands. By considering the origin and the benefit to be derived, it is possible to identify three types of mercenarism. The simplest type is that of the individual who offers freely and voluntarily to participate in an armed conflict or carry out some illegal violent act involving the killing or abduction of persons, the destruction of property, etc. With this type of mercenarism, the primary motive is financial gain, although there may be other factors.

109. The second type is the private organization involved in the business of armed violence and carrying out unlawful acts on its own account or for a third party. In this case, the organization recruits, finances - almost invariably acting as the paymaster, since the resources come from outside, provides training and transport and supervises the operation. While in operations of this kind, money is undoubtedly one of the benefits, the essence of the organization devoted to mercenary activities is identification with a given conception of human relations, international society and the order by which it should be governed, and finally a political ideology and cold professionalism with regard to armed violence as an expeditious means of imposing the order sought by the interests and the ideology in question. In this type of mercenarism, the principal responsibility lies with the mercenary organization, and prosecution of the individual mercenary should also extend to the organization.

110. The third type is the most serious, since it involves the State. In other words, it is the State itself which secretly organizes mercenary operations and diverts public funds or utilizes private resources for this purpose. The fact that a public body or representative of the State is mixed up in mercenary activities does not mean that legal responsibility stops there. Responsibility must extend to the State, in that the action is being taken in its name or on its behalf, and because the crime was committed to further a specific aim and the political interests of the State in question. This type of mercenarism is not motivated by financial gain, but by essentially political considerations.

111. Related to these three types of mercenarism is the responsibility of a State for the recruitment, training and transit of mercenaries it permits within its territory, and sometimes for related activities, such as arms trafficking and participation in such mercenary operations.

112. The first question to deal with is that of responsibility and whether such permissiveness is active or passive, and hence whether there is direct participation or complicity in mercenary acts. Many countries have specific laws prohibiting enlistment in foreign armed forces and thus the recruitment and training of mercenaries. How is it, then, that such activities are conducted openly in the very countries in which they are prohibited by law? This contradiction and de facto permissiveness is something which certainly deserves attention, and an extension of the Special Rapporteur's mandate should require him to focus on the question and propose measures which could then be incorporated into international legislation and domestic law, as specific rules designed to eliminate the contradictions and the tolerance of mercenarism and to prevent a recurrence of this problem.

VI. CONCLUSIONS

113. Despite the United Nations repeated condemnation of mercenarism and its adoption of resolutions against mercenary activities and direct or indirect State participation in them, the problem of mercenarism continues to be as important a factor as ever in conflicts of various kinds. Moreover, the information received shows that mercenary practices have increased in volume and proportion, have spread from Africa to other continents and have become a more complex phenomenon by virtue of the manifold forms of organization and intervention that have been developed.

114. The nature, scope and gravity of mercenarism has been established by General Assembly and other United Nations bodies, which have declared it to be a crime against international peace and security affecting the fundamental rights of mankind in that it involves gross violations of human rights and of the right to self-determination.

115. In specific terms, all the information on mercenary activities received by the Special Rapporteur shows its link with internationally wrongful acts such as interference in internal affairs, military opposition to national liberation movements, violations of States' territorial integrity, sovereignty and independence and the destabilization and overthrow of legitimate Governments, in short, the subordination of the country in question to the interests of the Power instigating the conflict and the participation of mercenary forces in it. In addition, the point is made that such practices are a direct violation of the fundamental rights of the individual, such as the right to life, physical integrity and security and to the enjoyment of property.

116. Although a consensus has been reached to condemn mercenarism as a matter of principle, the continued existence and growth of this phenomenon is due largely to the lack of rules of positive international law directly condemning mercenary practices and specifying both the obligations of States in this area and the preventive measures needed against the recruitment, utilization, financing and training of mercenaries.

117. The definition of "mercenary" contained in article 47 of Additional Protocol I to the Geneva Conventions constitutes the first attempt to spell out the notion of a mercenary in concrete terms and continues to be useful for international armed conflicts. However, on the basis of the information received regarding the development of mercenary practices and their widespread use, the definition has become inadequate. It is nevertheless taken as a starting point for other international documents, such as the OAU Convention and the second revised consolidated negotiating basis of a convention against mercenaries being considered by the Ad Hoc Committee. However, the new texts refer to mercenarism as a generic term covering all aspects of the phenomenon and to the mercenary as the individual responsible for actual operations.

118. Other new aspects of the current debate on mercenarism are: the determination of State responsibility for such practices; the combination of many factors involved in determining the motive and benefit, depending on the mercenaries participating in the operation; the need to distinguish between different types of mercenary activity - those involving international armed conflicts and those involving non-international conflicts, such as internal

armed conflicts or internal unrest; and finally, establishment of the principle that all mercenary practices involve unlawful interference in the internal affairs of a State and a violation of its sovereignty.

119. A number of States informed the Special Rapporteur that their domestic law prohibited and punished mercenary activities, specifically describing them as such. Others drew attention to their prohibition of enlistment in foreign forces and military training of such forces within the national territory. In the legislation of many countries, however, gaps exist which have facilitated the spread of mercenary practices.

120. According to the information received by the Special Rapporteur, the treatment of mercenaries arrested and tried would not appear to be consistent in all cases with international rules and principles requiring the observance of human rights and the genuine enjoyment of legal guarantees. Abuses of this kind may be related to, or the consequence of, the lack of adequate domestic legislation.

121. From the information provided to the Special Rapporteur, it may be concluded that mercenary practices are still found in Africa, particularly in southern Africa, where they are reportedly organized and put into effect by the South African Government. Reports have also been received of the emergence of mercenary practices in Central America and Suriname. The gravity of the reports received renders detailed examination of the question essential, in order to determine the scope of the reports, the nature of the mercenary practices involved and the responsibility, if any, of third States in such acts.

VII. RECOMMENDATIONS

122. Despite the preliminary nature of this report, a number of recommendations, themselves preliminary, can be made on the basis of the conclusions drawn in the preceding section.

123. The Special Rapporteur is of the view that every possible effort should be made to reach a consensus leading to the effective elimination of the reprehensible practice of mercenarism. A number of recommendations may be made concerning ways of arriving at an international consensus, adopting anti-mercenary policies, drafting an international convention against mercenarism and strengthening national legislation by providing adequate penalties for persons guilty of the offence of mercenarism. Such penalties must be applied with due regard for procedural guarantees, the right to a fair trial and other fundamental rights of the individual. The penalties themselves should be severe, but should not extend to the death penalty, the abolition of which is desirable.

124. The Commission is recommended to develop further its position that mercenary acts and mercenarism in general are a means of violating human rights and thwarting the self-determination of peoples.

125. The reports of mercenary activities in two continents (Africa and Latin America) should be studied further in order to determine the scope and implications of such activities and the possible responsibility of third parties.

126. The Commission should strengthen its co-operation and co-ordination with the various bodies concerned with mercenarism at the international level, such as the Ad Hoc Committee on the Drafting of an International Convention against the Recruitment, Use, Financing and Training of Mercenaries, the United Nations High Commissioner for Namibia, the International Law Commission, the Organization of African Unity (OAU) and the International Committee of the Red Cross (ICRC).

127. The Special Rapporteur will continue to regard as invaluable any assistance in the form of information and opinions which States and intergovernmental and non-governmental organizations may wish to extend to him in connection with his mandate.

128. Finally, given the complexity of the questions to be studied, the Special Rapporteur reiterates that this study is of a preliminary nature and should therefore be continued so that a more searching analysis can be made, the reports received can be further investigated and the facts can be verified on the spot in specific cases.
