

Mercenary Activities (Prohibition) Bill

Government Bill

As reported from the Foreign Affairs, Defence and
Trade Committee

Commentary

Recommendation

The Foreign Affairs, Defence and Trade Committee has examined the Mercenary Activities (Prohibition) Bill and United Future, Labour, the Progressive Coalition, and the Green Party recommend that it be passed with the amendments shown.

Introduction

The Mercenary Activities (Prohibition) Bill contains the legislative provisions required to implement in New Zealand law the International Convention against the Recruitment, Use, Financing and Training of Mercenaries. Under the Convention, States Parties must criminalise the conduct of persons who recruit, use, finance, or train mercenaries and of those who participate as mercenaries in combat during an armed conflict or in a concerted act of violence. These activities are currently not punishable under New Zealand law. The passage of this bill will enable New Zealand to accede to the Convention. This commentary outlines our consideration of the major issues in relation to the bill, and the amendments United Future, Labour, the Progressive Coalition, and the Green Party recommend.

Status of the Convention

Submitters raised concern over the small number of parties to the Convention. Some submitters questioned the value of New Zealand

becoming party to a treaty that has been ratified by 25 parties¹ but has not been ratified by countries that we usually regard as “likeminded”, such as Canada and Australia. However, United Future, Labour, the Progressive Coalition, and the Green Party believe the number and composition of parties is not decisive when determining whether New Zealand should become a party to a particular treaty. Rather, the key issue is whether New Zealand is willing to subscribe to the particular obligations that the treaty imposes. United Future, Labour, the Progressive Coalition, and the Green Party are mindful of Cabinet’s conclusion that notwithstanding the shortcomings of the Convention and the comparatively small number of States Parties there are advantages to New Zealand becoming a party. Even if there are few prosecutions, criminalisation of these activities will act as a deterrent to New Zealanders who might contemplate becoming mercenaries and will also ensure that mercenaries from other countries do not regard New Zealand as a “safe haven”.

Clause 5: definition of mercenary

United Future, Labour, the Progressive Coalition, and the Green Party recommend that clause 5(1)(a) be amended to ensure that it targets only those persons involved in wars as combatants, and that the phrase “take part in hostilities” be used instead of “fight” in clause 5(1)(a)(i). United Future, Labour, the Progressive Coalition, and the Green Party further recommend that clauses 5(1)(a)(ii) and 5(1)(b)(ii) be amended to clarify that making private gain might be one of the several purposes that a person has for taking part in hostilities or a concerted act of violence. The most contentious issue in the bill is the definition of mercenary. The Convention was never intended to cover all types of mercenaries but rather, it provides a narrow definition directed at a small group of so-called “true” or “traditional” mercenaries: unaffiliated individuals who are prepared to fight wars, overthrow Governments, or commit certain terrorist acts for money. The definition in clause 5 does not stand alone. It has to be read in conjunction with the individual offences. Thus being a mercenary is not in itself an offence; some other conduct is required for criminal liability.

¹ Azerbaijan, Barbados, Belarus, Belgium, Cameroon, Costa Rica, Croatia, Cyprus, Georgia, Guinea, Italy, Libya, Maldives, Mali, Mauritania, Qatar, Saudi Arabia, Senegal, Seychelles, Suriname, Togo, Turkmenistan, Ukraine, Uruguay, and Uzbekistan.

The definition of mercenary follows the definition in the Convention. It contains several cumulative requirements and targets two types of mercenaries: a person who is specifically recruited to take part in an armed conflict, and a person recruited to participate in a concerted act of violence.

The first definition is based on a provision in the First Protocol to the Geneva Convention that was adopted in 1977 which relates to the Protection of Victims of International Armed Conflict. Article 47 of the Protocol defines mercenary and deals with the status of a mercenary in the context of an international armed conflict.

The second definition is aimed at persons who take part in violent acts during coups, terrorist attacks or other similar events falling short of a war. Submitters raised concern that this definition might be interpreted to include some functions of those acting as UN peacekeepers or the New Zealand engineers in Iraq. United Future, Labour, the Progressive Coalition, and the Green Party do not agree with this interpretation as UN peacekeepers are mandated by a Security Council resolution to keep the peace, not to participate in acts of violence. Similarly the New Zealand Defence Force personnel are in Iraq for the purpose of providing humanitarian reconstruction assistance. This is not a combat role and has cover under a Security Council resolution. In any event, such personnel are sent on official duty by the New Zealand Government.

United Future, Labour, the Progressive Coalition, and the Green Party recommend that both limbs of the definition be amended to make the payment of money only one of the mercenary's purposes rather than the primary purpose. This amendment is recommended because it is difficult to prove to the criminal standard of what is a person's primary purpose in doing a particular thing. Clause 5(1)(a)(iii) emphasises that the person is paid an amount to participate in combat that is substantially in excess of that paid to combatants in the armed forces of the parties to the conflict. One reason for such a focus is the concern that mercenaries may have a vested interest in prolonging a conflict because they are getting well paid for their involvement.

The National Party and New Zealand First members believe the definition lacks clarity and certainty.

New clauses 5(2), 5(3) and 5(4)

United Future, Labour, the Progressive Coalition, and the Green Party recommend that new clauses 5(2), 5(3) and 5(4) be added.

Clause 5(2) addresses some of the concerns raised by submitters about the cumulative nature of the definition of mercenary in the Convention and in the Bill.

New clause 5(2) contains the elements of the definition of mercenary that were previously in subparagraphs (iv) to (vi) of clauses 5(1)(a) and 5(1)(b). Removing the elements from clause 5(1) and recasting them as statements of circumstances when a person is not a mercenary in clause 5(2) means that a prosecutor need not now present evidence on all six matters previously contained in each limb of the definition. The prosecutor need only present evidence about the matters moved to clause 5(2) if they are matters disputed by the defence. As a consequence of the inclusion of new clause 5(2) United Future, Labour, the Progressive Coalition, and the Green Party also recommend the deletion of clauses 5(1)(a)(iv) to 5(1)(a)(vi) and 5(1)(b)(iv) to 5(1)(b)(vi).

United Future, Labour, the Progressive Coalition, and the Green Party recommend that new clause 5(3) be added to make it clear that particular activities such as peacekeeping, VIP protection, and demining do not fall within the definition of mercenary. New clause 5(3) states that specific activities are not caught in the definition of mercenary.

New clause 5(4) states that new clauses 5(2) and 5(3) do not limit the circumstances in which a person is not a mercenary. In the case of clause 5(3) the matters listed are only an illustrative list of certain persons who are not mercenaries. In respect of activities not mentioned, clause 5(3) serves as a guide to interpretation. Several submissions were received on the issue of whether certain matters were covered by the definition of mercenary and United Future, Labour, the Progressive Coalition, and the Green Party feel that these new clauses should serve to exclude certain activities that have a constructive and legal purpose from being caught by the definition of mercenary.

The National Party and New Zealand First members are of the view that new clause 5(4) adds to the confusion and uncertainty surrounding the definition of mercenary.

Mercenaries pose a problem under international law, as their activities run contrary to established rules relating to the rights and obligations of combatants and State responsibility. A member of the armed forces swears allegiance to the State and therefore the State is held responsible for his or her actions. Members of the armed forces are

subject to military discipline that, amongst other things, enforces respect for the law of armed conflict. Some States use mercenaries in order to keep responsibility for breaches of international law at arm's length.

Clause 5(2)(a)(ii) provides that a person is not regarded as a mercenary if he or she is a member of an armed force of one of the parties to the armed conflict. Some submitters suggested that this exclusion might provide an easy way for mercenaries to avoid prosecution under this bill if the recruiting State designates them "special constables" or gives them some other special status. A person accused of committing an offence under this legislation who claims he or she is a member of an armed force that is party to the conflict would need to present evidence to convince a court of the validity of this claim. This would require proof, for example, that the person was subject to all the usual command and control structures of the armed force and also subject to all domestic and international law relevant to the participation in armed conflicts.

Consequential amendments

As a result of amendments to clause 5, consequential amendments are required to ensure the consistent use of terminology in the offence provisions, clauses 7 to 12. United Future, Labour, the Progressive Coalition, and the Green Party recommend that these clauses be amended to ensure that they are in line with the amendments to clause 5. United Future, Labour, the Progressive Coalition, and the Green Party also recommend that clause 7 be amended to clarify the way in which elements of the definition of mercenary apply in the recruitment context.

Private military companies

United Future, Labour, the Progressive Coalition, and the Green Party do not propose any amendments to deal with private military companies. Several submissions suggested that there is a place for such companies, which are often set up by former military personnel to provide a range of military and security services for Governments, non-governmental organisations, and companies. Some submitters suggested that private military forces have the potential to bring stability and security to States where order has collapsed and where resources of existing Governments are unable to cope.

This bill does not purport to deal with all issues associated with mercenaries. It is aimed simply at implementing the Convention. Its passage would not therefore preclude the taking of further measures in the future to recognise a role for and regulate the activities of private military companies. However, the manner in which these companies should or may be regulated raises a range of issues that are beyond the scope of the present bill to consider.

There are suggestions, including from the Special Rapporteur on Mercenaries, that the Convention should be amended or a new convention negotiated to recognise the role of private military companies and regulate them accordingly. We understand that this is a long-term objective that will be pursued through UN processes and is an issue that the Government may address at a later stage.

National Party and New Zealand First minority view

The National Party and New Zealand First oppose this bill and are concerned with three matters.

The first is the definition of mercenary. This definition lacks clarity and certainty. The United Nations Special Rapporteur regarded the original definition as inadequate in operational terms. The amendments suggested by the majority of the Committee do not address these concerns.

Secondly, parties to the convention do not include our traditional friends and allies. In particular, the USA, the UK, and Australia have not signed or ratified the Convention.

Thirdly, the National Party and New Zealand First are concerned that we continue to place into domestic law international conventions that have marginal relevance to our domestic circumstances. This bill covers one such convention.

Appendix

Committee process

The Mercenary Activities (Prohibition) Bill was referred to the committee on 5 November 2003. The closing date for submissions was 30 January 2004. We received and considered 6 submissions from interested groups and individuals. We heard 2 submissions. Hearing of evidence took 53 minutes and consideration took 1 hour and 38 minutes.

We received advice from the Ministry of Foreign Affairs and Trade, and the New Zealand Defence Force.

Committee membership

Hon Peter Dunne (Chairperson, United Future)

Luamanuvao Winnie Laban (Deputy Chairperson, Labour)

Tim Barnett (Labour)

Martin Gallagher (Labour)

Dail Jones (New Zealand First)

Keith Locke (Green)

Simon Power (National)

Hon Matt Robson (Progressive Coalition)

Dr the Hon Lockwood Smith (National)

Key to symbols used in reprinted bill

As reported from a select committee

Struck out (majority)

Subject to this Act,

Text struck out by a majority

New (majority)

Subject to this Act,

Text inserted by a majority

<Subject to this Act,>

Words struck out by a majority

<Subject to this Act,>

Words inserted by a majority

Hon Phil Goff

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The Parliament of New Zealand enacts as follows:

1 Title

This Act is the Mercenary Activities (Prohibition) Act **2003**.

Part 1

Preliminary provisions

2 Commencement

This Act comes into force on a date to be appointed by the Governor-General by Order in Council.

3 Purpose

The purpose of this Act is to implement in New Zealand law New Zealand's obligations under the Mercenaries Convention.

4 Interpretation

(1) In this Act, unless the context otherwise requires,—

concerted act of violence means an act of violence designed to—

- (a) overthrow a government or otherwise undermine the constitutional order of a State; or
- (b) undermine the territorial integrity of a State

Mercenaries Convention means the International Convention against the Recruitment, Use, Financing and Training of Mercenaries done at New York on 4 December 1989 (a copy of the English text of which is set out in the **Schedule**)

mercenary has the meaning given to it in **section <5> <5(1)>**.

(2) For the purposes of this Act, a person must be treated as being **ordinarily resident** in a specified State (including New Zealand) if—

- (a) the person's home is in the State; or
- (b) the person is residing in the State with the intention of residing there indefinitely; or
- (c) having resided in the State with the intention of establishing his or her home in the State indefinitely, the person is outside the State but has an intention to return to establish his or her home in the State or to reside in the State indefinitely.

5 Mercenary defined

(1) In this Act, unless the context otherwise requires, **mercenary** means—

- (a) any person—

- (i) who is recruited, within New Zealand or elsewhere, in order to ~~fight~~ ~~take part in hostilities~~ in an armed conflict; and
- (ii) whose ~~primary~~ purpose~~, or one of whose purposes,~~ in taking part in hostilities ~~during~~ ~~in~~ the armed conflict is making private gain; and
- (iii) who is promised or paid by, or on behalf of, a party to the armed conflict material compensation substantially in excess of that promised or paid to combatants of similar rank and functions in the armed forces of that party; ~~and~~ ~~or~~

Struck out (majority)

- (iv) who is not a citizen of a party to the conflict or ordinarily resident in territory controlled by a party to the conflict; and
- (v) who is not a member of the armed forces of a party to the conflict; and
- (vi) who is not sent by a State that is not a party to the conflict on official duty as a member of its armed forces; and

- (b) any person, other than a person referred to in **paragraph (a)**,—
 - (i) who is recruited, within New Zealand or elsewhere, in order to ~~participate~~ ~~take part~~ in a concerted act of violence; and
 - (ii) whose ~~primary~~ purpose~~, or one of whose purposes,~~ in taking part in the concerted act of violence is making significant private gain; and
 - (iii) who is promised or paid material compensation.

Struck out (majority)

- (iv) who is not a citizen of, or ordinarily resident in, the State against which the concerted act of violence is directed; and
- (v) who is not sent by a State on official duty; and
- (vi) who is not a member of the armed forces of the State on whose territory the act is undertaken.

New (majority)

- (2) A person is not a mercenary—
- (a) within the meaning of **subsection (1)(a)** if he or she is—
 - (i) a citizen of a party to the armed conflict or ordinarily resident in territory controlled by a party to the armed conflict; or
 - (ii) a member of the armed forces of a party to the armed conflict; or
 - (iii) sent by a State that is not a party to the armed conflict on official duty as a member of its armed forces:
 - (b) within the meaning of **subsection (1)(b)** if he or she is—
 - (i) a citizen of, or ordinarily resident in, the State against which the concerted act of violence is directed; or
 - (ii) sent by a State on official duty; or
 - (iii) a member of the armed forces of the State on whose territory the concerted act of violence is undertaken.
- (3) A person is not a mercenary within the meaning of **subsection (1)(a) or subsection (1)(b)** if he or she is taking part in—
- (a) a peace support mission—
 - (i) for any of the purposes of the United Nations; or
 - (ii) that is undertaken in accordance with the principles of the Charter of the United Nations; or
 - (b) the detection, clearance, deactivation, or destruction of mines or unexploded ordnance, other than in a combat role; or
 - (c) the delivery of humanitarian aid; or
 - (d) domestic policing duties or other lawful activities of a similar kind involving the protection of individuals or property.
- (4) **Subsections (2) and (3)** do not limit the circumstances in which a person is not a mercenary.

6 Act binds the Crown

This Act binds the Crown.

Part 2

Mercenary activities

Recruiting, using, financing, and training of mercenary

7 Recruiting person to be mercenary

- (1) Every person commits an offence, and is liable on conviction on indictment to imprisonment for a term not exceeding 14 years, who recruits, within New Zealand or elsewhere, a person for the purpose of ~~fighting~~ ~~taking part in hostilities~~ in an armed conflict—
 - (a) with the intention that the person ~~being recruited~~ make private gain from ~~participating~~ ~~taking part~~ in hostilities ~~during~~ ~~in~~ the armed conflict; and
 - (b) knowing that the person ~~being recruited~~ has been or is being promised by, or on behalf of, a party to the armed conflict, material compensation substantially in excess of that promised or paid to combatants of similar rank and functions in the armed forces of that party.
- (2) **Subsection (1)** does not apply if the person ~~being~~ recruited—
 - (a) is a citizen of a party to the conflict or ordinarily resident in territory controlled by a party to the ~~armed~~ conflict; or
 - (b) is ~~, or once recruited will be,~~ a member of the armed forces of a party to the ~~armed~~ conflict; or
 - (c) ~~is~~ ~~will be~~ sent by a State that is not a party to the ~~armed~~ conflict on official duty as a member of its armed forces.
- (3) Every person commits an offence, and is liable on conviction on indictment to imprisonment for a term not exceeding 14 years, who recruits, within New Zealand or elsewhere, a person for the purpose of ~~participating~~ ~~taking part~~ in a concerted act of violence—
 - (a) with the intention that the person ~~being recruited~~ make significant private gain from ~~participating~~ ~~taking part~~ in the concerted act of violence; and
 - (b) knowing that the person ~~being recruited~~ has been or is being promised material compensation to ~~participate~~ ~~take part~~ in the concerted act of violence.
- (4) **Subsection (3)** does not apply if the person ~~being~~ recruited—

- (a) is a citizen of, or ordinarily resident in, the State against which the concerted act of violence is <or will be> directed; or
- (b) <is><will be> sent by a State on <the> official duty <of that State>; or
- (c) is<, or once recruited will be,> a member of the armed forces of the State on whose territory the <concerted> act <of violence> is undertaken.

8 Using mercenary

Every person commits an offence, and is liable on conviction on indictment to imprisonment for a term not exceeding 14 years, who,—

- (a) knowing that a person is a mercenary of the kind described in **section <5(a)> <5(1)(a)>**, uses that person to <fight> <take part in hostilities> in an armed conflict; or
- (b) knowing that a person is a mercenary of the kind described in **section <5(b)> <5(1)(b)>**, uses that person to <participate> <take part> in a concerted act of violence.

9 Financing mercenary

(1) Every person commits an offence, and is liable on conviction on indictment to imprisonment for a term not exceeding 14 years, who, without lawful justification or reasonable excuse, provides funds intending that those funds be used, or knowing that they are to be used, in full or in part,—

- (a) to enable a person who is a mercenary of the kind described in **section <5(a)> <5(1)(a)>** to <fight> <take part in hostilities> in an armed conflict; or
- (b) to enable a person who is a mercenary of the kind described in **section <5(b)> <5(1)(b)>** to <participate> <take part> in a concerted act of violence.

(2) In **subsection (1), funds**—

- (a) means assets of every kind, whether tangible or intangible, moveable or immoveable, however acquired; and
- (b) includes legal documents or instruments (for example, bank credits, traveller's cheques, bank cheques, money orders, shares, securities, bonds, drafts, and letters of credit) in any form (for example, in electronic or digital form) evidencing title to, or an interest in, assets of any kind.

- (3) In a prosecution for financing a mercenary, it is not necessary for the prosecutor to prove that the funds provided were actually used, in full or in part, to *<finance>* *<enable>* a mercenary to *<fight>* *<take part in hostilities>* in an armed conflict or *<participate>* *<take part>* in a concerted act of violence.

10 Training prospective mercenary

- (1) Every person commits an offence, and is liable on conviction on indictment to imprisonment for a term not exceeding 14 years, who trains a person to *<fight>* *<take part in hostilities>* in an armed conflict—
- (a) with the intention that the person *<being trained>* be recruited as a mercenary of the kind described in **section <5(a)>** **<5(1)(a)>** once the person has completed the training; or
 - (b) knowing that the person *<being trained>* is likely to be recruited as a mercenary of the kind described in **section <5(a)>** **<5(1)(a)>** once the person has completed the training.
- (2) Every person commits an offence, and is liable on conviction on indictment to imprisonment for a term not exceeding 14 years, who trains a person to *<participate>* *<take part>* in a concerted act of violence—
- (a) with the intention that the person *<being trained>* be recruited as a mercenary of the kind described in **section <5(b)>** **<5(1)(b)>** once the person has completed the training; or
 - (b) knowing that the person *<being trained>* is likely to be recruited as a mercenary of the kind described in **section <5(b)>** **<5(1)(b)>** once the person has completed the training.

11 Training mercenary

Every person commits an offence, and is liable on conviction on indictment to imprisonment for a term not exceeding 14 years, who,—

- (a) knowing that a person is a mercenary of the kind described in **section <5(a)>** **<5(1)(a)>**, trains that person to *<fight>* *<take part in hostilities>* in an armed conflict; or

- (b) knowing that a person is a mercenary of the kind described in **section <5(b)> <5(1)(b)>**, trains that person to *<participate> <take part>* in a concerted act of violence.

Mercenary <participating> <taking part> in hostilities or concerted act of violence

12 Mercenary <participating> <taking part> in hostilities or concerted act of violence

- (1) Every person commits an offence, and is liable on conviction on indictment to imprisonment for a term not exceeding 14 years, who, being a mercenary of the kind described in **section <5(a)> <5(1)(a)>**, intentionally *<participates> <takes part>* directly in hostilities *<during> <in>* an armed conflict.
- (2) Every person commits an offence, and is liable on conviction on indictment to imprisonment for a term not exceeding 14 years, who, being a mercenary of the kind described in **section <5(b)> <5(1)(b)>**, intentionally *<participates> <takes part>* directly in a concerted act of violence.

Extraterritorial jurisdiction

13 Extraterritorial jurisdiction

- (1) Even if the acts or omissions alleged to constitute an offence occurred wholly outside New Zealand, proceedings may be brought for an offence under any of **sections 7 to 12**—
- (a) if the person to be charged—
- (i) is a New Zealand citizen; or
 - (ii) is ordinarily resident in New Zealand; or
 - (iii) has been found in New Zealand and has not been extradited; or
 - (iv) is a body corporate, or a corporation sole, incorporated under the law of New Zealand; or
- (b) if any of the acts or omissions is alleged to have occurred on board—
- (i) a ship registered, or required to be registered, under the Ship Registration Act 1992; or
 - (ii) a ship used as a ship of the New Zealand Defence Force; or
 - (iii) an aircraft registered, or required to be registered, in New Zealand under the Civil Aviation Act 1990; or

- (iv) an aircraft for the time being used as an aircraft of the New Zealand Defence Force; or
 - (v) an aircraft that is leased to a lessee whose principal place of business is in New Zealand, or who is a New Zealand citizen or a person ordinarily resident in New Zealand; or
 - (c) if a person in respect of whom the offence is alleged to have been committed—
 - (i) is a New Zealand citizen; or
 - (ii) is ordinarily resident in New Zealand.
- (2) The following sections do not apply in respect of an offence under any of **sections 7 to 12**:
- (a) section 8 of the Crimes Act 1961 (which relates to jurisdiction in respect of crimes on ships or aircraft beyond New Zealand):
 - (b) section 400 of the Crimes Act 1961 (which requires the consent of the Attorney-General to proceedings in certain cases for offences on ships or aircraft).
- (3) Nothing in this section limits the application of any of **sections 7 to 12** in respect of—
- (a) acts or omissions that occurred wholly in New Zealand; or
 - (b) the application of section 7 of the Crimes Act 1961 to the occurrence in New Zealand of—
 - (i) an act or omission forming part of an offence; or
 - (ii) an event necessary to the completion of an offence; or
 - (c) the application of section 8A of the Crimes Act 1961.

Part 3

Miscellaneous provisions

Evidence that States are, or are not, Parties to Mercenaries Convention

14 Certificate as to States Parties under Mercenaries Convention

A certificate that appears to be signed by, or on behalf of, the Secretary of Foreign Affairs and Trade and that states that a State is, or is not, a State Party to the Mercenaries Convention is sufficient evidence of that matter, unless the contrary is proved.

Investigation and prosecution of offences against Act or referred to in Mercenaries Convention

15 Application of sections 16 and 17

- (1) **Sections 16 and 17** apply whenever the Attorney-General receives information that there may be present in New Zealand a person who has committed, or is alleged to have committed, an offence against article 2, article 3, or article 4 of the Mercenaries Convention.
- (2) In **sections 16 and 17, relevant States Parties** means any—
- (a) State Party where the offence was committed; and
 - (b) State Party in relation to which the offence was directed or attempted; and
 - (c) State Party in relation to which any person against whom the offence was directed or attempted is a person of the kind referred to in article 10(2)(c) of the Mercenaries Convention; *<or>* <and>
 - (d) State Party—
 - (i) in relation to which the alleged offender is a citizen; or
 - (ii) in whose territory the alleged offender habitually resides, if the alleged offender is not a citizen of any State; and
 - (e) other interested States Parties the Attorney-General considers it appropriate to notify.

16 Attorney-General to notify relevant States Parties of measures taken to ensure person's presence

The Attorney-General must immediately notify the relevant States Parties, either directly or through the Secretary-General of the United Nations, if, as a result of receiving the information,—

- (a) a person is taken into custody in accordance with New Zealand law; or
- (b) other measures are taken under New Zealand law to ensure a person's presence for the purposes of the institution of criminal or extradition proceedings (being the measures contemplated by article 10(1) of the Mercenaries Convention).

17 Attorney-General to indicate to relevant States Parties whether New Zealand to exercise jurisdiction

When a preliminary inquiry has been undertaken under New Zealand law of the facts contained in the information (being a preliminary inquiry contemplated by article 10(1) of the Mercenaries Convention), the Attorney-General must promptly—

- (a) report the findings of the inquiry to the relevant States Parties; and
- (b) indicate to the relevant States Parties whether New Zealand intends to exercise jurisdiction.

18 Rights of certain persons taken into custody to communicate with representative of State

(1) This section applies to a person who is taken into custody in New Zealand as part of the measures referred to in **section 16**, and who is neither—

- (a) a New Zealand citizen; nor
- (b) a person who is ordinarily resident in New Zealand but who is not a citizen of any State.

(2) Promptly after being taken into custody, a person must be informed that he or she is entitled, and must be permitted,—

- (a) to communicate without delay with the nearest appropriate representative of the relevant State; and
- (b) to be visited by a representative of the relevant State.

(3) In **subsection (2), relevant State**, in relation to a person, means—

- (a) the State in relation to which the person is a citizen; or
- (b) the State that is otherwise entitled to protect the person's rights; or
- (c) if the person is not a citizen of any State, the State in whose territory the person ordinarily resides.

(4) Nothing in this section affects any other rights of a person to whom this section applies.

19 Attorney-General's consent to prosecutions required

(1) No proceedings for an offence against this Act may be instituted in any court except with the consent of the Attorney-General.

(2) However, a person alleged to have committed an offence against this Act may be arrested, or a warrant for the person's arrest may be issued and executed, and the person may be

remanded in custody or on bail, even though the Attorney-General's consent under **subsection (1)** has not been obtained.

20 Attorney-General to communicate outcome of prosecution

If a person is prosecuted for an offence under this Act, the Attorney-General must communicate the final outcome of the proceedings promptly to the Secretary-General of the United Nations, so that he or she may transmit the information to other States Parties to the Mercenaries Convention.

Extradition

21 Offences deemed to be included in extradition treaties

- (1) For the purposes of the Extradition Act 1999 and any Order in Council in force under section 15 or section 104 of that Act, any offence under any of **sections 7 to 12** is, if not already described in the treaty, deemed to be an offence described in any extradition treaty concluded before the relevant date and for the time being in force between New Zealand and any country that is a party to the Mercenaries Convention.
- (2) If, under **subsection (1)**, an offence is deemed to be an offence described in an extradition treaty, no person may be surrendered for the offence in accordance with the Extradition Act 1999 if the conduct alleged to constitute the offence occurred before the relevant date.
- (3) In this section, **relevant date** means, in relation to an offence under this Act, the date on which this section comes into force.

Amendment to Extradition Act 1999

22 Amendment to Extradition Act 1999

Section 101A(2) of the Extradition Act 1999 is amended by adding the following paragraph:

“(h) **section 21 of the Mercenary Activities (Prohibition) Act 2003.**”

Amendment to Mutual Assistance in Criminal Matters Act 1992

23 Schedule of Mutual Assistance in Criminal Matters Act 1992 amended to refer to Mercenaries Convention

The Schedule of the Mutual Assistance in Criminal Matters Act 1992 is amended by inserting, in its appropriate numerical order, the following row:

<p><25> <28> The International Convention against the Recruitment, Use, Financing and Training of Mercenaries, done at New York on 4 December 1989</p>	<p>An offence against the following sections of the Mercenary Activities (Prohibition) Act 2003</p> <table style="border: none;"> <tr> <td style="padding-right: 10px;"><i>section</i></td> <td><i>subject matter</i></td> </tr> <tr> <td>7</td> <td>Recruiting person to be mercenary</td> </tr> <tr> <td>8</td> <td>Using mercenary</td> </tr> <tr> <td>9</td> <td>Financing mercenary</td> </tr> <tr> <td>10</td> <td>Training prospective mercenary</td> </tr> <tr> <td>11</td> <td>Training mercenary</td> </tr> <tr> <td>12</td> <td>Mercenary <participating> <taking part> in hostilities or concerted act of violence</td> </tr> </table>	<i>section</i>	<i>subject matter</i>	7	Recruiting person to be mercenary	8	Using mercenary	9	Financing mercenary	10	Training prospective mercenary	11	Training mercenary	12	Mercenary <participating> <taking part> in hostilities or concerted act of violence
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8	Using mercenary														
9	Financing mercenary														
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11	Training mercenary														
12	Mercenary <participating> <taking part> in hostilities or concerted act of violence														

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Schedule**International Convention against the Recruitment,
Use, Financing and Training of Mercenaries**

The States Parties to the present Convention,

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

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

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

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

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

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

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

Have agreed as follows:

Article 1

For the purposes of the present Convention,

1. A mercenary is any person who:
 - (a) Is specially recruited locally or abroad in order to fight in an armed conflict;

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

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

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

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

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

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

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

(ii) Undermining the territorial integrity of a State;

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

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

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

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

Article 2

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

Article 3

1. A mercenary, as defined in article 1 of the present Convention, who participates directly in hostilities or in a concerted act of violence, as the case may be, commits an offence for the purposes of the Convention.

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

Article 4

An offence is committed by any person who:

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

Article 5

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

Article 6

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

- (a) Taking all practicable measures to prevent preparations in their respective territories for the commission of those offences within or outside their territories, including the prohibition of illegal activities of persons, groups and organizations that encourage, instigate, organize or engage in the perpetration of such offences;
- (b) Co-ordinating the taking of administrative and other measures as appropriate to prevent the commission of those offences.

Article 7

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

Article 8

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

Article 9

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

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

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

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

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

Article 10

1. Upon being satisfied that the circumstances so warrant, any State Party in whose territory the alleged offender is present shall, in accordance with its laws, take him into custody or take such other measures to ensure his presence for such time as is necessary to enable any criminal or extradition proceedings to be instituted. The State Party shall immediately make a preliminary inquiry into the facts.

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

- (a) The State Party where the offence was committed;
- (b) The State Party against which the offence has been directed or attempted;
- (c) The State Party of which the natural or juridical person against whom the offence has been directed or attempted is a national;
- (d) The State Party of which the alleged offender is a national or, if he is a stateless person, in whose territory he has his habitual residence;
- (e) Any other interested State Party which it considers it appropriate to notify.

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

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

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

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

Article 11

Any person regarding whom proceedings are being carried out in connection with any of the offences set forth in the present Convention shall be guaranteed at all stages of the proceedings fair treatment and all the rights and guarantees provided for in the law of the

State in question. Applicable norms of international law should be taken into account.

Article 12

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

Article 13

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

Article 14

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

Article 15

1. The offences set forth in articles 2, 3 and 4 of the present Convention shall be deemed to be included as extraditable offences in any extradition treaty existing between States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.
2. If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may at its

option consider the present Convention as the legal basis for extradition in respect of those offences. Extradition shall be subject to the other conditions provided by the law of the requested State.

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

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

Article 16

The present Convention shall be applied without prejudice to:

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

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

Article 17

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

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

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

Article 18

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

Article 19

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

Article 20

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

Article 21

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

IN WITNESS WHEREOF the undersigned, being duly authorized thereto by their respective Governments, have signed the present Convention, opened for signature at New York on 4 December 1989.

Mercenary Activities (Prohibition)

Legislative history

15 October 2003

Introduction (Bill 83–1)

5 November 2003

First reading and referral to Foreign Affairs, Defence
and Trade
