



**Economic and Social
Council**

Distr.
GENERAL

E/CN.4/2005/14
8 December 2004

Original: ENGLISH

COMMISSION ON HUMAN RIGHTS
Sixty-first session
Item 5 of the provisional agenda

**THE RIGHT OF PEOPLES TO SELF-DETERMINATION AND ITS
APPLICATION TO PEOPLES UNDER COLONIAL OR ALIEN
DOMINATION OR FOREIGN OCCUPATION**

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

Report of the Special Rapporteur, Shaista Shameem

Summary

In its resolution 2004/5 the Commission on Human Rights requested the new Special Rapporteur on mercenaries to consult States and intergovernmental and non-governmental organizations in the implementation of the resolution and to report, with specific recommendations, her findings on the use of mercenaries to undermine the right to self-determination to the Commission at its sixty-first session. The present report is submitted in accordance with that request.

This is the first report of the new Special Rapporteur, Shaista Shameem, appointed in July 2004. She has since that time undertaken a mission to Geneva to meet with relevant United Nations staff and representatives of Governments and non-governmental organizations. The Special Rapporteur also visited New York in November 2004 to make a presentation to the Third Committee of the General Assembly and have a dialogue with government delegates, and to meet bilaterally with representatives of Government and non-governmental organizations.

Based on her study, observations and consultations thus far, the Special Rapporteur proposes several key areas on which the mandate will focus, as follows:

- Noting the impact of the changing nature of conflict globally and the reformulation of the concept of “armed forces”;
- Examining the reasons for the possible lack of interest in widespread ratification and accession by States of the International Convention against the Recruitment, Use, Financing and Training of Mercenaries, and how this can be overcome;
- Exploring whether the proposed new legal definition of mercenaries would encourage States that have not yet ratified the Convention to do so;
- Noting the opinions of States that have ratified the Convention on the proposed new legal definition of a mercenary;
- Exploring whether licensing and regulation of genuine private security companies, such as through strong national legislation or an international registration mechanism, could serve to identify clear lines of accountability for bona fide companies;
- Understanding the legal and other mechanisms in place nationally, regionally and internationally to monitor the activities of mercenaries who violate human rights and impede the exercise of the right of peoples to self-determination.

CONTENTS

	<i>Paragraphs</i>	<i>Page</i>
Introduction	1 - 8	4
I. ACTIVITIES OF THE SPECIAL RAPPORTEUR	9 - 33	5
A. Implementation of the programme of activities	9 - 19	5
B. Correspondence	20 - 33	7
II. MERCENARY ACTIVITIES IN AFRICA	34 - 45	10
III. THE IMPACT OF THE ACTIVITIES OF PRIVATE COMPANIES OFFERING MILITARY ASSISTANCE, CONSULTANCY AND SECURITY SERVICES ON THE INTERNATIONAL MARKET	46 - 52	12
IV. TERRORISM AND MERCENARY ACTIVITIES	53 - 54	14
V. PROPOSAL FOR A NEW LEGAL DEFINITION OF A MERCENARY	55	14
VI. CURRENT STATUS OF THE INTERNATIONAL CONVENTION AGAINST THE RECRUITMENT, USE, FINANCING AND TRAINING OF MERCENARIES	56 - 58	14
VII. THIRD EXPERT MEETING ON MERCENARIES	59	15
VIII. CONCLUSIONS AND RECOMMENDATIONS	60 - 68	15

Introduction

1. In its resolution 2004/5 the Commission on Human Rights requested the new Special Rapporteur on mercenaries to consult States and intergovernmental and non-governmental organizations in the implementation of the resolution and to report, with specific recommendations, her findings on the use of mercenaries to undermine the right to self-determination to the Commission at its sixty-first session. The present report is submitted in accordance with that request.
2. The Commission also decided to extend the mandate of the Special Rapporteur for a period of three years. A new Special Rapporteur, Shaista Shameem, was appointed in July 2004.
3. In its resolution the Commission urged once again all States to take the necessary steps and to exercise the utmost vigilance against the menace posed by the activities of mercenaries, and to take legislative measures to ensure that their territories and other territories under their control, as well as their nationals, are not used for the recruitment, assembly, financing, training and transit of mercenaries for the planning of activities designed to impede the right to self-determination, to overthrow the Government of any State, or dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the right to self-determination of peoples.
4. The Commission welcomed once again the entry into force of the International Convention against the Recruitment, Use, Financing and Training of Mercenaries (hereafter “the International Convention”), and called upon all States that had not yet done so to consider taking the necessary action to sign or ratify the Convention.
5. In its resolution, the Commission requested the new Special Rapporteur on mercenaries to circulate to and consult with States on the new proposal for a legal definition of a mercenary drafted by Enrique Bernales Ballesteros (see E/CN.4/2004/15, paragraph 47) and to report her findings to the Commission.
6. The Commission requested the Office of the United Nations High Commissioner for Human Rights (OHCHR) to convene a third meeting of experts on traditional and new forms of mercenary activities as a means of violating human rights and impeding the exercise of the right of peoples to self-determination.
7. The Commission requested the Special Rapporteur to continue taking into account in the discharge of her mandate that mercenary activities are continuing to occur in many parts of the world and are taking on new forms, manifestations and modalities and, in this regard, requests her to pay particular attention to the impact of the activities of private companies offering military assistance, consultancy and security services on the international market on the exercise of the right of peoples to self-determination.
8. The Special Rapporteur wishes to thank all those who facilitated her consultations and took the time to meet with her during her missions.

I. ACTIVITIES OF THE SPECIAL RAPPORTEUR

A. Implementation of the programme of activities

9. The Special Rapporteur undertook a mission to Geneva from 28 September to 8 October 2004 to meet with OHCHR staff, as well as representatives of Governments and non-governmental organizations (NGOs), as part of a process of orientation with regard to her new mandate. Her activities during the mission are described below.
10. The Special Rapporteur first met with Claude Voillat of the Private Sector Relations Unit of the International Committee of the Red Cross (ICRC). With respect in particular to the issue of private military companies, Mr. Voillat stressed the focus of the ICRC on international humanitarian law and the ultimate responsibility of States. On the same date the Special Rapporteur also met with H.E. Mr. Assad Omer, Permanent Representative of Afghanistan to the United Nations Office at Geneva. She sought an invitation to visit the country to interview mercenaries who had been detained. The Ambassador welcomed the mission, provided it could be undertaken after the elections. The Special Rapporteur then met with Mark Thomson, Chief Executive Officer of the Association for the Prevention of Torture. Mr. Thomson expressed his Association's particular concern about mercenaries in detention and the interrogation procedures being used, and emphasized its work in promoting the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The Special Rapporteur also met with H.E. Mr. Joaquin Perez-Villanueva y Tovar, Permanent Representative of Spain to the United Nations Office at Geneva, with whom the Special Rapporteur discussed her desire to visit Spain in connection with residents' having information on the reported coup d'état attempt in Equatorial Guinea in March 2004.
11. The Special Rapporteur travelled to Paris to meet with Antonio Monsuy Esono, Second Secretary of the Permanent Mission of Equatorial Guinea to the United Nations Office at Geneva. She expressed her wish to observe the upcoming trials in Equatorial Guinea in relation to the reported coup d'état attempt in March 2004. He assured her that although it was not convenient for her to visit the country at that time because of national independence celebrations, a later visit during the trial would be welcome. The Special Rapporteur was also assured that the alleged mercenaries in detention were able to communicate with their families and lawyers and that their human rights were being respected while they awaited trial.
12. Upon her return to Geneva, the Special Rapporteur met with Carlos Hurtado Labrador, Counsellor at the Permanent Mission of Cuba to the United Nations Office at Geneva, who requested a copy of the list of States parties to the International Convention. The Special Rapporteur requested more information on the recent release of prisoners of Cuban nationality by the Government of Panama, in order to determine whether the incident was within her mandate. She then met with Mansoor Khan, Second Secretary of the Permanent Mission of Pakistan to the United Nations Office at Geneva, who was serving as Coordinator of the Asian Group until January 2005, as well as Coordinator of the Organization of Islamic Countries. He expressed the particular concern of Pakistan with respect to counter-terrorism efforts. The Special Rapporteur urged that the Government consider ratifying the International Convention, since there was evidence of possible links between mercenarism and terrorism.

13. The Special Rapporteur attended a meeting of the Eastern European Group chaired by H.E. Mr. Zohrab Mnatsakanian, Permanent Representative of Armenia to the United Nations Office at Geneva, who was serving as the Coordinator of the Group. Discussions covered the definition of mercenary, regulation of mercenaries through local legislation and the approach of ICRC. The Special Rapporteur also met with Chris Siddoti, Director of the non-governmental organization International Service for Human Rights (ISHR). It was agreed that ISHR would convene a meeting of the Special Rapporteur and relevant NGOs in Geneva, so that they could express views on the mandate, during her next visit in December.

14. The Rapporteur also met with Justin Biaboroh-Iboro, Minister Counsellor at the Permanent Mission of the Congo to the United Nations Office at Geneva, who was serving as Coordinator of the African Group. The meeting covered the mandate of the Special Rapporteur and her proposed mission to Equatorial Guinea. It was agreed to arrange for the Special Rapporteur to attend one of the meetings of the Regional Group during her next visit to Geneva.

15. The Special Rapporteur also met with Sergio Cerda, Minister at the Permanent Mission of Argentina to the United Nations Office at Geneva, who was serving as the Coordinator of the Group of Latin American and Caribbean States (GRULAC). The Minister provided some historical background to the mandate from the regional perspective, and stressed that regular dialogue with regional groups would be helpful. He indicated that he would convey the Special Rapporteur's interest to GRULAC, and that a meeting would be arranged during the Special Rapporteur's next mission to Geneva.

16. From 1 to 4 November 2004 the Special Rapporteur undertook a mission to New York to present her statement to the Third Committee of the General Assembly and to meet with government representatives and staff of relevant United Nations and non-governmental organizations.

17. During her mission the Special Rapporteur met with H.E. Mr. Orlando Requeijo Gual, Permanent Representative of Cuba to the United Nations, who noted that ratification of the Convention was currently before the Parliament and that approval was expected at the beginning of 2005. She also held a meeting with Lisa Misol, a researcher for Human Rights Watch focusing on business and human rights. Ms. Misol drew the Special Rapporteur's attention to the "voluntary principles on security and human rights in the extractive industries" developed by the Governments of the United States and the United Kingdom in 2001, with the participation of Human Rights Watch and other NGOs.

18. The Special Rapporteur then met with Sichan Siv, the representative of the United States to the Economic and Social Council, to discuss the proposed mission to that country in early 2005. In her meeting with Vincent McClean, the Director of the United Nations New York Office on Drugs and Crime, agreement was reached on initiating a process of information-sharing. It was noted that the Office had redirected its work from drugs and drug abuse to related criminal issues and criminal justice.

19. The Special Rapporteur also met in New York with Claudine Mtshali, the Permanent Representative of South Africa to the United Nations Office at Geneva and Pitso Monwedi, the Head of the Human Rights Section of the South African Ministry for Foreign Affairs. She

expressed her wish to observe the upcoming trials in South Africa in relation to the reported coup d'état attempt in Equatorial Guinea in March 2004 and urged that South Africa consider ratifying the International Convention. The Special Rapporteur also commended the strong legal framework against mercenarism in place in South Africa.

B. Correspondence

20. Further to the request of the General Assembly to the Secretary-General to circulate the enhanced definition of mercenaries contained in the final report of the Special Rapporteur, OHCHR, on behalf of the Secretary-General, sent a note verbale on 25 March 2004 to Member States requesting a response by 31 May. Responses were forthcoming from the Governments of Croatia, Mauritius and Cuba, the details of which are given in the note by the Secretary-General to the General Assembly (A/59/191).

21. On 3 August 2004 OHCHR sent a comprehensive note verbale to Member States in implementation of the resolutions adopted by the Commission on Human Rights at its sixtieth session, including resolution 2004/5 in which the Special Rapporteur was requested to circulate to and consult with States on the new proposal for a legal definition of a mercenary drafted by her predecessor (E/CN.4/2004/15, para. 47). At the time of writing this report, responses to that request had been received from the Governments of Mauritius, Namibia and Cuba.

22. In a letter received on 8 October 2004, the Permanent Mission of Mauritius to the United Nations Office at Geneva explained that Mauritius does not have any legislation incorporating the International Convention or General Assembly resolution 58/162. However, section 3 (2) of the Prevention of Terrorism Act describes terrorism as including acts which seriously intimidate a population, unduly compel a Government to perform or abstain from performing any act, and seriously destabilize and destroy the fundamental political and constitutional structure of a State. Also, certain sections of the Criminal Code deal with offences against the State, inter alia, with acts similar in nature to those that are committed by mercenaries although the term "mercenary" is not used.

23. In a letter dated 5 October 2004, the Government of Namibia noted that article 4 of the Constitution of Namibia provides that the Parliament may pass a law providing for the loss of Namibian citizenship by persons who, after the date of independence, have served or volunteered to serve in the armed or security forces of any other country without the written permission of the Namibian Government. However, no person who is a citizen of Namibia by birth or descent may be deprived of Namibian citizenship by such legislation. There are legislative measures in place to prohibit mercenary activities. Section 58 of the Defence Act, 2002 (Act 1 of 2002) prohibits certain acts in connection with service as mercenary. The law provides that a person who:

(a) Bind himself or herself to serve or render service as a mercenary shall be liable to a fine not exceeding N\$ 8,000 or to imprisonment for a period not exceeding two years, or both; and

(b) Makes any utterances or performs any act or does anything with intent to advise, encourage, assist, incite, instigate, suggest to or otherwise persuade any person to bind himself or herself to serve or render service as mercenary, is liable to a fine not exceeding N\$ 20,000, or to imprisonment for a period not exceeding five years, or to both. The Government of Namibia shares the concern of the international community about the problems relating to mercenaries, notably that mercenary activities threaten peace and the socio-political and economic stability of Governments.

24. In a note verbale dated 8 October 2004, the Government of Cuba stated that it considers that the definition of mercenaries given in article 1 of the International Convention does not cover its various manifestations and, furthermore, establishes excessive requirements for the purposes of definition by calling for them to be met concomitantly. It is inappropriate to use, as a criterion for the definition of a mercenary, the amount of the material compensation received. Furthermore, excluding from the definition of a mercenary those nationals who act against their own country, in the service of a foreign power or interest, subject to the payment of remuneration, particularly weakens its scope. Cuba has made concrete proposals in the past concerning a possible reformulation of the concept of “mercenary” which remain valid, and it welcomes the proposal made by the former Special Rapporteur which constitutes a good basis for initiating the process of strengthening the International Convention. As the former Special Rapporteur has noted, in the years following the end of colonialism, in most countries a metamorphosis of mercenarism has occurred, with new and sophisticated modalities of this phenomenon, such as the activities of so-called private security firms also known as private military companies coming to exist together with the traditional forms. These have every appearance of legality, which obscures the illegality of many of their actions and activities. When members of a national army commit war crimes, it is the responsibility of that army or State to try them, but when the crimes are committed by personnel of private security firms - who very often are not nationals or residents of the country where they are legally registered or of the country where they carry out their activities - those crimes remain in a legal limbo or, at least, a profound ambiguity arises with regard to legal jurisdiction. The Government in its reply also cites alleged cases of mercenarism in Iraq, Zimbabwe, Equatorial Guinea and, in particular, Panama.

25. On 8, 11 and 12 October 2004, the Special Rapporteur sent letters to the permanent missions in Geneva of the States parties to the International Convention requesting their reactions to the proposed new legal definition of mercenary.

26. In a letter dated 25 October 2004, the Permanent Mission of Qatar offered its opinion as follows: “This change to the definition of a mercenary is a response by the international community to the new crimes that are emerging in the world and which it was difficult to include in the old definition. These new crimes are condemned by the international community and are punished by law; hence, the attempt to provide a flexible definition of a mercenary which includes any crime that the international community condemns or may condemn in the future. The amendment takes account of the changes which the international community is seeing in the area of crime.”

27. In a letter dated 28 October 2004, the Permanent Mission of Azerbaijan noted that attempts to use mercenaries are still in abundance throughout the world, leading to increased violations of human rights and hindering the exercise of the right of peoples to self-determination. This undoubtedly underlines the importance of the international community's efforts to eliminate this phenomenon. As a State party to the International Convention, Azerbaijan considers it possible to revise the legal definition of a mercenary as proposed by Mr. Bernales Ballesteros. At the same time, while reserving the right to make additional comments, Azerbaijan proposed the following amendments to the new definition:

(a) In article 1, paragraph (2) (a) (iii), to replace the phrase "terrorist acts" by "terrorist, extremist and other acts which could undermine the normal activity of State agencies";

(b) In article 3, paragraph 1, to insert the word "extremism" after "terrorism".

28. In a letter dated 16 August 2004, the Government of Equatorial Guinea invited the Special Rapporteur to attend the judicial proceedings involving the alleged mercenaries charged with involvement in the reported attempted coup d'état in March 2004 in that country. At that time, it was foreseen that these proceedings would begin on 23 August. The Special Rapporteur replied on 24 August that her schedule of commitments would not allow her to attend at that time, but that she would be very interested in following developments and receiving communications as appropriate from the Government. On 21 September 2004 the Special Rapporteur further informed the Government that it would be possible for her to visit the country from 17 to 25 October and requested an invitation from the Government for those dates.

29. The Special Rapporteur was also in communication with the Government of the United States of America with a view to following through on a preliminary invitation to the former Special Rapporteur to undertake a fact-finding mission in that country. The Special Rapporteur initially proposed the dates 4-12 November 2004, immediately following her mission to United Nations Headquarters. In its letter of 13 September 2004 the Government welcomed the proposed visit but that it was not possible to provide precise dates or a schedule of appointments. On 24 September the Special Rapporteur thanked the Government for its positive response and proposed new dates of 15 to 22 February 2005. A provisional itinerary was also provided to serve as a basis for discussion of mission arrangements.

30. In a letter dated 6 September 2004 the Government of Cuba informed the Special Rapporteur of the decision of the Government of Panama to release four Cubans alleged to have been involved in terrorist acts in that country in 2000, and expressed its strong dissatisfaction with this decision. Attached was an official statement by the Government of Cuba on the situation. The Government also requested that the Special Rapporteur make a statement on the issue. The Special Rapporteur responded, in a letter of 12 October, that it was not clear to her from the material provided how the persons involved could be classified as mercenaries, and that it must first be established that this issue was within her mandate before she could consider any action. She therefore asked the Government to furnish her with further information which would clarify the nature of the acts committed and their links to mercenarism.

31. In keeping with her desire to ensure regular dialogue with Member States, the Special Rapporteur, in letters dated 12 October, also sought appointments to meet with the African and Latin American Regional Groups in Geneva during the course of her anticipated mission to Geneva in December 2004.

32. In a letter dated 3 November, the Special Rapporteur raised several issues of concern with the Government of Fiji. These encompassed reported misinterpretation among members of the public about the role of security servicemen provided by the Government of Fiji to the United Nations in Iraq and the need for the Government to clarify the nature of their deployment, as well as an inquiry into the efforts of the Government of Fiji to monitor the activities of private security companies. She also encouraged the Government to ratify the International Convention.

33. In correspondence dated 15 November 2004, the Special Rapporteur congratulated the Government of New Zealand for its ratification of the International Convention on 22 September and invited the Government to pay special attention to the note verbale seeking responses to the new proposal for a legal definition of a mercenary. On 16 November the Permanent Mission of New Zealand forwarded a copy of the Mercenary Activities (Prohibition) Act 2004.

II. MERCENARY ACTIVITIES IN AFRICA

34. The Special Rapporteur has been following the situation surrounding an alleged coup d'état attempt in Equatorial Guinea. According to reports reaching her, on 6 March 2004, 19 men - 8 South Africans, 6 Armenians, 1 German citizen and 5 suspects from Equatorial Guinea - were arrested in Malabo. The German reportedly died in custody some days later. The men were charged with spearheading an attempt to overthrow the Government of President Teodoro Obiang Nguema, which was allegedly to be supported a day later by additional mercenaries who were allegedly to arrive by plane, travelling through Zimbabwe. Prosecutors in Malabo reportedly accused the country's "opposition leader", Severo Moto, of offering the men a large sum of money, together with oil rights, to overthrow the Government.

35. The defendants went on trial in Malabo on 23 August and the case was adjourned on 31 August at the request of the country's attorney general, reportedly to gather further information from abroad. The trial was postponed in mid-October after the death of a defence lawyer and resumed on 16 November. Upon its resumption, eight new men were reportedly added to the accused, including a British citizen charged in South Africa, mentioned below, as well as members of the "government in exile".

36. It is reported that the trial ended on 26 November with the following judgements: the acquittal of three Equatorial Guinean and three South African defendants; the conviction and sentencing to 34 years in prison of the alleged leader, Nick du Toit; a sentence of 17 years in prison for the South African co-defendants; a sentence of 24 years for one Armenian co-defendant; 14-year sentences for six other Armenians; a 16-month sentence for one Equatorial Guinean and a sentence of one day for another Equatorial Guinean. Mr. Moto was sentenced to 63 years' imprisonment, while the members of his "government" were each given prison terms of 52 years.

37. Amnesty International, in a press release issued on 30 November recounting observations made by its delegation, which had attended the trial since 23 August 2004, expressed the following concerns:

(a) The defendants were arrested without a warrant and were not promptly informed of the charges against them in a language that they understood, as prescribed by law;

(b) They did not have access to their defence lawyers until two days before the start of the trial. In addition, the defence did not have sufficient time to prepare the defence and were not shown the prosecution's evidence against their clients;

(c) All the accused stated in court that their statements were taken not by the investigating judge (*juez de instruccion*), as prescribed by Equatorial Guinean law, but by the Attorney General, who was prosecuting the case in court and who, under the law, has no legal role in the interrogation stage of the proceedings;

(d) The defendants were required to sign statements in Spanish without the assistance of qualified interpreters. The initial statements of the South Africans were translated by one of the Equatorial Guinean co-defendants who, according to his own statement in court, also provided evidence against them. In court, interpretation for the South African defendants was performed by the Attorney General's official interpreter, which begs the question of his independence and impartiality. Amnesty International's delegates observed that vital pieces of information, such as defendants' statements about torture, were not translated, while others were distorted;

(e) One South African, of Angolan origin, spoke only Portuguese. The court was not aware of this crucial fact and there was no official interpreter for him. This raises serious concern regarding the circumstances in which he signed his statement.

38. The Special Rapporteur is seeking a transcript of the trial and will be undertaking further investigation.

39. On 7 March 2004, 67 suspected mercenaries, along with three flight-crew members, all holders of South African passports, were arrested on board a plane that landed at Harare International Airport in Zimbabwe and charged with violating the Public Order and Security Act, the Firearms Act and the Immigration Act. The Government of Zimbabwe alleges that the mercenaries were on their way to overthrow the Government of Equatorial Guinea, charges denied by the group, which maintained that it was headed for the Democratic Republic of the Congo to guard diamond mines.

40. Following a trial in Zimbabwe, on 27 August 66 of the men pleaded guilty to violating the Immigration Act, but were absolved of attempting to procure arms for the alleged coup in Equatorial Guinea. The two pilots received 16-month sentences while the other 65 men were served with sentences of one year each. The group leader, a British citizen, pleaded guilty to the charges and was subsequently sentenced to seven years in early September for breaching the Public Order and Security Act.

41. The Deputy Prime Minister of Equatorial Guinea reportedly announced that international arrest warrants had been requested for anyone connected with the coup attempt. A British citizen was arrested on 25 August in South Africa on charges of financing the attempted coup and violating South Africa's Regulation of Foreign Military Assistance Act.

42. The Special Rapporteur notes that Equatorial Guinea, South Africa and Zimbabwe have neither signed nor ratified the International Convention. She urges the respective Governments to give serious consideration to becoming parties to the Convention. The Special Rapporteur also notes that Zimbabwe and Equatorial Guinea are parties to the Convention for the Elimination of Mercenarism in Africa of the Organization of African Unity (OAU) and commends the actions undertaken thus far by those Governments in line with the Convention.

43. The Special Rapporteur further advocates that related legal proceedings be pursued and sentences pronounced in keeping with international legal and human rights standards. She recalls that she had hoped to attend the trial of the alleged mercenaries in Equatorial Guinea, as well as the trial of the British citizen in South Africa.

44. The Special Rapporteur has followed with interest events in West Africa. She notes the steps being taken with respect to regional initiatives for the repatriation of former combatants. In early October 2004, the Governments of Liberia and Sierra Leone signed a memorandum of understanding in Monrovia to finalize arrangements for the repatriation of the first group of Liberian fighters in Sierra Leone. Reports indicate that within this framework Sierra Leone will start the repatriation in January 2005 of 435 former Liberian government fighters who fled across the border to seek refuge during the latter stages of Liberia's civil war, while Liberia would send back to Sierra Leone 231 Sierra Leoneans who fought with armed factions in the Liberian conflict and who had recently registered for disarmament. Agreement was also reached between the two government delegations to grant total amnesty to the former fighters. The ex-combatants had reportedly already benefited from vocational training and other elements of disarmament, demobilization, reintegration and rehabilitation programmes.

45. The Special Rapporteur believes that in post-conflict situations repatriation initiatives and related training efforts such as these would serve to reduce the pool of foreign ex-combatants from which mercenaries are often recruited for armed conflicts in neighbouring countries. However, she also cautions against the extensive use of amnesties, which may have the effect of seeming to grant impunity for mercenary acts and may therefore undermine the objective of decrying mercenarism as an unacceptable alternative vocation.

III. THE IMPACT OF THE ACTIVITIES OF PRIVATE COMPANIES OFFERING MILITARY ASSISTANCE, CONSULTANCY AND SECURITY SERVICES ON THE INTERNATIONAL MARKET

46. Over the last decade, the proliferation of international private military companies operating in over 50 countries around the world has outstripped the effectiveness of the existing legal framework and enforcement mechanisms. This situation poses a problem on several levels. The nature and degree of accountability of these organizations and their employees is uncertain, paving the way for impunity for a range of acts which would otherwise be criminal. Also, the

legal status of private actors offering military services internationally is unclear, thus rendering the actor vulnerable to national legislation, often deficient where it exists, and thereby to improvised procedures in the case of perceived breaches. The uncertainty derives from the current inability of international law to accommodate actors whose attributes include international scope and private motive, and whose role may include either individual or corporate involvement in military operations.

47. Critically in question as well is the degree to which States are willing to cede, or are even fully conscious of ceding military force, a traditional privilege and right of the State, to private actors, whose motive is by definition profit as opposed to national interest or the protection of nationals.

48. As noted in this report, the Special Rapporteur will be reviewing elements of the International Convention with a view to capturing a contemporary picture of the phenomenon of mercenarism. This will take into consideration the responses of Member States during consultations, the results of the expert meetings on mercenaries, consultations with other relevant actors and the outcomes of the Special Rapporteur's own research.

49. During the period covered by the present document, reports reached the Special Rapporteur of the killing and mutilation of four United States private security contractors in Falluja, Iraq, at the end of March 2004. The acts were allegedly instigated by an angry mob. The Special Rapporteur has received no reports of legal action taken and the Government of the United States reportedly responded with a heightened military operation in the area.

50. The attention of the Special Rapporteur was also drawn to alleged incidents in April 2004 in Iraq of torture and sexual abuse of Iraqi prisoners by United States soldiers in the United States-run Abu Gharib prison outside Baghdad. The soldiers reportedly claimed that they were acting in part under the instruction of private military company interrogators hired by the Pentagon. It was further alleged that during this period one employee of a private company was accused of raping a male prisoner, but had not been charged since the jurisdiction of military law could not be established.

51. While United States soldiers are subject to the Uniform Code of Military Justice, a system of regulations and mechanisms for enforcement, contractors fall outside its jurisdiction. The 2000 Military Extraterritorial Jurisdiction Act extends federal United States law to persons "employed by or accompanying the armed forces outside the United States", but applies only to contractors hired by the Department of Defense. Iraqi law also apparently does not apply under these conditions since in June 2003 the declaration known as Order 17 granted immunity from local prosecution to civilian contractors working in the country. This was subsequently revised, and in June 2004 was extended until a transitional Iraqi Government is elected in January 2005.¹

¹ Patrick Radden Keefe, *Iraq: America's Private Armies*, 12 August 2004, at http://www.nybooks.com/articles/article-preview?article_id=17323.

52. The Special Rapporteur also received reports of three United States citizens involved in a private security business being sentenced to up to 10 years in jail after being found guilty by an Afghan court in September 2004 on charges including torture, running a private prison and illegal detention. Jonathan Idema, a former United States Green Beret, was arrested in July along with another ex-serviceman, Brent Bennett, and documentary filmmaker Edward Caraballo. Mr. Idema is reportedly a former United States Army Special Forces operative who subsequently ran a military equipment firm in the United States. Other reports suggest that the large rewards offered for the capture of Al-Qaida members in Afghanistan have contributed to the expansion of private security activity in the country.

IV. TERRORISM AND MERCENARY ACTIVITIES

53. The Special Rapporteur wishes to underscore that it is important not to confuse mercenaries with terrorist activity, as this may serve to obfuscate the mandate. Indeed, while operations fuelled by ideological, religious or political motives may involve mercenary services such as training or military support, this link should not be overstated. Nevertheless, the use of mercenaries should be considered within the ambit of any investigatory or regulatory framework on terrorism.

54. Similarly, the Special Rapporteur urges that vigilance should be exercised with respect to the methods applied and personnel employed in anti-terrorism efforts. In this respect, during the period covered by the report the Special Rapporteur can again make reference to the above-mentioned case in Afghanistan, where the sentenced men allegedly claimed that their purpose in the country was to fight terrorism.

V. PROPOSAL FOR A NEW LEGAL DEFINITION OF A MERCENARY

55. In addition to the responses to her note verbale, described above, the Special Rapporteur will also take into consideration the outcomes of the third expert meeting on mercenaries, due to be convened in Geneva by OHCHR in December 2004, in pursuing the question of the new legal definition of a mercenary proposed by her predecessor. It is her intention to formulate within the coming year procedures for the incorporation of a new definition into the International Convention, in keeping with the paragraph 11 of General Assembly resolution 56/232 of 2002, in which the Assembly requested the Special Rapporteur to propose a clearer definition of mercenaries, including clear nationality criteria, based on [her] findings, the proposals of States and the outcomes of the meetings of experts, and to make suggestions on the procedure to be followed for international adoption of a new definition.

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

56. The International Convention against the Recruitment, Use, Financing and Training of Mercenaries, adopted by the General Assembly by its resolution 44/34 of 4 December 1989, entered into force on 20 October 2001 when the twenty-second instrument of ratification or accession was deposited with the Secretary-General. There are now 26 States parties to the Convention.

57. On 22 September 2004 New Zealand became the twenty-sixth country to ratify the Convention, with the following territorial exclusion: "... consistent with the constitutional status of Tokelau and taking into account the commitment of the Government of New Zealand to the development of self-government for Tokelau through an act of self-determination under the Charter of the United Nations, this ratification shall not extend to Tokelau unless and until a Declaration to this effect is lodged by the Government of New Zealand with the Depositary on the basis of appropriate consultation with that territory."

58. As noted above, 26 States have now completed the formal process of expressing their willingness to be bound by the Convention. Those States are: Azerbaijan, Barbados, Belarus, Belgium, Cameroon, Costa Rica, Croatia, Cyprus, Georgia, Guinea, Italy, Libyan Arab Jamahiriya, Maldives, Mali, Mauritania, New Zealand, Qatar, Saudi Arabia, Senegal, Seychelles, Suriname, Togo, Turkmenistan, Ukraine, Uruguay and Uzbekistan. Nine other States have signed the International Convention, but have not yet ratified it. They are: Angola, Congo, Democratic Republic of the Congo, Germany, Morocco, Nigeria, Poland, Romania and Serbia and Montenegro.

VII. THIRD EXPERT MEETING ON MERCENARIES

59. The third expert meeting on mercenaries is due to be held from 6 to 10 December 2004 in Geneva. The agenda for the meeting is derived from paragraph 16 of Commission resolution 2004/5: (a) to give further consideration to the proposed new legal definition of a mercenary as contained in paragraph 47 of document E/CN.4/2004/15; (b) to make proposals on possible means of regulation and international supervision of the activities of private companies offering military assistance, consultancy and security services on the international market; and (c) to study and evaluate recent activities of mercenaries in Africa. The first meeting was held from 29 January to 2 February 2001, and was convened "to study and update the international legislation in force and to propose recommendations for a clearer legal definition of mercenaries that would allow for more efficient prevention and punishment of mercenary activities" (General Assembly resolution 54/151). The second meeting was held from 13 to 17 May 2002 and was convened "to continue studying and updating the international legislation and to make recommendations for a clearer legal definition of mercenaries that would make more efficient the prevention and punishment of mercenary activities" (resolution 56/232). The meeting will bring together 11 experts in the field. The Special Rapporteur will also attend in her official capacity.

VIII. CONCLUSIONS AND RECOMMENDATIONS

60. **The Special Rapporteur stresses the need to be careful not to confuse mercenaries with other actors in the field - such as "terrorists", "freedom fighters", "volunteers", "part-time soldiers", "rebels with a cause" and "private security companies" supplying security services to individuals and organizations in trouble spots throughout the world. While there may be occasions when the activities of mercenaries merge with activities of these other actors, it is important to avoid making assumptions.**

61. **Based on reports and preliminary observations on the issue of mercenarism, as recorded above, the Special Rapporteur finds it important to remain vigilant with regard to the following considerations.**

62. **First, it is important to note the impact of the changing nature of conflict globally and the reformulation of the concept of “armed forces” on the recruitment, use, financing and training of mercenaries who violate human rights and impede the exercise of the right of peoples to self-determination.**

63. **Secondly, it is critical to examine the reasons for the possible lack of interest in widespread ratification and accession by States of the International Convention against the Recruitment, Use, Financing and Training of Mercenaries, and how can this be overcome.**

64. **Thirdly, it is key to explore whether the proposed new legal definition of mercenaries would encourage States that have not yet ratified the Convention to do so.**

65. **Fourthly, the opinions of States that have ratified the Convention on the proposed new legal definition of a mercenary is of special significance, insofar as they have already registered their concern with regulating this activity.**

66. **Fifthly, it would be significant to explore whether licensing and regulation of genuine private security companies, such as through strong national legislation or an international registration mechanism, could serve to identify clear lines of accountability for bona fide companies and thereby distinguish other organizations engaging in mercenary activity to the detriment of human rights and the rights of peoples to self-determination.**

67. **Sixthly, the Special Rapporteur deems crucial a more comprehensive understanding of the legal and other mechanisms in place, nationally, regionally and internationally, to monitor the activities of mercenaries who violate human rights and impede the exercise of the rights of peoples to self-determination.**

68. **The Special Rapporteur will undertake an assessment of the above questions over the course of the next year and report fully thereon to the Commission on Human Rights at its sixty-second session.**
