

Mercenary Activities (Prohibition) Bill

Government Bill

Explanatory note

General policy statement

This Bill implements the International Convention against the Recruitment, Use, Financing and Training of Mercenaries 1989 (the **Mercenaries Convention**).

The Bill creates a number of offences to deal with activities involving mercenaries. Although there are currently no offences in New Zealand law relating to mercenaries, the proposed ban on the recruitment and use of mercenaries contained in the Bill is consistent with current New Zealand policy.

The Bill contains the standard range of provisions found in legislation that implements penal treaties. It will allow extraterritorial jurisdiction to be taken where offences are committed by New Zealanders abroad. It will also be possible for New Zealand to prosecute a foreign national suspected of having committed an offence against the Mercenaries Convention elsewhere who is apprehended in New Zealand and not extradited. The general provisions on mutual assistance in criminal matters and extradition will expand New Zealand's ability to co-operate with other countries in the investigation and prosecution of mercenary activities.

The Mercenaries Convention is the only multilateral treaty that directly addresses issues relating to mercenaries. It entered into force in 2001 and currently has 25 States Parties. New Zealand is not a signatory to the Mercenaries Convention, but will be able to accede to it once this Bill is passed.

The international community has found it difficult to develop a universally acceptable definition of mercenary activity and the definition of mercenary in the Mercenaries Convention is regarded as

somewhat narrow. Despite this, there are advantages in New Zealand becoming a party to the Mercenaries Convention. Most importantly, becoming a party to it demonstrates to the international community that New Zealand is among those countries that consider the recruitment and use of mercenaries to be unacceptable as a method of conflict resolution.

The creation of the new offences will ensure that there is a sanction for activities involving mercenaries that are not currently punishable under New Zealand law. It will also discourage the use of New Zealand as a location for the recruitment and training of mercenaries and also send a signal to any New Zealander who might consider providing mercenaries to external conflicts, or who might consider being a mercenary, that he or she risks punishment in New Zealand.

Clause by clause analysis

Clause 1 is the Title clause.

Part 1

Preliminary provisions

Clause 2 provides that the Bill comes into force on a date to be appointed by the Governor-General by Order in Council. The reason for commencement by Order in Council is that it is proposed that the Bill come into force on the same date as the Mercenaries Convention enters into force in New Zealand. The Mercenaries Convention will enter into force in New Zealand on the 30th day after the date of the deposit of New Zealand's instrument of accession with the Secretary-General of the United Nations (*see* articles 18(3) and 19(2) of the Mercenaries Convention).

Clause 3 states the Bill's purpose.

Clause 4 is the interpretation clause. The definition of **concerted act of violence**, based on article 1(2)(a)(i) and (ii) of the Mercenaries Convention, provides that it is an act of violence designed to overthrow a government, undermine the constitutional order of a State, or undermine the territorial integrity of a State.

Clause 4(2) sets out the meaning of **ordinarily resident** when the term is used in relation to a specified State (including New Zealand).

Clause 5 defines **mercenary** and is based on the definition of mercenary set out in article 1 of the Mercenaries Convention. There are 2

types of mercenary contemplated by the Mercenaries Convention and both of these are represented in the definition of mercenary in *clause 5*.

The first type of mercenary (a **type A mercenary**), based on the definition of mercenary in article 1(1) of the Mercenaries Convention, is a person—

- who is recruited, within New Zealand or elsewhere, in order to fight in an armed conflict; and
- whose primary purpose in taking part in hostilities during the armed conflict is making private gain; and
- 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
- who does not fall outside the definition because of the person's citizenship status, residence status, membership in the armed forces, or role in official duties (*see clause 5(a)(iv) to (vi)*).

The second type of mercenary (a **type B mercenary**), based on the definition of mercenary in article 1(2) of the Mercenaries Convention, is a person—

- who is recruited, within New Zealand or elsewhere, in order to participate in a concerted act of violence; and
- whose purpose in taking part in the concerted act of violence is making significant private gain; and
- who is promised or paid material compensation; and
- who does not fall outside the definition because of the person's citizenship status, residence status, role in official duties, or membership in the armed forces (*see clause 5(b)(iv) to (vi)*).

The definition of mercenary does not include members of the armed forces of any State, including members of the New Zealand Defence Force, who are acting in the course of their official duties.

Clause 6 provides that the Bill will bind the Crown.

Part 2

Mercenary activities

Recruiting, using, financing, and training of mercenary

Clause 7 creates the offence of recruiting a person to be a mercenary, as required by article 2 of the Mercenaries Convention.

Clause 7(1) makes it an indictable offence punishable by a term of imprisonment not exceeding 14 years to recruit a person for the purposes of fighting in an armed conflict,—

- with the intention that the person may make private gain from participating in hostilities during the armed conflict; and
- knowing that the person 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 the party.

Clause 7(2) sets out circumstances in which *clause 7(1)* does not apply because of the recruited person's citizenship status, residence status, membership in the armed forces, or role in official duties.

Clause 7(3) makes it an indictable offence punishable by a term of imprisonment not exceeding 14 years to recruit a person for the purpose of participating in a concerted act of violence,—

- with the intention that the person may make significant private gain from participating in the concerted act of violence; and
- knowing that the person has been or is being promised material compensation to participate in the concerted act of violence.

Clause 7(4) sets out circumstances in which *clause 7(3)* does not apply because of the recruited person's citizenship status, residence status, role in official duties, or membership in the armed forces.

Clause 8 creates the offence of using a mercenary, as required by article 2 of the Mercenaries Convention. It provides that it is an indictable offence punishable by a term of imprisonment not exceeding 14 years for a person to use a person—

- to fight in an armed conflict, knowing that the person is a type A mercenary; or
- to participate in a concerted act of violence, knowing that the person is a type B mercenary.

Article 16 of the Mercenaries Convention provides that the convention applies without prejudice to the rules relating to the international responsibility of States. This includes the rules relating to circumstances in which States, heads of States, and certain other high officials can be subjected to criminal proceedings in the courts of another State, including proceedings relating to using mercenaries.

Clause 9 creates the offence of financing a mercenary, as required by article 2 of the Mercenaries Convention. *Clause 9(1)* provides that it is an indictable offence punishable by a term of imprisonment not exceeding 14 years to provide, without justification or reasonable excuse, funds (as defined in *clause 9(2)*), intending that those funds be used, or knowing that the funds will be used, in full or in part, to enable—

- a person who is a type A mercenary to fight in an armed conflict; or
- a person who is a type B mercenary to participate in a concerted act of violence.

Clause 9(3) provides that in a prosecution under *clause 9(1)* it is not necessary for the prosecutor to prove that funds provided to a mercenary were actually used to finance a mercenary to fight in armed conflict or participate in a concerted act of violence. It is enough that the person intends or knows that the funds will be used for that purpose (as set out in *clause 9(1)*).

Clause 10 creates the offence of training a prospective mercenary. This offence addresses the situation where a person is being trained to be a mercenary. Under *clause 10*, it is an indictable offence punishable by imprisonment for a term not exceeding 14 years to train a person—

- to fight in an armed conflict with the intention that the person be recruited as a type A mercenary, or knowing that the person is likely to be recruited as a type A mercenary, once he or she has completed the training; or
- to participate in a concerted act of violence with the intention that the person be recruited as a type B mercenary, or knowing that the person is likely to be recruited as a type B mercenary, once he or she has completed the training.

Clause 11 creates the offence of training a mercenary, as required by article 2 of the Mercenaries Convention. The offence relates to the period after recruitment when a person is being trained. It provides

that it is an indictable offence punishable by a term of imprisonment not exceeding 14 years to train—

- a person to fight in an armed conflict knowing that the person is a type A mercenary; or
- a person to participate in a concerted act of violence knowing that the person is a type B mercenary.

Mercenary participating in hostilities or concerted act of violence

Clause 12 creates the offence of a mercenary participating in hostilities or a concerted act of violence, as required by article 3 of the Mercenaries Convention.

Clause 12(1) provides that it is an indictable offence punishable by a term of imprisonment not exceeding 14 years to be a type A mercenary and intentionally participate directly in hostilities during an armed conflict.

Clause 12(2) provides that it is an indictable offence punishable by a term of imprisonment not exceeding 14 years to be a type B mercenary and intentionally participate directly in a concerted act of violence.

Extraterritorial jurisdiction

Clause 13 relates to the Bill's extraterritorial jurisdiction. It provides that proceedings may be brought for an offence under any of clauses 7 to 12 in certain circumstances even if the alleged offending took place outside of New Zealand. The circumstances include—

- if the person charged is a New Zealand citizen, ordinarily resident in New Zealand, was found in New Zealand and has not been extradited, or is a body corporate or corporation sole incorporated under New Zealand law; or
- that the act or omission that constituted the offence occurred on board a ship registered in New Zealand, a ship used by the New Zealand Defence Force, an aircraft registered in New Zealand, an aircraft under by the New Zealand Defence Force, or an aircraft leased to a person whose principal place of business is New Zealand or who is a New Zealand citizen; or
- if the person in respect of whom the offence is committed is a New Zealand citizen or ordinarily resident in New Zealand.

Clause 13(2) and (3) clarifies the relationship between *clause 13(1)*, certain provisions of the Crimes Act 1961, and certain acts or omissions that occurred wholly in New Zealand.

Part 3

Miscellaneous provisions

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

Clause 14 relates to certificates as to States Parties under the Mercenaries Convention.

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

Clause 15(1) provides that *clauses 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.

Clause 15(2) defines **relevant States Parties** for the purposes of *clauses 16 and 17*.

Clause 16 provides that the Attorney-General must immediately notify the relevant States Parties (as contemplated by article 10(2) of the Mercenaries Convention) if—

- a person is taken into custody; or
- measures are taken to ensure a person's presence for the purposes of the institution of criminal or extradition proceedings.

Clause 17 requires the Attorney-General to promptly advise the relevant States Parties of the following matters if a preliminary inquiry has been undertaken:

- any findings of the inquiry; and
- whether New Zealand intends to exercise jurisdiction.

Clause 18 gives persons who are taken into custody under *clause 16* who are not New Zealand citizens or stateless persons ordinarily resident in New Zealand the right—

- to communicate without delay with the nearest appropriate representative of the relevant State (defined in *clause 18(3)*); and

- be visited by that representative.

Clause 19(1) requires the Attorney-General to give consent before proceedings may be brought for an offence against the Bill. *Clause 19(2)* provides that despite *clause 19(1)* a person alleged to have committed an offence may be arrested or remanded in custody or on bail without the Attorney-General's consent.

Clause 20 requires the Attorney-General to communicate the final outcome of any prosecution under the Mercenary Activities (Prohibition) Act 2003 to the Secretary-General of the United Nations, so that he or she may transmit that information to other States Parties.

Extradition

Clause 21 implements article 15 of the Mercenaries Convention. *Clause 21(1)* provides that for the purpose of the Extradition Act 1999, and certain Orders in Council made under it, an offence under any of *clauses 7 to 12* is deemed to be an offence described in an extradition treaty concluded with a country that is a party to the Mercenaries Convention before *clause 21* comes into force (defined as the **relevant date** in *clause 21(4)*).

Clause 21(2) provides that a person may not be surrendered for an offence in accordance with the Extradition Act 1999 if the conduct alleged to constitute the offence occurred before the clause comes into force.

Amendment to Extradition Act 1999

Clause 22 makes an amendment to section 101A(2) of the Extradition Act 1999. The effect is that an extradition treaty must be construed to give effect to *clause 21* of the Bill (which deems the offences in *clauses 7 to 12* to be offences in an extradition treaty concluded before *clause 21* comes into force).

Amendment to Mutual Assistance in Criminal Matters Act 1992

Clause 23 amends the Schedule of the Mutual Assistance in Criminal Matters Act 1992 to include reference to the Mercenaries Convention and the offences created by *clauses 7 to 12* of the Bill.

Inclusion in the Schedule means that States Parties to the Mercenaries Convention may seek the assistance of New Zealand in relation to offences that if they had been committed in New Zealand would correspond to the offences in *clauses 7 to 12* of the Bill.

Hon Phil Goff

Mercenary Activities (Prohibition) Bill

Government Bill

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

The Parliament of New Zealand enacts as follows:

1 Title

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

Part 1

Preliminary provisions

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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.

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4 Interpretation

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

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

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- (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**)

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mercenary has the meaning given to it in **section 5**.

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

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- (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.

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5 Mercenary defined

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 in an armed conflict; and 5
 - (ii) whose primary purpose in taking part in hostilities during 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 10
 - (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 15
 - (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 20
- (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 in a concerted act of violence; and 25
 - (ii) whose primary purpose in taking part in the concerted act of violence is making significant private gain; and 30
 - (iii) who is promised or paid material compensation; and
 - (iv) who is not a citizen of, or ordinarily resident in, the State against which the concerted act of violence is directed; and 35
 - (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.

6 Act binds the Crown

This Act binds the Crown. 40

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 in an armed conflict—
- (a) with the intention that the person make private gain from participating in hostilities during the armed conflict; and 10
- (b) knowing that the person 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. 15
- (2) **Subsection (1)** does not apply if the person recruited—
- (a) is a citizen of a party to the conflict or ordinarily resident in territory controlled by a party to the conflict; or
- (b) is a member of the armed forces of a party to the conflict; or 20
- (c) is sent by a State that is not a party to the 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 in a concerted act of violence— 25
- (a) with the intention that the person make significant private gain from participating in the concerted act of violence; and 30
- (b) knowing that the person has been or is being promised material compensation to participate in the concerted act of violence.
- (4) **Subsection (3)** does not apply if the person recruited— 35
- (a) is a citizen of, or ordinarily resident in, the State against which the concerted act of violence is directed; or
- (b) is sent by a State on official duty; or
- (c) is a member of the armed forces of the State on whose territory the act is undertaken. 40

- 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)**, uses that person to fight in an armed conflict; or 5
 - (b) knowing that a person is a mercenary of the kind described in **section 5(b)**, uses that person to participate in a concerted act of violence. 10
- 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,— 15
- (a) to enable a person who is a mercenary of the kind described in **section 5(a)** to fight in an armed conflict; or
 - (b) to enable a person who is a mercenary of the kind described in **section 5(b)** to participate in a concerted act of violence. 20
- (2) In **subsection (1)**, funds—
- (a) means assets of every kind, whether tangible or intangible, moveable or immovable, 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. 25 30
- (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 a mercenary to fight in an armed conflict or participate in a concerted act of violence.
- 10 Training prospective mercenary** 35
- (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 in an armed conflict—

- (a) with the intention that the person be recruited as a mercenary of the kind described in **section 5(a)** once the person has completed the training; or
- (b) knowing that the person is likely to be recruited as a mercenary of the kind described in **section 5(a)** once the person has completed the training. 5
- (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 in a concerted act of violence— 10
- (a) with the intention that the person be recruited as a mercenary of the kind described in **section 5(b)** once the person has completed the training; or
- (b) knowing that the person is likely to be recruited as a mercenary of the kind described in **section 5(b)** once the person has completed the training. 15

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,— 20
- (a) knowing that a person is a mercenary of the kind described in **section 5(a)**, trains that person to fight in an armed conflict; or
- (b) knowing that a person is a mercenary of the kind described in **section 5(b)**, trains that person to participate in a concerted act of violence. 25

Mercenary participating in hostilities or concerted act of violence

- ## 12 Mercenary participating in hostilities or concerted act of violence 30
- (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)**, intentionally participates directly in hostilities during an armed conflict. 35
- (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), intentionally participates 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— 5
- (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— 10
- (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 15

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

14 Certificate as to States Parties under Mercenaries Convention 20

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 25

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. 30
- (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 35
- (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
- (d) State Party—
- (i) in relation to which the alleged offender is a citizen; or 5
- (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. 10
- 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,— 15
- (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). 20
- 17 Attorney-General to indicate to relevant States Parties whether New Zealand to exercise jurisdiction** 25
- 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 30
- (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** 35
- (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—

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- (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,— 5
- (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— 10
- (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. 15
- (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. 20
- (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. 25
- 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. 30

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. 5
- (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. 10
- (3) In this section, **relevant date** means, in relation to an offence under this Act, the date on which this section comes into force. 15

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: 20
- “(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** 25
- 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 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> <p><i>section subject matter</i></p> <p>7 Recruiting person to be mercenary</p> <p>8 Using mercenary</p> <p>9 Financing mercenary</p> <p>10 Training prospective mercenary</p> <p>11 Training mercenary</p> <p>12 Mercenary participating in hostilities or concerted act of violence</p>
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Schedule

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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, 5

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, 10

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, 15

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, 20

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, 25

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: 30

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; 35

- (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; 5
- (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. 10
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 15
- (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; 20
- (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. 25

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. 30

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; 5
- (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. 10
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. 15
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. 20

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; 25
- (b) Co-ordinating the taking of administrative and other measures as appropriate to prevent the commission of those offences. 30

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. 5
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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; 15
 - (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. 20
3. The present Convention does not exclude any criminal jurisdiction exercised in accordance with national law. 25

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. 30

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; 5
 - (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; 10
 - (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. 15
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; 20
 - (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. 25
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. 30

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 35

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. 5

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. 10

Article 16

The present Convention shall be applied without prejudice to:

(a) The rules relating to the international responsibility of States; 15

(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 20

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. 25

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. 30

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. 35

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. 5
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. 10

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. 15
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. 20
2. Denunciation shall take effect one year after the date on which the notification is received by the Secretary-General of the United Nations. 25

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. 30

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.