



Cultures & Conflits
English documents

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privées*

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Édition électronique

URL : <http://journals.openedition.org/conflits/11502>

ISSN : 1777-5345

Éditeur :

CCLS - Centre d'études sur les conflits liberté et sécurité, L'Harmattan

Référence électronique

Christopher Kinsey, « International Law and the Control of Mercenaries and Private Military Companies », *Cultures & Conflits* [En ligne], English documents, mis en ligne le 26 juin 2008, consulté le 19 avril 2019. URL : <http://journals.openedition.org/conflits/11502>

Ce document a été généré automatiquement le 19 avril 2019.

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NOTE DE L'ÉDITEUR

The translation into French of this text has been published in our issue num.52: "Para-private coercion companies : new mercenaries ?"

- ¹ This paper examines how the construction of international law enables it to act as an agent of control over mercenaries and Private military companies. International treaties established to control the use of mercenaries include the Additional Protocol I and II to Article 47 of the Geneva Convention (1949), the Organisation of African Unity (OAU) Convention for the Elimination of Mercenaries in Africa (1972), and the International Convention against the Recruitment, Use, Financing and Training of Mercenaries (1989). These treaties regulate, for the most part, the relationship between states concerned with the use of international private violence, understood as mercenarism. Even so, as is made clear below, these treaties are far from perfect. Indeed, they reflect international tension between the West and parts of the Third World, notably Africa, over what these states see as the West's willingness to tolerate mercenary activities beyond their borders. Such political tension was clearly evident during the 1960s and 70s in postcolonial Africa, and forced the international community to focus significant attention on the activities of mercenaries. Yet, such suspicions toward mercenaries have never been translated into outright legal condemnation through international law.

- 2 The fact that this is so, has much to do with how African states have come to understand sovereignty and its relationship to mercenary forces over the last 40 years. While the difficulty of establishing a definition has frequently been discussed in the literature this paper addresses how the problem of definition is tied to political problems associated with the unwillingness to prohibit the use of mercenaries. As Holds Bashir explains, '[i]t is difficult to define what a mercenary is. This is because the word has different meanings at different times. The different meanings it has acquired throughout history depend on the spirit of the age'.¹ This problem still exists today. Thus, mercenaries are only mercenaries when it suits the political agenda of states to define them in this context, and this is reflected in the international treaties mentioned above. As this paper explains, these treaties do not prohibit the use of international private violence. Instead, such violence is allowed as long as it benefits the states that drew up the international treaties in the first place. This is the position of the private organisations mentioned below. While security companies, including Military Professional Resources Incorporated (MPRI), Group4, and Control Risk Group, have been described as mercenary by organisations opposed to private violence involvement in state affairs,² governments, in particular Western governments, have resisted attaching the mercenary label to these companies, since their activities are understood as addressing the legitimate security concerns of states.
- 3 This paper examines the legal problems caused by the recent emergence in international security of private military companies. The first part of the paper traces the legal argument associated with employing mercenaries. In particular, the paper examines the complex nature of those Conventions that attempt to establish a clear definition of mercenarism. It shows how the present definition of mercenarism, which served a political purpose during the period of decolonisation, and still does today, makes it extremely easy for the private security industry to exploit loopholes in international law that allow them to offer their services to leaders in charge of failing states. The paper then goes on to explore the argument surrounding the extent of government responsibility in prohibiting their citizens from engaging in mercenary activities. More recently, governments, especially in Africa, have wanted to include individual criminal liability as well as state liability in the Conventions, thus making it possible for an individual to be prosecuted for just being a mercenary, as well as for unlawful acts carried out while fighting as a mercenary. Addressing these issues in international law will take time, especially while major political leaders are unsure of the future direction of the use of military force. Until this time, it is unlikely they will act to either enhance this part of the private security market or restrict it.³

Changing the Law and the Rise of Mercenarism Post 1945

- 4 A long-standing problem with controlling the use of mercenaries has been the limit of modern legal analysis and precedent setting surrounding the problem. Some early legal writers did concern themselves with the practice of hiring mercenaries, but with mercenary forces playing such an integral part in the formation of European armies such concerns were largely ignored until the middle of the 19th century. It was a similar picture outside of Europe. Though, as a consequence of their use in colonial conflicts and other situations that served the national interests, their demise took longer, if it occurred

at all. For example, the French Foreign Legion is a mercenary force that was originally recruited to protect French colonial possessions⁴ and yet it still exists today.

- 5 Prior to 1945, concerns to do with mercenaries were expressed largely through the development of the law of neutrality. A country that allowed its national territory to be used for the purpose of the recruitment or enlistment of mercenaries was deemed to be in support of a belligerent. This was a position that was likely to draw the neutral country into a conflict it had no interest in through retaliatory action by one of the belligerents. As a result, provisions were included in the 1907 Hague Convention prohibiting mercenary recruitment on national territory.⁵ Such obligations were limited to countries policing their own national territory, and were not extended to include the prevention of nationals crossing over to another country to enlist in the army of a belligerent as, for example, was the case of foreign individuals who enlisted in the International Brigades in the Spanish Civil War. A number of states did introduce domestic legislation to reinforce their international obligation, while a few sought to control the actions of its citizens wishing to enlist in foreign armies.
- 6 After the Second World War, significant changes were made to the law regulating the use of force in international politics. Even so, such changes to legislation that did occur did not address the question of the involvement of mercenaries in combat. Considering the numerous conflicts, including that of ideology that surfaced between the United States and the Soviet Union immediately after the war, the introduction of regulations concerned with controlling the activities of mercenaries was of minor concern to the international community. This indifference changed during the period of decolonisation in the 1960s. This period witnessed a marked increase in mercenary numbers and activities, especially in countries of central Africa. For example, mercenaries such as Mad Mike Hore, Jacques Schramme and Bob Denard all fought in the Congo in the 1960s. The concept of mercenaries now took on greater importance for the international community, but more so for those African countries directly affected by the presence of mercenaries involved in their wars of liberation. Even so, the response of the International Community was to do little more than re-affirm Article 2(4) of the United Nations (UN) Charter,⁶ explaining the logical implications of the Article.
- 7 It was not until the late 1960s that the use of mercenaries against national liberation movements fighting for independence in colonial territories was declared a criminal act by UN General Assembly Resolution 2465,⁷ thus designating mercenaries as outlaws.⁸ This position was further endorsed through subsequent resolutions concerned with colonialism. This, as Taulbee explains, marked a significant move away from the idea of collective liability of the traditional law toward individual criminal liability. These resolutions further called for third party states to observe traditional law prohibiting mercenary recruitment on their national territory, and to introduce laws forbidding their nationals from engaging in mercenary activities.⁹
- 8 The OAU Convention, adopted in 1972, for the Elimination of Mercenaries in Africa mirrors those trends found in UN resolutions concerning mercenaries.¹⁰ The Convention also extended state obligation regarding the control of the activities of its nationals, by making states responsible for the prohibition and punishment of any activity connected with mercenaries that may occur within their jurisdiction.¹¹ The move away from the traditional view that states are individually accountable, to a collective responsibility towards accountability is the result of the OAU Convention placing an obligation on individuals who meet its requirement. Individuals have to either fulfil the requirements

in Article One,¹² which defines what a mercenary is, or the requirements regarding those people who recruit or assist mercenaries through training, financial help, or protection of prosecution. Further to this departure is the adoption of obligations by contracting States to stop their nationals from participating in mercenary activities as defined by the above Convention.¹³ As such, contracting States must endeavour to prosecute any person, whatever nationality, within their jurisdiction, who is accused of mercenary activity.¹⁴ The relevant Article One reads as follows:¹⁵

- [A] ‘mercenary’ is classified as anyone who, not a national of the state against which his actions are directed, is employed, enrolls or links himself willingly to a person, group or organisation whose aim is:
 - (a) To overthrow by force of arms or by any other means the government of that Member State of the Organisation of African Unity;
 - (b) To undermine the independence, territorial integrity or normal working of the institutions of the said State;
 - (c) To block by any means the activities of any liberation movements recognised by the Organisation of African Unity.

9 Even with these provisions, the OAU Convention does not totally forbid the recruitment of mercenaries. In accordance with Article One, governments, or any other groups, are prohibited from employing mercenaries to defend themselves from those actions carried out by a liberation movement recognised by the OAU. The aim of the Article was primarily to stop European mercenaries fighting for the minority governments of Rhodesia and South Africa. However, non-nationals that fall outside the defined category of mercenary may be employed by a government to defend itself from dissident groups within its own borders, as in the case of the Cuban troops that fought on the side of the Popular Movement for the Liberation of Angola (MPLA) during the Angolan civil war. The reason for this was to allow African governments to give support to movements of national liberation, without allowing conditions to emerge in their own country that might encourage such dissident groups to operate against them.¹⁶ At the same time, African governments wanted to deny the opportunity to mercenaries to operate against the same movements of national liberation.

10 The capture and subsequent trial of thirteen mercenaries in Angola in 1976 again focused international attention on mercenary activity. All the accused were charged with the crime of being a mercenary.¹⁷ Of the thirteen accused, four were sentenced to death, and the others to long prison sentences. As a result of the trial, the Luanda Draft Convention on the Prevention and Suppression of Mercenaries (1976) was issued.¹⁸ The Luanda Draft Convention again stressed the responsibility of individual states to prevent their nationals from taking part in mercenary activities, as well as those individual persons defined as mercenaries. State responsibility, as such, is conveyed in Article 3¹⁹ that makes government officials who undertake to employ, aid, or recruit mercenaries liable for criminal prosecution. Thus, failure by a State to carry out the prosecution of officials who had undertaken such activities would, argues Taulbee, ‘create international responsibility on the part of the offending State’.²⁰ Article 5²¹ represents the attitude of the members of the Popular Revolutionary Tribunal who presided over the trial, in that, ‘a mercenary bears responsibility both for being a mercenary and for any other crime committed by him as such’.²² Possibly the most important Article was Article 4,²³ which deprived mercenaries of the status of being a lawful combatant. Captured mercenaries were, as such, not given the protected status of prisoners-of-war. This, as Hampson explains,

‘violated the principle of equality of belligerents and confused the *jus ad bellum* and *jus in bello*’.²⁴ This provision was later incorporated into the 1977 Geneva Additional Protocol I.²⁵ However, the definition of mercenary as decided upon by the Geneva conferees is more limited in scope than that expressed in the Luanda Draft Convention. At the same time, Additional Protocol I does allow for States to offer to mercenaries prisoner-of-war status if they so wish. What is clearly understood, and addressed in Additional Protocol II,²⁶ is that mercenaries are entitled to the basic humanitarian treatment and protections provided for persons in the power of a party to the conflict who are not otherwise entitled to more favourable treatment.

A Legal Definition

- 11 How then should we define a mercenary? The traditional notion of a mercenary is ‘a soldier willing to sell his military skills to the highest bidder, no matter what the cause’.²⁷ Mockler, on the other hand, believes the true mark of a mercenary is ‘a devotion to war for its own sake. By this, the mercenary can be distinguished from the professional soldier whose mark is generally a devotion to the external trappings of the military profession rather than to the actual fighting’.²⁸ While such general definitions may be true, they do not address the question of a precise definition. The task of addressing such a question is essential if individual persons are to be denied important legal rights as a consequence of falling into a particular category. But also, as international law covering mercenaries evolves, States will have no option but to take on the obligation to control those activities determined by the scope of the definition.
- 12 The definition that finally emerged, set out in Additional Protocol I to Article 47 of the Geneva Convention (1949), only did so after states ensured their political interests were looked after. As such, the definition has allowed for competing state interests, while it has also had to balance precision with significance. As Taulbee notes, it has had to strike a balance between a need to provide general parameters for evaluating contextual elements, and requirements that attempt rigorous and exhaustive descriptions of persons, situations and activities.²⁹ A definition that is too detailed might be too rigid, and thus unable to accommodate changes as circumstances demand. On the other hand, a brief definition that allows a judgement in its application leaves open the possibility of abuse. A very general definition would allow the interpretation of the terms to be too openly susceptible to political or ideological calculations.
- 13 The actual definition in international law as set out in Additional Protocol I to Article 47 of the Geneva Convention (1949) classifies a mercenary according to the following criteria:³⁰
- (a) Is specially recruited locally or abroad to fight in an armed conflict;
 - (b) Does, in fact, take part in activities;
 - (c) Is motivated to take part in hostilities essentially by the desire for private gain
 - (d) Is neither a national of a Party to the conflict nor a resident of a territory controlled by a Party to the conflict;
 - (e) Is not a member of the armed forces of a Party to the conflict;
 - (f) Has not been sent by a State, which is not a Party to the conflict on official duty as a member of its armed forces.

- 14 The wording of the definition is such as to exclude those foreign nationals in the service of the armed forces of another country, as with those individuals that served in the International Brigades in the Spanish Civil War, and where the international community is willing to tolerate such persons, from falling within the definition of mercenary. Furthermore, Article 47 of Protocol I ignores foreign military personnel integrated into the armed forces of another state. Included here would be the French Foreign Legion, and Gurkhas. The definition also leaves out those induced by ideology³¹ or religion, and those who may not participate directly in the hostilities. Finally, those foreigners employed as advisors and trainers are also not included in the definition.
- 15 Without a clear working definition, the problem arises of how to ensure states comply with international laws relating to the control mercenaries. While states accepted in principle, through the adoption of General Assembly resolutions, not to permit by way of action or omission an armed group launching an invasion of another state from within its own borders, member states still failed to restrain their citizens from enlisting in mercenary groups. As a result of this failure, the international community recognised the need for a multilateral convention. During the course of the thirty-fifth session of the General Assembly it was therefore decided to draft an International Convention against the recruitment, use, financing and training of mercenaries. The Convention was presented to the General Assembly for signature and ratification in December 1989. The Convention adopts a more inclusive definition than that found in the Additional Protocol I. As a result, the recruitment, use, financing and training of mercenaries are also declared to be offences. But, while such an inclusive definition is not in itself a problem, there is a problem in policing the activities of individuals engaged in the above activities. We will return to the Drafting of an International Convention against the recruitment, use, financing and training of mercenaries later. First, there is a need to examine the issues connected with the problems of constructing an adequate legal definition of the term mercenary.
- 16 The Additional Protocol I must still rely on motivation when making a distinction between mercenaries and other types of combatants. Western States have been highly critical of this point. The motivation for mercenaries is money. Thus explains Abraham, 'a mercenary is motivated ... essentially by the desire for private gain'.³² However, as the Diplock report, which was published in 1976 following the involvement of British mercenaries in Angola, makes clear the chances of determining the motivation of combatants is virtually impossible:
- "... any definition of mercenaries which require positive proof of motivation would either be unworkable, or so haphazard in its application as between comparable individuals as to be unacceptable. Mercenaries, we think, can only be defined by reference to what they do, and not by reference to why they do it."³³
- 17 While motivation should not comprise the sole definitional element, objections to its use as part of the definition are also unconvincing. In domestic law, critical distinctions based upon motivation are regularly made.³⁴ There also appear to be no grounds for objecting to the evidence needed to establish motivation under the test in Additional Protocol I. The point being made here is that it is very difficult to obtain the necessary evidence to prove

the first five elements of Taulbee's list, included below, since it means having access to the records of the opposing party to the conflict, a situation unlikely to occur.

- 18 Taulbee identifies 6 issues relating to the problem of distinguishing mercenaries from other foreign volunteers. They are:³⁵
- (1) Whether a distinction should be drawn between non-nationals and resident non-nationals;
 - (2) Whether a "mercenary" includes all who meet certain operative tests, or whether some overt actions directly related to hostilities are necessary;
 - (3) Whether outside private forces and national troops should be considered different from third party states;
 - (4) Whether individuals recruited for a specific conflict should be distinguished from those recruited under other circumstances;
 - (5) Whether motive should be defined through objective tests;
 - (6) Whether a legal distinction should be drawn between legitimate and non-legitimate movements for national liberation.
- 19 However, the problem of obtaining evidence necessary for a prosecution exists with all statutes that provide for extraterritorial jurisdiction over nationals, and, as such, there are no real grounds to object to matters of this concern.³⁶ More important is the question of compensation, which is seen as essential to establishing a distinction in motivations. For African states, compensation by way of private gain distinguishes mercenaries from non-resident non-nationals who volunteer to aid legitimate liberation movements. If the drive for private gain is removed from the definition, then the definition holds no substantive content. The term mercenary would simply describe all non-resident non-nationals that have chosen to fight for whatever reason, including political and religious ones. This therefore appears to be an important test in determining the status of a combatant in war. Though at present it is unclear how states would test for compensation that might take a number of forms other than monetary.
- 20 Origin also serves to define the term mercenary. A mercenary is neither a national of a party to the conflict nor a resident of a territory controlled by a party to the conflict. Instead they are generally 'bands of professional soldiers ... temporarily united, under leaders of strong personality, fighting for pay and the [spoils of war], but not entirely indifferent to claims of honour and legality, or to the interests of their country of origin'.³⁷ The idea of using origin in international law to help determine the apportionment of rights and obligations of a national may not necessarily be the most effective way of linking an individual to a specific territory. Non-nationals often reside in territories where conflicts erupt. As such, even as a non-national, they may feel they have a substantial interest to protect. Such a person might also have important skills, as well as local knowledge, that one of the parties to the conflict may be prepared to pay a premium wage for. Yet under the OAU Convention³⁸ and the Luanda Draft Convention,³⁹ this particular type of individual could be deemed a mercenary. Their status is wholly dependent on the party they choose to fight for in a conflict. The critical test being whether such a person opposes movements for self-determination, or liberation.⁴⁰
- 21 The definition of mercenary as noted above in Additional Protocol I gives conservative answers to the above questions. Furthermore, for a person to qualify as a mercenary they must meet all of the tests in the definition consecutively.⁴¹ As previously discussed, any person deemed a mercenary has no right to the protected status of a combatant, or prisoner-of-war that a soldier serving in a state military will have. The purpose of

Additional Protocol I and II is to ensure that those participating in struggles against colonial domination, racist regimes, or alien domination are given protected status, while the provisions also apply to the use of mercenaries in general. The enlistment of mercenaries in national liberation movements is, again, not singled out. This point is interesting since the Additional Protocol I definition does not mirror the general thrust of the language of previous UN resolutions or of the OAU and Luanda Draft Conventions.

- 22 The Additional Protocol I definition represented a compromise in that members of the Organisation for Economic Cooperation and Development (OECD) emphatically argued that criminal liability can only come from the performance of specific acts of war⁴² while the majority of other nations wanted a broader definition of mercenary to include the idea that status alone was also a criminal act. Those states that sought a more inclusive definition pointed to the fact that by voluntarily enlisting in a mercenary force the person was signifying intent, and, as such, enlistment should automatically subject the individual to criminal liability. Thus, placing an emphasis on the voluntary act of enlistment meant that the determining of mercenary status carries an additional onus. Any person carrying out those acts listed above in the draft conventions, including the Convention against the Recruitment, Use, Financing and Training of Mercenaries, would be liable for prosecution, thereby supplying a necessary deterrent upon such an individual.
- 23 African states have also attempted to extend the definition of mercenary to include those mercenaries not covered under the definition in Additional Protocol I. A number of states have argued that Additional Protocol I only covers those mercenaries engaged in armed conflicts of an international nature. The Protocol does not cover civil wars where mercenary activity is most prevalent. As such, any useful definition of mercenary must include situations of intrastate wars, as well as meet the criteria of international armed conflict.
- 24 Delegates from the West have agreed that the 1977 Nigerian Draft Convention for the Elimination of Mercenaries in Africa should address those situations that fall outside those covered by Additional Protocol I. In agreeing to this position, Western states assert two principal positions be met. First, that the definition in Additional Protocol I does not apply only to situations of international armed conflict,⁴³ and second, any definition set out in future conventions remains consistent with the Additional Protocol I definition so as to maintain the integrity of the regime established in Additional Protocols I and II. Any additional circumstances that do not fall under international armed conflict should be presented in a form that is in line with the Additional Protocol I definition.⁴⁴ Western states argue that the correct way of addressing the above problem is to prohibit certain acts and activities within a carefully specified context. These delegates, argues Taulbee,⁴⁵ must widen the contingencies to which the Additional Protocol I definition would apply, rather than expanding the classes of activities and individuals included in the definition proper.
- 25 The result of these discussions, to reconcile opposing views between different member states of the UN, was, as mentioned previously, the introduction of the International Convention against the Recruitment, Use, Financing and Training of Mercenaries on the 4th December 1989.⁴⁶ The articles included in the Convention embrace more closely those ideas advocated by African states. The Convention diverges somewhat from the conservative emphasis of Additional Protocol I. The approach adopted is the specific offences approach for extending the definition of mercenarism to situations that fall

outside international armed conflict. Thus, those acts mentioned in the Convention's title become equivalent to direct participation within the meaning of the provisions of Additional Protocol I.

- 26 The International Convention against the Recruitment, Use, Financing and Training of Mercenaries is not beyond criticism. Abraham points to three areas where the Convention is deemed problematic:⁴⁷
- (1) Only when the crime of mercenarism is committed within the boundaries of a state or by a national of a state is that state accorded jurisdiction to deal with the crime;
 - (2) In the event of conflict, the Convention denies to the aggrieved state the right to proceed against an offending state;
 - (3) The Convention provides for no monitoring mechanism of its provisions, thus placing that responsibility on the individual member states.
- 27 Since 1989, when the Convention against the Recruitment, Use, Financing and Training of Mercenaries was signed, The United Nations General Assembly has continued to pass resolutions concerned with the activities of mercenaries. Such resolutions, as previously explained, have, in general, reflected the restricted nature of the ban on the use of mercenaries, as well as those traditional worries expressed by the international community towards the activity of individuals engaged in mercenary activities,⁴⁸ while also dealing with the actions of mercenaries in a variety of different circumstances. These include the destabilising of neighbouring states, acting as the vanguard for a coup in a small state, the hindering of movements of national liberation in their drive towards independence, and the violation of human rights.⁴⁹ The object of these resolutions is to highlight the fact that the actions of mercenaries contravene basic principles of international law, including non-intervention in the internal affairs of states, and territorial integrity, and independence.⁵⁰ This type of mercenarism is described by Marie-France Major as 'an international wrongful act'.⁵¹
- 28 Again there is no total ban on the use of mercenaries under international customary law. Those conventions introduced by the international community have focused on the prohibition of mercenary activities aimed at the sovereignty of legitimate states, the suppression of movements of national liberation, or national self-determination. Those activities undertaken by PMCs in Africa and other parts of the world have, in the majority of cases, fallen outside of this characterisation. We will return to this issue later. But briefly, they have not been seen to challenge the sovereignty of states, oppose movements of national liberation, or been directed against movements of self-determination. As Zarate argues, in Africa there has developed 'a clear distinction between foreign support of legitimate African regimes and individualised mercenary attempts to wreak havoc in the region'.⁵²
- 29 The continued effort to condemn mercenarism through the different political institutions of the UN is seen by some, whose objective is to interpret that part of international law concerned with mercenary activity, as constituting evidence of a rule, 'that states have a legal obligation, which goes beyond the traditional constraints of international law, to control the recruitment of its nationals in situations where a threat to peace and security exists'.⁵³ Those that support this argument fail to recognise that such condemnation and resolutions have been directed at specific conflicts, which have seen mercenaries pose a potential threat to international peace and security. As such, these resolutions and condemnations do not necessarily constitute a blanket opposition to the use of mercenaries.

30 Expanding on this argument, even where the condemnation and resolutions expressed have been more general in their range and meaning, the statements do not endorse customary international norms. In this instance, the General Assembly does not have the authority, under the UN Charter, to enact, alter, or to terminate rules of international law. Thus, the proliferation over the last four decades of resolutions and repetition of recommendations regarding mercenaries does not amount to evidence of practice on the part of states, and *opinio juris* that would be necessary for such practice to constitute international law. All such resolutions and recommendations that originate from the General Assembly or those regional organisations including the OAU can do is to contribute to the eventual establishment of a future customary rule of international law. Further to this argument is the issue of ratification. For the International Convention against the Recruitment, Use, Financing and Training of Mercenaries to constitute settled international law the Convention must be ratified. As the Convention stands at present, only sixteen states have become signatories. Of these, three, Angola, Congo, and Nigeria, have all hired, or had direct dealings with PMCs.⁵⁴ The Convention needs twenty two signatures for it to pass into law. In this respect, the legal impact of the Convention is further reduced, giving additional weight to attempts to undermine the above claim regarding customary rule of international law.⁵⁵

Mercenaries and State Responsibility

31 The notion that states have responsibilities has in the past been linked to the idea of territorial sovereignty. While a state can demand that it receives the same rights of independence and territorial integrity as any other state that is a member of the international community, holding such rights necessitates an obligation on the part of all states to respect and protect these rights when applied to other states. Taulbee notes that there are two areas of responsibility a state recognises when it violates international law. First, loss and damage resulting from the act; and second, delinquency imputed to the state.⁵⁶ The validity of these propositions has been rarely disputed.⁵⁷

32 The topic of the debate has primarily been the connection between non-performance of duties and consequent liability. The point of contention is realising a standard of performance required by states within the context of the extent of its own legal authority in protecting the rights of other states. A state's standard of performance in controlling mercenary activities, as well as PMCs, is only one part of this ongoing debate. The idea of statehood suggests states are able to perform certain functions. One function that is presumed to be within the capacity of the incumbent government, since they have absolute authority over their territory, is to police the activities of its own nationals within its own borders.⁵⁸ Garcia-Mora argues that a '[s]tate which fails to prevent a harmful act against another state has violated an international obligation to preserve world order.⁵⁹ Furthermore, even if a state has clearly used all of its means to prevent an unlawful act against a foreign state, but has not remedied the situation, it has failed to discharge its obligation and will remain liable'.⁶⁰

33 The implication for states of failing to carry out their international responsibilities to other member states is that there be imposed on them, through arbitral tribunals and courts, an absolute standard of liability. In the past, relative standards have been imposed and have sought to include two components: knowledge and capacity. The fact that a state knows of a harmful act, or one that is to be carried out is not in or of itself sufficient

to establish responsibility. Even so, traditional international law does require states to demonstrate good intentions by extending all reasonable efforts to protect member states from acts of aggression by their nationals, and or, to punish offenders.

- 34 The issue as to the extent a state can, or should, be held responsible for its nationals engaged in mercenary activity is a contentious one. This is even more so now that there is a reliance on motivation in the definition of mercenary found in both the Additional Protocol and the International Convention against the Recruitment, Use, Financing and Training of Mercenaries. In this respect, both conventions ignore the accountability of states regarding the actions carried out by their nationals. Indeed, as Abraham points out, '[t]hose peremptory norms which do in fact exist continue to shy away from imputing responsibility to a state for the actions of its citizens'.⁶¹ This reluctance is, in part, related to 'the international community's fear of mercenaries, ... in that they are wholly independent from any constraints built into the nation state system'.⁶² Thus, it is argued that states are extremely limited as to what they can actually do to prevent nationals from carrying out mercenary activities, and should therefore not be held responsible for those nationals that undertake such activities. A state that accepts such a proposition ignores its own obligations of respect for territorial integrity and political independence of other member states in the international community, and as such neglects its responsibility to ensure its own nationals behave in a manner that serves not to undermine those obligations. If this problem is to be addressed, then international law will have to have incorporated within it the power to attribute responsibility to states for the actions of its nationals. Such responsibility would arise from the acknowledgement by states of the fact that membership of the international community accords such a responsibility on the modern state.
- 35 Ultimately, the core of this argument is not whether a state has a responsibility ascertaining to obligations to the international community, this is not disputed, but how far this responsibility reaches. The law has in the past deemed it unreasonable to attempt to attach responsibility to a state where there has been a satisfactory attempt by that state to stop those actions caused by their own nationals that might lead to an act of injury on another state. Thus, without the state concerned having prior knowledge of those actions, there is limited action it can take to prevent such actions occurring, and, as such, the international community has not felt it appropriate to punish the state concerned over those actions carried out by its nationals. Furthermore, many states, especially less developed ones, do not have the necessary resources to control the movements and actions of their nationals. It is not surprising therefore that the international community has supported attempts by individual states to introduce legislation and administrative measures to control the actions of their nationals, which they see as the easier route. Such legislative action is within the capability of most member states, including most of the less developed, of the international community.
- 36 The driving force for legislation against mercenaries has on the whole come from Third World states. African states, in particular, have sought to negotiate a multilateral convention concerning the use of mercenaries in armed conflicts around the world. This is not surprising. If we trace the history of mercenary involvement in armed conflicts since the 1960s we see that most have taken place on the African continent, and are continuing to do so. As a result of this, most recent commentaries have argued that there is now the need to strengthen existing laws concerning all aspects of mercenary activities, as well as to make states more accountable for the actions of their citizens.

While the International Convention against the Recruitment, Use, Financing and Training of Mercenaries has addressed the need to prohibit the activities of individual mercenaries, or groups of mercenaries, it has failed to apportion blame to states for the actions of its citizens who conduct such activities. As such, the impact the Convention has had on preventing mercenaries from applying their trade has been much reduced. The meaning of the Convention can therefore be seen as more symbolic than substantive. Current efforts and concerns might also be directed at a phenomenon that is in reality transitory in nature.

Private Military Companies or Corporate Mercenaries: A Legal Distinction

37 The argument so far has been with regard to the problems associated with constructing a legal definition of mercenarism, and a state's responsibility in preventing their nationals from participating in mercenary activities. Thus, we have seen how difficult it is to give an exact legal definition of mercenarism that covers every eventuality of mercenary activity, and which states accept and are therefore willing to subscribe to. In such a difficult environment any attempt to brand those working for private military companies (PMCs) as mercenaries only further complicates the issue of definition. David Shearer draws on this, pointing out the significant problems of applying the criteria of Article 47 to the personnel of military companies. Shearer highlights four major areas of contention:⁶³

- (1) Under sub-paragraph (a), recruitment must be specifically for a particular armed conflict. Since many personnel working for military companies are employed on a long-term basis, they arguably cannot be considered mercenaries.
- (2) The requirement that mercenaries take a direct part in hostilities, as required by sub-paragraph (b), would exclude individuals acting as foreign military advisers and technicians. ... Most security firms, Military Professional Resources Incorporated (MPRI) of the US for example, exclude themselves from the definition of mercenary on this basis.
- (3) The need to establish a 'desire for private gain' under sub-paragraph (c) is difficult to prove because it introduces a psychological element, motivation. This concern has been extensively discussed above.
- (4) Under sub-paragraph (c), a member of the armed forces of a party to a conflict cannot also be considered a mercenary. Consequently, by becoming a member of a county's military, contracted fighters avoid the label of mercenary under sub-paragraph (e). Sandline, in its contract with the Papua New Guinea government, termed its employees 'Special Constables', no doubt to reinforce this distinction.

38 Employees of PMCs, whose job it is to provide military support, are frequently accused of being mercenaries, but with a smart business veneer to hide this fact, and are therefore seen as operating illegally. Although problematical, establishing the legal status of PMCs is therefore important since it has implications for the conduct of employees of PMCs involved in the promotion of international security in general. While such exclusions, as commented on by Shearer, are in reality technicalities, with each section left sufficiently open so as to be able to question its actual meaning, taken together they render Article 47 unworkable for both the individual mercenary and PMCs.⁶⁴ This is of course intentional. African states have in their construction of the legal definition of mercenarism, been careful to ensure that such a definition is sufficiently open to dispute, and this allows

them the opportunity to employ whatever military force they deem necessary to maintain power.

- 39 Should we therefore define those working for PMCs as mercenaries? This is more of a political than legal question in that reasons for deciding either way will invariably be politically driven. Those opposed to any private military involvement in war argue that those who work for PMCs should only be described as mercenaries and that no other label should be attached that might conceal this fact. For this group, state armies, or national liberation movements, representing political communities, are the only forces that should be allowed to conduct war. War is the domain of these two groups, and, as such, they are responsible for the physical protection of the communities they represent. PMCs, on the other hand, are often seen as representing the economic interests of a minority group, normally Western interests that share nothing in common with those they are charged with protecting. Those that carry out the work of PMCs should therefore be classified as mercenaries, in that they represent an organisation willing to sell military skills to the highest bidder, no matter what the cause. The only exceptions are those foreigners that choose to fight because of their political convictions. Such a person or group of persons receive no economic benefits from fighting, unlike those working for PMCs, and are therefore described as volunteers.
- 40 Those opposed to this argument point to the political agendas of those who describe PMCs as representing nothing more than corporate mercenaries. This is especially the case of those military forces that see themselves as victims of the success of PMCs, whether they are themselves legitimately recognised by their own people or not. In the end it is left up to the conscience of the individual, influenced by his own political beliefs and values, as to whether a person contracted to give military assistance to a foreign army is a mercenary, volunteer, or security advisor. Finally, regarding the issue of regulating PMCs, if the international community is that unclear as to its intentions about whether the actions of PMCs should be made illegal, then the alternative is to control them through regulation.
- 41 The problem of definition is clearly related to the political problems associated with the reluctance of states to exclude the use of mercenaries. The result of this reluctance has seen the emergence of tension between African states in particular, and the West, especially Europe. While African leaders have been the driving force behind shaping international law regarding mercenaries, the West remains cautious. Such tensions are noticeable in The Additional Protocol 1 definition. Indeed, as where OECD countries see criminal liability coming from the performance of specific acts in war, the majority of nations have sought to include the idea of status alone as a criminal act, thus establishing a more inclusive definition. Attempts to resolve these tensions are proving difficult.
- 42 As this paper has explained, current international legislation on mercenaries is very limited in its effectiveness.⁶⁵ The weakness of the law is of course intended. Governments, but notably African governments, see no reason to deny themselves access to a potentially valuable source of military expertise. All the international community has wanted to do for the last 5 decades is to remove freelance mercenaries from those wars it would prefer them to stay out of. This is particularly so of African governments who have been the target for these freelance mercenaries in the majority of cases, and still are today.

- 43 Finally, international law at present makes no mention of PMCs. This is not surprising considering the recent appearance of these organisations on the international stage. The problem now is if, in the future governments do allow PMCs to actively engage in civil wars on their behalf, failure to achieve a legal separation⁶⁶ could see the employees of PMCs having their combat status legally challenged by the other side, leading to dire consequences for any employee unlucky enough to be taken captive. In this respect, international law has two important roles to play if PMCs are to act on behalf of the international community. First, it must protect the combat status of PMCs employees actively engaged in fighting. Second, it must allow PMCs go about their lawful business, while prohibiting the activities of the classic mercenary. These will not be easy tasks to achieve, but they must if PMCs are to work for the international community.

NOTES

1. Quoted in Zarate J.C., (1998) 'The Emergence of a New Dog of War: Private International Security Companies, International Law, and the New World Order', in Stanford Journal of International Law No. 34, p125.
2. Musah A. F., and Fayemi J.K., ed, (2000) Mercenaries: An African Security Dilemma London: Puto Press, p 269-271.
3. The attacks on the World Trade Towers in New York and the Pentagon in Washington on September 11th 2001 by members of al-Qaeda network will have a major bearing on this particular subject.
4. For general discussion on the use of mercenaries outside of Europe see Smith R., (1978) Mercenaries and Mandarins New York: KTO Press.
5. Oppenheim L., (1952) International Law ed by Lauterpacht H., 7th edition, London: Longmans Green & Co, p 703.
6. 'All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purpose of the United Nations.' UN Charter Article 2, para. 4.
7. Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, General Assembly Resolution 2465, 23 UN GAOR Supplement. (No. 18) at 4, UN Document A/7218 (1968).
8. UN General Assembly Resolutions do not directly translate into international or domestic law. Instead they are understood as representing the expressed wishes of the collective membership of the UN.
9. Taulbee J. L., (1985) 'Mercenaries and Contemporary International Law', in California Western International Law Journal America: California Western School of Law, Vol. 15, No. 2, p. 346.
10. OAU Convention for the Elimination of Mercenaries in Africa, OAU Document CM/433/Rev. L., Annex 1 (1972). The Convention is a 'Law-making' treaty, which lays down rules of general application, imposing duties on states to enact legislation within the ambit of the Convention's framework. The Convention required the signatures of 10 states to ratify it. So far 22 member states have signed the Convention allowing it to enter into force. Finally, it is only binding on OAU member states. For an account of the Convention see Musah A. F., & Fayemi J.K., ed, (2000) Appendix V. p. 286-288.

11. OAU Convention for the Elimination of Mercenaries in Africa, Article 2. Fn 10.
12. Musah A. F., & Fayemi J.K., ed, (2000) p. 286.
13. OAU Convention for the Elimination of Mercenaries in Africa, Articles 2,3. Fn 10.
14. OAU Convention for the Elimination of Mercenaries in Africa, Articles 6,7. Fn 10.
15. Musah A. F., & Fayemi J.K., ed, (2000) p. 286.
16. Herbst J., (1999) 'The Regulation of Private Security Forces', in The Privatisation of Security in Africa South Africa: South African Institute of International Affairs, p. 115.
17. For an account of the trial see Mockler A., (1986) The New Mercenaries London: Corgi Books, p. 279-309.
18. The Luanda Draft Convention on the Prevention and Suppression of Mercenaries hereinafter cited as Luanda Draft Convention.
<http://www1.umn.edu/humanrts/instree/mercenaryconvention.html> 25th July 2001. Hereafter Luanda Draft Convention.
19. See the Luanda Draft Convention.
20. Taulbee J., (1985) 'Myths, Mercenaries and Contemporary International Law', California Western International Law Journal Vol. 15, No. 2, p. 339-363.
21. See the Luanda Draft Convention.
22. Hampson F. J., (1991) 'Mercenaries: Diagnosis Before Proscription', in Netherlands Yearbook of International Law Vol. 22, No. 3, Netherlands: Martinus Nijhoff Publishers, p. 27.
23. See the Luanda Draft Convention.
24. Hampson F. J., (1991) p. 27.
25. Protocol I, Article 47, additional to the Geneva Convention of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1), UN Doc. A/32/144 Annex 1 (1977).
26. Roberts A., & Guelff R., (2000) Documents on the Laws of War Oxford: Oxford University Press, p. 485.
27. O'Brien K., (1998) 'Military-Advisory Groups and African Security: Privatised Peacekeeping', in International Peacekeeping London: Frank Cass Vol. 5, p. 78-105, p. 81.
28. Mockler A., (1986) p. 35-36.
29. Taulbee J., (1985) p. 349.
30. Roberts A., & Guelff R., (2000) p. 447.
31. Idealists can be found on either side in a conflict. Those British mercenaries who fought in Angola included Nick Hall. Hall claimed he was fighting not for money, but against communism, even if it meant fighting without pay in a distant country far from home, in Dempster C., & Tomkins D., (1978) Firepower London: Corgi, p. 59. Halls political views were in fact extreme rightwing, in Mockler A., (1986) p. 220.
32. Abraham G., (1999) 'The Contemporary Legal Environment', in The Privatisation of Security in Africa South Africa: South African Institute of International Affairs, p. 97.
33. Report of the Committee of Privy Counsellors appointed to inquire into the recruitment of mercenaries, Cmnd. 6569, p. 2.
34. For example, intent is an element of conspiracy, which is defined as follows: A person is guilty of conspiracy in the first degree when, with the intent that conduct constituting a class A felony be preformed, he agrees with one or more persons to engage in or cause the performance of such conduct.
N.Y. Penal Law 105.15.
35. Taulbee J., (1985) p. 351.
36. Collecting evidence in a third country of a crime committed by an overseas national so that person can be prosecuted in his or her own country is not unique to mercenarism. A similar problem will undoubtedly occur in relation to paedophiles that commit their crime abroad but prosecuted in their own country as is now happening in the United Kingdom.

37. Mockler A., (1986) p. 33-34.
38. See fn 12 for an explanation of the significance of the OAU Convention.
39. The Luanda Draft Convention is part of the OAU Convention For The Elimination Of Mercenaries In Africa, OAU Doc CM/433/Rev.L, Annex I (1972), Appendix II. The International Commission of Inquiry on Mercenaries, in Luanda, produced the Draft in June 1976. While its significance is the same as the Convention For The Elimination Of Mercenaries In Africa, it is after all part of the Convention, Hampson describes it as a political tract masquerading as a legal text. See Hampson F. J., (1991) p. 28.
40. Burchett W., & Roebuck D. (1977) The Whores of War: Mercenaries Today p.234.
41. Hampson F. J., (1991) p. 29.
42. The Western view on this issue is shown by summary statements in the Sixth Committee by Mr Saint Martin (Canada) Mr DeStroop (Australia). UNs 38th Session GAOR C.6 U.N Doc. A/C.6/38/SR.23 (1983). Statement by Mr Font (Spain). UNs 38th Session GAOR C.6 U.N Doc. A/C.6/38/SR.25 (1983).
43. Taulbee J., (1985) p. 355.
44. Taulbee J., (1985) p. 355.
45. Taulbee J., (1985) p. 355.
46. Hampson F.J. (1991) p. 30. Also see fn 42 for a list of officials from Western governments who expressed an official view. For details of the convention, see <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty6.asp> 24th January 2002. Document No. A/RES/44/34.
47. Abraham G., (1999) p. 98.
48. Zarate J.C., (1998) 'The Emergence of a New Dog of War: Private International Security Companies, International Law, and the New World Order', in Stanford Journal of International Law 34. p. 70.
49. Abraham G., (1999) p. 98.
50. Abraham G., (1999) p. 99.
51. Major MF., (1992) 'Mercenaries and International Law', in Journal of Comparative and International Law 22, p. 117.
52. Zarate J.C., (1998) p. 90.
53. Zarate J.C., (1998) p. 133.
54. Abraham G., (1999) p. 100.
55. The International Convention Against the Recruitment, Use, Financing and Training of Mercenaries will not enter into force until the 30th day following the date of deposit of the 22 ratification or accession. At the time of writing the Convention had still not been ratified, or accessioned by the necessary 22 member states.
56. Taulbee J., (1985) p. 356.
57. Taulbee J., (1985) p. 356.
58. This particularly point is very relevant at present, with the United State's war on terrorism obviously demonstrating governments are not always able to achieve this level of control over their territory.
59. The argument put forward by Garcia-Mora is pertinent to the events of the 11th September 2001 in two ways. First, to what extent does 11th September suggest a link between the Afghanistan state and al-Qaeda actors within Afghanistan, and was this link sufficient to justify military intervention by America. Second, the suggestion that there now exists states with little or no control over parts of their territory, and therefore limited liability.
60. Taulbee J., (1985) p. 357.
61. Abraham G., (1999) p. 101.
62. Zarate J.C., (1998) p. 122.

63. Shearer D., (1998) 'Private Armies and Military Intervention', in Adelphi Paper 316 Oxford: Oxford University Press, p. 17/18.
64. Hampson F. J., (1991) p. 3-38.
65. See 'Report on the Question of the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of People to Self-determination', UN Doc. E/CN/4/1997/24, 27 January 1998. Part 3, Section B, Current International Legislation and its Limitations, published by the Office of the UN High Commissioner for Human Rights for a detailed account of what is included in the legislation.
66. The debate as to whether PMCs are corporations whose employees are mercenaries or military advisers is ongoing, and therefore the distinction between the two is still blurred.
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Keywords : International Law, Private Military Companies, security

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