

the mercenary issue at the UN commission on human rights

the need for a new approach

International Alert
Policy and Advocacy Department
1 Glyn Street
London
SE11 5HT
United Kingdom
Tel: +44 (0)20 7793 8383
Fax: +44 (0)20 7793 7975
E-mail: general@international-alert.org
Website: www.international-alert.org

ISBN 1-898702-06-7

*Prepared for International Alert by Leonard Gaultier,
Garine Hovsepian, Ayesha Ramachandran, Ian Wadley
and Badr Zerhdoud of The Graduate Institute of
International Studies, Geneva*

Preface by Andrew Clapham

INTERNATIONAL ALERT

International Alert is an independent non-governmental organization which analyses the causes of conflict within countries, enables mediation and dialogue to take place, sets standards of conduct that avoid violence, helps to develop the skills necessary to resolve conflict non-violently, and advocates policy changes to promote sustainable peace. The International Alert Policy and Advocacy department has three programmes on security and peacebuilding: light weapons, the privatization of security, and security sector reform. Each promotes the development and implementation of policies and works to enhance the capacity of governments, non-governmental organizations, and civil society to address the causes of insecurity in regions of conflict.

- The Light Weapons programme, established in 1994, focuses on identifying ways to control the proliferation and misuse of conventional arms, especially light weapons.
- The Privatization of Security programme, established in 1998, focuses on the development and promotion of policies and practices which will ensure that the activities of private security and military companies have a positive impact on preventing conflicts and building sustainable peace.
- The Security Sector Reform programme focuses on the development and promotion of policies and practices which contribute to the effective implementation of security sector reform programmes.

Contents

Abbreviations	3
About the authors	4
Preface	5
Executive Summary	6
I Introduction	9
II The current phenomenon – private security services	10
2.1 Mercenaries	10
2.2 Private security companies	10
2.3 Other forms of private security services	12
III Threat posed by private security services to the protection of human rights	13
3.1 Accountability	13
3.2 Agency	13
3.3 Human rights violations	14
3.3.1 As part of commercial security measures	14
3.3.2 In situations of armed conflict	14
3.3.3 Involving the extraction of natural resources	15
IV The institutional response by the international community to private security services	16
4.1 The UN Special Rapporteur on the use of mercenaries	16
4.1.1 Historical background	16
4.1.2 The response of the United Nations	16
4.1.3 The mandate of the Special Rapporteur on the use of mercenaries	17
4.1.4 The Special Rapporteur's activities and reports	18
4.1.5 The restrictions of the Special Rapporteur's mandate	19
4.1.6 The current status of the mandate	19
4.2 Other UN bodies	20
4.2.1 The UN General Assembly	20
4.2.1.1 The First Committee	20
4.2.1.2 The Third Committee	21
4.2.1.3 The Sixth Committee	21
4.2.1.4 The Review of Mechanisms	21
4.2.2 The UN Economic and Social Council (ECOSOC)	22
4.2.2.1 The UN Commission on Human Rights	22
4.2.2.2 The Crime Prevention Structure	23
4.2.3 The UN Secretariat	23
4.2.4 The Security Council	24
4.3 Other international organizations: the ICRC	24
4.4 Non-governmental organizations	25
4.5 Conclusion regarding the institutional response by the international community to private security services	25

V	The legal dimensions of private security services	26
5.1	Customary international law	26
5.2	Additional Protocol I of 1977 to the Geneva Conventions (1949)	27
5.3	International Convention Against the Recruitment, Use, Financing and Training of Mercenaries	28
5.4	The OAU Convention for the Elimination of Mercenaries in Africa	30
5.5	International Law Commission Draft Code of Crimes Against the Peace and Security of Mankind	32
5.6	International Criminal Law	33
5.7	Draft Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition and other related materials	33
5.8	National legislation	33
5.8.1	Mercenary legislation	33
5.8.2	Foreign military assistance legislation	34
5.8.3	South Africa Regulation of Foreign Military Assistance Act	34
5.9	Conclusion regarding the legal dimensions of private security services	35
VI	Conclusions and recommendations: The need for a new approach	36
6.1	A new mechanism	37
6.1.1	Specialized expertise	37
6.1.2	Further definition of prohibitable mercenary activity	38
6.1.3	New frameworks for responsibility	38
6.1.4	New frameworks for regulation and monitoring	38
6.1.5	Seek ratification and enforcement of UN and OAU Conventions	39
6.1.6	Investigate and monitor private security services	39
6.1.7	Dialogue with users and providers of private security services	39
6.1.8	Reporting function	40
6.1.9	Provide coordination between UN bodies and agencies	40
	Endnotes	41

Abbreviations

BP	British Petroleum
CARE	Care International
CCPCJ	Commission on Crime Prevention and Criminal Justice
CICP	Centre for International Crime Prevention
DSL	Defence Systems Ltd
ECOSOC	The UN Economic and Social Council
EU	European Union
GIIS	Graduate Institute of International Studies
ICC	International Criminal Court
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for former Yugoslavia
IDAS	International Defence and Security Ltd
ILC	International Law Commission
IMF	International Monetary Fund
KFOR	Kosovo Force (NATO)
MPRI	Military Professional Resources Inc
NATO	North Atlantic Treaty Organization
NGO	Non-governmental organization
OAU	Organization of African Unity
POW	prisoner of war
PSS	private security service(s)
UN	United Nations
UNDP	United Nations Development Program
UNHCR	United Nations High Commission for Refugees
UNICEF	United Nations Fund for Children
UNICJRI	United Nations Interregional Criminal Justice and Research Institute

About the authors

This briefing is the result of a study conducted for International Alert by a team of five researchers studying at the Graduate Institute of International Studies (GIIS) in Geneva.

The research and writing of the briefing was overseen by *Andrew Clapham*, Associate Professor of Public International Law at the GIIS since 1997. Before joining the GIIS Andrew Clapham was the Amnesty International representative at the United Nations in New York. His current research interests concern the role of non-state actors in international law. His publications include *European Union: The Human Rights Challenge* Volume I and *Human Rights in the Private Sphere*.

The other members of the research team were:

Leonard Gaultier, a candidate for the *Certificat d'Études Internationales* from the GIIS. Prior to studying at the GIIS, Leonard Gaultier completed his French military service as a legal counsel for the airforce. He holds a *Diplôme d'Études Approfondies* in Public International Law from Panthéon-Assas in Paris.

Garine Hovsepian, a joint candidate for a Master of Arts in Law and Diplomacy from the Fletcher School of Law and Diplomacy (Boston) and for the *Certificat d'Études Internationales* from the GIIS. Garine Hovsepian studied law at the Université de Montréal in Canada and is a member of the Quebec Bar. She previously practiced at the law firm Ogilvy Renault in Canada.

Ayesha Ramachandran, a candidate for a Bachelor of Arts in Government and English Literature at Smith College in the United States who has been a visiting scholar at the GIIS between 1999 and 2000. Ayesha Ramachandran has worked in the Migration Division of the International Labour Office and for Migrants' Rights International and other non-governmental organizations in India.

Ian Wadley, a joint candidate for a Master of Arts in Law and Diplomacy from the Fletcher School of Law and Diplomacy (Boston) and for the *Certificat d'Études Internationales* from the GIIS. Prior to studying at the GIIS, Ian Wadley was a practising lawyer in Perth, Australia. He holds a Bachelor of Law and a Bachelor of Commerce (Management) from Murdoch University in Perth.

Badr Zerhdoud, a candidate for the *Diplôme d'Études Approfondies* at the GIIS. Badr Zerhdoud holds a Law degree from the University of Aix-en-Provence in France and the University of Maastricht in the Netherlands.

Damian Lilly, Programme Manager of the Privatization of Security and Peacebuilding advocacy programme at International Alert, was responsible for the overall editing of the document. The views expressed are those of International Alert.

Preface

This briefing has been written in the context of discussions on the future of the United Nations expert 'mercenary mechanism' which tackles the use of 'mercenaries' as a means of violating human rights and of impeding the right to self-determination. The authors of the briefing have chosen not to be prisoners to the different definitions of mercenary found in various international treaties. Instead they have sought to show that private security services (PSS) are playing an increasing role on the world stage, and that such activities have led to the denial of human rights in a number of contexts. The authors have also chosen to look again at what a UN 'mechanism' can do, and have made a number of suggestions for a reformulated mandate to take account of the issues which could be constructively addressed by the UN, thirteen years after the original 1987 mandate created the Special Rapporteur on the use of mercenaries.

The briefing succeeds in showing how the UN and its member states could take a more coordinated approach to dealing with the human rights issues arising in the context of private security today. The legal landscape is laid out in some detail and it becomes clear by the end of the briefing that ratification and implementation of existing treaties will not on their own meet current concerns. Nor do the authors suggest that states should embark on a new treaty-drafting exercise. Definitions, prohibitions, jurisdiction, and punishment are traditional responses in this field, but the issues have become complex as not all private security services can be considered outlawed and criminal. Furthermore part of the concern is not so much the status of the personnel (combatant, mercenary, civilian, criminal, etc.) but rather the behaviour of the personnel and their employers. Even where private security companies are not necessarily operating as illegal mercenaries, compliance with international human rights law norms remains a key issue. International distinctions regarding legal status no longer seem so relevant at a time when the focus of the international community has turned to ensuring accountability for war crimes and human rights abuses.

By challenging our assumptions about mercenaries and the role of a UN mechanism, the briefing sets out an original and feasible set of proposals for further UN action in this field. Let us hope that the issue is given serious attention by governments in the lead-up to discussions on a new UN mandate at the UN Commission of Human Rights in 2001.

Andrew Clapham, Associate Professor of Public International Law,
Graduate Institute of International Studies, Geneva

This briefing argues that the institutional and legal response by the international community to the mercenary problem as it is manifested today is inadequate and urgently needs to be addressed. In recent years mercenary activity has changed radically to take on new and complex forms which fall outside the existing institutional and legal frameworks for mercenaries. The traditional mercenary, someone who fights for financial gain in armed conflicts alien to his or her own nationality, has been supplemented by the emergence of private security companies. As a product of globalization and the end of the Cold War, companies such as Executive Outcomes, Sandline International, Military Professional Resources Inc., and Defence Systems Ltd. have begun to offer security and military services on the international market to governments, multinational corporations and humanitarian agencies. In addition to these companies, there is now a plethora of non-state private security groups which pose a common challenge to the state as the principle provider of security and the protector of human rights. This briefing groups all these various manifestations together under the term 'Private Security Services' (PSS). It proposes that a new mechanism be set up within the UN system (replacing the existing mandate of the Special Rapporteur on the use of mercenaries in the UN Commission on Human Rights) to address the broader human rights implications of the present day PSS phenomenon.

Section 2 describes the current and emerging phenomenon of PSS by traversing the range of groups and activities encompassed by the term. These include:

- (1) *Mercenaries*, which continue to be present in most ongoing conflicts, and volunteers or ideological mercenaries that display a close resemblance to them and are difficult to distinguish;
- (2) *Private security companies*, which provide a range of services to multinational companies with oil and mining interests, humanitarian agencies and governments, and are the principle group of actors seen as providing PSS; and
- (3) *Other forms of private security services*, which are supplied by other privately motivated armed groups, including private militias, civil defence forces and vigilantes.

Section 3 examines the threat posed by PSS to the protection of human rights by moving away from the narrowly conceived interpretation of the link between mercenary activity and the right of peoples to self-determination. There has been a contentious debate as to whether PSS help or hinder security situations in fragile states. All sides of the debate agree however that there is a lack of accountability of PSS providers for human rights violations in contrast to state armed forces which are accountable under international human rights and humanitarian law. In view of the problem of PSS accountability and the unique challenge they present for the protection of human rights, examples of documented instances where PSS providers have been involved or implicated in human rights violations are covered. These fall into three broad categories:

- (1) abuses committed as part of commercial security measures;
- (2) abuses that occur in situations of armed conflict; and
- (3) abuses involved in the extraction of natural resources.

Such a categorisation by *situation* rather than by the *category of right* violated facilitates the development of practical responses by associating abuses with the denial of rights contained in national and international legal human rights instruments.

Section 4 surveys the responses there have been within the UN system to the mercenary problem and the relevance of these to the PSS phenomenon. It demonstrates that the international community's institutional response to PSS has been sketchy and uncoordinated among a number of UN bodies, organs, commissions, and committees addressing specific aspects of the issue but not its entirety. There is officially no UN mechanism currently examining the human rights impact of PSS in all its new and emerging forms. The mandate of the UN Special Rapporteur on the use of mercenaries remains the principal focus of the UN's response. However, the mandate is not working effectively because the resolution that supports it neither includes the new forms of the problem in the shape of private security companies nor reflects the specific threat posed by these actors to the protection of human rights. International Alert does not believe – as has been suggested – that the Sixth Committee of the General Assembly would be an appropriate forum in which to address the issue. The priority is for the mercenary mandate within the Commission on Human Rights to be reviewed in 2001 – as is scheduled – and made more effective for tackling the issue.

Section 5 reviews the applicability to PSS of existing and nascent legal responses to the problem of mercenaries, both at the international and national levels. It demonstrates that a total ban on the use of mercenaries does not strictly exist in international customary law; only a duty on states to refrain from engaging or encouraging armed mercenaries from incursion into the territory of another state. Article 47 of Protocol I to the Geneva Conventions is the only international instrument dealing with mercenaries, but defines them only to deny them combatant and prisoner of war status within international humanitarian law. The International Convention Against the Recruitment, Use, Financing, and Training of Mercenaries makes mercenary activity an international offence, but is not yet in force and is full of loopholes and ambiguities. The OAU Convention for the Elimination of Mercenaries in Africa, while having better-defined obligations, faces many of the same definition obstacles and has only a regional focus. Furthermore, both the International and OAU Conventions only deal with mercenaries as a threat to the territorial integrity of states and the right of peoples to self-determination. They are also not applicable to most of the activities of PSS providers. At the national level, some countries have legislation in place to control mercenary activities, but most do not classify being a mercenary as a criminal offence. Even fewer countries, among which is South Africa, have legislation regulating the activities of modern-day private security companies and their supply of military assistance abroad. The entering into force of the International Convention would represent a strengthening of the existing legal framework, but is unsatisfactory on its own for addressing PSS.

Conclusions and recommendations

The international community needs to adopt a new institutional and legal approach to problems of mercenaries and PSS. The existing, weak legal framework for mercenaries needs to be supplemented if the international community is to respond to the more wide-ranging PSS phenomenon. It would be unhelpful merely to call for the banning of PSS. International Alert believes that the international community should work towards the prohibition and suppression of PSS deemed illegitimate and undesirable, whilst at the same time providing proper regulation and monitoring of those other PSS seen as legitimate. This should involve a process of dialogue and engagement with certain PSS providers and their users, and effective regulation and monitoring of PSS in general. In this regard, International Alert recommends that the UN take the opportunity of the review of the current mandate of the Special Rapporteur on the use of mercenaries at the 2001 session Commission on Human Rights to begin to establish a new mechanism, with a wider remit, that would address the broad issue of PSS. This proposed new mechanism should fulfil the following functions:

- **Specialized expertise** to study the impact of PSS on human rights, to identify appropriate policy responses, and to provide an advisory role to states experiencing PSS.
- **Further definition of prohibitable mercenary activities** to build upon the expert meetings currently being convened by the Office of the UN High Commissioner for Human Rights on this matter.
- **New frameworks for responsibility** to provide clarity on the legal responsibility of users of PSS and providers themselves to ensure adequate protection of human rights.
- **New frameworks for regulation and monitoring** such as a UN Regulatory Body to register and monitor the activities of accredited private security companies.
- **Seek ratification and enforcement of UN and OAU Conventions** by UN member states and act as a monitoring mechanism for their implementation.
- **Investigate and monitor private security services** and in particular compliance with existing legal instruments to consider how they might be amended and supplemented to address more adequately the human rights problems associated with PSS.
- **Dialogue with users and providers of private security services** to highlight the threat posed by PSS to the protection of human rights and recommend appropriate steps to safeguard against possible violations such as the adoption of national legislation or codes of conduct.
- **Reporting function** to disseminate information and analysis on PSS into the public realm and thus provide publicity sanctions for rogue PSS.
- **Coordination among UN bodies and agencies** to provide coherence to the numerous bodies and agencies in the UN dealing with discrete elements of the PSS issue.

I Introduction

In 1987, the United Nations (UN) Commission on Human Rights appointed a Special Rapporteur on the use of mercenaries as a means of violating human rights and of impeding the right of peoples to self-determination. The creation of a mercenary mandate was in response to the scourge caused by mercenaries in post-colonial Africa in the 1960s and 1970s, and the threat posed by these combatants to newly-independent states. The duties of the Special Rapporteur has included reporting on the human rights violations committed by mercenaries and seeking the ratification of the International Convention Against the Recruitment, Use, Financing, and Training of Mercenaries which has yet to come into force.

However, since the establishment of the Special Rapporteur's mandate, the mercenary phenomenon – particularly in recent years – has changed radically to take on new and complex forms of security work which fall outside the existing institutional and legal frameworks for mercenaries. The traditional mercenary – someone who fights for financial gain in armed conflicts alien to his or her own nationality – has been supplemented by the emergence of companies such as Executive Outcomes, Sandline International, Military Professional Resources Inc., and Defence Systems Ltd, which have begun to offer security and military services on the international market to governments, multinational corporations and humanitarian agencies. These new manifestations of the private security phenomenon share a common feature with traditional mercenaries in that the use of force has moved outside the exclusive realm of the state into the private sphere. But they also display differences, suggesting that they need to be tackled in new and innovative ways. There is now a plethora of non-state private security groups which pose a common challenge to the state as the principle provider of security and the protector of human rights. This briefing groups all these various manifestations together under the term 'Private Security Services' (PSS), denoting the movement away from direct state control of the use of armed force towards private actors. (Those forms of PSS that are commercialized and take on corporate forms will be referred to specifically as 'private security companies'.) It argues that the institutional and legal response from the international community to the mercenary problem as it is manifested today is inadequate and urgently needs addressing. It proposes that a new mechanism be set up within the UN system and outlines the role that this would play.

II The current phenomenon – private security services

This section describes the current and emerging phenomenon of private security services and attempts to draw some distinctions.

2.1 Mercenaries

The mercenary in the mould of Bob Denard or ‘Mad’ Mike Hoare who emerged during the decolonization of several African states in the 1960s is still prevalent in many ongoing conflicts today. The continued presence of traditional mercenary activity has been observed in recent African conflicts – notably during the civil war in the former Zaire in 1997, where at least 200 French, Belgian, British, Serbian, South African and Ukrainian mercenaries were known to be fighting for President Mobutu Sese Seko against Laurent Kabila.¹ Whilst present in nearly all conflicts, mercenaries have been particularly active in armed conflicts in: Afghanistan, Angola, Armenia, Bosnia-Herzegovina, Chechnya, Colombia, Congo-Brazzaville, the Democratic Republic of the Congo, Eritrea, Ethiopia, Georgia, Kashmir, Kosovo and Sierra Leone. The individuals themselves are from an equally extensive and diverse list of countries from the former Soviet Union, Europe, the Middle East, the Americas, and Africa.

A group of actors in conflicts who closely resemble mercenaries and are difficult to distinguish are volunteers or ideological mercenaries. These foreign fighters fight alongside local warring factions primarily because of religious or ideological affiliation. The mujahadin epitomize this type of combatant. As ‘holy warriors’ for Islam they have participated in conflicts where the Islamic interest is seen to be at stake, such as in Afghanistan, Kashmir, several conflicts in Central Asia, and the former Yugoslavia.² A US government communication from the Pentagon following the creation of KFOR in Kosovo in 1999 alleged that ‘volunteer forces’ of Russian soldiers participated in Serbian ethnic cleansing against Albanians, motivated by personal association with the Serb ideological cause, rather than by Russian government sanction.³ Ideological mercenaries, however, may also in part be motivated by the financial rewards of being a combatant, at least in terms of it representing a livelihood. It is extremely difficult to say with assurance that an individual’s motivation for fighting is either exclusively financial or ideological; usually it is a combination of the two. Volunteers will therefore also be included in the PSS categorization used here.

2.2 Private security companies

Private security companies are the principle group of actors examined here that are seen as providing PSS. These companies have received growing attention from the international community in recent years because of their highly publicized participation in a number of conflicts worldwide. The most discussed of these companies is perhaps Executive Outcomes (now no longer in business), originally based in South Africa, and known mainly for its

extensive contracts in Angola and Sierra Leone. Other major companies include Sandline International, Military Professionals Resources Incorporated, Vinnell Corporation, Defence Systems Limited, Air-Scan, Saracen International, Lifeguard, Omega Support Limited, Gurkha Security Services, and Special Project Service Ltd.⁴ Unlike mercenary forces which are generally covert in nature, relying on *ad hoc* organizational and financial arrangements, private security companies have attempted to be more above board about their operations and intentions. They are usually registered companies, pay taxes and display many characteristics of corporations in any other industry. Private security companies provide a range of services in conflict situations including: combat and operational support, military advice and training, arms procurement, logistical support, security services, intelligence-gathering, and crime prevention services.⁵

Strictly speaking, there are two groups of companies: private military companies and private security companies. It is difficult to distinguish between the two types of companies, although private military companies are associated more with activities designed to have a military impact, whereas private security companies are primarily concerned with protecting individuals and property. A number of companies, however, provide both sorts of service. The term private security company is used here to encompass both kinds of company which operate in conflict regions and can demonstrate the use of force more associated with state security forces.

Clients of private security companies are usually either multinational companies with mining or oil interests in conflict situations, humanitarian agencies, or governments in need of additional support to supplement existing security forces.⁶ Private security companies are used by corporations to protect personnel, installations, and infrastructure. One of the largest companies in this area is the British company Defence Systems Limited (DSL), whose clients include: De Beers, Texaco, Chevron-Schlumberger, British Gas, Amoco, Exxon, Mobil, Ranger Oil, British Gas, British Petroleum, Bechtel, BHP Minerals, American Airlines, and Shell.⁷ Significantly, these private security companies themselves often belong to large conglomerates which have substantial economic interests in countries where security services are indispensable. Levdan, for example, the largest Israeli company operating in the industry, is a subsidiary of Kardan Investment, an import-export company active in the diamond trade. International Defence and Security Ltd (IDAS) (a Belgian-Dutch security company with Israeli connections) also has a joint venture agreement with American Mineral Fields International on diamond concessions in the Lunda Norte province of Angola.⁸ Private security companies are also used by UN and non-governmental humanitarian agencies to protect their staff and property in the hostile regions in which they work. Agencies that have used private security companies include the UNHCR, UNICEF, UNDP, as well as a number of NGOs.

It has been the provision of direct military assistance by private security companies to governments that has raised the most concern. The cases of Executive Outcomes being used in Angola and Sierra Leone, and Sandline International in Papua New Guinea and Sierra Leone, attracted a great deal of media attention.⁹ Direct participation in counter-insurgency operations where the state’s army is considered inadequate, though, is not the norm. While some firms have advertised their willingness to engage in direct combat duties alongside regular state forces, most companies are mainly involved in the provision

of military and strategic training. Military training for national armed forces, including advice about weapons procurement, tactics, and force structure, feature in most contracts signed. A leading company in this field is the US company Military Professional Resources Incorporated (MPRI). It is best known for its training of the Croatian army in 1995 which led to allegations that it contributed to human rights violations committed during the subsequent bloody offensive in the Serb-held Krajina region.¹⁰

2.3 Other forms of private security services

In addition to mercenaries and private security companies there are arguably a number of other privately-motivated armed groups that do not fit the traditional model of national armed forces.¹¹ These include private and state militias such as those allegedly supported by the Indonesian armed forces against the people of East Timor during the referendum on the independence of the territory in 1999. Another example is the existence of 'ranch-and-range' security forces in South Africa, providing domestic, private paramilitary forces to protect large ranch holdings. Civil defence forces and vigilante groups also share the characteristic of providing private security services to clients. While these groups do not readily fit within the traditional understanding of mercenaries or private security companies, they are another manifestation of the broad trend towards the privatization of security in which the use of force is moving away from the preserve of the state. There is today a wide range of actors providing security functions normally associated with the state which are not motivated by political or ideological goals as in the case of rebel and insurgent groups, but instead by possible financial rewards. They include not only mercenaries and private security and military companies but also volunteers, private militias, civil defence forces, and vigilantes. The term PSS has been offered here to encompass the broad range of activities associated with these actors. It is by no means precise and indeed requires further analysis to define which activities and groups should be included, but it seems to highlight the impact the privatization of security phenomenon is having on the protection of human rights.

III

The threat posed by private security services to the protection of human rights

As stated earlier, the impact of traditional mercenary activity on human rights has been conceptualized in terms of the threat posed by the use of mercenaries to the right of peoples to self-determination and the enjoyment of human rights. This section examines the relationship between the broader PSS phenomenon and human rights. It suggests that it is necessary to move away from this narrowly conceived interpretation of the link between mercenary activity and human rights in order to understand the threat posed by PSS to the protection of human rights.

3.1 Accountability

With the emergence of private security companies in recent years there has been a contentious debate about whether they help provide security or are conversely a source of instability. The international community has accepted the use of PSS in some contexts, such as by multinational corporations and even humanitarian agencies to protect staff and property in hostile conflict regions. It has also been argued that private security companies performing military functions can be more effective and cheaper than national armies and international peacekeeping forces, without many of the same political constraints.¹² On the other hand, many commentators have questioned the legitimacy of private companies to perform such roles and have drawn attention to the negative consequences of their use.¹³ While this important wider debate exists, due consideration of the arguments is beyond the scope of this paper, whose principal focus is the impact PSS are having on the protection of human rights. Nevertheless it is recognized by all sides of the debate that there is a lack of accountability of the activities of PSS providers in terms of human rights violations. While state armed forces are accountable under international human rights and humanitarian law, the lines of accountability for PSS providers are not always so straightforward. As will be seen in section V, these actors are allowed to operate largely unregulated in most contexts.

3.2 Agency

It has been suggested that when private security companies are hired by a government or registered in their home state they can be considered as state providers, exposing the latter's international responsibility.¹⁴ Such a relationship of agency does not, however, always exist when private security companies operate in grey areas of accountability. Registration and licensing by government authorities will not necessarily create a relationship of agency between the private security companies and the state. Nor will actions of the private security companies always easily be attributed to the state who has employed them. Furthermore, today, it is not states but rather non-state or non-governmental entities, such as corporations and non-governmental organizations (NGOs), that often employ private security companies. Consequently, if the actions of these private security companies are not linked to a state, then it becomes unclear how to deal with human rights abuses associated with their use, what recourse there would be should they occur, and what effective ways exist to control and deter future violations perpetrated by these private entities.

3.3 Human rights violations

In view of the problem of accountability for PSS and the unique challenge they present for the protection of human rights, it is instructive at this point to look at what instances there have been of PSS providers being involved or implicated in human rights violations. Human rights abuses committed by PSS providers fall into three broad categories: abuses committed as part of commercial security measures, abuses that occur in situations of armed conflict, and abuses involving the extraction of natural resources. Such a categorization by *situation* rather than by the *category of right* violated facilitates the development of practical responses by associating abuses with the denial of rights contained in national and international legal human rights instruments. What appears below are examples of some of the documented instances that there have been of PSS providers being involved in human rights abuses. This is by no means an exhaustive survey; there is an urgent need for further research in this regard.

3.3.1 As part of commercial security measures

Human rights abuses as part of commercial security measures occur mostly in the context of the protection of multinational corporation installations by private security companies. The abuses in these cases have included invasions of privacy through phone tapping, interception of mail and other intelligence-related activities, suppression of trade union activity, harassment of protesters, and complicity with local law enforcement forces in arbitrary detentions and enforced disappearances of prominent dissenters. For example, human rights problems arose with regard to the use of Defence Systems Limited (DSL) by British Petroleum (BP) in Colombia, who were seen as being complicit in human rights abuses committed by the Colombian state security forces responsible for protecting BP installations. Similar cases have occurred in the case of Congo-SEP, a Petrofina subsidiary in the Democratic Republic of Congo, and its use of Sapelli SARL for security; with the use of Executive Outcomes by the mining company Sierra Rutile in Sierra Leone; and by Shell in Nigeria, whose 'Shell Police' have had an infamous record among the local population.¹⁵

3.3.2 In situations of armed conflict

Human rights abuses may take the form of individual crimes against humanity and in situations of international and internal armed conflict they may constitute war crimes, as recognized by international humanitarian law. Attacks on civilian populations, including mass bombings, killings, destruction of villages, summary executions, torture and mutilation, and the use of certain prohibited arms have all been observed in the conflicts where PSS providers have been active such as the former Zaire, Sierra Leone and Angola. In this regard it has been noted how Executive Outcomes was responsible for introducing indiscriminate weapons, including fuel air explosives, into Angola.¹⁶ Allegations concerning the use of such weapons and other barbaric acts of warfare committed by Executive Outcomes appear in a television documentary about the company.¹⁷ The evidence so far has mainly been anecdotal, however.¹⁸ The analysis of the involvement of traditional mercenary forces in human rights abuses has been more by association with the poor record of the warring parties with whom they have fought. It is highly problematic that there is little reliable information available on exact cases because PSS providers operate predominantly in areas where there is inadequate monitoring of human rights because the prevalent conditions of war restrict observer access.

3.3.3 Involving the extraction of natural resources

Human rights abuses concerning the involvement of PSS providers in the extraction of natural resources have connections to violations of the right of peoples to self-determination and the right to development. In particular, the activities of private security companies have been seen as neo-colonial because of the substantial financial burden their cost puts on the countries that hire their services, countries which are usually poorly developed and can ill-afford their services. The costs of hiring private security companies have been met either by diverting IMF and World Bank loans or more often by granting considerable mining concessions to associated companies to exploit. This results in the long-term mortgaging of a country's natural resources and puts an excessive and undesirable strain upon the internal affairs of a country. Such a situation inherently undermines the right to development as well as the right to self-determination through state sovereignty.¹⁹ In a highly publicized case involving the use of private security companies in Papua New Guinea the intricate web of pay-offs for concessions to exploit the copper mine on the island of Bougainville pitted two private security companies, Sandline International and J S Franklin, against each other, with the latter allegedly making pay-offs to a senior military officer, Brigadier Singarok, to undermine the contract being secured by the former.²⁰

IV The institutional response by the international community to private security services

This section surveys what responses there have been within the UN system and other organizations in the international arena to the mercenary problem and the relevance of these responses to the present day PSS phenomenon. This assessment goes beyond the mandate of the UN Special Rapporteur on the use of mercenaries.

4.1 The UN Special Rapporteur on the use of mercenaries

4.1.1 Historical background

Mercenaries once possessed a degree of legitimacy. It was only after World War II and the recognition of the right to self-determination that the international community's attitude to mercenary activities changed. The development of mercenary activity on a large scale in Africa, which coincided with the process of decolonization on the continent, prompted the UN and regional bodies such as the Organization of African Unity (OAU) to condemn the use of mercenaries and brand them as criminals. The international community's concern stemmed from the use of foreign mercenary forces by nationalist movements to prevent or hinder the exercise of the right to self-determination of newly-independent states.²¹ The OAU passed a series of resolutions to address the problem and embarked on a process to arrive at a suitable definition of mercenary in order to ban their use. In 1977, in Libreville, the OAU adopted the Convention for the Elimination of Mercenaries in Africa. The Convention was the first attempt to tackle mercenary activity at the international level through international criminal law.

4.1.2 The response of the United Nations

In 1967, the UN Security Council adopted its first resolution in which it condemned 'any State which persists in permitting or tolerating the recruitment of mercenaries... with the objective to overthrow the governments of the United Nations'. It called upon governments 'to ensure that their territory as well as their nationals are not used for the planning of subversion, recruitment, training and transit of mercenaries'.²² Following a series of resolutions condemning the use of mercenaries, the UN General Assembly, on 14 December 1979,²³ decided on a resolution, sponsored by 26 member states, to place an item for 'drafting an international convention against the recruitment, use, financing and training of mercenaries' on the agenda of its thirty-fourth session in 1980.²⁴ It invited all member states to communicate to the Secretary General of the UN their views and comments on the need to elaborate urgently such a convention. It also called upon all states to ensure by both administrative and legislative means that the territories under their control would not be used for the planning of subversion and recruitment, assembly, financing, and using of mercenaries for the overthrow of the government of any state.²⁵

During the 1980s, the UN continued to be concerned about mercenaries, especially in the African continent where the phenomenon persisted, but also in a number of other contexts. There was a strong desire to create a new instrument to tackle the problem, and on 4 December 1989 the UN General Assembly adopted and opened for signature and ratification the International Convention against the Recruitment, Use, Financing and Training of Mercenaries.²⁶ (A detailed examination of the OAU and the International Conventions appears in section V).

4.1.3 The mandate of the Special Rapporteur on the use of mercenaries

It was against this backdrop that the UN Commission on Human Rights, by a resolution of 9 March 1987, decided to appoint a person with an international reputation as a Special Rapporteur on the use of mercenaries.²⁷ The resolution reads:

1. Decides to appoint for one year a Special Rapporteur to examine the question of the use of mercenaries as a means of violating human rights and of impeding the exercise of the right of peoples to self-determination;
2. Requests the Chairman of the Commission, after consultations with the other members of the Bureau, to appoint an individual of recognized international standing as Special Rapporteur;
3. Decides further that the Special Rapporteur in carrying out his mandate shall seek and receive credible and reliable information from governments, as well as specialized agencies, intergovernmental organizations and non-governmental organizations;
4. Requests the Secretary General to appeal to all governments to cooperate with and assist the Special Rapporteur in the performance of his duties and to furnish all information requested;
5. Further requests the Secretary General to provide all necessary assistance to the Special Rapporteur;
6. Requests the Special Rapporteur to submit to the Commission at its forty-fourth session a report on his activities regarding this question;
7. Decides to consider the question of the use of mercenaries as a means of impeding the exercise of the right of peoples to self-determination at its forty-fourth session as a matter of high priority under the agenda item entitled 'The right of peoples to self-determination and its application to peoples under colonial or alien domination or foreign occupation'.

The resolution was adopted by 30 votes to 11, with one abstention.²⁸ The draft resolution was initially submitted by Afghanistan, Algeria, Bulgaria, Cuba, Ethiopia, the German Democratic Republic, Mozambique, Nigeria, the Ukrainian Soviet Socialist Republic and the United Republic of Tanzania.²⁹ In the course of the debate on the resolution, the USA submitted a number of amendments which would have *inter alia* restricted the scope of the resolution to Southern African states, and removed a preambular reference to mercenary activity being potentially a crime against humanity. Those amendments were subsequently withdrawn by the USA.³⁰ Australia, Austria, Ireland, and Norway too introduced a revised draft resolution which differed from the final resolution text above in that it proposed referring the matter to the Ad Hoc Working Group of Experts on the situation of human rights in Southern Africa.

Under this draft resolution, the Ad Hoc group were to be given an additional request to report to the forty-fourth session of the Commission concerning 'the role of mercenaries in supporting the system of Apartheid in South Africa and Namibia as well as in the commission of acts of aggression by South Africa against neighbouring countries'.³¹ The draft resolutions were not successful³² however and the text quoted above was successfully passed.

The appointed Special Rapporteur, Sr. Enrique Bernales Ballesteros (Peru), has since reported annually to both the Commission on Human Rights and the Third Committee of the General Assembly all developments concerning mercenary activity. In addition, the Special Rapporteur has been responsible for encouraging states to ratify the International Convention of 1989. To enter into force, the Convention must be ratified by 22 States. To date twenty states have done so with a further nine having signed, but not yet ratified.³³ The placing of this mandate in the hands of a Special Rapporteur of the Commission on Human Rights in 1987 demonstrates the international community's understanding thirteen years ago that the activities of mercenaries presented a serious threat to the universal enjoyment of human rights.

4.1.4 The Special Rapporteur's activities and reports

In his reports, the Special Rapporteur has noted communications received from member states concerning mercenary activities occurring within their territory and the steps taken to address these. He has emphasized the concern created by the intensity of mercenary activities in specific contexts, including Bosnia, Sierra Leone, the Democratic Republic of Congo, and Angola. In recent reports he has drawn particular attention to the emergence and activities of private security and military companies. For this very sensitive subject, the Special Rapporteur proposes to:³⁴

expose and discuss the problem publicly and to develop regulations clearly establishing which security and military responsibilities can never be usurped from States because they are inherent to the State's very existence.

The quality and impact of the Special Rapporteur's report have, however, received criticism from delegations and observers at the Commission for focusing overly on theoretical and legal questions related to the mercenary problem, at the expense of providing a systematic means of documenting mercenary activities and associated human rights violations. Consequently the Commission has given little attention to the reports each year.³⁵ While the Special Rapporteur's reports have done much to draw attention to the gravity of the situation surrounding mercenary activity and the actions of private security companies, there has yet to be any recommendation made for a response which could encompass the full range of concerns raised. It would appear, however, that there is a lack of proven and reliable information being provided to the Special Rapporteur by governments and civil society groups, especially in comparison to other mandates in the Commission. NGOs can play an important role in this regard by providing information on mercenary activities in the countries where they operate.

4.1.5 The restrictions of the Special Rapporteur's mandate

Another critical problem is that the current wording of the resolution on the mandate of the Special Rapporteur covers the problem only as it was experienced in post-colonial Africa and the precise role played by mercenaries in that era. As a result, the issue comes under agenda item 5 of the Commission on 'the right of peoples to self-determination and its application to peoples under colonial or alien domination or foreign occupation'. This narrowly conceived interpretation of the problem has severely restricted the utility of the mandate. As has been argued, contemporary forms of the problem in the shape of PSS threaten not only the right of peoples to self-determination but also a host of other human rights which should be referred to more explicitly in the resolution on the mandate. At present the activities of private security companies do not strictly come within the current remit of the Special Rapporteur's mandate – something that the Special Rapporteur has noted on a number of occasions – let alone the even broader PSS phenomenon highlighted in this paper. Officially, there is no mechanism within the UN system to study and monitor PSS to ensure that human rights are respected. The current mercenary mandate in the Commission on Human Rights is therefore ill-equipped to tackle PSS comprehensively.

4.1.6 The current status of the mandate

At the 1995 session of the Commission, the mandate of the Special Rapporteur was renewed for a further three years, but the proposing resolution was not adopted by consensus. This was seen as an indication of some delegations' ambivalence to the issue. No action was taken on the issue at the 1996 and 1997 sessions of the Commission. In 1998, however, the mandate was extended for a further three years, reflecting renewed interest in the issue as a result of an increasing number of reports about mercenary activities, as well as concerns raised by the Special Rapporteur about the advent of private security and military companies displaying mercenary characteristics. As in other years, the fifty-fifth session of the Commission in 1999 passed a resolution on 'The use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination.' The result of the vote was 35 in favour, twelve against, with six abstentions.³⁶ The main opposition to the resolution came from the West and East European groups, with the other regional groups being broadly supportive. The main-sponsor of the resolution, Cuba, did not open up the resolution for discussion prior to it being tabled.

In their explanation of vote, Germany, on behalf of the European Union (EU), stated that mercenary activities should be strongly condemned, but that the EU could not support the draft resolution as there had been no consultation on its contents. It was added that the EU doubted that the mercenary issue should be dealt with as a human rights problem within the jurisdiction of the Commission. However, three of the seven EU Member States within the Commission abstained, rather than voting against the resolution, suggesting that there is not consensus within the EU on this issue. In its explanation of vote, Canada said that it recognized the seriousness and human rights implications of the use of mercenaries,

but did not think the draft resolution reflected those concerns sufficiently and so would vote against it. This votation and series of statements is similar to what occurred in the 2000 session of the Commission and reflects the political impasse that has been reached on the issue. It is important that future resolutions on the mercenary issue be open for informal consultations prior to being tabled. In addition, future resolutions should contain language which demonstrates the links between mercenary activities and human rights violations more accurately, and should reflect more precisely the present-day characteristics of the phenomenon. The mercenary mandate is due for renewal at the 2001 session of the Commission, which will provide an excellent opportunity to take these considerations into account.

4.2 Other UN bodies

In view of the limits of the Special Rapporteur's mandate in the Commission on Human Rights, it is important to survey the relevance of the work of other bodies and agencies within the UN system to the mercenary and PSS issues to assess how they could be tackled most effectively. In this section, the activities of four of the principal organs of the UN are considered: the General Assembly, the Economic and Social Council (ECOSOC), the Security Council and the Secretariat.

4.2.1 The UN General Assembly

The General Assembly is the UN's most universal body. Its activities range from dealing with questions of international law to humanitarian issues, and mercenaries could clearly be one of the topics dealt with in this forum. The great number of questions the Assembly is called upon to consider obliges it to allocate most of its activities to its six main Committees. Considering their respective competencies, the most relevant Committees are the First Committee, dealing with Disarmament and International Security, the Third Committee dealing with Social, Humanitarian and Cultural Issues and the Sixth Committee, which deals with Legal Affairs.

4.2.1.1 The First Committee

The First Committee, according to its recent allocation of items³⁷, is concerned with topics such as the non-proliferation of nuclear weapons or general and complete disarmament. None of its declarations or resolutions specifically deal with mercenary activities. However, the illicit trafficking of small arms is a topic with which the Committee is increasingly dealing. It has adopted a number of resolutions on the issue³⁸ and is involved in the organization of the UN Conference on the Illicit Trade in Small Arms and Light Weapons in all its Aspects due to take place in 2001. There are obvious overlaps between arms trafficking and mercenary activities and it is therefore arguable that this Committee would be competent to consider the question of PSS and its impact on armed conflict. However, this would only be from a narrow disarmament perspective and would not reflect the human rights concerns raised here.

4.2.1.2 The Third Committee

The Third Committee is more relevant from a human rights perspective. Mercenary activity falls within the scope of this Committee as it is in charge of crime prevention and criminal justice, and human rights questions.³⁹ (The Committee was used in the past to focus broadly on social, humanitarian, and cultural affairs, but now devotes some three quarters of its time to human rights questions.) Indeed, various resolutions on mercenary activity have been adopted by the Third Committee along the lines of those that have been put to the Commission on Human Rights. In particular, the resolution passed by the fifty-fourth session of the General Assembly in 1999 on 'the use of mercenaries as a means of violating human rights and impeding the exercise of the right of people to self-determination' requested the UN High Commissioner for Human Rights to publicize the adverse effects of mercenary activities, render advisory services to states affected by such activities and to convene expert meetings 'to study and update the international legislation in force and to propose recommendations for a clearer legal definition of mercenaries that would make for more efficient prevention and punishment of mercenary activities'.⁴⁰ The commitment of resources⁴¹ now to this exercise demonstrates the importance of tackling the inadequacies of current responses. (The expert meetings mentioned are discussed in greater depth in section 4.2.3)

4.2.1.3 The Sixth Committee

The Sixth Committee of the General Assembly is concerned with international law. It is composed of government lawyers representing states, who are engaged in drafting conventions and declarations, debating such documents drafted elsewhere (mostly in the International Law Commission), and discussing general problems of international law. Its function is to examine the legal and constitutional aspects of matters referred to it and to consider measures to encourage the progressive development of international law and its codification. The role of the International Law Commission (ILC) is dealt with in detail in Section V. It is sufficient here simply to note that the ILC's work also falls within the realm of legal drafting and codification efforts.

4.2.1.4 The Review of Mechanisms

In 1999, the fifty-fifth session of the UN Commission on Human Rights discussed a report that the Bureau of its fifty-fourth session had been appointed to compile on the 'Rationalization of the work of the Commission'.⁴² The exercise was a means of improving the effectiveness of the Commission's mechanisms and the capacity of the UN to promote and protect internationally-recognized human rights and contribute to the prevention of their violation. Paragraph 20, Recommendation 1(e), recommended that the Commission consider a proposal to 'terminate the mandate of the Special Rapporteur on the use of mercenaries and recommend that this matter be henceforth considered directly in the General Assembly (Sixth Committee)'. The inter-sessional open-ended Working Group on Enhancing the Effectiveness of the Commission on Human Rights that met to discuss the Bureau's report on three occasions before the fifty-sixth session of the Commission in 2000, however, was unable to reach a conclusion on this proposal. The Group said in its report to the Commission that it 'is not in a position to make a recommendation on this issue. It notes that the mandate is due for renewal in 2001 and recommends that all options – continuation, adjustment, termination – be further examined to enable a considered decision at that time.'⁴³

International Alert welcomed the conclusion of the Working Group not to terminate the mandate of the Special Rapporteur. It believes the Sixth Committee is not the appropriate forum to tackle the problem of mercenaries and PSS. If the issue were to be addressed in the Sixth Committee, instead of by a Special Rapporteur or similar mechanism, the international community would lose a valuable means of gaining evidence and reporting on the threat posed by the phenomenon to the protection of human rights. There is reason to believe that the phenomenon persists and PSS are more prevalent than when the mechanism was first established, necessitating its continuation in some form. Such a move would also represent the loss of an effective mechanism for dialogue with governments on the problem and a means of seeking ratification and implementation of international law pertaining to mercenary activity, particularly the International Convention.

In sum, the General Assembly and its Committees have dealt with the mercenary question in the past. Indeed, it was under the General Assembly's authority that an Ad Hoc Committee was established in 1980⁴⁴ to draft the International Convention against mercenaries. However, for the reasons outlined above, the Committees of the General Assembly are not the most appropriate places for a detailed analysis and discussion of the current problems surrounding the more general PSS phenomenon and its impact on human rights. The pressing issue now is not the need for a more precise definition of mercenary, but rather how to respond to the emergent forms of the wide array of actors rendering PSS, most notably private security companies. The hectic General Assembly Regular Session, which is devoted to the drafting and adoption of resolutions, would not be conducive to a serious consideration of this issue. Nor is it suggested that the Sixth Committee should embark on the drafting of a new treaty at this stage.

4.2.2 The UN Economic and Social Council (ECOSOC)

ECOSOC has two subsidiary bodies which are relevant to the PSS question – the Commission on Human Rights and the Commission on Crime Prevention and Criminal Justice.

4.2.2.1 The UN Commission on Human Rights

The Commission on Human Rights and the Sub-Commission on the Promotion and Protection of Human Rights (both created by ECOSOC) are the UN's main bodies dealing with the protection and promotion of human rights. As noted earlier, the Commission has passed a series of resolutions on the mercenary issue. Apart from the Special Rapporteur on the use of mercenaries – whom we have considered above – the Commission has also appointed various other Special Rapporteurs and Working Groups reporting on different human rights issues, some of which are relevant to the mercenary and PSS issue. The Working Group on Enforced or Involuntary Disappearances, the Special Rapporteur on Extra-judicial, Summary or Arbitrary Executions, and the Special Rapporteur on Torture are possibly some of the mechanisms under which PSS could be treated. However, they cannot currently tackle this broad and unique phenomenon and are already overloaded. The Sub-Commission on the Promotion and Protection of Human Rights has also established several Working Groups and Special Rapporteurs in order to investigate, discuss, and report on issues such as systematic rape and sexual slavery during armed conflicts, and terrorism.⁴⁹ It may be that mercenaries and PSS providers commit such acts, but again, one would only be able to consider one particular aspect of the phenomenon through these mechanisms.

4.2.2.2 The Crime Prevention Structure

The Commission on Crime Prevention and Criminal Justice (CCPCJ), also created by ECOSOC, provides guidance to the Centre for International Crime Prevention (CICP) which is the UN office responsible for crime prevention, criminal justice and criminal law reform. The Centre is part of the UN Office for Drug Control and Crime Prevention. Together with its research arm, the United Nations Interregional Criminal Justice and Research Institute (UNICJRI) in Rome, it has prepared three global programmes: one against Corruption, the second against Trafficking in Human Beings and the latest entitled Assessing Transnational Organized Crime Groups. As part of this process a Convention on Transnational Organized Crime has been drafted under the Centre's authority. (This Convention is dealt with in section V)

Although mercenary activity could in specific cases represent a clear case of transnational organized crime, neither the Commission's 1999 Report to ECOSOC⁴⁶, nor the Projects for Global Studies on Organized Crime issued by the CICP for the year 2004 and the UNICJRI for the year 2001 mention the mercenary phenomenon specifically. Given that those studies cover Colombian cartels, Italian Mafia, and Chinese Triads, as well as South African groups, the topic appears to be very widely drawn, and divergent from the unique problem of PSS. The short period of time allocated to carry out these CCPCJ studies means that the issue is unlikely to be addressed in any detail. This is not to say, however, that there is no need for greater coordination between the crime prevention structure and human rights bodies on these interrelated issues. The Special Rapporteur on Violence Against Women, for instance, submitted a report relating to the trafficking of women in connection with the drafting of the Convention on Transnational Organized Crime. In a similar fashion, the Special Rapporteur on the use of mercenaries could have been involved in the preparation of this Convention.

4.2.3 The UN Secretariat

The Office of the UN High Commissioner for Human Rights⁴⁷ reports to the Commission on Human Rights, ECOSOC and the General Assembly. The Research and Right to Development Branch of the Office of the High Commissioner is in charge of carrying out substantive research projects on a whole range of human rights issues of interest to the UN's human rights bodies. These studies could include the mercenary and PSS issues. Nothing has yet been done concerning this issue, given that the Commission on Human Rights has a specific mandate on the topic which is supported by an officer within the Office of the High Commissioner.

However, the Office of the High Commissioner has an important role to play in publicizing and highlighting the impact of PSS on human rights. Indeed, as part of work resulting from the Third Committee resolution mentioned earlier, the Office of the High Commissioner has been tasked to 'issue a booklet, prepared by a consultant and translated and published in all six official languages, to publicize the effects of the mercenaries' activities'.⁴⁸ The Office of the High Commissioner is also responsible for convening the expert meetings to study and update international mercenary legislation mentioned earlier. Subsequent resolutions in the fifty-sixth session of the Commission on Human Rights and the fifty-fifth session

of the General Assembly in 2000 have meant that the focus of these meetings will be now be on 'the traditional and new forms of mercenary activities as a means of violating human rights and impeding the exercise of the right of peoples to self-determination'.⁴⁹ This is a welcome refocusing of the meeting as it will allow consideration of PSS in their broad sense, as suggested here, rather than being beholden to merely establishing a clearer legal definition of mercenaries. However, the threat posed to the protection of human rights is still narrowly conceived. A total of ten regional experts will convene in early 2001 and a report will be submitted to the fifty-seventh session of the Commission on Human Rights. It is important that the expert meeting's scope covers the PSS phenomenon in a broad sense and its impact on human rights, and looks for innovative ways to tackle the issue.

4.2.4 The Security Council

The Security Council is the UN organ primarily responsible for the maintenance of international peace and security. The activities of mercenaries could clearly endanger international peace and security. The Security Council may have to (as it has in the past) deal with mercenaries both as a general issue and in specific contexts. The Security Council usually restricts its attention to specific conflict situations like the Congo, Sierra Leone or Haiti. However, recent resolutions on illicit arms flows to and from Africa⁵⁰ and on the protection of civilians in armed conflicts⁵¹, for instance, suggest that it is increasingly giving attention to problems viewed globally rather than in country-specific situations. The Report of the UN Secretary General to the Security Council on the Protection of Civilians in Armed Conflicts refers to the fact that violence in modern armed conflict is frequently perpetrated by non-state actors, including irregular armed forces and privately-financed militias.⁵² The Security Council will be concerned as soon as PSS represents an identified threat to international peace and security. It has not addressed PSS specifically in its recent work, though, and it is likely to restrict its response to particular contexts rather than examining the phenomenon more generally.

4.3 Other international organizations: the ICRC

The work of the International Committee of the Red Cross (ICRC) is of particular relevance to the mercenary issue because of the special role it plays in promoting the application of international humanitarian law in situations of armed conflict, where of course mercenaries are most active. Specific reference is, in fact, made to mercenaries within the Geneva Conventions. This is discussed in more detail in section V. However, in order to assess the ICRC's institutional response to the mercenary issue it can be stated that international humanitarian law criminalizes mercenaries only in so far as war crimes are committed; the Geneva Conventions and their Protocols do not criminalize mercenarism *per se*. Therefore, the ICRC has never really addressed the mercenary problem as an issue separate from its main role in the promotion of international humanitarian law. The ICRC's response would be mostly limited to armed conflicts and would not address the uses of PSS which increasingly arise outside such contexts. In addition, the ICRC adheres, in most cases, to a self-imposed respect for confidentiality in order to preserve access to the people whom it seeks to protect. It would therefore not be able to play a major role in monitoring and reporting on PSS.

4.4 Non-governmental organizations

It is not possible here to examine every NGO in order to assess the attitude and actions of each with respect to the subject of mercenaries and PSS. The large human rights organizations such as Human Rights Watch and Amnesty International have addressed the issue as part of their work on the closely-related issue of the impact of small arms and military services on human rights, but it remains peripheral to their priority concerns. Local non-governmental organizations have also shown an interest in the mercenary issue as it pertains to their context. NGOs from Kashmir and Colombia have been active at the Commission on Human Rights in this regard. Even though an increasing interest in such matters exists within the NGO community, a lack of resources and competing priorities has meant that NGOs have not been able systematically to address the issue thus far.

4.5 Conclusion regarding the institutional response by the international community to private security services

The international community's institutional response to the mercenary and PSS problem is sketchy and mostly uncoordinated. As can be seen, a number of UN bodies, organs, commissions, and committees are addressing specific aspects of the problem. There is officially no UN mechanism, though, that is currently examining the human rights impact of PSS in all its new and emerging forms, despite its growing importance. The mandate of the UN Special Rapporteur on the use of mercenaries remains the principal focus of the UN's response to the issue, but, as has been argued, the mandate is not working effectively because the resolution that supports it does not include the new forms of the problem in the shape of PSS providers, nor does it reflect the specific threats posed by these actors to the protection of human rights. The priority is for the mercenary mandate within the Commission on Human Rights to be reviewed in 2001 (when it is due for renewal) and made more effective in order to tackle the issue. Before addressing the measures that should be adopted for this to occur, it is first necessary to consider the legal framework within which the issue of PSS is situated.

To determine how to address – legally or otherwise – the current manifestations of mercenaries, namely PSS, it is important first to review the applicability of existing and nascent legal responses to the problem of mercenaries, both at the international and national levels. This section will demonstrate that a total ban on the use of mercenaries does not strictly exist in international customary law. It will also show that PSS, particularly when provided by corporations to governments, often fall outside the prohibitions that do exist under international, regional, and national laws.⁵³

5.1 Customary international law

There is little evidence to indicate that mercenaries or the use of mercenaries is illegal in customary international law. However, there are indications that such a rule of customary international law may be developing. The roots of anti-mercenary laws are to be found in the neutrality laws of the nineteenth century that are codified in the Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land.⁵⁴ Article 4 of the Hague Convention provides that neutral states during international wars cannot allow ‘corps of combatants’ or ‘recruiting agencies opened in the territory of the neutral power’ to act as belligerents. However, Article 6 absolves the neutral power of any responsibility if persons cross the border to offer their services to belligerents. Article 17 (on the loss of neutrality) suggests that the provision could be applicable to mercenaries. However, it should be noted that the illegal act is not mercenarism *per se*, but the act of violating the sovereignty and territorial integrity of a state. International law concerning mercenaries is therefore closely linked to the concepts of aggression and principles of non-interference.⁵⁵

As stated earlier, since the wave of decolonization in the 1960s there have been a number of UN General Assembly and Security Council Resolutions and Declarations condemning the use of mercenaries. In particular the General Assembly's 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States includes the following paragraph:⁵⁶

Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State.

The use of mercenaries is illegal in customary international law, however, only to the extent that it violates the norms protecting territorial sovereignty, political independence, and non-interference.⁵⁷ The judgement in the Nicaragua vs. the United States of America case before the International Court of Justice, though not directly responding to the mercenary question, illustrates this clearly. The Court rejected Nicaragua's contention that the Contra rebels had been created and controlled by the US government (who allegedly supplied them with arms, training, and funds) to the extent that this control triggered US state responsibility for their acts. The court did, however, find that the US government had violated the principle of non-intervention.

5.2 Additional Protocol I of 1977 to the Geneva Conventions (1949)

The only international treaty currently in force at the international level that defines and addresses the issue of mercenaries is the Additional Protocol I of 1977 to the Geneva Conventions of 12 August 1949 relating to international armed conflicts.⁵⁸ Protocol II relating to the protection of victims of non-international armed conflicts makes no mention of mercenaries.⁵⁹ Article 47 of Protocol I reads:

1. A mercenary shall not have the right to be a combatant or a prisoner of war.
2. A mercenary is any person who:
 - (a) is specially recruited locally or abroad in order to fight in an armed conflict;
 - (b) does, in fact, take a direct part in the hostilities;
 - (c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
 - (d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
 - (e) is not a member of the armed forces of a Party to the conflict; and
 - (f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.

The first paragraph of Article 47⁶⁰ denies mercenaries the right to be considered as combatants or prisoners of war. The second paragraph then defines mercenary by referring to six cumulative requirements. One of the determining criteria is the mercenary's pecuniary motivation. Aside from the obvious difficulty of determining a combatant's motivations, the real problem with this provision is that those who are essentially motivated by reasons other than private gain, such as a desire for adventure, obsession with war or ethnic identification, are not necessarily included. In addition, not only is it necessary to prove private gain as a motivation, but a mercenary must in fact be promised ‘material compensation substantially in excess of that promised or paid to combatants of similar rank’. A person is not considered a mercenary, however, if he or she is integrated into the armed forces of a party to the conflict, thus rendering the article inapplicable in all cases where PSS personnel are integrated into a government's armed forces. Awarding nationality or residency to the mercenary may also help him or her escape this definition. Finally, Article 47 requires that the person actually takes part in the hostilities, thereby excluding trainers, military technicians and advisors.

Thus, PSS providers can easily fall outside the Protocol I definition of mercenary. In many cases they restrict their activities to training troops or giving technical or strategic advice, and do not ‘take a direct part in the hostilities’. It has also been suggested that any PSS contract could easily circumvent the requirement that the combatant be specially recruited to ‘fight in an armed conflict’ by specifying, for example, that the agreement is to restore security and not participate in an armed conflict.⁶¹ When they do take part in the hostilities, most private security companies integrate into the armed forces for which they work,⁶² thereby preventing one of the requirements of the definition being met. It has even been suggested that PSS providers (particularly private security companies) authorized by their

home state to operate abroad can be considered as being 'sent by a State which is not a Party to the conflict on official duty as a member of its armed forces' so as to exclude them from requirement 2(f) of Article 47. Alternatively, PSS providers can even be considered as civilian contractors (although regarded as a member of the military force in the field) of either the home state or of the employing state.⁶³

It should be borne in mind that Protocol I applies only to international armed conflicts, which the Protocol itself (Article I(4)) defines to include:

armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right to self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

The instruments which cover conflicts not of an international nature do not contain provisions specifically referring to mercenaries. More importantly, the only purpose of this definition within Protocol I is to deny such mercenaries the right to claim combatant and prisoner of war (POW) status in the event of capture, a status which is otherwise presumed under Article 45 of Protocol I.⁶⁴ State parties may nevertheless choose to accord mercenaries in their custody POW treatment and are bound by minimal guarantees of humane treatment.⁶⁵

In principle, however, Article 47 denies mercenaries the right to claim combatant status. They can consequently be tried as common criminals by the relevant state party, provided the acts committed are criminalized under national legislation. They may even be tried for being mercenaries, but only if there is domestic legislation criminalizing the status of being a mercenary, which would be unusual. In sum, Article 47 of Protocol I does not refer to state obligations with regard to the phenomenon of mercenaries, but solely to the status of mercenaries in international armed conflicts, which it does not criminalize. Although the definition is important in that it has influenced definitions found in subsequent instruments, its only real purpose is to determine whether a particular fighter qualifies for the protection and treatment awarded to recognized combatants and prisoners of war in international armed conflicts.

5.3 International Convention Against the Recruitment, Use, Financing and Training of Mercenaries

The 1989 International Convention Against the Recruitment, Use, Financing and Training of Mercenaries mentioned earlier defines a mercenary in its first article. This definition applies, for the purpose of the Convention, in two situations. The first, addressed in the first paragraph of Article I, applies to any armed conflict, international or internal. The second, addressed in the second paragraph of Article I, is applicable in 'any other situation' where there is a concerted act of violence with the specific aim of overthrowing the government or otherwise undermining the constitutional order or territorial integrity of a state.

The first paragraph of Article I reproduces the definition of mercenary found in Article 47 of Protocol I, but deletes the requirement that the mercenary 'in fact takes part in the hostilities'. However, since participation in hostilities or in the concerted act of violence

reappears in Article 3 in order for a mercenary to commit an 'offence' under the Convention, this distinction is not substantial. An individual's participation in hostilities can therefore be considered just as pertinent a factor in the International Convention's definition of an individual criminal offence as it is for Article 47 of Protocol I. Of course, the obligations on state parties not to recruit, use, finance or train mercenaries will relate to the wider definition and not only to those mercenaries who fall within the criminal definition, i.e. those who take part in hostilities.

The second paragraph of the Convention's definition, regarding concerted acts of violence with particular aims, seems to open the doorway to 'legitimate' versus 'illegitimate' mercenaries. In other words, it focuses on the intention or motivation of the conduct of the mercenary, as can be readily seen:⁶⁶

Article 1 ...

Paragraph 2

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

- (a) Is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at:
 - (i) Overthrowing a Government or otherwise undermining the constitutional order of a State; or*
 - (ii) Undermining the territorial integrity of a State;**
- (b) Is motivated to take part therein essentially by the desire for significant private gain and is prompted by the promise or payment of material compensation;*
- (c) Is neither a national nor a resident of the State against which such an act is directed;*
- (d) Has not been sent by a State on official duty; and*
- (e) Is not a member of the armed forces of the State on whose territory the act is undertaken.*

The Convention thus seeks to prohibit activity which aims to run counter to customary international law concerning non-intervention in domestic affairs, territorial integrity and even 'the inalienable right of peoples to self-determination' which is mentioned later in the Convention, at Article 5.

In contrast to Article 47 of Protocol I, the International Convention actually creates international offences. Thus, a mercenary, as defined in the Convention, 'who participates directly in hostilities or in a concerted act of violence', commits an offence for the purposes of the Convention (Article 3). Moreover, the International Convention also renders the recruiting, use, financing or training of mercenaries by 'any person'⁶⁷ an offence (Article 2).⁶⁸ Even attempted or complicit mercenary activity, and attempts at recruiting or training, are offences under the Convention (Article 4).

The International Convention creates binding obligations upon state parties. First, it prohibits states themselves from recruiting, using, financing or training mercenaries in general and, particularly, but not exclusively, when it is 'for the purpose of opposing the legitimate exercise of the inalienable right of peoples to self-determination, as recognized by international law' (Article 5). Second, states are also required to cooperate in the prevention of the offences set forth in the Convention (Article 6) by:

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 [...]

Thus, states have an obligation to prevent mercenary activity, which can be interpreted to include regulating and even preventing the operation of companies when they are linked to 'mercenary' activities. Third, the Convention requires states to make the Convention offences punishable by appropriate penalties (Article 5(3)). Thus, the individual criminal responsibility (of natural, and, it may even be argued, legal persons) will be engaged at the national level in those states that enact the relevant legislation.⁶⁹ The Convention also provides states with the obligation to establish relevant jurisdiction as well as the obligation to extradite or prosecute (Articles 9 and 11).

The Convention lacks, however, any monitoring machinery and relies instead on the state parties to the Convention to coordinate their enforcement of it. This gap is a serious deficiency within the Convention. Despite the fact that it is larger in scope than Article 47 of Protocol I, the Convention in general contains most, if not all, of the same loopholes. Therefore the same criticisms mentioned above concerning the Article 47 of Protocol I definition can be levelled at the International Convention. In the context of the International Convention, though, such criticism is more pertinent as the loopholes prevent mercenaries, not to mention private security companies, from being caught in the criminal law framework. By contrast, where a person falls outside the definition of mercenary in Article 47 of Protocol I he or she is simply left under the existing framework of international humanitarian law. In the case of the International Convention, however, there is an absence of any state obligations where mercenaries and PSS providers are operating outside the tight definition of mercenary that appears. PSS outside the arena of armed conflict or outside the context of a threat to self-determination or territorial integrity fall completely outside the scope of the Convention. These problems reduce the effectiveness of the Convention in deterring mercenary activities and tackling the human rights problems associated with the modern-day PSS phenomenon and in particular with private security companies. Despite its loopholes and ambiguities, however, the entry into force of the International Convention would nevertheless represent a positive step in eradicating certain traditional forms of mercenary, possibly including those situations where mercenary activities are conducted by private security companies.

5.4 The OAU Convention for the Elimination of Mercenaries in Africa

The 1985 OAU Convention for the Elimination of Mercenaries in Africa⁷⁰ aims to define and outlaw both the status of being a mercenary and the act of mercenarism in Article 1. It reads as follows:

- I. A mercenary is any person who:
 - a) Is specially recruited locally or abroad in order to fight in an armed conflict;
 - b) does in fact take a direct part in the hostilities;

- c) Is motivated to take part in the hostilities essentially by the desire for private gain and in fact is promised by or on behalf of a party to the conflict material compensation;
 - d) Is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict;
 - e) Is not a member of the armed forces of a party to the conflict; and
 - f) Is not sent by a state other than a party to the conflict on official mission as a member of the armed forces of the said state.
2. The crime of mercenaries is committed by the individual, group or association, representative of a State or the State itself who with the aim of opposing by armed violence a process of self-determination stability or the territorial integrity of another State, practices any of the following acts:⁷¹
 - a) Shelters, organizes, finances, assists, equips, trains, promotes, supports or in any manner employs bands of mercenaries;
 - b) Enlists, enrolls or tries to enrol in the said bands;
 - c) Allows the activities mentioned in paragraph (a) to be carried out in any territory under its jurisdiction or in any place under its control or affords facilities for transit, transport or other operations of the above-mentioned forces.
3. Any person, natural or juridical who commits the crime of mercenaries as defined in paragraph 1 [sic]⁷² of this Article commits an Offence considered as a crime against the peace and security in Africa and shall be punished as such.

It appears that some confusion has crept into scholarly comment on this article as many authors have mistakenly cited the 1972 draft of the Convention.⁷³ The 1972 draft did not contain in its definition of mercenary all the elements found in the first paragraph of Article 1 of the adopted text quoted above. This has led to some misleading analysis by those commentators who have relied upon the wrong text. To add to the confusion, a collection of humanitarian law documents has completely omitted paragraph 1 of Article 1 when reproducing the OAU Convention.⁷⁴

The adopted OAU Convention, while carefully defining mercenary in Article 1(1), fails to establish any criminal offence directly associated with this definition. What the Convention criminalizes instead is the crime of mercenarism defined in paragraph 2 of Article 1. For the purpose of the OAU Convention, the crime of mercenarism is committed when the individual, group, association or state specifically aims at opposing by armed violence a process of self-determination or the stability and territorial integrity of another member state, and, in addition, either enrolls as a mercenary, or supports, employs, or allows bands of mercenaries to develop or operate in any territory under its jurisdiction or control.

The OAU Convention explicitly engages the responsibility of 'juridical persons' in Article 1(3), ensuring that corporations are criminally responsible under the treaty. It also engages state responsibility (possibly criminal as opposed to 'delictual' under the International Convention⁷⁵) via Articles 1 and 5(2), the latter of which reads:

2. *When a State is accused by virtue of the provisions of Article 1 of this Convention of acts or omissions declared by the aforesaid article to be criminal, any other party to the present Convention may invoke the provisions of this Convention in its relations with the offending State and before any competent OAU or International Organization tribunal or body.*

The OAU Convention establishes state obligations to prevent mercenarism and requires states to adopt severe legislative measures to forbid and punish the crime of mercenarism (Articles 6 and 7). The Convention also makes provisions for the jurisdiction of each state to either extradite or prosecute offenders (Articles 8 and 9). However, the OAU Convention criminalizes only those activities that have the particular purpose of overthrowing a legitimate government or suppressing a self-determination process. Although the OAU Convention prohibits governments from hiring mercenaries to suppress national liberation movements engaged in a process of self-determination, it does not prohibit legitimate governments from defending themselves against illegitimate dissident groups within their borders by employing mercenaries or PSS providers. Nor does the OAU Convention address conduct which violates international human rights and fundamental freedoms or humanitarian law, irrespective of the legitimacy of the aim for which mercenaries are being used. As the UN Special Rapporteur rightly contends:

Although the Convention is more comprehensive than Article 47 of Additional Protocol I, it does not differ much from it as far as the definition of mercenary is concerned and it lends itself to different and possibly conflicting interpretations in cases where it is States themselves, on the initiative of their Governments, that hire private firms to provide services connected with public order and security.

Although the OAU Convention has in many respects a broader application and better-defined obligations than other instruments, and despite the fact that it clearly and expressly incurs the responsibility of both 'juridical persons' and states, it criminalizes only the non-legitimate use of mercenaries and does not deal more generally with violations of human rights or humanitarian law, even when committed by 'legitimate' mercenaries employed by states. Its regional character also only binds those African states which have ratified the Convention.

5.5 International Law Commission Draft Code of Crimes Against the Peace and Security of Mankind

Due mainly to the opposition of Western countries,⁷⁷ the International Law Commission (ILC) has deleted all reference to mercenary activities in its most recent (1996) version of the Draft Code of Crimes Against the Peace and Security of Mankind.⁷⁸ Formerly, the 1991 ILC Draft Code of Crimes⁷⁹ provided for criminal responsibility of individuals who were providers or representatives of a state and who were recruiting, using, financing, or training mercenaries. In order to define mercenary, the 1991 ILC Draft Code of Crimes incorporated only the second paragraph of Article 1 of the International Convention on mercenaries.⁸⁰ Now that any reference to mercenary activity has been deleted from the Draft Code of Crimes, it is of little use for an assessment of international law relevant to PSS.

5.6 International Criminal Law

Neither the Statutes for the International Criminal Tribunal for former Yugoslavia (ICTY), nor the International Criminal Tribunal for Rwanda (ICTR), nor even the Statute of the International Criminal Court (ICC) include in the crimes under their jurisdiction the crime of being a mercenary or the crime of mercenarism *per se*. The jurisdiction that these tribunals can exercise over individual mercenaries will be for the actual conduct or commission of crimes set forth in the respective statutes and not for the act of being a mercenary. The Special Rapporteur has stated, though, that trials of mercenaries for crimes committed in the conflict are likely to come before the ICTY.⁸¹

It is important that the actual conduct or actions of PSS providers are subject under international criminal law to prosecution by the ICC. It has even been suggested that the fact that such acts are committed by a mercenary may be considered as an aggravating factor by courts when determining sentences.⁸² The ICC's jurisdiction, however, does not extend to organizations and corporations. Article 25 of the ICC Statute expressly gives the Court jurisdiction over natural persons. Nevertheless, the exclusion of legal persons from the Court's jurisdiction does not necessarily preclude the responsibility of such corporations under international criminal law nor the possibility of trials of corporations in national jurisdictions.⁸³

5.7 Draft Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition and other Related Materials

As noted earlier, the Commission on Crime Prevention and Criminal Justice has recently agreed a UN Convention against Transnational Organized Crime. Attached to this Convention is a draft (yet to be agreed) Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition and other Related Materials.⁸⁴ Mercenaries are included in the preamble of the Protocol which *inter alia* identifies the kinds of actors that are likely to be involved in arms trafficking. This is consistent with the Special Rapporteur's identification in his reports of the link between mercenaries and arms trafficking. However, the status of being a mercenary or the act of mercenarism *per se* are not criminalized in the Protocol; only their involvement in arms trafficking. The Draft Convention on Transnational Organized Crime would oblige states, among other things, to establish the liability of legal persons for participation in 'serious crimes'. Thus, it may cover mercenary activities if the states concerned criminalize mercenaries by rendering it a 'serious crime' for the purposes of the Draft Convention, although this is unlikely. The Draft Protocol will ostensibly require States to adopt legislation that would criminalize activities relating to illicit manufacturing and trafficking, regardless of who commits the act. In sum, the Draft Protocol will control some, but not all activities carried out by PSS providers.

5.8 National legislation

5.8.1 Mercenary legislation

In the domestic legislation of most countries, being a mercenary is not classified as a criminal offence in its own right. Furthermore, no provision is usually made for the extradition of mercenaries. According to the Special Rapporteur, this makes it easier for PSS providers to commit crimes with impunity.⁸⁵ It also helps to explain why the International Convention

has yet to come into force. Of those countries which have criminalized enrolling as a mercenary or mercenarism itself, the offences usually do not cover PSS in general, but are instead aimed at nationals acting in a manner covered by the traditional definition of mercenary contained in Article 47 of Protocol I and the International and OAU Conventions.

Examples of such legislation include the United Kingdom's (UK) 1870 Foreign Enlistment Act which renders illegal the recruitment of British citizens to serve in the forces of a foreign state at war with another state which is at peace with the UK. However, the last case where a person was tried under this law dates back to 1896.⁸⁶ Similarly, the United States has passed several legislative acts restricting the potential recruitment and enlistment of its citizens as mercenaries for foreign providers including: the Neutrality Act of 1794,⁸⁷ the Foreign Relations Act, the Immigration and Nationality Act, and the Foreign Providers Registration Act.⁸⁸ None of these laws is geared towards restricting the use of modern mercenaries by non-state actors as do the International and OAU Conventions, nor do they address the issue of PSS providers in general.⁸⁹ A number of other countries have legislation regarding foreign enlistment or mercenary activity under its traditional definition.⁹⁰ Overall, however, there is little national legislation to support the International and OAU Conventions in criminalizing mercenary activity.

5.8.2 Foreign military assistance legislation

There are even fewer countries which have national legislation to regulate PSS more broadly and in particular the activities of private security companies. The United States and Israel have registration requirements for such companies as well as legislation regulating the manufacturing or export of defence articles and defence services.⁹¹ To date South Africa probably has the clearest and most direct legislation specifically regulating private security companies and the export of military assistance.

5.8.3 South Africa Regulation of Foreign Military Assistance Act

The new South African Constitution adopted by the Constitutional Assembly on 8 May 1996 regulates domestic security services in Chapter 11. It requires providers to act in accordance with the Constitution, national laws and international obligations which South Africa must abide by, including those pertaining to human rights. In addition to these requirements, the South African government passed in July 1998 the Regulation of Foreign Military Assistance Act. The Act prohibits mercenary activity which is defined as 'direct participation as a combatant in armed conflict for private gain' (Article 2 and Article 1(iv)).⁹² In addition, the Act requires legal or juridical persons to obtain government authorization for rendering foreign military assistance abroad. Without such authorization, such assistance is prohibited and considered an offence, exposing the person to a fine and/or imprisonment (Articles 3 to 8).⁹³ Among the criteria for granting or refusing authorization, the Government must consider whether the assistance would result in the infringement of human rights and fundamental freedoms in the territory where the assistance is rendered, endanger peace in a region by introducing destabilizing military capabilities, or contribute to the escalation of regional conflicts (Article 7).

However, when private security companies are required to seek authorization for rendering military assistance abroad, there are no provisions for exercising control over the conduct and manner in which the services are provided once authorization has been given. In the development of national legislation applicable to PSS, more elaborate provisions requiring compliance with international human rights and humanitarian law are needed, as well as proper mechanisms to ensure private security companies operate in a transparent and accountable manner.

5.9 Conclusion regarding the legal dimensions of private security services

At the international level, there is little evidence that customary international law bans the use of mercenaries. Customary international law does include, however, a duty on states to refrain from engaging or encouraging armed mercenaries from incursion into the territory of another state. Article 47 of Protocol I to the Geneva Conventions is the only instrument in force at the international level (as opposed to the OAU Convention which only applies to those African states that have ratified it) dealing with mercenaries by defining them for the sole purpose of denying them the right to claim combatant and prisoner of war status within international humanitarian law. The International Convention does make mercenary activity an international offence, but it is not yet in force and is in any case full of loopholes and ambiguities. The OAU Convention, while having better-defined obligations, faces many of the same definitional obstacles as the International Convention and has only a regional focus. Critically, both the International and OAU Conventions only deal with mercenaries as a threat to the territorial integrity of states and the right of peoples to self-determination. They are furthermore not applicable to most PSS providers and the types of activities in which they are engaged. The other existing or nascent international instruments relevant to PSS address only certain types of offence, such as international war crimes, money-laundering, corruption, and arms trafficking.

At the national level, some countries do have national legislation relevant to mercenary activities, but most do not classify being a mercenary as a separate criminal offence. Even fewer countries, among which is South Africa, have legislation regulating the activities of modern-day private security companies and their supply of military assistance abroad.

The entering into force of the International Convention would represent an important step in eradicating and preventing mercenaries in their traditional form. It will help characterize situations where mercenaries threaten the right of peoples to self-determination and assist in prosecuting and punishing such offenders, if appropriate extradition and prosecution procedures are enforced. It may even oblige states to regulate some, though not all, of the activities of private security companies that are deemed of a mercenary character. However, the existing legal framework, at both the international and national levels, is clearly unsatisfactory for addressing the modern phenomenon of PSS in its entirety. It does not regulate or limit the activities of PSS providers such as private security companies, nor does it provide any protection of human rights.

Conclusions and recommendations: The need for a new approach

The preceding review leaves little room for doubt that the international community needs to adopt a new institutional and legal approach to the problem of mercenaries and PSS. Arguably, the emerging PSS phenomenon, as described here, is the real issue in the current era. PSS fall outside the international and national legal frameworks applicable to traditional mercenary activity, which are in any case incomplete and weak. There are also gaps in the institutional responses from the UN and other international organizations to this emerging issue. The UN Special Rapporteur on the use of mercenaries is the only real focal point, yet the mandate for his work takes a narrowly-conceived conceptualization of the problem and is poorly supported. New scenarios call for new responses and the adaptation of existing practices. It would be highly dangerous to leave PSS to the free market; to do so would present a dangerous threat to the protection of human rights. The state has been the traditional guardian of the use of armed force. With a growing PSS market taking on this responsibility in an unregulated fashion, careful consideration needs to be given to the consequences of this trend for the protection of human rights.

It is evident that the existing prohibition of mercenary activity in the international and national legal frameworks, albeit incomplete, needs to be supplemented if the international community is to respond to the more wide-ranging PSS phenomenon. The complexity of the current situation means that it is unhelpful merely to call for the banning of PSS in general. The Special Rapporteur himself has recognized the need for a more tailored legal response to private security companies. International Alert believes that the international community should work towards the prohibition and suppression of PSS deemed illegitimate and undesirable, whilst at the same time providing proper regulation and monitoring of those other PSS seen as legitimate, due to the unique challenge they present to the protection of human rights. Further study of and consultation on the phenomenon should in time yield the development of a range of measures to ensure a comprehensive regulatory framework exists to govern PSS.

In this regard, the issue should not be taken up by the Sixth Committee of the General Assembly – as some delegations in the Commission on Human Rights would wish to see. Explicitly devoted to the drafting of legal documents, the Sixth Committee would be an inappropriate forum in which to analyse and discuss the consequences of the PSS phenomenon. Sending the issue to the Sixth Committee would pre-empt a thorough examination of the issue and represent the loss of an opportunity for dialogue on how the international community wishes to address the issue. It is not so much a lack of law that is the problem, but rather the lack of any agreed policy response. Further examination of definitions is not the priority. What is required at this point is study and reflection on the impact of PSS on human rights. By analogy, the legal *prescription* (or *proscription*) should follow the policy *diagnosis* and not the reverse.

The PSS issue should not merely be dealt with as a matter of legal definition of mercenary and other PSS providers, and their consequent legitimacy within international law, but should also involve a process for dialogue and engagement with certain PSS providers and their users to ensure there is respect for human rights and a response to any wrongdoing. The existing legal framework needs to be coupled with more effective regulation and monitoring of PSS and reporting on them to rectify the current absence of such safeguards. What is highlighted here is the institutional role the UN can play in this regard in the form of a new mechanism on PSS.

6.1 A new mechanism

International Alert recommends that the UN establish a new mechanism with a wider remit than the current mandate of the Special Rapporteur on the use of mercenaries in the Commission on Human Rights to address the broad issue of PSS. In addition to promoting the development of and adherence to the existing legal framework, the mechanism would also provide a means of reporting on and monitoring the provision of PSS and in particular the conduct of private security companies so that they adhere to internationally-agreed human rights standards. In addition, the mechanism would provide coordination amongst the diverse activities undertaken in different parts of the UN system, currently tackling different aspects of the problem.

The review of the mandate of the Special Rapporteur at the forthcoming 2001 session of the Commission on Human Rights is the obvious starting point for the creation of this new mechanism. In view of the merits of the placement of this mechanism within the Commission vis-à-vis the other UN bodies and agencies discussed in section IV, International Alert believes the existing mandate of the Special Rapporteur should be transformed into a new mechanism to address PSS in a broad sense. What appears below are the specific functions that the new proposed mechanism should fulfil in order for it to be effective in addressing the issue.

6.1.1 Specialized expertise

Specialized expertise is needed to address the complexity and diversity of the PSS phenomenon. In particular, the new mechanism would be required to study the impact of PSS on human rights and identify appropriate policy responses. It would also provide an advisory role to states experiencing PSS. Such an expert could operate through the office of the Special Rapporteur, if its mandate were to be significantly amended to take into account PSS more generally. International Alert does not believe the creation of a Governmental Working Group within the Commission on Human Rights on PSS would be appropriate in terms of the flexibility needed to address the issue. A possible alternative to a new mandate for the existing Special Rapporteur would be the creation of a Special Representative of the Secretary General on the issue of PSS, but this would need to be a new post.

6.1.2 Further definition of prohibitable mercenary activity

The new mechanism would assist efforts by the international community to understand better those mercenary activities and actions carried out by PSS providers which should be prohibited and those others that should be considered legitimate. As the Special Rapporteur has noted with reference to private security companies, 'The legal gaps, defects and ambiguities that currently facilitate mercenary operations by private companies should be remedied through explicit rules that regulate and clearly limit what they may and may not do internationally, while clearly defining the responsibility for human rights violations and abuses and other crimes and offences of the companies, the States that hire them and the individuals they recruit.'⁹⁴ Such a role would be consistent and would build upon the outcomes of the expert meetings being convened by the Office of the High Commissioner for Human Rights.

6.1.3 New frameworks for responsibility

The attachment of legal responsibility for the actions of mercenaries and PSS providers is not straightforward under the current legal framework. For example, responsibility for the actions of PSS providers may attach to the state in which they are based – as in the case of properly licensed private security companies. Those states that hire the services of PSS providers also have legal responsibility for their activities. When it is non-state actors, such as multinational corporations and humanitarian agencies, that hire PSS providers, this also confers responsibilities. The new mechanism would play an important role in providing clarity on the legal responsibility of users of PSS and providers themselves to ensure adequate protection of human rights.

6.1.4 New frameworks for regulation and monitoring

The new mechanism would also propose new frameworks for regulating and monitoring PSS providers. It has been suggested, for example, that a UN Regulatory Body could be set up (in a similar fashion to the UN Conventional Arms Register) to register and monitor the activities of accredited private security companies. Such a body would certainly help set important precedents for needed transparency and accountability in the international PSS market by setting internationally-agreed standards for providers to meet, and would require them to report on their activities. The new mechanism could help support the creation of such a body and other similar regulatory mechanisms. In the case of a UN Regulatory Body, however, the UN would probably first need to see advances in terms of supplier countries providing regulations for companies operating out of their territory before it could play a significant regulatory role itself.

6.1.5 Seek ratification and enforcement of UN and OAU Conventions

A first step in the creation of a functioning international legal regime for PSS would be the ratification and enforcement, imperfect as they may be, of existing legal instruments dealing with mercenary activity. The new mechanism would therefore continue (as the Special Rapporteur has already been doing) to encourage the UN member states to ratify the International Convention Against the Recruitment, Use, Financing and Training of Mercenaries. The Convention requires two more ratifications to enter into force, which could be expected to occur in the foreseeable future. If, or once, this occurs, the role of the new mechanism would be to ensure the implementation of the Convention, and to assist with the implementation of the OAU Convention on the Elimination of Mercenaries that is already in force. The largest failure of the existing Conventions is that they lack any monitoring machinery or effective enforcement procedures. The new mechanism would help rectify this institutional deficiency if properly supported.

6.1.6 Investigate and monitor private security services

Because the impact of PSS on human rights is as yet unclear, the new mechanism would play a vital role in investigating and monitoring PSS providers, and in particular those associated with human rights violations. A key task would be to study compliance with the existing legal instruments and to consider how these instruments might be amended and supplemented to address more adequately the human rights problems associated with PSS. In addition, the new mechanism would assess whether the use of PSS by governments and other actors in conflict situations hampers the international scrutiny and accountability which normally attaches to the use of military force. Reliable and verifiable information about PSS providers – especially concerning human rights violations – is very difficult to obtain. The mechanism would have the advantage of close cooperation with the other interested UN bodies and the ability to investigate specific allegations of any wrongdoing.

6.1.7 Dialogue with users and providers of private security services

A key function of the new mechanism would be to enter into dialogue with users of PSS, such as governments, multinational corporations and humanitarian agencies, and PSS providers themselves, such as private security companies. As part of this dialogue the new mechanism would highlight the threat posed by PSS to the protection of human rights and recommend appropriate steps that should be taken to safeguard against possible violations. In particular, the new mechanism would provide governments with assistance in the formulation of appropriate national legislation regarding PSS. The new mechanism could also help facilitate dialogue between multinational corporations, humanitarian agencies and private security companies with the aim of establishing codes of conduct and guidelines on the provision of security and human rights.

6.1.8 Reporting function

The benefits of the new mechanism's studying, monitoring and dialogue activities would be greatly reduced if the resulting information and analysis did not emerge into the public realm. The reporting on and dissemination of information and analysis on PSS and, in particular, their impact on human rights would in this way provide publicity sanctions for rogue PSS providers. The possibility that PSS representatives could respond in their own defence against accusations made by the mechanism would add procedural and normative legitimacy to the UN mechanism.

6.1.9 Provide coordination between UN bodies and agencies

A new mechanism would help remedy the current lack of a coordinated approach to this multifaceted problem across the UN bodies and agencies to ensure an effective and coherent response. The new mechanism would provide coherence to the numerous bodies and agencies in the UN dealing with discrete elements of the PSS issue. In particular, it would facilitate greater coordination with: other Special Rapporteurs in the Commission and Sub-Commission, especially on Terrorism and Human Rights, because of similar aspects of the problems; the human rights treaty bodies; the Office of the High Commissioner for Human Rights; the UN Security Council; and the UN Commission on Crime Prevention and Criminal Justice. In addition, at the level of policy and decision, it would be important for the new mechanism to liaise with UN agencies and offices operating in violent conflicts where PSS is prevalent. The mechanism would also maintain close cooperative links with the ICRC and receive the input of NGOs working on this issue.

Endnotes

- ¹ See footnote 106 in Juan Carlos Zarate, 'The Emergence of a New Dog of War: Private International Security Companies, International Law and the New World Disorder', *Stanford Journal of International Law*, Vol. 34, No.1, Winter 1998, p91
- ² Charles Clover, 'Contest for regional supremacy replaces cold war conflict in Afghanistan', *Financial Times*, 5 August 1999
- ³ Robert Burns, 'Pentagon: Russia fought for Serbs', *Associated Press*, 23 June 1999 and Roy Gutman, 'Volunteer Killers/Sources: Russia helped Slaughter Ethnic Albanians', *Newsday*, 22 June 1999
- ⁴ David Isenberg, 'Soldiers of Fortune Ltd: A Profile of Today's Private Sector Corporate Mercenary Firms', Washington: Centre for Defence Information Monograph, November 1997; David Isenberg, 'Have Lawyer, Accountant and Guns, Will Fight: The New Post-Cold War Mercenaries', a paper for the Getting Guns off the Streets of the Global Village, Panel of the International Studies Association Convention, February 1999; David Shearer, 'Outsourcing War', *Foreign Policy*, Fall 1998, No. 112, p68-81
- ⁵ Damian Lilly, 'The Privatization of Security and Peacebuilding: A Framework for Action', London: International Alert, September 2000, p13
- ⁶ Zarate, *op. cit.*, p90-92
- ⁷ David Isenberg *op. cit.*; Pratab Chatterjee, 'Mercenary Armies and Mineral Wealth', *Covert Action Quarterly Magazine*, Fall 1997
- ⁸ Pratab Chatterjee, 'Guarding the Multinationals, DSL and the International Private 'Security' Business', *The Corporate War Machine*, March 1998; and Chatterjee (Fall 1997), *op. cit.*
- ⁹ A substantial literature exists on these four cases. See Zarate, *op. cit.*; David Isenberg (November 1997), *op. cit.*; David Shearer, 'Private Armies and Military Intervention', *International Institute for Strategic Studies Adelphi Paper 316*, Oxford: Oxford University Press, February 1998; Yves Goulet, 'MPRI: Washington's Freelance Advisors', *Jane's Intelligence Review*, July 1998, p426; and Herbert Howe, 'Private Security Forces and African Stability: The Case of Executive Outcomes', *The Journal of Modern African Studies*, Vol. 36/2, 1998, p307-331
- ¹⁰ David Shearer, *op. cit.*, p58
- ¹¹ See Comfort Ero, 'Vigilantes, Civil Defence Forces and Militia Groups: the other side of the privatisation of security in Africa', *Conflict Trends Magazine*, Accord, June 2000
- ¹² See Herbert Howe, *op. cit.* and David Shearer, *op. cit.*
- ¹³ Abdel Fatau-Musah and J. Kayode Feyami, 'Mercenaries: An African Security Dilemma', London: Pluto Press, 1999
- ¹⁴ Zarate uses the term 'quasi-state agent' for private security companies, see Zarate, *op. cit.*, p125
- ¹⁵ See 'Soldier of Fortune: The Mercenary as Corporate Executive', *African Business*, December 1997; Steven Dudley and Mario A. Murillo, 'Oil in a Time of War: Multinational Exploration and its Impact on the Internal Conflict in Colombia'; Chatterjee, *op. cit.*
- ¹⁶ Alex Vines, 'Mercenaries and the Privatisation of Security in Africa' in Greg Mills and John Stremmlau, *The Privatisation of Security in Africa, South Africa*, The South African Institute of International Affairs (SAIIA), March 1999, p54
- ¹⁷ 'Executive Outcomes: The War Business', Journeyman Productions, London, 1997
- ¹⁸ See also Philip Trewhitt, 'The Business of Killing', The Parliamentary Human Rights Group, London, 1999, p14-15
- ¹⁹ See Enrique Bernales Ballesteros, 'Report on the Question of the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Rights of People to Self-determination', (E/CN.4/1998/31), 27 January 1998
- ²⁰ For a chronicle of media coverage, see www.sandline.com.
- ²¹ Edward Kwakwa, 'The Current Status of Mercenaries in the Law of Armed Conflict', *Hastings International and Comparative Law Review*, Vol. 14, 1990, p119
- ²² Security Council Resolution 239, UN Doc S/INF/22/Rev.2, 1967
- ²³ GA Res 34/140 of 14 December 1979. 26 Member States sponsored the resolution: Angola, Barbados, Benin, Burundi, Congo, Egypt, Ghana, Guinea, India, Jamaica, Lesotho, Madagascar, Mali, Mozambique, Niger, Nigeria, Panama, Rwanda, São Tomé and Príncipe, Seychelles, Sierra Leone, Togo, Yugoslavia, Zaire, Zambia. See UN Doc. A/34/L.58 and Add. 1
- ²⁴ UN Doc A/35/366/Add.1, p8 para. 4
- ²⁵ Allaoua Layeb, 'The need for an international convention against mercenaries and mercenarism', *The African Journal of International and Comparative Law*, October 1989, p472-473
- ²⁶ GA Res 44/34, UN GAOR 6th Comm.
- ²⁷ See Commission Resolution 1987/16 published in the Official Documents of ECOSOC, Supp. 5, E/1987/18, p58 in English, p64 in French.

²⁸ See Official Documents of ECOSOC, Supp. 5, E/1987/18, p189-196, especially p195. The votation was as follows: In favour: Algeria, Argentina, Bangladesh, Brazil, Bulgaria, Byelorussian Soviet Socialist Republic, China, Colombia, Congo, Costa Rica, Cyprus, Ethiopia, Gambia, German Democratic Republic, India, Iraq, Lesotho, Mexico, Mozambique, Nicaragua, Pakistan, Peru, Philippines, Senegal, Somalia, Sri Lanka, Togo, USSR, Venezuela, Yugoslavia. Against: Australia, Austria, Belgium, France, Germany, Federal Republic of, Ireland, Italy, Japan, Norway, UK, USA. Abstentions: Rwanda.

²⁹ See Official Documents of ECOSOC, Supp. 5, E/1987/18, p189

³⁰ *idem*, p192-193

³¹ *idem*, p194-195, concerning amendments E/CN.4/1987/L.81 to the revised draft resolution E/CN.4/1987/L.9/Rev.2

³² The states voting in favour of this draft resolution were those which subsequently voted against the resolution eventually adopted, i.e.: Australia, Austria, Belgium, France, Germany, Federal Republic of, Ireland, Italy, Japan, Norway, UK, USA. Votes against this draft resolution were: Algeria, Argentina, Bangladesh, Brazil, Bulgaria, Byelorussian Soviet Socialist Republic, China, Colombia, Congo, Costa Rica, Cyprus, Ethiopia, Gambia, German Democratic Republic, India, Iraq, Mexico, Mozambique, Nicaragua, Pakistan, Peru, Philippines, Rwanda, Senegal, Somalia, Sri Lanka, Togo, USSR, Venezuela, Yugoslavia. Lesotho abstained

³³ The following twenty states have ratified the Convention: Azerbaijan, Barbados, Belarus, Cameroon, Croatia, Cyprus, Georgia, Italy, Maldives, Mauritania, Qatar, Saudi Arabia, Senegal, Seychelles, Suriname, Togo, Turkmenistan, Ukraine, Uruguay and Uzbekistan. The following nine states have signed but have yet to ratify the Convention: Angola, Congo, Democratic Republic of the Congo, Germany, Morocco, Nigeria, Poland, Romania, and Yugoslavia

³⁴ Enrique Bernales Ballesteros, 'Report on the Question of the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Rights of People to Self-determination', (E/CN.4/1998/31), 27 January 1998

³⁵ For an excellent commentary on the mercenary issue at the Commission on Human Rights see Human Rights Internet at www.hri.ca

³⁶ UN Doc E/CN.4/1999/L.5. The main sponsor of the resolution was Cuba. Co-sponsors were Algeria, Angola, Congo, Democratic People's Republic of Korea, Egypt, Ethiopia, Guinea, India, Iraq, Madagascar, Uganda, Vietnam, Yemen. The votation was as follows: In favour: Bangladesh, Bhutan, Botswana, Cape Verde, Chile, China, Colombia, Congo, Cuba, Democratic Republic of the Congo, Ecuador, El Salvador, Guatemala, India, Indonesia, Madagascar, Mauritius, Mexico, Morocco, Mozambique, Nepal, Niger, Pakistan, Peru, Philippines, Qatar, Russian Federation, Rwanda, Senegal, South Africa, Sri Lanka, Sudan, Tunisia, Uruguay and Venezuela. Against: Austria, Canada, Czech Republic, Germany, Japan, Latvia, Luxembourg, Norway, Poland, Romania, the United Kingdom and the United States. Abstentions: Argentina, France, Ireland, Italy, Liberia and Republic of Korea.

³⁷ UN Doc A/C.1/54/1, 20 September 1999

³⁸ UN Doc A/54/54V

³⁹ UN Doc A/C.3/54/1, 20 September 1999

⁴⁰ UN Doc A/54/151

⁴¹ UN Doc A/54/604 and UN Press Release GA/AB/3350

⁴² UN Doc EC/CN.4/1999/104

⁴³ UN Doc E/CN.4/2000/112

⁴⁴ UN Doc A/35/48

⁴⁵ UN ECOSOC, Commission on Human Rights decision 1997/114

⁴⁶ UN Doc E/CN.15/1999/12

⁴⁷ Created by the General Assembly, Resolution 48/141, 20 December 1993

⁴⁸ See UN Press Release GA/AB/3350, December 1999, p2

⁴⁹ UN Doc E/CN.4/RES/2000/3 and UN Doc A/C.3/55/L.23

⁵⁰ UN Doc S/RES/1209, 1998

⁵¹ UN Doc S/RES/1264, 1999

⁵² See para. 8 of the UN Doc S/1999/957, 8 September 1999

⁵³ For a detailed analysis of this conclusion see Zarate, *op. cit.*, p75. See also Marie-France Major, 'Mercenaries and International Law', Georgia Journal of International and Comparative Law, Vol. 22, 1992, p103-150

⁵⁴ For a detailed discussion of neutrality laws and the Hague Convention (V) in relation to the development of anti-mercenary laws see Françoise J. Hampson, 'Mercenaries: Diagnosis Before Prescription', Netherlands Yearbook of International Law, Vol. 22, 1991, p17-19; Edward Kwakwa, *op. cit.*, p86; Zarate, *op. cit.*, p126

⁵⁵ Zarate, *op. cit.*, p126-127

⁵⁶ For details of UN Resolutions and Declarations, see Zarate *op. cit.*, p127; p132-133 and footnotes 309, 310, 327, 328, 330, 349-352; Marie-France Major, *op. cit.*, p118-127

⁵⁷ See footnote 356 in Zarate, *op. cit.*, p133

⁵⁸ Additional Protocol I to the Geneva Conventions of 12 August 1949, 8 June 1977 relating to the protection of victims of international armed conflicts reprinted in International Legal Materials Vol. 16, 1391, 1977

⁵⁹ Protocol II, reprinted in International Legal Materials, Vol. 16, 1443, 1977

⁶⁰ For an extensive criticism of Article 47, see Edward Kwakwa, *op. cit.*, p67-92. Kwakwa's main argument is that denying POW status and related treatment to mercenaries is incompatible with promoting humane conduct in armed conflict and provides mercenaries no incentive to comply with international humanitarian law. See also Marie-France Major, *op. cit.*, p108-113; and Enrique Bernales Ballesteros, 'Report on the Question of the Use of Mercenaries as a Means of Impeding the Exercise of the Right of Peoples to Self-determination', (E/CN.4/1988/14), 1998

⁶¹ See Zarate, *op. cit.*, p124

⁶² *ibid.*

⁶³ *ibid.*

⁶⁴ Article 45 requires that, when in doubt, the holding party should presume POW status and consequent treatment for any prisoner, until such time as his status has been determined by a competent tribunal. Such a presumption is also provided by Article 5(2) of the Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention)

⁶⁵ Article 75 of Protocol I, to be read with 45(3) thereof, requires that all persons who are not entitled to POW status nevertheless be treated humanely in all circumstances and enjoy the minimal guarantees provided therein. Similarly, in the case of non-international armed conflicts, mercenaries benefit from the minimal guarantees of protection provided by Article 3 common to the four Geneva Conventions of 1949, and the corresponding provisions in Protocol II, when the latter is applicable.

⁶⁶ Article 1, para. 2, International Convention against the Recruitment, Use, Financing and Training of Mercenaries, UN General Assembly Resolution 44/34, 4 December 1989

⁶⁷ Bearing in mind that the states' obligation in relation to mercenary activity is specifically mentioned later in the Convention, the term 'any person' at Article 2 creates an ambiguity as to whether the 'offence' *per se* is meant to be addressed to states as well. The OAU Convention is clearer in this respect

⁶⁸ Training of mercenaries does not mean training provided by mercenaries to government security forces, which is what most private security companies claim to do. The commission of the offence of recruiting mercenaries is also not dependent upon the mercenary having actually participated in hostilities. There is therefore a good reason for taking the requirement of direct participation out of the definition of 'mercenary'

⁶⁹ The OAU Convention, on the other hand, specifically mentions 'juridical persons' at its Article 1(3)

⁷⁰ OAU Doc CM/817 (XXXIX), Annex II, Rev. I, p1√7; 1490 UNTS 100. The Convention was adopted in 1977 and entered into force in 1985

⁷¹ The official version of the Convention appears to be missing a comma between the words 'self-determination' and 'stability'

⁷² There seems to be a drafting mistake in paragraph 3 of Article 1, as the crime of mercenarism is defined not in paragraph 1 but rather in paragraph 2 of Article 1

⁷³ Draft Convention on the Prevention and Suppression of Mercenaries, OAU Doc CM/433/Rev. L, Annex I, 1972. Such authors include Zarate, *op. cit.*, p128; Marie-France Major, *op. cit.*, p108

⁷⁴ D. Schindler and J. Toman (eds.), 'Droit des Conflits Armés – Recueil des conventions, résolutions et autres documents', Geneva : Comité International de la Croix-Rouge, Institut Henry-Dunant, 1996

⁷⁵ The question of whether states may be said to be 'criminally' liable is still the subject of debate amongst scholars of international law

⁷⁶ Enrique Bernales Ballesteros, 'Report on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right to Self-determination', (A/53/338), 4 September 1998, para. 51

⁷⁷ Petra Hagelstam, 'Soldiers of Fortune in Bosnia – The Casagrande Incident', The Finnish Yearbook of International Law, 1997, p277

⁷⁸ UN Doc A/CN.4/L.532, 1996. Also available at <http://www.un.org/law/ilc/reports/1996/96repfra.htm>

⁷⁹ UN Doc A/CN.4/L.464/Add.4, 1991. Printed in Yearbook of the International Law Commission, Vol. II, part Two, 1991, p97

⁸⁰ Article 23(2) of the 1991 Draft Code of Crimes. See also the International Law Commission commentaries to the article in the Yearbook of the International Law Commission, Vol. II, part Two, 1990, p28-29

-
- ⁸¹ Enrique Bernales Ballesteros, 'Report on the Question of the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-determination', (A/51/392), 23 September 1996, para. 32. It seems that the Finnish authorities had informed the ICTY of a Finnish mercenary by the name of Marco Casagrande, who was suspected of having committed grave breaches of international humanitarian law both as a soldier and as a commander in Bosnia during 1993 and 1995. However, it appears that the ICTY chose not to investigate the matter further due to lack of clear and sufficient evidence. See Petra Hagelstam, *op. cit.*, p284
- ⁸² Article 78(1) of ICC Statute; Article 24(2) of ICTY Statute; Article 23(2) of ICTR Statute. See also Enrique Bernales Ballesteros, 'Report on the Question of the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-determination', (A/51/392), 23 September 1996, paras. 20 and 94
- ⁸³ See Andrew Clapham, 'The International Criminal Court and the Question of Jurisdiction under International Criminal Law over Legal Persons Including MNCs' in M. Kamminga and S. Zia Zarifi (eds.), *Liability of Multinational Corporations under International Law*, The Hague: Kluwer, forthcoming
- ⁸⁴ Both the draft Convention and the draft Protocol are available at <http://www.uncjin.org/Documents/Conventions/dcatoc/7session/index.htm>
- ⁸⁵ Enrique Bernales Ballesteros, 'Report on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right to Self-determination', (A/53/338), 4 September 1998, para. 72
- ⁸⁶ For details on the 1870 Foreign Enlistment Act, see Edward Kwakwa, *op.cit.*, p81-82; Zarate, *op.cit.*, p137-138; L.C.Green, 'Essays on the Modern Law of War', 2nd Edition, New York, Ardsley, Transnational Publishers, 1998, p542-546. See also Enrique Bernales Ballesteros, 'Report on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right to Self-determination', (E/CN.4/1999/11), 13 January 1999, para. 51 and Enrique Bernales Ballesteros, 'Report on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-determination', (A/54/326), 7 September 1999, para. 26 and 32
- ⁸⁷ For references as well as detailed information on US national legislation, see Zarate, *op. cit.*, p134-37. For analysis of the Neutrality Act particularly, see Kwakwa, *op. cit.*, p79-80, and L.C.Green, *op. cit.*, p540-542
- ⁸⁸ This Act requires any agent of a foreign state (including those recruiting military personnel) to register with the federal government. It allows the US to control the recruitment of its nationals or residents by foreign states. See Zarate, *op. cit.*, p136
- ⁸⁹ Zarate, *op. cit.*, p136-137
- ⁹⁰ For examples of legislation in Georgia see Enrique Bernales Ballesteros, 'Report on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-determination', (A/54/326), 7 September 1999, para. 13; in Ecuador see Enrique Bernales Ballesteros, 'Report on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-determination', (A/53/338), 4 September 1998, para. 10; in Portugal, *Idem*, para. 13; in the Ukraine see Enrique Bernales Ballesteros, 'Report on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-determination', (E/CN.4/1997/24), 20 February 1997, para. 22; in France see Zarate, *op. cit.*, p140 and Enrique Bernales Ballesteros, 'Report on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-determination', (E/CN.4/1998/31), 27 January 1998
- ⁹¹ See Zarate, *op. cit.*, p154-157
- ⁹² Sec 1 (iv) Regulation of Foreign Military Assistance Act, 15 of 1998
- ⁹³ This legislation introduces a sentence of no more than 10 years imprisonment and a fine of no more than 1 million Rand for nationals or foreigners residing in South Africa who participate in military missions outside South African territory without the authorization of the South African Government
- ⁹⁴ Enrique Bernales Ballesteros, 'Report on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right to Self-determination', (A/53/338), 4 September 1998, para. 80
-