

ELIMINATION OF

MERCENARISM IN AFRICA

A NEED FOR A NEW CONTINENTAL APPROACH

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FOREWORD

The Institute for Security Studies (ISS) is a think-tank research institute whose mission is to conceptualise, inform and enhance the debate on human security in Africa in order to support policy formulation and decision making at every level towards the enhancement of human security for all in Africa. The ISS undertakes independent research and, where possible, works collaboratively with and through national, subregional and regional organisations. In the past, the ISS has undertaken major research work in the field of privatisation of security, which has been critical in influencing policy-making processes in the African continent.

As early as 1999, the ISS published a monograph entitled *Peace, profit or plunder? The privatisation of security in war-torn African societies*, which had been edited by Jakkie Cilliers and Peggy Mason (now out of print). In 2007, the ISS published a monograph entitled *Private security in Africa: manifestation, challenges and regulation*, edited by Sabelo Gumedze, and in the same year, volume 16 (no 4) of the ISS *African Security Review*, edited by Dean-Peter Baker, focused on the privatisation of security, too. Another monograph entitled *Private security sector in Africa: country series*, which was edited by Sabelo Gumedze, was published by the ISS in 2008 and highlighted the privatisation of security in three African countries, namely South Africa, the Democratic Republic of Congo and Uganda. All these publications are available at the ISS's website, www.issafrica.org.

The 2007 monograph laid a foundation for the current monograph, *Elimination of mercenarism in Africa: a need for a new continental approach*, which mainly focuses on the elimination of mercenarism in Africa (the darker side of the private security industry). The aim of this monograph is to inform the revision process of the 1977 OAU/AU Convention on the Elimination of Mercenarism in Africa. In this monograph a strong argument is made for the need for a new continental approach to deal with the new modalities of traditional mercenarism, which involve an emerging and flourishing industry comprised of private military and security companies. The further aim of the recent ISS research work on privatisation of security is to inform the drafting of a pro forma regulatory framework for the private security sector in Africa at national and regional levels.

The purpose of the pro forma legislation is to serve as a guide in the process of formulation of an effective framework at national and regional levels.

In the final analysis, it is hoped that the ISS work on the subject of the privatisation of security will bring about a better understanding of the role of the private security sector in peacekeeping and in state and corporate security in Africa, based on field research and country case studies; give momentum to an appropriate regulatory regime for private military sector engagement in Africa, including the elimination of mercenary activity and the revision of the OAU/AU Mercenary Convention; and give momentum to and make inputs on the development of appropriate legislative and regulatory frameworks for the regulation of private security companies in Africa countries.

The chapters in this monograph are based on papers presented by experts from various fields and disciplines during a conference hosted by the ISS on the regulation of the private security sector in Africa, which was held from 5 to 6 March 2008 at the African Union Headquarters in Addis Ababa, Ethiopia. It would not have been possible to successfully publish this well-researched and informative monograph without the generous support of the ISS project funders, namely the International Development Research Council (IDRC) and United Nations University (UNU).

The Security Sector Governance Programme (then Defence Sector Programme) staff contributed immensely to the final product. I would like to thank the SSG staff under the leadership of Dr Naison Ngoma, and particularly Lauren Hutton and Job Hlongwa. Special thanks goes to the Pretoria office director, Major-General (Rtd) Len le Roux, who was the project leader, and Nadia Ahmadou (a former SSG intern who is now working for the African Security Analysis Programme of the ISS). My sincere appreciation to the ISS's publications coordinator, Dorette de Jager, for her tenacity in ensuring an excellent final product.

Special thanks also go to the Director, Conference Services, of the African Union, Nedjat Khellaf, who facilitated the hosting of the Conference on the Elimination of Mercenarism in Africa at which the contents of this monograph were deliberated upon. My heartfelt appreciation to all the contributors who agreed to write on this complex yet important subject for Africa. This monograph would not have come to fruition without their sacrifice and partnership with the ISS in this important venture. The aim of all the contributions in this monograph is to ensure that the African continent becomes peaceful and secured, an extremely important condition for Africa's development.

The editor

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PART I

INTRODUCTION

INTRODUCTION

THE ELIMINATION OF MERCENARISM AND REGULATION OF THE PRIVATE SECURITY INDUSTRY IN AFRICA

Sabelo Gumedze

The General Assembly of the United Nations, at its 62nd session, adopted Resolution 62/145 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 General Assembly was '*[a]larmed and concerned* at the danger that mercenaries constitute to peace and security in developing countries, in particular in Africa and in small states' (UN General Assembly 2007). As a result of this danger, the General Assembly condemned mercenary activities in Africa because they violate human rights and impede the right of peoples to self-determination in particular. The organisation further commended African states on their collaboration in preventing such illegal actions, which have posed a threat to the integrity of and respect for the constitutional order of their countries and the exercise of the right of their peoples to self-determination. The General Assembly expressed concerns about the new modalities of mercenarism in the form of private security companies (PSCs) and private military companies (PMCs). The body noted that 'the recruitment of former military personnel and ex-policemen by private military and private security companies to serve as "security guards" in zones of armed conflict seems to be continuing' (UN General Assembly 2007). In this context, Africa is seen as fertile grounds for mercenary activities (in which some private security/military companies are involved). This in turn undermines further the African continent's rare commodity of peace and security.

With the advent of the new war(s) on terror led by the United States and United Kingdom, notably in Iraq and Afghanistan, the recruitment of former military personnel and ex-policemen by PSCs and PMCs has been an ongoing and rather disturbing trend in Africa. This has meant that African armies are literally training for the private security/military sector. Thus far, very few African states have put in place a regulatory framework on the provision of assistance of a military or military-related nature to, or the provision of humanitarian assistance by private security/military actors in, countries experiencing armed conflicts, or the enlistment of its nationals in foreign national armed forces. The only African state which has made progress on a regulatory framework in which these world-wide challenges are addressed, is South Africa through the promulgation of the Prohibition of Mercenary

Activities and Regulation of Certain Activities in Country of Armed Conflict Act (Act 27 of 2006).¹ South Africa has in the past years been a supplier of personnel with security and military expertise to the private sector.

That Africa has been on the receiving end of mercenary activities is not in dispute. In fact, mercenarism has contributed to undermining of the continent's peace and security. Mercenaries have featured in African coups (and coup attempts), which have in turn violated a plethora of human rights, including the right to self-determination, which is guaranteed under article 20(1) of the African Charter on Human and Peoples' Rights and which provides that:

All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.

Neither is it disputed that Africa has witnessed the new modalities of mercenarism in the form of the emergence of PSCs and PMCs. What is most disturbing is that these companies feature in almost every African conflict. With peace and security generally remaining a pipe dream in Africa, PSCs and PMCs are surfacing in the continent's conflict zones time and again. PSCs and PMCs are also increasingly involved in peacekeeping operations, where they offer humanitarian assistance. Furthermore, they are increasingly involved in security sector reform (SSR) processes in various African states. What complicates the issue even further is the transnational nature of PSCs and PMCs. For instance, a US-based company could be contracted by the US government to train forces in a post-conflict African state, using employees with a number of different nationalities. The nature of the private security/military sector is one that can be best described as a thriving industry/business that largely benefits from Africa's protracted conflicts, which are more often than not precipitated by rich mineral resources. A noticeable trend is that PSCs and PMCs generally based outside Africa form associations for purposes of self-regulation, legitimising their business ventures, and ensuring that their reputation is not tainted by having the same mercenary label. These associations maintain excellent websites with lists of and website links to their members.

The question is whether the African Union and African states are alarmed and concerned about the danger that mercenaries and its new modalities constitute to Africa's peace and security. First, the AU, in its few years of

its existence, has failed to ensure that all of its members ratify the 1977 OAU Convention on the Elimination of Mercenarism in Africa (OAU/AU Mercenary Convention).² As at 10 April 2008, out of 53 AU member states only 28 had ratified the convention. Second, the AU failed to develop an instrument creating a treaty organ to monitor and enforce the implementation of the convention, thus rendering the treaty powerless. Third, the AU, while knowing about the emergence of the new modalities of mercenarism in the form of PSCs and PMCs, has failed to regulate the latter's activities, at least at the international level. Furthermore, the AU has not participated convincingly in the ongoing global debate on the use of mercenaries as a means of violating human rights and impeding the exercise of the right to self-determination, which is currently led by the UN Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-determination (UN Working Group 2007).³ Finally, the AU has failed to assess the usefulness or otherwise of the OAU/AU Mercenary Convention, especially in view of the definition given of a 'mercenary' and the somewhat complex nature of the involvement of PSCs and PMCs in African conflicts and post-conflict states, peacekeeping missions and humanitarian assistance operations.

The link between mercenaries and PSCs and PMCs is easy to find. The recent failed coup attempt in the oil-rich Equatorial Guinea – which involved the self-confessed British Etonian mercenary, Simon Mann and former SAS officer, who allegedly led a group of 70 people, mainly of South African nationality, to overthrow the government of President Teodoro Obiang Nguema Mbasogo in March 2004 – attest to the fact that if not properly addressed, mercenarism and its new modalities will continue to be a security threat in Africa. Mann was recently convicted of leading an attempt to oust the Equatorial Guinea President and sentenced to imprisonment for a period of 34 years, which he will serve at the notorious Black Beach prison that located on the island of Bioko in the capital city of Malabo in Equatorial Guinea. A statement by the chairperson and rapporteur of the Mercenaries Working Group, Mr José Luis Gómez del Prado, deserves mention:⁴

The new modalities [of traditional mercenarism] involve an emerging and very flourishing industry of private military and security companies, which operates under a commercial logic of obtaining the greatest profit. With the privatization of war, the 'private or independent contractors' (new freelancers of the 21st century) would appear to have become the prime export product of some industrialized countries to zones of armed conflict. These companies also recruit and train in developing countries, which experience high

unemployment rates, cheap manual labour and a tradition of migrant labour, and send these persons to conflict zones, where effectively ordinary guards become combatants.

While African states are aware of the activities undertaken by the PSCs and PMCs, save for a few states there is a general indifference in so far as addressing the problems associated with mercenaries and its new modalities are concerned. In this regard the following actions speak volumes: The Angolan government secured the services of the now defunct Executive Outcomes to fight UNITA rebels;⁵ the Sierra Leonean government followed the same route in fighting its rebels; the Liberian government agreed to US assistance, in the form of DynCorp International, to train the Liberian army; this also happened with the reshaping of thousands of former Sudan People's Liberation Movement (SPLM/A) rebel fighters into a professional army. When Executive Outcomes and Sandline International, two PMCs that engaged in combat operations, were disbanded, their employees found new employment with other PSCs and PMCs, and this has never been questioned or interrogated by the Africa's continental organisation, the AU. Having noted the recent trend of PSC and PMC involvement in Africa in which various types of assistance are offered and provided by nationals from states not only in Africa but also the rest of the world, the AU has done nothing more than adopt a wait-and-see strategy. No official position has been adopted, either at the level of the AU Commission or the AU Assembly. This should be a cause for concern.

It is within this particular context and against this background that this monograph has been compiled and structured. The main aim of the monograph is to feed into the processes at the international, regional and domestic levels, by addressing the problems posed by activities undertaken by PSCs and PMCs, which are compounded by the fact that they are sometimes linked to mercenary activities, as was duly noted by the UN Working Group (2007). The monograph seeks to address the issue of mercenaries and its newest forms as they affect the African continent. It contains a premier collection of scholarly contributions with the following themes:

- The extent of mercenarism in Africa and its impact on human security
- The role of the legitimate private security sector vis-à-vis mercenarism in Africa
- Combating mercenarism in Africa at the domestic, regional and international levels

- An effective regulatory framework which addresses the private security sector and mercenarism in Africa
- The effect of the private security sector and mercenarism on human rights, with particular focus on women and children in Africa
- The possibility of revising the 1977 OAU Convention on the Elimination of Mercenarism in Africa

The monograph aims to contribute to the global debate around mercenaries, PSCs and PMCs that is earnestly seeking to influence the determination of universal norms and standards by states, especially with regard to the use of PSCs and PMCs, as there are as yet no universally accepted definitions in existence. In fact, the most obvious feature of the contributions in this monograph is a critique of the definition of who a ‘mercenary’ is. In a speech on the use of mercenaries, which violates human rights and impedes the exercise of the right of peoples to self-determination, the then special rapporteur, Enrique Bernales Ballesteros (2004, paras 37, 41), identified the absence of a clear, unambiguous and comprehensive legal definition of a ‘mercenary’ as one of the greatest challenges in combating mercenary activities. He emphasised that it was necessary to ‘conduct further study of the connection between the increase in mercenary activities and the obvious lacunae in the definition and in international legislation’. Mr Ballesteros proposed a new legal definition of a mercenary, factoring in number of major elements, which are set out in paragraph 47 of his report. Despite this proposal, there seem to be major difficulties in pinning down mercenaries especially in view of the new modalities, in the form of the emergence of PSCs and PMCs, which in themselves lack a universal definition, too.

The nature of the debate around mercenaries and private/military security companies

In chapter 1 on the debate on the elimination of mercenarism and regulating the private security industry in Africa, Gumedze attempts to provide an understanding of the nature of the debate around mercenaries and private/military security companies (PMSCs) by asking whether the differentiation between mercenaries and PMSCs is simply akin to what he calls ‘pouring old wine into new bottles’. He argues that grouping mercenaries and PMSCs is entirely wrong, because it obfuscates a clear understanding of the nature of the problem, namely that while mercenaries are entirely outlawed under international law, PMSCs are not. They are constantly used by individual

states, the UN and even the AU in various assignments. Gumedze points out that Africa faces an unprecedented growth of PMSCs. He further points out that while they often manoeuvre their way into diverse business activities in the name of helping to achieve peace and security in Africa, this is gainsaid by the blatant involvement of the industry in countries with rich mineral resources such as Sierra Leone, Angola, Liberia and Sudan.

In the global debate on mercenaries and PMSCs there has been a tendency to call for the regulation of PMSCs and the prohibition and elimination of mercenaries. Gumedze argues that before any meaningful control or regulatory mechanism could be developed, cognisance must be taken of the possibilities involved and the different permutations, especially with regard to PMSCs and the way in which they operate. A situation could be created in which PMSCs and mercenaries are grouped together despite the fact that they are involved in a number of roles, some of which may even promote peace and security not only for the nation states but also for their populations. Gumedze avers that there is a very thin line dividing mercenaries and PMSCs, especially those involved in combat operations, such as Executive Outcomes and Sandline International. This was very clear in the recent Blackwater scandal, in which Blackwater security guards allegedly shot and killed 17 civilians in Baghdad on 16 September 2007, allegedly while acting in self-defence. Even if the argument could be made that Blackwater is not a mercenary outfit, the incident raises serious human rights issues. In fact, the UN Working Group (2008) has issued a communication alleging human rights violations perpetrated by the employees of Blackwater. Gumedze comes to the conclusion that the commentators fall into what he terms a 'mercenary' trap, in which PMSCs are likened to mercenaries without any justification.

He further distinguishes between the different types of mercenaries in the light of the provisions of article 47(2) of the 1977 Additional Protocol I⁶ to the Geneva Conventions, whose definition of a 'mercenary' largely mirrors that of the OAU/UN Mercenary Convention. Gumedze then considers the challenges which the international community face in so far as mercenaries and PMSCs are concerned, and briefly discusses the new South African legislation on the prohibition and regulation of mercenary activities.

In his conclusion Gumedze emphasises the need for breaking the link between PMSCs and mercenaries in order to distinguish between the various roles which PMSCs undertake and take into consideration the new modalities in the form of PMCs and PSCs which are sometimes involved in mercenary activities. The purpose is to better inform a regulatory framework for the

PMSCs and possibly also the debate around the need for the revision of convention, which is now outdated.

Foaleng takes up the debate in chapter 2 with reference to what she calls 'African mercenarism', with the aim of dispelling the notion that mercenaries are all white skinned and exemplified by characters such as Bob Denard, Christian Tavernier, Mike Hoare and Jean Schramme, who were all of non-traditional African origin. She points out that there are examples of activities of African mercenary groups, which have been precipitated by the armed conflicts in Africa since the end of the Cold War. Foaleng argues that with the multiplication of non-state armed groups and the failure of disarmament, demobilisation and reintegration (DDR) processes, which are linked to the growing recruitment child soldiers, there has been an emergence of cross-border migration by the non-state armed groups seeking economic gain by participating in conflicts. She mentions the Liberian and Sierra Leonean experiences which witnessed the migration of young fighters, who were forcibly recruited by rebels from these African states, usually as children, who later seize opportunities to fight in foreign conflicts as a means for survival.

Foaleng considers the definition of mercenarism provided in various international instruments such as Addicton Protocol I to the Geneva Conventions, the OAU/AU Mercenary Convention and the International Convention on the Recruitment, Use, Financing and Training of Mercenaries⁷ of 4 December 1989 (the UN Mercenary Convention). She also considers mercenarism in the literature with the aim of providing an understanding and circumscription of the mercenarism phenomenon. A contemporary African mercenarism is described with reference to examples of African states such as the then Zaire, Mozambique, Angola, Uganda and Liberia which have experienced protracted civil wars and various armed conflicts since the end of the Cold War, and which have featured various non-state armed groups whose conduct bordered on mercenary activities.

Foaleng next looks at the notion of human security and the manner in which mercenary activities impact upon it. She gives a people-centred definition of the concept, with reference to article 1(k) of the African Union Non-Aggression and Common Defence Pact of 31 January 2005, which is not yet in force. This is followed by a brief review of some recent cases of African mercenary activities on the continent, such as Congolese and Chadian mercenaries in the Central African Republic, Sudanese mercenaries in Chad, and Liberian mercenaries in Guinea and Côte d'Ivoire. With regard to all these examples Foaleng offers an insight into the impact of the mercenary activities on human security.

In her conclusion she argues that African mercenarism presents a major challenge to Africa and that the current instruments do not take account of mercenaries in the African context, who are roaming the continent, taking advantage of African conflicts and adding to the lack of human security. Foaleng maintains that African states should continue to fight against mercenarism, which undermines the right to self-determination, and she further underscores the need to prevent African mercenarism from consolidating itself into a more corporate form as witnessed in the emergence of PSCs and PMCs. This requires that states address border management issues with neighbouring countries as well as the implementation of the provisions of the African Union Non-Aggression and Common Defence Pact on human security in the event that it comes into effect.

The extent of the mercenarism and its impact on human security and human rights

Ndlovu-Gatsheni and Dzinesa pose a provocative question of whether one man's volunteer is another man's mercenary in chapter 3. They map the extent to which mercenarism is taking place in Africa, and note that one of the key challenges to the emerging African security is that of dealing with the so-called 'new mercenarism', which is the 'darker' manifestation of the privatisation of security. They concede that the 'new mercenary' is hard to define and speaks the language of defending African sovereignty, and furthermore that the emergence of legalised PSCs and PMCs present major challenges as the state continues to lose their traditional control of the resources and means to violence. At the onset, Ndlovu-Gatsheni and Dzinesa present four challenges to the emerging African security architecture, namely the definition of a mercenary, the establishment of the extent of mercenarism in Africa, assessing the impact of mercenarism in Africa, and the regulation of the private security sector.

In their chapter Ndlovu-Gatsheni and Dzinesa describe the methodological challenges of their work that arose due to the 'clandestine and secretive nature, and illegality of mercenary activities in general'. They argue that it would be problematic in the extreme to put an end to mercenarism, precisely because it is so difficult to establish the extent of mercenary activities in Africa and to measure the extent to which it impacts on human security on the continent. In this regard Ndlovu-Gatsheni and Dzinesa go as far as to state that any study of the extent of mercenarism in Africa and its impact is in fact a study of the extent of African conflicts and their impact on human security in Africa, arguing successfully that mercenarism is completely intertwined with African conflicts and in its effects on all aspects of particularly human security.

The two researchers explore the 'definitional conundrums and the state of the debate on mercenarism' with reference to the various international instruments defining mercenarism as well as various writings in which PSCs and PMCs are defined. In mapping the extent of operations of mercenaries, they consider the various African regions that have witnessed mercenary activities and identify South Africa as one of the most prominent suppliers of mercenaries in southern Africa. In the next section Ndlovu-Gatsheni and Dzinesa discuss the impact of mercenary activities on human security, tracing the emergence of the concept and describing its seven components, namely economic, food, health, environmental, personal, community and political security, and its importance in the African context, based on the intrastate nature of most conflicts on the continent. They also consider the categorisation of PSCs and PMCs, which they argue is useful, albeit to a limited extent, in analysing the impact of mercenarism on human security in the continent.

In their conclusion Ndlovu-Gatsheni and Dzinesa state that the main concern for the emerging African security architecture is the proliferation of PMCs and the broader private security sector, which present an immediate challenge regarding clear definition, as is the case with mercenarism. They also identify the challenge of quantifying, at least in precise terms, the extent of mercenary activities in Africa and recommend further empirical research and in-country surveys to profile the scope and extent of the phenomenon in contemporary Africa.

The role of the legitimate private security sector vis-à-vis mercenarism in Africa

Approaching the debate from a human rights perspective, Lumina counts the costs by discussing the impact of corporate warfare on the human rights of women and children in Africa in chapter 4. In his introduction Lumina argues that the proliferation of mercenaries in internal armed conflicts globally as well as the emergence of PSCs and PMCs raise human rights concerns. He refers to the UN's position that the use of mercenaries undermines the right of people to self-determination, among other things. Lumina argues that while studies of the impact of mercenarism on human rights have traditionally concentrated on the threat it poses in so far as the right to self-determination and enjoyment of human rights are concerned, he examines how mercenary activities and PSCs contribute to the violation of human rights in general and the rights of women and children in particular.

In this chapter Lumina looks at the historical context of the use of mercenaries, such as the Greek mercenaries fighting for the Persian Empire

and Numidian mercenaries fighting in ancient Egypt. He then discusses mercenary activities in African states such as Côte d'Ivoire, Liberia, Sierra Leone and Angola, which prolonged the conflicts in those states. Lumina further considers the new corporate military and security service providers, and comes to the conclusion from the variety of services they offer, that the distinction between mercenary activity and legitimate private security activity is not often clear-cut.

Lumina extensively discusses various international regulatory frameworks that deal with mercenarism, including the OAU Convention, and notes that there is as yet no legal framework for the regulation of the activities of PSCs and PMCs in the context of armed conflict. With regard to a possible new international regulatory framework, Lumina starts by acknowledging that the current regulatory framework concerning mercenarism has a number of limitations and does not sufficiently address forms of mercenarism typified by PMSCs. He then recommends that the UN and OAU conventions be amended to deal with the limitations inherent in the existing definitions and also PMSCs. He further recommends not only the adoption of appropriate national and regional regulations concerning PMSCs but also that states should be encouraged to ratify the two existing conventions.

Lumina provides insight into the link between mercenaries and PMSCs, and human rights, by examining the general responsibility of states to respect, protect and facilitate the enjoyment of human rights. He argues that those states that hire PMSCs have an obligation to ensure that the companies they contract respect the applicable rules of international law; to accept responsibility for violations of international law committed by PMSCs; and to investigate and if necessary punish violations of international law committed by PMSCs. Lumina also considers the threats posed by 'corporate warriors' to the protection of human rights and discusses the impact of mercenaries and PMSCs on the rights of women and children, noting that there is no repository of comprehensive information concerning human rights violations committed by mercenaries and PMSCs during armed conflicts.

Combating mercenarism in Africa at the domestic, regional and international levels

In her contribution on banning mercenarism and regulating private security activity in Africa in chapter 5, Schulz discusses 'the good, the bad and the ugly' in the private security industry. She points out that mercenarism and Africa have traditionally had an uneasy relationship as the former has in the

past been used against colonialism. In contemporary times, PSCs and PMCs are regarded as ‘the seamless continuation of old-style mercenarism’. Schulz also addresses the intricate question of where mercenary activity ends and legitimate private security starts by looking at the narratives on mercenarism in Africa. She focuses on ‘tales and realities’, which underscoring the fact that mercenary activity in Africa had been prevalent long before the 20th century, with reference to African states which have witnessed mercenary activities such as Congo, Angola, Nigeria and Sudan.

Schulz also considers the definitional challenges in ‘hybrid’ security structures and argues that the incorporation of mercenarism and private security in security sector reform (SSR) and DDR processes require a clear definition of all the actors involved. This will remove misunderstandings about what mercenarism and private security stand for. Schulz attempts to distinguish between the different categories of actors, which include vigilante groups, mercenaries, private security companies (domestic and international), and private military companies, in order to address the structure which regulation should take.

Focusing on PSCs, Schulz argues that in order to reap the benefits that privatisation of military functions could hold, clear standards and guidelines for the delivery of private security services have to be formulated. Hence private security should be addressed within the SSR framework which is supported by the Development Assistance Committee of the Organisation for Economic Cooperation and Development. She also recommends a matrix approach to regulation as the only approach aimed at regulating and controlling private security activity in Africa that could deal with the challenges posed by ‘a transnational industry with a serious potential for human rights abuses and criminal activity’. Schulz is of the view that alongside a meaningful framework for the regulation of PSCs, there needs to be an amended OAU/AU Mercenary Convention, which has to be precise about definitions of terms. She argues that such an amended convention should be based on a matrix approach to the regulation of legitimate actors in the area of private security.

Towards an effective regulatory framework for addressing the private security sector and mercenarism in Africa

The importance of finding an effective regulatory framework aimed at addressing the private security sector in Africa cannot be overemphasised. In chapter 6 Messner discusses how such a framework could be framed.

He raises the point that although the OAU/AU Mercenary Convention has existed for 33 years, the continent still lacks an effective, clear and robust regulatory framework for mercenary issues and the legitimate private security sector. Messner attempts to propose an ideal worldwide legislative and regulatory template, which seeks to 'adequately deal with illegitimate non-state activity in conflict situations while at the same time encouraging the legitimate private security sector to flourish'.

Messner looks at the definitional challenges in the discourse and the importance of the private peace and stability operations industry, noting that the industry is particularly broad and that there is a need to address the misconceptions regarding its operations. Messner also makes the point that private security companies have been used for a very long time and countries such as the US, Canada and the UK, too, are using private security companies in order to augment their logistics. Messner calls for good legislative and regulatory frameworks that will guide the operations of the private peace and stability operations industry and considers various interests such as state interests, international interests, African interests, and private interests. These should inform the manner in which the legislative and regulatory frameworks are to be framed and will serve to avoid what he refers to as 'bad law and regulation'.

In his discussion on the development of legislation for the industry, Messner considers whether such legislation should be enabling or prohibitive, drawing inspiration from various jurisdictions such as Australia, France, New Zealand and South Africa and also considers international frameworks under the UN. He also looks at the notion of criminality, arms trafficking, labour issues, contract law and professional standards, referring to various frameworks both at the domestic and international levels. He concludes his discussion by restating the inadequacy of the current international legal and regulatory framework that seeks to address the role of the private peace and stability operations industry in conflict, post-conflict and disaster areas and he provides a number of key considerations for constructing an effective international, legal and regulatory framework. Finally, Messner provides a draft of a proposed convention for the regulation of the private peace and stability operations industry and the elimination of illegitimate non-state actors in conflict in Africa.

In chapter 7, Williamson discusses the status of mercenaries and private military/security companies under international humanitarian law (IHL). A point that is made from the beginning is that there is no legal vacuum in relation to the private security industry and mercenaries operating in conflict zones, because IHL is applicable in all such cases, but that it brings with it

certain obligations and rights. He argues that although more recent conflicts such as those in Iraq and Afghanistan have included a greater variety of actors, including PSCs and PMCs, IHL remains applicable. IHL equally applies to mercenaries operating in conflict situations.

Williamson makes a distinction between civilians and combatants, and discusses the implications of this distinction in terms of IHL. He also considers mercenaries under IHL, underscoring the issue of distinguishing between mercenaries and PSCs and PMCs to address the concerns raised by their involvement in conflict zones. He refers to the 1977 Additional Protocol I to the Geneva Conventions, noting that IHL does not explore the legality of mercenaries although a definition is provided in the Additional Protocol. Williamson looks at the definition in detail and concludes that under IHL, mercenaries are civilians and are not entitled to take a direct part in hostilities.

Williamson discusses the position of PSCs and PMCs under IHL and argues that since there is no specific acknowledgement of PSCs and PMCs under IHL, the label to append to them in international armed conflict must be decided on a case-by-case basis. He also discusses the notion of prisoners of war status, which can only be conferred upon individuals recognised as combatants. He considers the question of individual criminal responsibility in relation to members of PSCs and PMCs as well as mercenaries participating in armed conflicts and also the responsibility of states to ensure respect for IHL. In conclusion Williamson reasserts that as a body of law, IHL 'defines the protection to be afforded to individuals in the midst of armed conflicts as well as the parameters and considerations to be taken into consideration when conducting hostilities'.

In chapter 8, Juma looks beyond the current international and regional normative regimes as they relate to mercenarism, pointing out that while the use of soldiers and military personnel is as old as war itself, the concerted normative response seeking to address the practice only began in the latter part of the 20th century. He discusses the emergence of the 'newer ventures' in the form of PSCs and PMCs, who constantly distinguish themselves from mercenaries by claiming to champion legitimate causes. He argues that as a result of these new actors in the conflict theatre, it is improbable that a legislative regime meant to address mercenarism can also be used to address the former. This argument forms the basis upon which the OAU/AU Mercenary Convention should be revised.

Juma identifies points for legal intervention and asserts the relevance of law in the improvement of peace and security in Africa. As in the case of the other contributors, Juma discusses the definitional challenges relating to

mercenaries in international law and argues that it is possible to look beyond the current international and regional framework. He argues that there is a need to build a consensus for the evolution of a framework for mercenarism and the security sector in general. He considers the development of mercenary law at the continental level and then discusses the manner in which a normative intervention could be developed and amongst others discusses the OAU/UN Mercenary Convention as well as the UN Mercenary Convention and traces the history behind their adoption.

Juma also revisits the definitional conundrums with regard to PSCs and PMCs and he argues that even though some PSCs and PMCs perform the same functions as mercenaries, 'they still fall outside the definition of the prohibited mercenarism provided by existing law'. He then discusses the parameters for regulation in terms of a 'two-pronged approach' based on a domestic approach and a continental framework, and offers guidelines which the AU could adopt in monitoring PSCs and PMCs. In conclusion Juma argues that while it is still necessary to maintain the abolitionist stand against the so-called traditional mercenaries, there is a need to develop legal regimes aimed at addressing the 'burgeoning private security industry', including the related issue of transparency.

Conclusion

The contributions to this monograph cover a wide range of issues relating to mercenarism and its new modalities in the form of PSCs and PMCs. While the various challenges have been identified in this discourse, it would perhaps be prudent to ask whether such contributions would be of use first in curbing mercenary activities in Africa, which have been identified as violating human rights and impeding the exercise of the right of peoples to self-determination, and second in addressing the challenges brought about by the emergence of the private actors in the form of PSCs and PMCs. As Bryden (2001:18) said, '[s]ecurity privatization in all its guises is not going away'. This situation calls for African states in particular (collectively and individually) to reconsider their current policies (or lack of them) regarding this phenomenon. At the continental level, the UN has already put the issue of the use of mercenaries and its concomitant privatisation phenomenon high on its agenda, by the establishment of the UN Working Group. It is such special procedures that bring hope to those individuals and groups whose rights have been violated and are likely to be violated as a result of mercenary activities and PMSCs. This is not only confined to conflict situations, because neither mercenaries nor private security actors confine their operations to wars and armed conflicts.

As Africa seems to be seriously lagging behind in so far as the discourse on mercenarism is concerned. The AU, a continental organisation whose objectives include ensuring peace, security and stability on the continent, should ensure that the strategic efforts towards eliminating mercenarism in Africa are supported by the revision of the OAU/AU Mercenary Convention. It should also give serious consideration to the regulation of the private security industry which is rapidly emerging as a key player in the African security architecture in various forms. As the mandate of the UN Working Group (2007) has been extended for a period of three years, it is essential that the AU comes on board, so that it can gain insight into the intricacies of the privatisation of security and its dangers with regard to mercenarism.

A dialogue is still required among AU member states on the issues identified in this monograph. What should be the end result, is a situation that will bring all African states together in a common understanding of the issues involved so that they are able to develop an effective framework that will succeed in eliminating mercenaries from the continent, and not just containing them, and also regulating the private security actors in the form of PSCs and PMCs. This can only be achieved through the commitment of African leadership and the constant engagement of civil society, whose objective is none other than positively influencing policy-making processes.

Notes

- 1 Assented to by the President of the Republic of South Africa on 12 November 2007 and published in the South African *Government Gazette* on 16 November 2007, thus coming into operation in terms of section 16 of the Act.
- 2 Convention of the OAU for the Elimination of Mercenarism in Africa, OAU Doc CM/433/Rev. L. Annex 1 (1972), adopted in Libreville on 3 July 1977 and entered into force 22 April 22 1985.
- 3 See the latest reports of the UN Working Group (2007) at <http://www2.ohchr.org/english/issues/mercenaries/index.htm>.
- 4 See unofficial translation of the statement by Mr José Luis Gómez del Prado, chairperson-rapporteur of the Working Group on the use of mercenaries, to the 4th session of the Human Rights Council in Geneva on 21 March 2007.
- 5 It is alleged that ‘the first President of the communist “New South Africa”, [Nelson] Mandela made it one of his priorities to destroy Unita – with the aid of Executive Outcomes’ (see LoBaido 2008).
- 6 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts 1977.

- 7 International Convention against the Recruitment, Use, Financing and Training of Mercenaries. General Assembly resolution 44/34 of 4 December 1989. Available at <http://www2.ohchr.org/english/law/mercenaries.htm>.

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PART II

**THE NATURE OF THE DEBATE
AROUND MERCENARIES AND
PRIVATE MILITARY/SECURITY
COMPANIES IN AFRICA**

CHAPTER 1
POURING OLD WINE INTO NEW BOTTLES?
THE DEBATE AROUND MERCENARIES AND
PRIVATE MILITARY AND SECURITY COMPANIES

Sabelo Gumedze

Morally, there can be no doubt about the repugnance of mercenary activity (which is ineffectually proscribed under international law), or any other form of private activity which makes a direct contribution to ignite or prolong violent armed conflict (Malan 1999:56).

Introduction

There is a growing perception that private military and security companies (PMSCs) constitute a new form of mercenarism. In a 2007 report, the United Nations Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the rights of peoples to self-determination observed that 'many States have been taken by surprise by the modern form of mercenarism, including the unforeseen effects of the recruitment activities of PSCs and PMCs'.

Addressing the question whether PMSCs and mercenaries are the same is not an easy task. First, the definition of a mercenary in international law has not yet been settled. Second, the definitions of private security companies (PSCs) and private military companies (PMCs), which are in fact to a large extent associated with mercenaries (rightly or wrongly), have not been settled in international law either. While some regard PMSCs (especially those operating in conflict situations) as mercenaries, others see them as legitimate private actors whose sole mandate is to maintain peace and stability.

Africa is a continent that is facing an unprecedented growth of PMSCs which more often than not manoeuvre their way into diverse business activities in the name of seeking to achieve peace and security on the continent. The growing interest of PMSCs (as well as mercenaries) in Africa's extractive industry or in countries with rich mineral resources is a known fact. In Sierra Leone, for instance, the government hired a now defunct PMC, Executive Outcomes, to obstruct rebel forces in exchange for diamond mining concessions and later payment of an additional US\$35 million (Creutz 2006:39). In Angola, Executive Outcomes entered the conflict scene at the

request of the Angolan government and regained control of the town of Soyo with its life-important oil facilities from UNITA (*União Nacional para a Independência Total de Angola*, National Union for the Total Independence of Angola,) rebels (Creutz 2006:37).

Liberia, a country well known for 'conflict diamonds', has in the recently hosted a private 'multifaceted global enterprise', Dyncorp International, which was contracted by the United States to assist in recruiting and training a new army in Liberia. Most recently it was reported¹ that DynCorp International will also train and equip up to 500 Liberian National Police members who will establish an Emergency Response Unit with the United Nations Police and the United Nations Mission in Liberia (UNMIL). Over and above this task, DynCorp International will also undertake new building construction and the renovation of existing LNP facilities, which shall cost \$3.5 million. A complex interaction has recently emerged as a result of the strategic behaviour of multinational corporations and the new wars in Sudan (DIIS 2006), which is also known for its oil riches, where PMSCs have entered the scene to address 'security'-related concerns. Interestingly, Dyncorp International happens to be one of these.²

From the onset, this paper emphasises that it is incorrect to lump together PMSCs and mercenaries. As shall become clearer, this erroneous grouping has resulted from past involvement of PMSCs in mercenary activities, and is also informed by the general understanding of what 'mercenaryism' entails. Commentators such as Leander (2002) have even gone so far as to suggest that the growing demand for mercenary services has resulted in the growth and sustainability of PMCs. However, 'mercenary services' and 'military services' should not be used interchangeably. Generally mercenary activities involve military skills but military services per se are not necessarily delivered by mercenaries. For this reason it is important to define the term 'mercenary', even though it is a difficult task given the plethora of meanings that have been assigned to it in the past. It is however equally important to define the 'mischief' which international and regional instruments seek to root out through the prohibition of mercenaryism. A warning must be sounded, however, that terms such as 'PMSC' and 'mercenary' have no universally accepted definitions and care should be taken when decisions are made on how they should best be addressed. From the article it will become clear that some definitions of mercenaries to a large extent also cover PMSCs. For instance, if PMSCs are defined in terms of being foreign to a conflict, motivated by financial gain and participating in combat (Shearer 1998:68), they do seem to match the negative definition of the mercenary (Jones 2006:358).

The question that needs to be asked is whether the PMSCs of today are indeed a reincarnation of yesterday's mercenaries. PMSCs vociferously argue that they are 'peace and security ambassadors' and mercenaries the 'bad guys'. Viewed from one perspective, PMSCs do behave as peace and security ambassadors, but from another they are arguably involved in mercenary activities. Amnesty International (2005:56) notes that 'there is a grey area between what constitutes "security assistance" and when the level of involvement becomes that of a mercenary ie somebody paid to take an active part in combat operations'. Mercenaries are by their very nature extremely secretive and may hide behind legitimate security companies. It is therefore confusing to control and regulate an industry such as the private security sector, which sometimes arguably does harbour (or is likely to harbour) mercenary units within its legitimate establishment. Perhaps one of the many lessons learned from the alleged involvement of Simon Mann, the Etonian and alleged leader of the group that was held in Zimbabwe en route to Equatorial Guinea to stage a coup against President Teodoro Obiang Nguema Mbasogo and to seize the country's oil riches, is that it is possible for bad elements within a PMSC to switch roles from being legitimate private security/military actor to that of a mercenary, when an opportunity presents itself.³

In attempts to control and regulate the private security industry, cognisance must be taken of all the possibilities involved, and the interplay between mercenaries and PMSCs. The question which should be answered is whether PMSCs are indeed mercenary corporations as some commentators have suggested. This would imply that, as mercenaries, PMSCs should be prohibited outright as it is the case under international law. However, in practice this would not be possible because PMSCs do play an important role in the maintenance of peace and security, although this is not always the case. Services in which PMSCs have been involved include risk advisory services, training of local forces, armed security on site, cash transport, intelligence services, workplace and building security, war zone security needs, weapons procurement, personnel and budget vetting, armed, air and logistical support, maritime security, cyber security, weapons destruction, prisons, surveillance, psychological warfare, propaganda tactics, covert operations, close protection and investigations.⁴ As a result of the ever-growing PMSCs in Africa and the vacuum under international law on their control and regulation, I, as I have done before (see Gumedze 2007b) call for the revision of the 1977 OAU/AU Convention on the Elimination of the Mercenarism in Africa (OAU/AU Mercenary Convention),⁵ which after three solid decades in existence has proved the obvious, namely that it has been fruitless.

The private military corporation defined

In the most general sense a PMSC may be defined as an entity that does nothing but assist in endeavours aimed at addressing security concerns through a variety of security engagements. The word 'security' in this context is used in the most general sense, much as the term 'mercenary' which has so far not yet been given a universally accepted definition. This, coupled with the fact that PMSCs face the same challenge, means that it is prudent not to cluster the two, as they present different perspectives within the context of their operations. The definitional challenge in respect of mercenaries is exacerbated by the ever-growing number of corporate military firms or private military firms (PMFs). PMFs sometimes refer to themselves as security or peace organisations and are reported to form part of a security industry with an annual revenue estimated at US\$100 billion (see Singer 2004:523–524; Newel & Sheehy 2006:68). However, while mercenarism may be said to be involved in 'security work', not all PMSCs could be said to be mercenaries.

In analysing the connection between fragile statehood, armed non-state actors and security governance, Schneckener (2006:27) falls into the trap of clustering mercenaries and PSCs by stating that they are 'volunteers usually recruited from third states who are remunerated for fighting in combat units or for conducting special tasks on their own'. The first point that needs to be corrected is that these entities are not in any way 'volunteering': they are remunerated, a fact which Schneckener concedes. Second, contrary to the case of mercenaries (who comprise a private army recruited from third states), PSCs are not necessarily recruited from third states, but may have been contracted within their own state of incorporation or registration. Third, a PSC/PMC is a corporate entity in terms of the law while a mercenary group is not, at least in the legal sense. On this point it must be accepted that PMCs and PSCs are capable of transforming into a mercenary group with relative ease. However, this does not mean that all PMCs and PSCs are mercenary groups.

The private security/military industry is considered to be a deadly one as it arguably provides high returns at the expense of human lives. Further, without any doubt African conflict means business for PMSCs. The more hostile and inhospitable situations are in Africa, the more business PMSCs gain. While some see them as deadly, 'PMCs can be useful and arguably provide excellent service while offering swift and needed aid to embattled regions' (Desai 2005:827). It is safe to conclude that while some PMSCs are indeed useful in Africa, there are also those whose objective is to destabilise states. It is for this reason that the South African state, which has for the past

decade been the largest supplier of military personnel for PMSCs, enacted the Regulation of Foreign Military Assistance Act of 1998, which shall soon be replaced by the Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act, 27 (Act 27 of 2006).⁶ It is also for this reason that it has been argued that because '[p]rivate military or security companies are able to intervene in conflicts, tilting the balance of power in favour of their paymasters [and] they have the potential to undermine legitimate constitutional democracies' (Lekota 2007), they must be discouraged at all costs. It is doubtful whether this would be a viable option because these same PMCs are capable of restoring and anchoring legitimate constitutional democracies. Perhaps, before such statements are made, it is important that the dynamics surrounding the industry are understood. Looking at PMCs with a 'mercenary lens' does not address the issue of how the industry could best be regulated.

The Mercenary/PMSC confusion

The term 'mercenary' is one that is loaded, subjective and carries lots of emotional baggage and connotations (Isenberg 1997). It is a pejorative term and no government or non-state actor wants to be associated with it, particularly as mercenarism is prohibited outright. Newell and Sheehy (2006:71) argue that the term 'mercenary' 'includes a person who is foreign to a conflict participating in combat with the aim of securing personal gain'. In an attempt to distinguish a mercenary from a PMC, they argue that this definition cannot be applied to PMCs because of the wide range of services offered by PMCs. The 'personal gain' referred to is generally pecuniary in nature, although Sapone (1999) disputes this fact, stating that many mercenaries profess to have political or ethical motivations. He gives the example of mercenaries who had been recruited by the Rhodesian independence organisation in 1975, but who backed out despite the substantial pay because they had been roped in to fight against a white Rhodesian government (see also Tickler 1987). He also refers to another example given by Tickler of a mercenary in the failed coup in the Seychelles who only joined because 'the Seychelles is a Communist tyranny run by Soviets and Marxists and the Libyan regime' (Tickler 1987:104). Whether this would be the case today, one can only speculate.

In his work on new mercenary groups and the privatisation of conflict, Adams (1999) prefers to use the ordinary dictionary definition of mercenaries which he refers to as individuals or organisations who sell their military skills outside their country of origin and as an entrepreneur rather than as a

member of a recognised national military force. In terms of this definition all PMCs are in effect mercenaries. However, PMSCs have an entrepreneurship dimension in that they undertake contracts outside their country of origin, but do not form part of a recognised military force. Adams' line of thinking echoes that of the former Secretary-General of the UN, Kofi Annan, who, when requested to express an opinion on the efficacy of bringing on board PMCs as part of the UN strategy to put an end to the civil war in Sierra Leone, stated that no distinction could be made between PMCs and mercenaries (Shearer 1998:68).

Nathan (1997) states that mercenaries are a generic problem of great proportions and avers that this is regardless of the specific conduct or misconduct of the now defunct Executive Outcomes. In this statement, Nathan labels Executive Outcomes as a 'mercenary' organisation as opposed to a private military organisation. Nathan (*ibid*) defines mercenaries as soldiers that are hired by a foreign government or rebel movement in order to contribute to the prosecution of armed conflict – whether directly by engaging in hostilities, or indirectly through training, logistics, intelligence or advisory services – and who do so outside the authority of the government and defence force of their own country.

Again, in terms of this definition all employees of PMCs who contribute to the prosecution of armed conflict are deemed to be mercenaries. This shows that it is important to determine the intention and level of engagement of a particular private security actor (see Gumedze 2007a:3). This would also prevent PMSCs who decide to 'dress in borrowed robes' in their operations from escaping the label of mercenaries. Nathan's definition presupposes that provided that the end product of the operation is a contribution to an armed conflict, the operative would be defined as a mercenary. However, if the end result is not necessarily an armed conflict but ousting of a state president, for example, Nathan would fail to label such an operative as a mercenary. As I stated elsewhere, 'one problem associated with this discourse is the meaning of the word "mercenary". While mercenaries are generally private armies, not all private armies are mercenaries. It is therefore incorrect to assume that the private security sector comprises ... mercenaries' (Gumedze 2007a:12). Such an incorrect assumption to which many commentators fall victim should be avoided at all costs.

Viewing all PSMC employees as mercenaries does not address the problem of how best the industry can be regulated. Nathan bases his criticism of so-called 'mercenaries' on the fact that they are not controlled. However, there are emerging legal regimes aimed at regulating PMSCs, such as the

South Africa legislation, which would perhaps address Nathan's fears. A closer look at the South Africa legal regime suggests an even stricter control of Nathan's 'mercenaries'.⁷

Nathan (1977) further raises an interesting argument that while citizens who volunteer for military service in democratic states are generally motivated by a desire to serve their country, and do so with honour, so-called 'mercenaries' are typically motivated by profit and are therefore driven mainly by self-interest, mentioning Executive Outcomes as an example of such a 'mercenary'. It would seem that in Nathan's view, there are no PMSCs that are not mercenaries. Lamb (2000), who equates mercenaries with private security, supports Nathan's arguments and notes that privatisation of security is equal to the employment and deployment of 'mercenary' forces in armed conflicts.

Juma (2005:463), who likens what he terms 'private military outfits' to mercenaries, falls into the same trap. His definition for a mercenary is 'a professional soldier serving a foreign power ... who receives payment for his services'. He qualifies this by stating that mercenaries often have little or no regard for the cause for which they are fighting. The first problem I have with Juma's definition is again that he is grouping PMSCs with mercenaries, while the second problem is the phrase 'serving a foreign power'. Not all PMSCs serve foreign powers, for they often have highly diversified operations. My third problem concerns the phrase 'little or no regard to the cause for which they are fighting' which assumes that the intention does not necessarily have to be present for one to become a mercenary. Juma mentions Sandline International as an example of what he terms a British 'mercenary outfit', who was paid an estimated US\$10 million by the Sierra Leone government to restore it to power in 1998. Here Sandline International did in fact have regard for the cause, because they were contracted to restore the government to power. It is unfortunate that Juma gives no example of a 'mercenary' who had little or no regard for the cause for which he was fighting.

With regard to the South African Regulation of Foreign Military Assistance Bill, Juma (2005:466) argues that '[w]hether such an approach will be successful in regulating the activities of mercenary groups is doubtful'. Again, Juma misses the point. The intention of South African legal regime is to outlaw (as opposed to regulate) mercenary groups and to control and regulate PMSCs. Even at the international level mercenaries are prohibited. It is for the same reason that the UN Special Rapporteur on Mercenaries, Enrico Ballesteros (2004, para 10), noted that '[t]he participation of mercenaries in armed conflicts ... always hampers the enjoyment of the human rights of those on whom their presence is inflicted'.

Walker and Whyte (2005:652), who prefer to refer to PMCs as the ‘new mercenaries’, argue convincingly that ‘[t]he difference between mercenary, private security company, and private military company, is often blurred, with the latter term being the most recent origin and without legal definition in domestic or international law’. It is because of the absence of such a legal definition especially in international law that commentators continue to confuse these two terms. Particularly in Africa, there is a need to address this problem at the level of the AU through the revision of the OAU Convention. As Walker and Whyte (*ibid*) argue, ‘[t]he label “mercenary” is perhaps unsurprisingly, given the negative imagery conjured by this word in common parlance, usually now avoided’. Sounding a word of caution, Desai (2005:837) notes:

If one merely perceived PMCs as soldiers of fortune or amoral mercenary groups, one misses the fact that the PMC industry consists of a spectrum of companies from providing full scale, combat engaged personnel and services (including lethal ones) to those providing purely non-lethal, support functions [and] given that mercenary services are banned under international law, no PMC would wish to be deemed mercenary under such laws.

Fricchione (2005:730–739) argues that markets for coups supported by mercenaries expanded as colonial interests took hold and weak governments became easy targets. Interestingly, during the decolonisation period the market became even more lucrative. De Wolf (2006:321–322) argues that it was as a result of the cruel behaviour of mercenaries in several decolonisation conflicts in Africa during the 1960s and 1970s, that many countries agreed that it was necessary to prohibit mercenary activities, which led to the inclusion of article 47 of Additional Protocol I to the Geneva Conventions and the drafting of the 1989 International Convention against the Recruitment, Use, Financing and Training of Mercenaries which came into force in 2001. Given the interest of the ever-growing PMSCs (and mercenaries alike) in Africa’s extractive industry, it is disturbing that the AU (whose objectives include, *inter alia*, the promotion of peace, security and stability in Africa)⁸ has to date not revised the OAU/AU Mercenary Convention. Such a revision would not be possible if the challenges posed by PMSCs on the continent are not addressed.

Types of mercenaries

Sapone (1999:13–16) divides the mercenaries into two groups. The first are the adventurer-mercenaries, to whom he refers as ‘loose bands of mercenaries

[that] have been common participants in small, obscure wars since the mid-1960s', adding that many of them had experienced disciplinary problems while serving in state armies. According to Sapone adventurer-mercenaries seek a provisional existence at the margins of states and many of them profess to be unwilling to fight for an unjust cause. In other words, they do not just sell their military labour to any willing buyer, which dispels the notion that making money from their activities is always the motivating and overriding force.

The second type of mercenary which Sapone (1999:17–18) identifies, are the multinational military corporations, whose purpose is purely commercial. The example Sapone gives of this type of 'mercenary' is Executive Outcomes, a defunct South African private company, which Sapone defines as 'a mercenary multinational corporation who sold their military labor on an international market'. According to Sapone, Executive Outcomes represented an inversion of the commodity system in the sense that it was in the first place an autonomous military organisation that usurped the economic and political power of states, and in the second place it produced a convincing counter-ideology that legitimised the alienability of military labour with certain restrictions.

Sapone unfortunately adopts a wrong approach in that he identifies PMCs with mercenaries, as informed by his example of Executive Outcomes. He uses the activities that Executive Outcomes undertook during its heydays as a primary example of mercenarism. While accepting that just like a chameleon, a PMC can change its activities and be classified as a mercenary, this does not mean that all PMCs are mercenaries. Conversely, not every mercenary is a PMC. While it is true that a PMC and a mercenary may have military expertise in common, it is the manner and contexts in which the military expertise is used that determine whether a mercenary activity is taking place or not.

Singer (2001/02:191) argues that mercenaries are by their very nature 'understood to be individually-based in unit and thus ad-hoc in organization'. This presupposes that a mercenary operates as an individual and is often contracted at the spur of the moment. He further argues that mercenaries 'work for one client and, focused as they are on combat, provide only one service: guns for hire ... Although their trade is technically banned by international law, mercenaries remain active in nearly every ongoing conflict. But because of their ad hoc nature, they lack cohesion and discipline, and thus their strategic impact is limited.' It is their unorganised nature, lack of cohesion and discipline that makes mercenaries lethal and thus outlawed in Africa.

What remains a contemporary challenge is that because of the lack of a universal definition of mercenaries and PMSCs, one person's freedom fighter

could be another's rebel. To some, PMSCs will remain mercenaries yet others regard them as 'peace ambassadors'. It is unfortunate that international law is not solving the problem, either. Rosky (2004:908–909) reveals a painful truth about PMCs, which is worth noting:

Generally, PMCs do everything but fight: They train foreign troops before wars, provide back line support during wars, and perform peacekeeping duties after wars. They tend to be rather taciturn and mysterious when asked how often they exercise force. They are especially reluctant to say that they initiate combat for clients. There is no question that they often find themselves in combat zones, and on front lines, but they claim to restrict themselves to logical and defensive tasks. They studiously avoid labels like 'mercenaries' or 'soldiers for hire,' preferring to market themselves as 'private security firms,' staffed by officers who are 'professionals,' 'leaders,' and 'strategists' and soldiers who are 'advisors,' 'specialists,' and 'peacekeepers.' Both the industry and the clientele are committed to guarding the secrets of particular missions. Thus, it is hard to know when, how, and how much PMCs exercise force. But it has become increasingly obvious that some do.

Under international law, one thing that is certain is that mercenaries are undesirable. Kassebaum (2000:589) succinctly argues that the impetus for prohibiting the use of mercenaries was the experiences of African nations with mercenaries during their wars of independence. One challenge is that although mercenaries are undesirable under international law, the fact that different international regimes define mercenaries differently makes it difficult to understand what exactly is outlawed. In terms of some international instruments PMSCs are defined as mercenaries, thus prohibiting them, but in terms of others they are not.

That mercenary activities still take place especially in Africa is not in doubt. Sapone (1999:1) argues that the increase in mercenary activities is a result of what he calls the flourishing 'international black market of military services'. This is true in the sense that military services are a trade without any effective regulatory systems in place.

Article 47(2) of the 1997 Additional Protocol I to the Geneva Conventions, which is most widely used, provides that a mercenary is anyone 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, 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
- 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

This definition is cumulative in the sense that a mercenary is defined as someone to whom all of the above must apply (Desai 2005:839). As Fallah (2006:608) rightly pointed out, article 47(2) is mirrored by article 1(1) of the OAU/UN Mercenary Convention in all respects except for the part that deals with motivation. While the latter only talks of material compensation, the former requires that such material compensation must be 'substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party' in article 47(2)(c). This definition is unfortunately very narrow and it easy to be excluded on these grounds.

In so far as the motivation requirement is concerned, the United Kingdom's House of Commons Report (2001 :6) which aimed at outlining options for the control of private military companies which operate out of the [United Kingdom], its dependencies, and the British Islands noted that 'a number of governments including the British Government regard [the Geneva Convention] definition unworkable, 'because determining the motives of an actor is by its nature impractical, and one can easily devise a contract to place the contractor outside the definition'.

In terms of article 47(1) of Additional Protocol I, a mercenary 'shall not have the right to be a combatant or a prisoner of war'. According to Kalshoven and Zegveld (2001:90) 'it was notably the group of African States who fought for acceptance of this exception, which in Western eyes goes against the basic idea of the right to be a prisoner of war ought not to be dependent on the motives, no matter how objectionable, which prompt someone to take part in hostilities'. This provision also found its way into the Mercenary Convention. An important

point raised by Fricchione (2005:740) is that the Geneva Conventions' definition 'introduces the conceptual difficulties in defining mercenary activity for modern warfare'. Modern warfare also includes non-state actors such as PMSCs and the flaws reflected in the definition of a mercenary make it possible for PMSCs to engage in 'mercenary' activities without breaking the law.

Spear (2006:48) argues that the list of conditions in article 47(1) has led a number of commentators to conclude that it is almost impossible to classify employees of PMSCs as mercenaries. In this regard Shearer (1998:18–19) notes that 'as long as these companies and their clients word contracts in a manner that excludes them from the cumulative effect of Article 47, they will fall outside its purview'. Spear also refers to an interesting statement by Best (1980:328) who argues that '[a]ny mercenary that cannot exclude himself from this definition deserved to be shot – and his lawyer with him'.

Addressing the challenges of mercenaries and PMSCs

One of the challenges facing the international community today is that the traditional definitions of mercenarism were not designed to encompass PMSCs, the form in which mercenary bands are embodied today (Coleman 2004:1509). Coleman's argument presupposes that mercenary bands are now embodied in PMSCs and if he is correct, it should be a cause for concern because while the latter is allowed to operate, the former is not. The question of whether PMSCs are mercenaries remains a contentious issue. To resolve the matter Singer (2003:40–50) proposed six criteria to distinguish mercenaries from PMSCs

- A mercenary is not a citizen of the state in which he or she is fighting
- A mercenary is not integrated into any national force, and is bound only by contractual ties of a limited employee
- A mercenary fights for individual short-term economic reward, not for political or religious goals
- A mercenary is brought in by circuitous ways in order to avoid legal prosecution
- A mercenary usually functions in 'temporary and ad hoc' groups, perhaps due to the black market nature of the business
- A mercenary's focus is only on 'combat service for single clients'

The PMSCs cannot be pinned down under this criteria because of the following: One, their organisation is a prior corporate structure; two, their motives are driven by business profit rather than individual profit; three, PMSCs are legal, public entities active in the open market; four, their services have a wider range and their clientele are varied; five, their recruitment is public and specialised; and six, in terms of links, they have ties to corporate holdings and financial markets.

While there are not many domestic legal regimes that address the challenges posed by PMSCs and mercenaries in Africa at the national level, the best example is that of South Africa where first, private security actors are regulated both at the domestic and international levels and second, mercenary activities by South African nationals and permanent residents are prohibited. Private security actors are regulated and controlled in terms of two legal instruments, namely the Private Security Industry Regulation Act of 2001 (PSI Act) and the Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act 27 of 2006 (Mercenary Act) – not yet in force.⁹ While the PSI Act is aimed at regulating private security actors within South Africa (ie at the national level), the Mercenary Act is, as the name suggests, aimed at prohibiting mercenary activities and regulating certain activities in a country of armed conflict, that is, at the international level.

In terms of the section 1 of the PSI Act, ‘security service’ is defined as the provision of one or more of the following services: protecting or safeguarding a person or property in any manner; giving advice on the protection or safeguarding of a person or property or on any other type of security service as contemplated in the Act or on the use of security equipment;¹⁰ providing a reactive or response service in connection with safeguarding of any person or property in any manner; providing a service aimed at ensuring order and safety on premises used for sporting, recreational, entertainment or similar purposes; manufacturing, importing, distributing or advertising monitoring devices as contemplated in the Interception and Monitoring Prohibition Act of 1992; performing the functions of a private investigator;¹¹ providing security training or instruction to a security provider or prospective security service provider; installing, servicing or repairing security equipment; performing functions of a locksmith; making a person or the services of a person available, whether directly or indirectly, for rendering the above to another person; managing, controlling or supervising the rendering of the above; and creating the impression, in any manner, that one or more of the services as mentioned above are rendered.

As was stated above, the Mercenary Act provides for a legislative measure aimed at curtailing unauthorised and opaque PMCs/PSCs operating in a

regulated country or area and regulating the recruitment of South African citizens and permanent residents. It prohibits any person from being involved in mercenary activities, which includes any person who participates as a combatant for gain in an armed force; any person who directly or indirectly recruits, uses, trains, supports or finances a combatant for private gain in an armed conflict (however, there is no doubt that the South African public security forces are training for the private sector); any person who directly or indirectly participates in any manner in the initiation, causing or furthering of an armed conflict or a coup d'état, uprising or rebellion against any government; and any person who directly or indirectly performs any act aimed at overthrowing a government or undermining the constitutional order, sovereignty or territorial integrity of a state (section 2).

The Mercenary Act specifically prohibits and regulates certain assistance or rendering of services in a country of armed conflict. In terms of section 3 of the Mercenary Act, no person may undertake, within the Republic or elsewhere, the following without the authorisation of the National Conventional Arms Control Committee:

- Negotiate or offer to provide any assistance or render any service to a party to an armed conflict or in a regulated country
- Provide any assistance or render any service to a party to an armed conflict or in a regulated country
- Recruit, use, train, support or finance any person to provide assistance or render any service to a party to an armed conflict or in a regulated country
- Perform any act that has the result of furthering the military interests of a party to an armed conflict or in a regulated country

The Mercenary Act further prohibits and regulates the enlistment of South Africans in armed forces (section 4). Accordingly, no South African or permanent resident is permitted to enlist in any armed force other than the Defence Force, including an armed force of any foreign state, unless it has been authorised by the committee. In the event that such authorisation is granted, it may also be revoked if the authorised person takes part in an armed conflict as a member of an armed force other than the Defence Force.

In section 5 the Mercenary Act also prohibits and regulates humanitarian assistance in a country of armed conflict. This means that no South African

humanitarian organisation is permitted to provide humanitarian assistance in a country of armed conflict or regulated country unless it registers with the Arms Control Committee for that specific purpose. This provision seeks to also control those PMSCs that are involved in the provision of humanitarian assistance in areas of armed conflict or a regulated country. For a country to be regulated, it has to be proclaimed as such by the President in the *Government Gazette* in terms of section 6 of the Mercenary Act.

The reasons which the committee may advance in denying authorisation include the following

- That such authorisation is in conflict with South Africa's obligation in terms of international law
- That it would result in the infringement of human rights and fundamental freedoms in the territory where the assistance or service is to be rendered or the exemption granted
- That it endangers the peace by introducing destabilising military capability into the region or territory where the assistance or service, or humanitarian aid, is or is likely to be, provided or rendered
- That it would contribute to regional instability or negatively influence the balance of power in such region or territory
- That it in any manner supports or encourages any terrorist activity or terrorist and related activities (as defined in section 1 of the Protection of Constitutional Democracy against Terrorist and Related Activities Act of 2004)
- That it in any manner initiates, causes or furthers an armed conflict, or a coup d'état, uprising or rebellion against a government
- That it prejudices South Africa's national or international interests

In so far as the domestic dimension is concerned, the PSI Act is very important because of the swelling numbers of the private security actors within South Africa's borders. The fact that the number of PSC personnel and the size of PSC budgets both exceed those of public law enforcement agencies should be a cause for concern. For instance, there are 129 583 (excluding civilians) South African police officers and the ratio of police officers to citizens is one police officer for every 365 citizens. According to the latest statistics provided

by the Private Security Industry Regulatory Authority (2006:35, 40), there were 4 763 active private security businesses and 296 901 active registered security officers in 2006. This means that the private security officers outnumber the South African police officers by two to one.

The Mercenary Act is mainly aimed at regulating the provision of assistance or service of a military-related nature in a country of armed conflict, the enlistment of South African citizens and permanent residents in other armed forces and the provision of humanitarian aid in a country of armed conflict. However, it also applies outside the borders in terms of section 11, the purpose being to cover those former apartheid security personnel who now work in the private security industry or as mercenaries. While the Mercenary Act does at first glance seem to provide a regulatory framework, a closer investigation suggests otherwise. The Mercenary Act is arguably a prohibitive mechanism that seeks a complete ban on South Africans with security or military expertise operating abroad. The South African government views exportation of security or military expertise as a security threat, and the Blackwater incident in Iraq attests to the fact that if not effectively regulated, private security actors in conflict situations can pose a security threat to innocent civilians.

Not only African states like South Africa are being challenged by the emergence of the private security industry at the national level. In the US, private security guards have outnumbered public police officers by a ratio of three to one since the 1970s, with American spending on private security guards (US\$90 billion) being more than double its spending on public police (US\$40 billion) every year (Rosky 2004:987). As the industry continues to grow, the fine line between ordinary security guards and military operatives becomes even thinner. Owing to the laws of demand and supply, many PSCs, such as Blackwater USA, have had to refocus their operations. Scahill (2007) succinctly describes the rise of the Blackwater USA, the 'world's most powerful mercenary army' and argues that Blackwater's true fame and fortune was gained in the aftermath of 9/11, when it formed Blackwater Security Consulting in 2002. Regrettably, just like other private contractors in Iraq, Blackwater was not regulated and controlled by Iraqi law, as the Coalition Provision Authority (CPA) Order 17, dated 27 June 2004, granted the private security companies immunity from Iraqi law.

The challenges posed by mercenaries and PMSCs can best be addressed by means of security sector reform (SSR). According to Bryden (2006:3) SSR concepts form a bridge with security policy, peace and democracy promotion and development assistance. This cross-sectional character has

an integrating effect, which means that SSR reaches beyond the state to for example armed non-state actors. In addressing the African continental SSR strategy, there is a great need for African practitioners to rethink strategies that could best regulate and control the private security industry on the continent. This could only be achieved by a thorough understanding of the dynamics around the privatisation of security, including the fact that PMSCs and mercenaries are not the same. It is only then that the enactment and possible strengthening of effective laws can be undertaken. Such laws should not only be put in place but they should also be enforced. It is critical that the regulation of private security be undertaken at all levels, that is at domestic, regional and international levels. The regulatory frameworks should cover the roles and types of services that private security actors may provide; the criteria used for licensing and deregistration processes; the application of the regulatory frameworks within and outside the territory in which they are established; the control of the use of force and firearms; the training and professional requirements; the vetting and licensing of security operatives; and the standards for transparency and oversight mechanisms.

On the question of oversight, it is important that all programmes which address this issue with regard to public police and military also include the private security industry within its ambit. On this point, parliamentarians should among others become involved in the privatisation of security debate both at the national and regional/international levels. At the level of the African Union,¹² the Pan-African Parliament should also be involved in shaping the African SSR strategy by amongst others involvement in the debates on the regulation and control of the private security industry in Africa. Parliaments are the representatives of the African people and in principle their opinion will reflect what the African people want regarding the privatisation of security in Africa.

Another strategy which has emerged within the private security industry is that of self-regulation, with private security actors forming associations and establishing voluntary codes of conduct to promote professionalism and set standards for the industry. This strategy must be promoted and supported within the African SSR strategy. The Code of Conduct and Ethics for the Private Security Sector, which was developed by the European Security Services and the Union Network International, Europa in 2003, is a good example in this regard. Within the African context it is important to note that although this strategy is supported, a self-regulatory code should be drawn up by the private security actors themselves and not just imposed to them by African states. Non-legal best practices should always be promoted in addressing the private security industry within the SSR.

Conclusion

This paper has attempted to explore the relationship between mercenaries and PMSCs in Africa. It pointed out the different definitions by commentators for both PMSCs and mercenaries and the general mistake of grouping them together. The paper highlighted the different types of mercenaries and discussed mercenaries in terms of international law regulations, particularly with regard to the 1977 Additional Protocol I to the Geneva Conventions whose definition is mirrored by the OAU/AU Mercenary Convention. A revision of these instruments would be impossible without addressing the issue of PMSCs, some of which are arguably in one way or the other a reincarnation of the traditional mercenaries. These discussions led to the consideration of the latter and the definition of a mercenary in particular. Last, a way forward was mapped based on first solving the definition problem of PMSCs and mercenaries, which should include addressing the challenges within an SSR strategy, second prohibiting mercenarism in Africa, and third regulating PMSCs. This was done with specific reference to South African legislation.

That mercenarism is strongly disapproved of under international law (Coleman 2004:1493) is not in dispute. What is in dispute is grouping mercenaries together with PMSCs. The absence of an international legal definition for the different types presents challenges in identifying which activities should be proscribed and which permitted. In this regard Jackson (2006:19) argues that African wars are:

... characterized by the involvement of a multiplicity and diversity of military and non-military actors: government military formations ... rebels, insurgents, private militias ... warlords, criminal gangs, mercenaries and private security providers, multinational corporations, local entrepreneurs and business interests, non-governmental organizations ... peacekeepers ... and child soldiers – among the many.

This confirms again that both mercenaries and PMSCs feature prominently in African wars, which do not necessarily conform to what Jackson (ibid) refers to as 'the conventional conception of organized, hierarchical and disciplined professional armies who fight in identifiable military uniform'. It is this lack of conformity which makes it easy for PMSCs to switch roles, enabling them to put maximising of profits at the head of their goals. According to Desai (2005:827)

... because of the ever-increasing drive to privatize government services and the current entrenched use of PMCs, even if one

believes military force should never be used, its use will not likely soon disappear. Yet the same motivation that may lead one to argue PMC use should be banned also demand that the industry needs to be regulated.

It is disturbing that PMSCs, especially from outside the African continent, are considering Africa fair game in their robust 'empire-building and extension drive' without African preparedness for such an 'invasion'. The use of PMSCs and mercenaries by both state and non-state actors in Africa will always occur. And so will the confusion about the distinction between PMSCs and mercenaries. Unless and until the AU addresses this confusion by initiating a dialogue that will culminate in the drafting and adoption of two legal instruments that would focus on the regulation of PMSCs in Africa and the prohibition of mercenarism in Africa, the concerns and problems surrounding the emergence of PMSCs and the mercenary activities will also be with us forever. It is the AU, in its Constitutive Act, that has underscored the 'need to promote peace, security and stability as a prerequisite for the implementation of [Africa's] development and integration agenda' (preamble); stated the objective to 'promote peace, security, and stability on the continent' (art 3); and is guided by the principle of 'peaceful coexistence of Member States and their right to live in peace and security' (art 4(i)). Addressing the challenges of PMSCs and mercenaries in Africa is a step to the direction of promoting peace, security and stability on the continent. While the debate has already begun, the ball still remains in the AU's court.

Notes

- 1 See DynCorp International Press Release March 31, 2008 'DynCorp International Awarded Police Training Work in Haiti and Liberia' <http://www.dyn-intl.com/subpage.aspx?id=317> [accessed 15 July 2008].
- 2 The role of DynCorp as well as other PMSCs in Africa seems to be profound. However, it is doubtful whether Africa is ready to host such corporations in the name of 'peace and security'. One aspect, which is always lacking in this discourse, is the thorough understanding by Africans of the phenomenon of private security at both the domestic and international levels and its impact on the continent.
- 3 A caveat must certainly be sounded because if Simon Mann could switch roles, every person in the private security/military industry is capable of doing so (Gumedze 2008).
- 4 On PMCs, see <http://www.sourcewatch.org/index.php?title=PMC> [accessed 28 June 2007].

- 5 Adopted on 3 July 1977 and entered into force on 22 April 1985.
- 6 Act 27 of 2006 is not yet in force, however, as the South African government is still working on the regulations to complete it before it is proclaimed in a *Government Gazette* as operational by the President of the Republic of South Africa.
- 7 See, for instance, the South African Prohibition of Certain Activities in Country of Armed Conflict Act 27 of 2006.
- 8 See article 3 of the Constitutive Act of the AU.
- 9 The Act was passed on 17 November 2006 by the National Council of Provinces and was assented to by the President of the Republic on 12 November 2007, after which it shall effectively come into force by proclamation in the *Government Gazette* in terms of section 16 of the Act.
- 10 Security equipment means an alarm; a safe, vault or secured container; a satellite tracking device, closed-circuit television or bomb detection, fire detection, metal detection, x-ray inspection, or for securing telephone communications; or a specialised device to open, close or engage locking mechanisms or to reproduce or duplicate keys or other objects which are used to unlock, close or engage locking mechanisms.
- 11 In terms of the Act, a private investigator means a person who, in a private capacity and for the benefit of another person, investigates the identity, actions, character, background or property of another person, without the consent of such a person, but does not include –
 - (a) auditors, accountants, attorneys, advocates or forensic scientists conducting investigations which fall within the formal and reasonable course and scope of their professional functions;
 - (b) internal investigators conducting normal and reasonable investigations into employee misconduct;
 - (c) internal investigators conducting investigations which a business, other than an investigating business, may undertake in the course and scope of its normal and reasonable endeavours to safeguard its security, strategic, operational or business interests.
- 12 See article 3 (5) of the Protocol to the Treaty Establishing the African Economic Community Relating to the Pan-African Parliament, adopted 2 March 2001 and entered into force on 14 December 2003.

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CHAPTER 2

‘AFRICAN MERCENARISM’

Mpako Foaleng¹

Introduction

When analysing the role of mercenaries and the right to self-determination in the African context, one could be tempted to perceive mercenarism as an activity mainly undertaken by non-Africans – with a few exceptions like apartheid South Africa. This view, which is not necessarily wrong, has been fed by the fact that well-known mercenaries such as Bob Denard, Christian Tavernier, Mike Hoare and Jean Schramme were nationals of ex-colonial powers, or simply whites. In addition, mercenary activities were undertaken in countries which had just gained independence – such as Congo, Angola, Benin, the Seychelles and the Comoros, to cite a few – and who were struggling to consolidate their sovereign power. The mercenaries took advantage of the misadventures of the post-decolonisation process and of the Cold War battle as played out on the African continent.

This does not mean that Africans themselves have not taken part in mercenary activities on the continent. However, they usually formed part of non-African mercenary groups fighting to maintain colonial links and the economic interests of the former colonial powers. Despite this form of participation, the role played by Africans in mercenary activities on the African continent – with the exception of apartheid and post-apartheid South Africa – seems to be underestimated and understudied.² Certainly, this is the case because mercenarism is viewed through the lens of post-decolonisation, neo-colonialism and the right to self-determination and territorial integrity as referred to in the OAU/AU Convention on the Elimination of Mercenarism in Africa of 1977 (the OAU/AU Mercenary Convention) and the UN (International) Convention against the Recruitment, Use, Financing and Training of Mercenaries of 1989 (the UN or International Mercenary Convention). Even though researchers have recently become more interested in the transformation of mercenarism and the role of the private military companies and private security companies, the phenomena have been looked at through a neo-colonialist lens (Musah & Kayode Fayemi 2000).

There are historical examples, albeit rare, of activities by African mercenary groups. Since the end of the Cold War, the African continent has experienced a number of armed conflicts. They have shaped different societies and contributed

to the proliferation of non-state armed groups who provide services of a military nature in foreign countries. Apart from whether they conform to the present definitions of a mercenary, one could argue that the activities carried out by these non-state armed groups are of a mercenary nature, given the economic interest that they have in pursuing military activities. In addition, in the 18 years since the end of the Cold War there has been a number of situations bearing the characteristics of what can be called contemporary African mercenarism or, in other words, mercenary activities undertaken by Africans in Africa. Indeed, the militarisation of conflict that has affected societies is linked to the multiplication of non-state armed groups and the proliferation of small arms and light weapons, the end of armed conflicts in other areas/states and the failure of the disarmament and demobilisation and reintegration process that follows. This is further linked to the rising numbers of children who are recruited into the military forces. These situations and circumstances in many cases create contexts and a huge pool of labour for mercenary activity on the African continent. The conflicts in West Africa have produced a cross-border migrant population of young fighters who were abducted and forcibly recruited by rebels in Liberia or Sierra Leone, usually as children, and who later viewed war as mainly an economic opportunity (Human Rights Watch March 2005:1).

This paper will analyse the phenomenon of African mercenarism (with the exception of apartheid South Africa), what it is and which challenges it represents to efforts to improve human security and eliminate the phenomenon on the continent. It will study and identify emerging issues, manifestations and trends regarding mercenaries or mercenary-related activities and their impact on human security. The first part of the paper will go through the legal provisions contained in the conventions and the literature in order to explore the concept of mercenarism. The second part tries to answer the question of whether one can talk about African mercenarism by investigating Africans' involvement in mercenarism, including in its contemporary manifestations. The third part analyses the impact of such activities on human security in order to draw attention to contemporary challenges and future directions which should inform the ongoing reflections on the revision of the OAU/AU Mercenary Convention. Finally, brief case studies illustrate the arguments presented.

Defining mercenarism

Provisions of international conventions on mercenarism

Many forms of armed forces use, for example in covert aggressions (such as decolonisation or post-colonial wars) which are undertaken by or with

non-state armed groups, are not explicitly provided for by the international legal system and especially by UN Charter. Consequently the international community resorted to the creation of conventions to fill the gaps posed by these uses of force.

Three international conventions attempt to give a definition of a mercenary, albeit not comprehensively, as they face the classical problem inherent to any attempt to provide a definition that reflects the factual situations (Chateau 2001:98–102; Shearer 1998). These are, in chronological order, article 47 of Additional Protocol I of 8 June 1977 to the Geneva Conventions of 12 August 1949 (Additional Protocol I), followed by the OAU/AU Convention on the Elimination of Mercenaries in Africa of 3 July 1977 (the OAU/AU Mercenary Convention) and the International Convention on the Recruitment, Use, Financing and Training of Mercenaries of 4 December 1989 (the UN (International) Mercenary Convention).

Article 47 of Additional Protocol I

Article 47 of Additional Protocol I relates to the protection of victims of international armed conflicts. It states that a mercenary is any person who:

- is specially recruited locally or abroad in order to fight in an armed conflict
- does, in fact, take a direct part in the hostilities
- 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
- is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict
- is not a member of the armed forces of a party to the conflict
- 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

This article raises some points that are difficult to apply in the African context. Additional Protocol I applies only to situations of international armed conflicts

and wars for self-determination, in the form of conflicts between liberation movements and colonial powers. Accordingly, civil wars which are the main scenarios found on the African continent, are not part of its scope. All the conditions described in each section have to be met in order for a person to qualify as a mercenary. In addition, it is difficult to establish when someone is motivated by 'the desire for private gain', which in some circumstances on the African continent may be confused with the desire for survival. The level of material compensation has to be substantially 'in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that party'. In the African context, it may be difficult to establish the substantiality of the excess. This is the case because many factors have to be considered. One of these is the original standard of living of the combatants in their countries of origin or elsewhere. If the original standard of living was lower than what is promised, it is immaterial whether that promised compensation is higher or lower than payment received by a combatant of a similar rank. Moreover, could it then be said that no mercenary activity is taking place in cases where the gain is not excessive?

The condition of section (d) is problematic because apart from the problem posed by a combatant holding a double nationality, African frontiers are porous and there are populations that straddle borders where generally states have not yet consolidated their administrative control. These make it difficult to pin down an African mercenary on the grounds of nationality or residence. Are combatants of non-state armed groups (militia or rebel groups) based in a neighbouring country (be it with or without the approval of the host country), residents of that country?

Generally, it can be said that Additional Protocol I does not necessarily outlaw mercenarism nor does it condemn the phenomenon as such. It aims at preventing mercenaries from enjoying the rights afforded by the statute to prisoners of war.

OAU/AU Convention for the Elimination of Mercenaries in Africa

The OAU/AU Convention for the Elimination of Mercenarism in Africa (the OAU/AU Mercenary Convention) was adopted less than a month after Additional Protocol I, on 3 July 1977. In the preamble it refers to mercenarism as a grave threat to 'the independence, sovereignty, territorial integrity and harmonious development of Member States of the Organization of African Unity' and to 'the legitimate exercise of the right of African People under colonial and racist domination to their independence and freedom'. Apart from the major concern raised by the reference to the right to self-

determination from colonial and racist domination, it is interesting to note that the reference to the preservation of the 'territorial integrity and harmonious development' broadens the scope of application of the Convention to include situations of civil war.

The first section of article 1 of the OAU/UN Mercenary Convention incorporates the provisions of the article 47 of the Additional Protocol, with a few exceptions. First, the convention refers to armed conflicts and not only an armed conflict, to provide for the fact that a mercenary may be hired to fight in different conflict situations. Second, in article I(1(c)) the c deals with the motivation element and limits itself to 'the desire for private gain' through 'material compensation', and thus excludes the comparative factor provided for in article 1(c) of Additional Protocol I. Thus, the remark above about the distinction between the desire or need for 'survival or protection' and the desire for 'private gain' remains valid here.

The OAU/AU Mercenary Convention is considered to be outdated and may be useless in the current armed conflict context on the African continent, because it does not regulate the activities of private security and military companies and other private military actors currently at the heart of the privatisation of security. However, one could argue that the UN Charter is outdated, too. The difference is that in the case of the UN Charter, there are organs that continuously contribute to its interpretation, thus keeping it flexible.

The reference in article I(1(a)) to the mode of compensation of the mercenary states that it can be material or 'otherwise'. One can argue that this provision addresses the concern previously raised in connection with article I(1) about the difficulty of distinguishing between the desire or need for 'survival or protection' and the desire for 'private gain'. In other words, the specific reference to 'otherwise' could be interpreted as anything apart from money that the combatant mercenary receives in exchange of his/her services, be it as an individual or as part of an armed group.

Although many African countries have in practice violated the OAU Convention, the provision in the second section of article I, regarding the type of actors susceptible to committing the crime of mercenarism, that is, 'individual, group or association, representatives of a State and the State itself', is still relevant.

Articles 5 and 6 of the convention condemn governments that recruit mercenaries to suppress national liberation movements in their struggle for self-determination, and give them the responsibility to act so as to eradicate all mercenary activities in Africa. However, the convention does not

condemn governments that resort to mercenaries or other types of foreign armed groups to defend themselves from internal threat to their regimes, which seems to contradict the obligation to contribute to the eradication of mercenarism in Africa. The convention seems to have been envisaged for consolidated and well functioning states but not necessarily for dictatorships and illegitimate governments. More recently, since the end of the Cold War, many African leaders have resorted to all sorts of military help in order to ensure the survival of their regimes, most of which have been illegitimate, despite the fact that many of them have learnt how to manipulate their constitutions in order to remain in power.

The UN (International) Convention on the Recruitment, Use, Financing and Training of Mercenaries

The third is the International Convention on the Recruitment, Use, Financing and Training of Mercenaries, of 4 December 1989. This convention also incorporates the definition of article 47 of Additional Protocol I, except for subparagraph (b). As is the case with the conventions mentioned above, this convention does not clarify the definition of the activities surrounding mercenarism, either. In addition, it would be very difficult to meet all the conditions set out in article I(1).

There are some comments that apply to all three conventions. The principle of self-determination may lend itself to different interpretations. Mercenary activity is identified with opposition to liberation struggles (Sandoz 1999:204), which begs the question of whether African countries were aware of the fact that the fight for self-determination could – beyond the unresolved colonial problems that some of them were facing – be undertaken by people under a regime that they perceived as a colonial one or as impeding them from enjoying all rights that go along with sovereignty? This leads to the question of how a liberation movement should be defined? For instance, during civil war, Unita in Angola claimed to be fighting for self-determination of the Angolan population because according to its leadership, the members of the MPLA, the party then in power, were not real Angolans but *assimilados*. Although this claim has never been recognised by other African countries, it raises the question of who is entitled to exert the right to self-determination. The Covenant on Civil and Political Rights of 16 December 1966, the International Covenant on Economic, Social and Cultural Rights of 3 January 1976, and the African Charter on Human and People's Rights of 21 October 1986 all recognise the right to self-determination by all peoples and their right not be deprived of their wealth and resources.³ In the name of these rights African people may turn against their government, which would be a

civil war if it becomes an armed conflict. Moreover, the conventions do not condemn states that resort to mercenaries or other forms of armed groups to defend themselves from internal threats represented by rebellions.

The conventions on mercenarism were drafted for formally functioning and effective states, as is evidenced by the fact that states should be able to put in place national jurisdictions strong enough to perform the responsibilities contained, for instance, in articles 5 and 6 of the OAU/UN Mercenary Convention and article 6 of the International Mercenary Convention. However, in the African context, the regimes of many countries are struggling to remain in power and they furthermore do not necessarily control all armed activities undertaken on their territories.

The literature on mercenarism

In order to understand and circumscribe the phenomenon of mercenarism, I will now look at explanations for the word ‘mercenary’, starting with dictionary meanings.

The Longman Dictionary of Contemporary English defines a ‘mercenary’ simply as ‘a soldier who fights for any country or group that pays him, not for his own country’. The Oxford Essential Dictionary of the US Military defines a ‘mercenary’ as ‘a professional soldier hired to serve in a foreign army’. In the literature on the subject, mercenaries are often described as ‘soldiers for hire’, ‘dogs of war’ or ‘soldiers of fortune’.

According to Schreier and Caparini (2005:16), ‘traditionally, mercenaries have been defined as non-nationals hired to take direct part in armed conflicts. The primary motivation is said to be monetary gain rather than loyalty to a nation-state. This is why they are also called soldiers of fortune’. Mercenaries fight for governments or groups in other countries for a substantial monetary reward and according to Nathan (1997:10–12), mercenaries are ‘soldiers hired by a foreign government or rebel movement to contribute to the prosecution of armed conflict – whether directly by engaging in hostilities or indirectly through training, logistics, intelligence or advisory services – and who do so outside the authority of the government and defence force of their own country’.

Generally, mercenaries have claimed to be motivated by altruistic, ideological or religious aims; nevertheless, the fact is that they are hired to fight a war or take part in attacks in a country other than their own. Mercenaries also claim to promote security (Goddard 2001:8), but one could ask ‘security for whom’

because in many African countries security for the regime has not always coincided with the security and the stability for the whole country and its citizens, that is, including human security.

After the end of the Cold War, the phenomenon of mercenarism developed in two directions. On the one hand, there are actors whose activities, although undertaken within the broad context of the privatisation of security, in substance look like those of mercenaries. The actors in this category have progressively taken on a corporate edge and in general do not want to be identified with mercenarism. These are private security and private military companies. On the other hand, there are those who can be described as mercenaries in the classical – negative – sense of the term. As Schreier and Caparini (2005:16) put it, mercenaries 'can be misguided adventures, but often they are merely disreputable thugs, ready to enlist for any cause or power ready to pay them'.

The image of mercenaries is a negative one because they are associated with clandestine or criminal activities and trafficking. For some, the term is pejorative as it conjures up an image of a hardened white soldier brutally intervening in an African country for financial gain. Mercenarism, however, is an activity engaged in throughout the world. Although it is not confined to the African continent, this continent does appear to be the most affected by the phenomenon. However, in the last two decades mercenaries have progressively extended their activities to other areas of the world such as Asia, the Balkans, Central America and the South Pacific.

Whereas the different international provisions and the literature define who the mercenary is, they do not provide a comprehensive view of mercenary activities. The international conventions have been criticised and are considered to be outdated in part because they do not take into consideration the activities of companies acting in the private security sector (Gumedze 2007:13–14).

Contemporary mercenarism in Africa

African nationals have also taken part in mercenary operations in Africa, acting clearly as mercenaries. For instance, in the case of Mobutu Sese Seko's Zaire, mercenaries from Morocco were involved in addition to Western mercenaries, and helped Mobutu fight against the two rebellion attacks of Shaba I and II in the 1970s. In the process they actually served French, Belgian and American interests by keeping control over Zaire's

minerals. Another example, also from Zaire, is that of Moroccan, Angolan, Mozambican and South African nationals hired by a mercenary group led by Europeans. This mercenary group was made up of some 300 combatants of different nationalities, trained by former French presidential guard officer Colonel Alain Le Carro, former Gendarme Robert Montoya, and the Serbian commando Lieutenant Milorad Palemis, to defend the Mobutu regime between 1996 and 1997. Following Mobutu's defeat, they moved to Congo-Brazzaville, where they fought for the besieged Lissouba government (Boyne 1997; Agence France-Presse 1997).

Since the end of the Cold War, Africa has experienced a number of military events that have shaped security needs and concerns. These have resulted in the development of different trends which lead one to question whether it is possible to identify a certain pattern in and the development of, a contemporary African mercenarism.

The proliferation of armed conflicts

Since gaining independence, a number of African countries have experienced decades of instability, misrule, corruption, military coups and low-intensity conflict, interspersed with periods of full-scale civil war with international dimensions. Others have resisted, and experienced a type of stability mainly because of conditions prevailing internationally. Indeed, in some cases, the social struggle was taken hostage by Cold War politics, which was the source of weapon supplies that extended civil wars and dictatorial regimes. The cases of Angola and Mozambique, of Zaire under Mobutu and Uganda under Idi Amin Dada are examples of protracted civil wars and dictatorships that occurred on the continent during that period. However, the end of the Cold War and its client-like relationship between the superpowers and African countries resulted in a power vacuum and even the countries that had been relatively stable experienced civil armed conflict. One of the results was, as Rupesinghe and Ni Anderlini (1998:8) put it, 'the spread of violence and the emergence of disparate groups, ostensibly fighting in the name of ideology, religion or ethnicity, but seeking to finance their operations through local taxation, plunder and pillage'. All major sub-regions of the continent were affected, as is clear from table 1.

Against this background Zartman and Aleksandrovich Kremeyuk (1995:XI, 16) explain that many armed conflicts, mainly internal, which erupted at that time were augmented in frequency and numbers, lasted for years, and were more murderous than those that occurred during the Cold War period when

Table 1 Civil armed conflicts of different intensities in Africa since the end of the Cold War

| | |
|------------------------------|-----------------------------|
| Algeria | 1992–1998 |
| Angola | 1992–2002 |
| Burundi | 1991– |
| Central African Republic | 1996–1998, 2000–2003, 2005– |
| Democratic Republic of Congo | 1996–1997, 1998– |
| Republic of the Congo | 1997– 2000 |
| Côte d'Ivoire | 2002– |
| Djibouti | 1991–1994 |
| Ethiopia | 1974–1991 |
| Liberia | 1989–1996, 1997–2003 |
| Mali | 1990–1996 |
| Mozambique | 1976–1992 |
| Niger | 1990–1994 |
| Rwanda | 1990–1997 |
| Sierra Leone | 1991–2002 |
| Senegal (Casamance) | 1990–2004 |
| Somalia | 1988–1992 |
| Sudan | 1983– |
| Uganda | 1986– |

Source: Foaleng (2005:65).

the superpowers were in control. Protracted conflicts and sporadic outbursts of wars were also considered to be endemic to developing countries.

Although Gurr and Marshall, with Khosla (2000) have argued that there was a sharp increase in the total magnitude of violent conflict within societies from the 1950s to 1980s throughout the world, there is statistical proof that the most murderous and devastating civil wars after 1990 were localised in Africa (Eriksson, Sollenberg & Wallensteen 2003).

The proliferation of armed conflicts has been accompanied by the proliferation of non-state armed groups and combatants.

Proliferation of non-state armed groups and combatants

Before trying to understand the proliferation of armed groups, it should be emphasised that non-state armed groups are non-state actors. Non-state actors are not new to world politics. Yet during the 1990s, they commanded unprecedented attention due to the increased interest in their role in intrastate conflicts, in international politics and in assistance to regional organisations and the United Nations in peace maintenance.⁴ The term 'non-state actors' in itself holds nothing but a negative meaning. It depends on how we choose to define this concept, which can be understood as including or excluding some types of organisations that are not state entities. The term refers to a wide range of actors, with non-state actors in general referring to those actors that are not conceived as states in the sense of an entity internationally recognised as having an international personality and being an active member of the interstate system. This could be a de facto regime with the factual characteristics of a state, or an international organisation, non-governmental organisation, armed group and faction, mercenary, business firm and company, or any individual or group of individuals (Gordenker & Weiss 1995:357–359). Of importance for this paper are non-state armed groups and individual combatants.

Armed groups can be insurgents engaged in political and military attacks aimed at destroying and replacing the power and the legitimacy of the ruling government. The insurgents can carry out military attacks against the governmental forces or even against each other. This category includes militia groups made up of irregular and recognisable armed forces operating within an ungoverned area of a territory, not necessarily with the goal of overthrowing the government, or based in neighbouring countries.

The proliferation of armed conflicts on the African continent led to the rapid growth of rebel movements, militias and factions and it was reflected by the proliferation of warlords. Warlords are in fact leaders of armed groups or bands that can number up to several thousand, who control part of the national territory or of a neighbouring country (Duffield 1997:18). The lack of cohesion and discipline in these military organisations can lead to multiple splits and thus the multiplication of armed groups. According to Hansen (2003:83), the warlord system consists of four tiers, namely the 'the warlords themselves, their close subordinates, their military commanders and their soldiers. Because of a

Table 2 Non-state armed groups in the DRC armed conflict

| Between 1996 and 1997 | Since 1998 |
|--|---|
| <p>National rebel group</p> <ul style="list-style-type: none"> • AFDL: Alliance des forces démocratiques pour la libération du Congo <p>Local armed group</p> <ul style="list-style-type: none"> • Mayi-Mayi | <p>National rebel movements</p> <ul style="list-style-type: none"> • MLC: Mouvement de Libération du Congo • RCD-Congo: Rassemblement congolais pour la démocratie (rebel group made up of MLC and RCD-Goma dissidents) • RCD: Rassemblement congolais pour la démocratie • RCD-Goma of Ilunga • RCD-K/ML: RCD-Kisangani/Mouvement de libération • RCD-N: RCD-National <p>Local armed groups</p> <ul style="list-style-type: none"> • FIPI: Front pour l'intégration et la paix en Ituri • FLC: Front de libération du Congo (merger of MLC and RCD-ML) • FNI: Front nationaliste intégrationniste • FPDC: Forces populaires pour la démocratie au Congo • FRPI Front de résistance patriotique de l'Ituri • Mayi-Mayi • PUSIC : Parti pour l'unité et la sauvegarde de l'intégrité du Congo • UPC: Union des Patriotes Congolais <p>Foreign non-state armed groups</p> <ul style="list-style-type: none"> • ADF: Allied Democratic Forces • LRA: Lord's Resistance Army • WNBFB: West Nile Bank Front • UNRF II: Uganda National Rescue Front II • FUNA: Former Ugandan National Army • FDD: Forces burundaises de défense pour la démocratie • UNITA: União Nacional para a Independência Total de Angola • FDLR: Democratic Liberation Forces of Rwanda |

lack of a central administration with the ability to collect taxes and distribute resources efficiently, the close subordinates and the military commanders often have to be granted an independent source of income – thus, they acquire a certain independent power base'. Some armed groups are decentralised economically and each military commander can find a source of income for

Table 3 Non-state armed groups in the Liberian armed conflict

| Between 1989 and 1997 | Between 1999 and 2003 |
|--|---|
| <p>National rebel movement</p> <ul style="list-style-type: none"> • INPFL: Independent National Patriotic Front of Liberia • LPC: Liberia Peace Council • NPFL: National Patriotic Front of Liberia • NPFL-CRC: National Patriotic Front of Liberia-Central Revolutionary Council • PRC: People’s Redemption Council • ULIMO: United Liberation Movement of Liberia • ULIMO-J: of Roosevelt Johnson • ULIMO-K: of Alhaji G V Koroma • Lofa Defense Force • Liberia National Council | <p>National rebel movement</p> <ul style="list-style-type: none"> • LURD: Liberians United for Reconciliation and Democracy • MODEL: Movement for Democracy in Liberia |

Source: Foaleng 2007:127–128.

his sub-group, and then become militarily independent. The weakness in the hierarchical cohesion of the armed group allows different armed factions to provide security services where possible – even if it is not like well-structured companies – in order to survive. It is estimated that over the past 15 years, more than 400 non-state armed groups that are not military firms, in some 90 countries, have been the driving forces in low-intensity conflicts. More conventional non-state groups have developed survival techniques in order to finance themselves (Ghebali 2001:32; Foaleng 2005:61–74). In tables 2 and 3 an attempt is made to identify non-state armed groups that were active in the conflicts in the Democratic Republic of Congo (DRC) and Liberia and in major armed conflicts in the Great Lakes region and West Africa.

When an armed group disappears as a fighting force, the combatants do not necessarily stop being combatants, but search for new jobs as soldiers. In this way non-state armed groups form a pool of combatants. As they split up into smaller groups, they in turn hire new combatants (often young boys and girls) who add to the pool. Thus it is estimated that at the official end of the conflict in the DRC, there were at least 130 000 combatants, including 2 610 women and 30 200 children, who had already been demobilised while thousands more were still awaiting demobilisation or continued to operate as militias despite the end of the civil war (IRIN 2007). In Liberia at least 101 000 persons, including women and children, were demobilised at the end of the conflict in 2003.

Arms trafficking and increased militarisation

The proliferation of armed conflicts, armed groups and combatants was accompanied by an increase in arms trafficking and militarisation of societies. Consequently situations of armed conflict in Africa became markets for arms trafficking. Arms traffickers called intermediaries played an important role in the provision of weapons to the protagonists of wars in exchange for financial gain, as evidenced by numerous reports of the UN panel of experts mandated to enquire into the violation of arms embargos. In fact, since the 1990s more military weapons have been in the hands of non-state actors than in the hands of national governments (Lewis 1998). There are many areas of low-intensity conflict, and areas where communities have a high need to provide for their own security – especially at the borders where governments have lost control because of the porosity of the frontiers – which have contributed to the rapid spread of small and light weapons. This proliferation of arms within countries has led to a greater concern about internal rather than external threats among governments. Even though the threat may seem to come from a neighbouring country, it is actually about internal matters (Mandel 1999:39–46). In addition, local communities are increasingly accessing weapons in order to provide for their own security.

Non-state armed groups, non-state combatants and mercenary activities

It is considered a difficult task to distinguish the activities of the groups of actors identified in this section from mercenarism, as it closely resembles mercenarism. According to O'Brien (2000:62) private armies, militias and warlords are private forces and combatants that represent the next rung of mercenaries. He adds that 'although such forces can include mercenaries in organised numbers (such as 5 Commando in the Belgian Congo during its wars of the 1960s), these groupings do not always have a national outlook to their conflict; indeed, these groups can often be transnational, supported by whatever country they can obtain funds and hardware at any given time, and fight simply for control of a region or resources'. He cites as examples in this category 'diverse entities as transnational terrorist organisations, religiously-motivated combatant groups (such as those supported by the Islamic Brotherhood), and leaders such as [the late] John Garang in Sudan' (ibid).

The activities of non-state armed groups that can be considered to be mercenary in nature can be traced back to the Cold War period. Rebel non-state actors also manipulated ideologies to suit their needs. This was for example a strategy used by the Front for the National Liberation of the

Congo (*Front pour la Libération Nationale du Congo*, FLNC) a rebel group from the then Zaire which was based in Angola. The FLNC manipulated the ideological confrontation to secure political and military support from the Angolan MPLA and Soviet block by declaring the movement to be a political front along the lines of a 'Leninist revolutionary party' (Willame 1980:14). However, the movement had fought for so many divergent causes that its ideological position and clear motivation was open to question. The group fought not only for the secession of Katanga (1960–1963), the Congolese central government (1964–1966) and Portuguese colonialists in Angola (1968–1974), but also the MPLA in Angola (1974–1977). All along, the movement was concerned with its survival, and its ability to maintain the group and its combatants, while continuing its desperate fight against the Mobutu regime. Consequently, it sold its services to different and opposing actors such as the Portuguese and the MPLA government in Angola, in exchange of monetary gains.

More recently, many of these non-state armed groups and combatants have undertaken activities close to mercenarism, even though they continue to officially exist as rebel or militia groups. The fact that these categories of actors 'fight with more organisation than mercenaries and their efforts [and] are more directed over longer periods of time' (O'Brien 2000:62) do not prevent them from undertaking mercenary-like activities in exchange for gain or 'otherwise', as defined in the OAU/AU Mercenary Convention. The gain could take the form of training and experience because, while rebel groups are used as mercenaries by the host government in its internal fight against a rebellion, the government is actually contributing to the enhancement of the military skills of the rebel combatants, enabling them to become better trained and more prepared to carry on their combat in their country of origin.

Mercenaries are normally used as combatants to defend a country or a regime from internal or external threats or to instigate a rebellion. With the end of the Cold War the superpowers left the African continent and many of its regimes with fewer resources for their survival. African states have increasingly faced internal threats, 'hence leading to the proliferation of non-state actors assuming the security role traditionally played by states or global organisations' (Cilliers & Dietrich 1996). As Schreier and Caparini (2005:17) put it:

Mercenaries generally are temporary and *ad hoc* groupings of individual soldiers that are recruited in oblique and circuitous ways, in order to avoid legal prosecution. Lacking the professionalism and discipline that come from prior organization, integration, and doctrine, mercenaries are often limited

in their capabilities. Overall, they are unable to provide anything other than direct combat at the small-unit level and some limited military training. They regularly remain dependent on their host communities for logistics and support. Large-scale or long-term training and consulting missions are, like engineering and logistics, mostly outside their scope.

Non-state armies are increasingly becoming specialised in fighting for foreign states and are actually fighting others' wars for them, by selling security services to their host government. Rebel groups that are based in neighbouring countries could, as a reward to the state harbouring them, from time to time agree to be incorporated into the army of that state and help to carry out military operations against an internal rebellion there. For instance, in their fights against internal rebellions, as the case of the FLNC in Angola mentioned above, states have enlisted the help of foreign non-state armed groups for military activities.

Young boys and girls initially forcibly recruited, sometimes have no alternative but to consider combat as their profession. Thus soldiering becomes a way of survival, because there are no better prospects for reintegration in their countries of origin. Again citing Schreier and Caparini (2005:16):

Sometimes, they are veterans of a past war or an insurgency looking for whatever new conflict to continue in what they did before: fighting. Thus, what pulls people into the mercenary trade is not necessarily a motivation based entirely on monetary gain, but often the self-awareness that this is the only life style which such an individual can have. The failure of reeducation or training programs to provide hope to former combatants often plays a major role in making them continue life as warriors. For some who have spent the last decade in combat, the realization that they do not fit into the civilian society can be a prime motivator to mercenary activity.

One of the main challenges at the end of an armed conflict to ensure that peace is consolidated is to return former combatants to civilian life. In many cases, programmes for DDR have not proved to be successful. This is particularly challenging in sub-regions where resolution of an armed conflict in one area or country may be followed by armed conflict starting up in another country in the region, perpetuating a vicious circle between conflict and peace. In West Africa the conflict in Sierra Leone followed the one in Liberia, which was in turn followed by conflict in Côte d'Ivoire. The same occurred in the Great Lakes region, where conflict in the DRC followed that in Rwanda, Burundi and Uganda. All those conflicts have links and

connections and provide sources of mercenary combatants for each other. For many of these mercenary combatants, war has become the best way to survive in situations when and where there is little prospect for a return to civilian life.

The porosity of border areas is a major contributing factor to the movement of combatants from one country to another. Most countries emerging from war have a low development level, which does not offer much hope to demobilised combatants. These combatants therefore seek new jobs in fragile neighbouring countries with which their country of origin share porous borders. Generally, the rise of regional conflicts and network-based transnational crime seriously undermine the ability of both weak and strong states to control their borders. However, the need to secure defensible borders is even more important when transnational non-state armed groups straddle porous border areas. For example, in the case of Guinea, out of 9 000 ex-volunteers (including children) who had been hired by the government in 2000–2001 to repel cross-border attacks from the Sierra Leone non-state armed group the Revolutionary United Front and Charles Taylor's Liberia, some 3 879 combatants had yet to be demobilised by 2005. While some were integrated into the army and some joined the marching bands or went back to civilian life, many of the demobilised combatants became available for hire as soldiers in conflicts in neighbouring countries (Bergman & Florquin 2005:160, 280).

Another example: in 1994 during a lull in the civil war in Liberia that led to the start of a disarmament process, it was reported that the combatants of all parties to be disarmed and demobilised numbered approximately 60 000, of whom as many as 25 per cent were children. This disarmament process failed, as did many others that followed. There was no possibility of integration into a national armed force, as the national army disintegrated once the civil war started in December 1989 (UN 1994, para 24). As a result of the economic conditions in Liberia, many combatants resorted to the rule of the gun in order to feed themselves and their families and when the disarmament process failed, many of the combatants went back to war or to banditry, often in neighbouring countries (UN 1995, para 41).

If mercenaries are combatants that operate outside their own countries, it is also generally accepted that combatants who operate outside their own countries are a major challenge to peace and security in Africa. Such 'combatants on foreign soil' had been involved in conflicts in the Great Lakes region and West Africa. For instance, in December 2004 in Liberia, 612 of the more than 101 000 combatants who were disarmed identified

themselves as foreign nationals: 50 were from Côte d'Ivoire, 1 from Ghana, 308 from Guinea, 4 from Mali, 7 from Nigeria and 242 from Sierra Leone (UN 2004, para 24). No fewer than 15 000 foreign combatants have also been identified in the DRC since 2000. It is estimated that there are still 7 000 to 8 000 foreign combatants in the DRC (IRIN 2007). These were not necessarily combatants on official duty of their governments or fighting for ideological reasons, but professional soldiers.

Human security issues

Human security is a relatively new concept which is people-centred (UNDP 1994:23). The goal of the 'national security' concept has traditionally related to the need to defend a country from external threats, whereas the human security concept focuses on the protection of individuals. The classic conception of security has evolved to such an extent that it has become largely irrelevant with regard to conflicts between states. The focus of human security, namely on the protection of individuals and communities from any type of violence, stems from the fact that conflicts within states make up more than 95 per cent of armed conflicts. An ongoing debate which opposes the view of protection from violence, which is considered to be too restrictive, advocates instead a broader view of human security which includes protection from economic insecurity and threats to human dignity.⁵ According to article 1(k) of the AU Non-Aggression and Common Defence Pact of 31 January 2005 (which still needs to be ratified):

'Human Security' means the security of the individual in terms of satisfaction of his/her basic needs. It also includes the creation of social, economic, political, environmental and cultural conditions necessary for the survival and dignity of the individual, the protection of and respect for human rights, good governance and the guarantee for each individual of opportunities and choices for his/her full development.

According to the UNDP Report on Human Development (1994:23), human security 'is concerned with how people live and breathe in a society, how freely they exercise their many choices, how much access they have to market and social opportunities – and whether they live in conflict or in peace'.

In many cases, however, the violence that individuals and communities endure in situations of armed conflict also puts them in an insecure economic situation and undermines their dignity. In Africa the increasing

privatisation of security as a result of the involvement of rising numbers of non-state armed groups and combatants, has also led to higher human costs, as illustrated by the refugee crisis, internal displacements and human rights and humanitarian law violations. The presence of non-state armed groups particularly in porous border areas contribute to the deterioration of the security situation and to increased vulnerability of resident populations. This has been the case along the south-eastern border of Chad with Sudan's Darfur, the eastern areas of the DRC bordering Uganda, Rwanda and Burundi and the northern areas of the Central African Republic (CAR) along the borders with Chad and Sudan's Darfur.

With regard to smaller ad hoc groups of mercenaries from Russia, Ukraine, Belarus, the Balkan countries, South Africa, Israel, the UK, France, the US and other countries who have been fighting in the Balkans and Caucasus conflicts, Schreier and Caparini (2005:17) elaborate:

[S]uch units may be infiltrated by criminals on the run, terrorists or guerrillas in disguise, sadistic psychopaths, intelligence officers, etc. These 'dogs of war' are known for their disloyalty and lack of discipline. Many have committed acts of banditry, rape, and an array of atrocities in the mutilated host countries ... The misgivings about this type of mercenaries are that they are freelance soldiers of no fixed abode, who, for large amounts of money, fight for dubious causes. They are said to be inherently ruthless, sometimes help to fuel and prolong conflicts, are disloyal, cannot really be relied up on, and can easily switch sides to the highest bidder in any war zone. This is why the term 'mercenary' is a loaded and subjective one, carrying lots of emotional baggage and connotations.

In a way, this also holds good for those non-state armed actors and combatants identified previously, whose accountability still have to be established with regard to human rights abuses and humanitarian law violations committed during the course of their activities. Their involvement in conflict situations have in many cases added to the already damaged human security in conflict situations. These violations may include exploitation of human resources, as occurred in the case of the DRC.⁶ The violations include also the use of child soldiers, atrocities such as rape, abductions, maiming, torture, confiscation of livestock, killing of unarmed civilians, and the destruction of granaries, schools, hospitals and other public buildings. Sometimes governments that resort to use of actors considered to be mercenaries in this article, give them tacit permission to extract their payment from civilians – as is often the case with their own soldiers.

A brief review of some recent cases of African mercenary activities in Africa

Central African Republic

Congolese mercenaries

When faced with an internal rebellion led by François Bozizé between 2001 and 2003, President Ange Félix Patassé sought help outside the country as he could not rely on his own army. Indeed, after the failed coup attempt of 28 May 2001, the army almost completely disintegrated and many soldiers fled to neighbouring countries. Very few remained in the CAR. Officially, Libya sent troops to assist Patassé to quell the rebellion, but he also called for assistance from the *Movement de Libération du Congo* (MLC), a rebel group based and active in the neighbouring DRC, which sent some 1 500 mercenaries to assist Patassé in his effort to squash the rebellion. Bemba's rebel group provided the assistance because they needed an opening for the trade of natural resources he was exploiting in the DRC. However, Bemba and his mercenaries supposedly also received diamonds to the value of some CFA5 billion as payment for their assistance to Patassé (FIDH 2006:14–15).

Chadian mercenaries

The northern part of the Central African Republic bordering on Chad and Sudan is an area in which the government of CAR has almost no control. Numerous non-state armed groups and armed men from Chad, CAR and Sudan operate in the area, ready to offer their services to the highest bidder. Given the state absence in the area these actors also operate as highway bandits and terrorise the residents. Some of the Chadian groups act with the acquiescence and at the request of the CAR government. Patassé had previously hired Chadians to help protect him from internal threat. The best known of these is a group of some 300 mercenaries lead by Martin Koumtanmadji Nadingar, alias Abdulaye Miskine, who was charged by Patassé with the responsibility of securing the northern part of the country during the troubles of 2001 to 2003 (FIDH 2006:23–24). There is some debate over the true country of origin of Miskine, who is said to have been born in the border area between Chad and CAR.

Bozizé also received assistance from Chadian mercenaries when he overthrew the regime of Patassé in March 2003. However, after the coup Bozizé was unable to pay the salaries promised to the mercenaries, also called ex-libérateurs. Fighting erupted when the mercenaries demanded

to be paid about US\$1 800 each for their assistance to President François Bozizé. CAR security forces clashed with the group of Chadian mercenary fighters in a northern suburb of Bangui, the capital of the CAR, on a number of occasions.

Human security issues

During the different cycles of violence in CAR since 2000, the civilian population has been the main victim. Civilians have been subject to continuous assault by the belligerents, rebels and loyalists, including the mercenaries they were using. The crimes committed include repetitive forced displacement, rape (which was used systematically as weapon of war against women, men and children, especially in the 2002/03 conflict) and looting, killing and violent attacks. Up to two million people have been affected by the conflict and many have taken refuge in the bush and in neighbouring Chad and Cameroon. Some of these crimes were committed by the MLC mercenaries led by Abdulaye Miskine during their presence in the CAR (FIDH 2006:23–24; see also IDMC 2007a). Consequently in May 2007 the International Criminal Court decided to open an investigation into crimes allegedly committed in 2002 and 2003, and to monitor the current situation in CAR.

Chad

Sudanese mercenaries in Chad

The Sudanese government has been facing a rebellion in the western region of Darfur since early 2003. The rebellion involved rebel factions and militia groups who accused the government of neglecting the region. The Chadian government is facing a rebellion led by numerous Chadian rebel groups in eastern Chad, which borders on the Darfur region. These groups are based in western Darfur and are reportedly receiving support from the Sudanese government in their fight against the Chadian government of Idriss Deby. Similarly, the Sudanese rebel groups based in eastern Chad are supported by the Chadian government. Although it is not clear why the Sudanese groups are receiving support from the Chadian government, it is known that it has been using the Sudanese rebels to undertake operations against the Chadian rebel groups. These groups thus provide military services, in exchange for their survival as a rebel group or simply as human beings in a very difficult environment where scarce resources are causing tensions between different communities.

Some 20 non-state armed groups have been identified in eastern Chad. It is not known how big these armed groups are, but they certainly represent a reservoir of potential combatants for recruitment to fight in foreign wars.

Human security issues

According to Human Rights Watch (2007:12), armed groups that have proliferated 'along the Chad–Sudan–CAR border zone ... have committed serious crimes against civilians in Chad that may amount to war crimes and crimes against humanity'. Since the conflict in Darfur started in 2003, some 230 000 Sudanese civilians have taken refuge in south-eastern Chad, more than 170 000 Chadians have been internally displaced, while 45 000 Chadians have taken refuge in Darfur. Attacks against civilians which have included Sudanese rebel groups fighting alongside Chadian forces include rape, banditry and harassment. The insecurity caused by the presence of different armed groups in south-eastern Chad is hampering enjoyment of a whole range of rights of these civilians, including access to food, water, shelter and livelihood (IDMC 2007b).

West Africa

Liberian mercenaries hired by Guinean dissidents

During the conflicts that has ravaged West Africa (see Human Rights Watch 2005), especially Liberia, Sierra Leone, and to a certain extent Guinea, since the 1990s, many combatants participated in clashes in neighbouring countries, to which they were rarely sent by their own governments on official duties. For instance, it was reported that Guinean dissidents known as the Movement of the Democratic Forces of Guinea, hired Liberian fighters at between US\$150 and US\$200 in a bid to overthrow the Guinean government (Bergman & Florquin 2005:280). The dissidents were based in Liberia and backed by the Taylor regime (logistical support and finance) and the Revolutionary United Front of Foday Sankoh from Sierra Leone (IRIN 2004).

Liberians hired by rebel groups in Côte d'Ivoire

The other West African area where a number of African mercenaries were hired and used by all parties at war was Côte d'Ivoire. Before the failed coup attempt of 2002 which turned into a civil war, President Robert Guei – who had come to power after a military coup in December 1999 – had hired Liberian mercenaries to help him stay in power. During the second half of

2002 the government of Laurent Gbagbo hired South African mercenaries, while the rebel groups in the north hired Liberian (often along ethnic lines) and Sierra Leonean mercenaries to fight on their side (Libération 2003). In reaction to reports about the presence of mercenaries in Côte d'Ivoire, the UN Security Council (2003a; 2003b) called upon states neighbouring Côte d'Ivoire to prevent 'mercenaries across their borders and the illicit trafficking and proliferation in the region of arms, especially small arms and light weapons'.

Human security issues

The conflicts in West Africa triggered an intractable round of forced displacements of civilian populations at the regional level, of which some lasted a few weeks and some for several years, and some recurred many times, in Liberia, Sierra Leone, Guinea and Côte d'Ivoire (IDMC 2006). Although the thousands of young African mercenaries involved in conflicts in West Africa have been victims themselves, they have committed serious human rights crimes against civilians, often on a widespread systematic scale.

Conclusion

According to Schreier and Caparini (2005), 'today, it is the presence of African mercenaries, either individually, through tribal affiliations, or through the forcing of intervention by external national government actors with private interests and concerns in foreign conflicts throughout the continent, that far outnumbers the presence of any Western actors involved in Africa's conflicts'. Indeed, many African countries have long suffered from a vicious cycle of armed conflict, bad governance, economic decline, political upheaval, corruption, and exploitation by leaders that resulted in rebel insurgencies made up of largely unemployed and frustrated youths.—After the end of the conflict and the subsequent failure of DDR processes, many youths made war their profession, giving life to what is called 'contemporary African mercenarism' in this paper. This phenomenon has been exacerbated in Africa by the existence of porous borders with insufficient governmental controls between countries. Cross-border mercenarism in African comes at a high human cost as the combatants undertake their activities (including loot, pillage, killing, torture and rape) in total impunity.

If there is a major challenge which the existing conventions on mercenaries did not foresee within the African context, it is the strong need for the implementation of an effective rehabilitation and reintegration programme for ex-combatants. The needs of former African combatants scouring the

continent for emerging conflicts have to be addressed by providing them with alternatives to war to earn their living.

African countries should continue to fight against mercenarism, which undermines the right to self-determination; however, more resources should be used to prevent African mercenarism from consolidating itself into a more corporate form. This will require major structural changes to border management between neighbouring countries as well as to the way in which countries decide to implement the provisions of the AU Non-Aggression and Common Defence Pact on human security if and when ever it enters into force.

Notes

- 1 The author would like to thank Beata Skwarska for her comments on the preliminary draft of this paper.
- 2 This article will not address apartheid and post-apartheid South Africa mercenary activities on the African continent because the subject is of particular importance and deserves to be studied separately.
- 3 Indeed, the two covenants state that:
 - '1. All peoples have the right of self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development.
 2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.'
- 4 See for instance the full conference proceedings of Engaging Non-state actors in a landmine ban: a pioneering conference (2001).
- 5 See the definition of the Commission on Human Security (2003:4) which includes situations in which conflict is absent: '... to protect the vital core of all human lives in ways that enhance human freedoms and human fulfilment. Human security means protecting fundamental freedoms – freedoms that are the essence of life. It means protecting people from critical (severe) and pervasive (widespread) threats and situations. It means using processes that build on people's strengths and aspirations. It means creating political, social, environmental, economic, military and cultural systems that together give people the building blocks of survival, livelihood and dignity.'
- 6 See for instance the addendum to the report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo (UN 2001, para 16).

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PART III

**THE EXTENT OF MERCENARISM
AND ITS IMPACT ON HUMAN
SECURITY AND HUMAN RIGHTS**

CHAPTER 3
‘ONE MAN’S VOLUNTEER IS
ANOTHER MAN’S MERCENARY?’
MAPPING THE EXTENT OF MERCENARISM AND
ITS IMPACT ON HUMAN SECURITY IN AFRICA

Sabelo J Ndlovu-Gatsheni and Gwinyayi A Dzinesa

Introduction

One of the key challenges to the emerging African security architecture is that of dealing with ‘new mercenarism’ as the ‘darker’ manifestation of the privatisation of security. The ‘traditional mercenary’ was easier to identify as a ‘dog of war’ and a ‘soldier of fortune’. The ‘new mercenary’ is harder to define and speaks of defending African sovereignty. The traditional mercenary emerged within the terrain of African struggles for independence and mainly fought on behalf of colonial regimes. The new mercenary has emerged in a complex new environment which is marked by privatisation and liberalisation together with the hegemony of the market. Within this environment, security has undergone privatisation and the state has lost its traditional monopoly over control of the resources and means of violence. At the centre of the discourse of privatisation of security are legitimate private security companies (PSCs), private military companies (PMCs) and private military contractors or private military firms. Within this terrain dominated by non-state providers of security, the key issue is that of the darker manifestations that lend credence to the continued relevance of the concept of mercenarism in Africa.

Four challenges have emerged from the new African security architecture. The first challenge is how to define mercenaries in a terrain dominated by legal private providers of security that are viewed very negatively in some quarters and very positively in others. The second challenge is how to establish the extent of mercenarism in Africa within an environment in which military activities remain part of the ‘top secret’ list. The third challenge is how to assess the impact of mercenarism on human security under the current circumstances where the definition of mercenary is not yet clear. The final challenge is how to regulate operations and activities of the private security sector and how to eliminate/ abolish those aspects of private security that amount to mercenarism. This chapter grapples with these complex issues in a rather generic way, exploring the challenges and complexities involved in dealing with issues of private security and mercenarism in Africa.

Methodological challenges

Owing to the clandestine and secretive nature and illegality of mercenary activities in general, it is proving very hard for those concerned with curbing mercenary activities to establish the extent of mercenarism in Africa and to measure its impact on human security. Compounding the difficulties of establishing the extent of mercenarism is the fact that mercenaries operate within complex corporate-political networks, to the extent that they sometimes operate alongside regular national forces in defence of particular African regimes. Second, mercenaries come in a variety of guises, and some have even taken on a corporate identity, which make them difficult to identify. The matter is further complicated by some having embedded themselves within non-lethal service providers (NSPs) in addition to PSCs and PMCs that are operating legally in Africa.

What is clear, however, is that any study of the extent of mercenarism in Africa and its impact is in a way also a study of the extent of African conflicts and the impact of those conflicts on human security in Africa. In other words, the exploration of mercenarism is inextricably intertwined with conflicts in Africa. This is not surprising, because mercenaries fish in the troubled waters of Africa and profit more from conflict zones than peace zones. In most cases these conflicts occur in regions rich in mineral and petroleum resources. By mapping the extent of mercenarism, which necessarily involves charting the conflict zones where mercenaries operate, it becomes possible to determine the broad areas of operations of mercenaries and so measure the impact of their involvement in African conflicts on human security. It is nevertheless very difficult to put actual numbers on mercenaries in operating in Africa.

Definitional conundrums and the state of the debate on mercenarism

In the context of proliferation of legitimate private military security companies (PMSCs), one needs to be careful in using the term mercenary. Although some people incorrectly equate mercenary companies with security companies, care should be taken to use the correct terminology, and distinguish between mercenaries and PMSCs. Since the adoption of The Hague Convention in 1907, across the OAU/AU Convention on the Elimination of Mercenarism in Africa (the OAU/AU Mercenary Convention) and up to the International Convention against the Recruitment, Use, Financing and Training of Mercenaries of 1989 (the UN (International) Mercenary Convention), the identity of the mercenary has been shifting, just as other identities shift over time.

The shifting identity of mercenary always occurred in tandem with the changing character of conflict and nature of war. Conflict and warfare in Africa has undergone a transformation, ranging from liberation struggles of the 1960s, military coups of the 1970s together with Cold War 'proxy wars', to the current intrastate wars of the post-Cold War period, and the present-day civil wars coupled with fratricidal resource-based conflicts in which PMSCs have featured prominently. One problem is that transformation of conflict and the entry of new non-state actors have not been accompanied by an adjustment of legal frameworks dealing with conflict and warfare. Legal framing has lagged behind the shifting character of conflict and is by its very nature reacting to situations and occurrences. It is within this context that the huge growth in PMSCs has taken regulatory organs by surprise, to the extent that it has no ready-made legal framework which can define and regulate and even abolish some of the darker aspects of the proliferation of private military security in Africa.

Motivating for the 'revision' of the OAU/AU Mercenary Convention, Sabelo Gumedze (2007:22) wrote that:

The revision of the 1977 Organisation of African Unity's Convention on the Elimination of Mercenarism (Mercenary Convention) is now long overdue. The existence of the Mercenary Convention has over the years failed to eliminate mercenarism in Africa, among others as a result of the manner in which it defines a 'mercenary'. The problem is exacerbated by the rapid growth of the private security sector in the form of private military/security companies (PMSCs), which to a large extent arguably represents a new form of 'mercenary' outfit that is technically not covered by the Mercenary Convention.

Definition conundrums become very pertinent in the context of the rise of the so-called 'new corporate mercenary' and the frantic efforts by NSPs/PSCs/PMCs to dissociate themselves from the mercenary label in preference of the security provider or military contractor labels.

In the changing global and regional security architecture in which PMSCs feature prominently, a universally accepted definition of the mercenary phenomenon remains elusive. Mercenaries operate within complex corporate-political networks, which make the task of distinguishing between mercenary and soldier more difficult as the former has operated tactically alongside national armed forces in conflict zones. Equally pertinent is the dispersal of the traditional and forbidden mercenaries within the blossoming legitimate Private Security Industry (PSI), involved in military activities that were

previously the prerogative of national defence forces. These private security providers include NSPs, PSCs and PMCs.

The international community, recognising the need to deal with the traditional mercenary problem, adopted article 47 of Additional Protocol I of 1977 to the Geneva Conventions. The article stripped the much maligned traditional freelance mercenaries, variously labelled ‘lawless guns for hire’ and ‘dogs of war’, of combatant and prisoner of war status in military confrontations. It provides a common definition of the traditional mercenary based on six criteria that have to be met cumulatively, which makes it difficult to label any individual as a mercenary.¹ The 1989 UN Convention outlawed and criminalised mercenarism. The OAU followed its lead by adopting the 1977 Convention, which came into force on 22 April 1985.² This move of the OAU came as no surprise in view of the continent’s well-documented mercenary involvement in coups and other subversive activities.

There is no consensual definition of the legitimate corporate security identities that have replaced traditional mercenaries. Holmqvist (2005:5–6) has noted that the term private security company is a contested one whose definition overlaps with the more mercenary connotations of private military companies. These can be categorised by the broad range of operations and services they typically provide (see table 1).

Table 1 Providers by type

| | Non-lethal service providers | Private security companies | Private military companies |
|----------------------------|---|--|--|
| Types of services provided | <ul style="list-style-type: none"> • Mine clearance • Logistics and supply • Risk consulting | <ul style="list-style-type: none"> • Industrial/commercial site protection • Humanitarian aid protection • Embassy/mission protection • VIP/close protection • Surveillance and investigation • Risk assessment and analysis | <ul style="list-style-type: none"> • Military training • Military intelligence • Offensive combat |

Source: Richards and Smith (2007:28)

These definitions and categorisations may have their imperfections and weaknesses, but do bring some clarity that is essential for an in-depth survey of the extent of mercenary forces in Africa. However, the problem is still that as long as there are unknown actors within the private military security industry, whose activities amount to mercenarism, they will always taint the whole industry. They would always represent a thin membrane between legitimate private security providers and mercenarism. As long as the motive of PMSCs is primarily commercial, they will find it difficult to shake off the mercenary label completely. As long as they make profits from conflict, war and crisis rather than from peace and harmony, the mercenary mark will stick to PMSCs. Their involvement in African conflict zones make their motives suspect.

In Africa private military service providers can be traced back to the onset of the independence era in the 1960 and 1970s. During that period colonial regimes employed traditional mercenaries against African national liberation movements. The modern variants – NSPs, PMCs and PSCs – became extensive in the post-Cold War era and some are still active in ongoing conflicts on the continent. The demise of apartheid in South Africa in the aftermath of the Cold War marked the end of Africa's decolonisation struggle. Post-Cold War downsizing of military forces coupled with problematic disarmament, demobilisation and reintegration programmes resulted in a ready supply of military specialists and weapons. At the same time the strategic security interests of the bigger powers shifted away from Africa, which created a security vacuum that fuelled the demand for private military service providers, who found their niche in the market in the conflict-weak state-extractive natural resources triangle.

In March 1998 former UN Secretary-General Kofi Annan (1997: 4) noted

Since 1970, more than thirty wars have been waged in Africa, and the majority of them have been regional ones. In the year 1996 alone, of the 53 African countries 14 were at war, causing more than half the total number of war victims around the world, more than eight million refugees and displaced persons.

The widespread conflict and violence in Africa coincided with an increasing demand for mercenaries/private military service providers. Private military service providers have the comparative advantage of cost-effectiveness and efficiency over state armies. Continued instability in countries such as the Democratic Republic of Congo (DRC), Uganda and Somalia provided markets as well as breeding grounds for mercenarism.

Governments, such as the governments of Angola and Sierra Leone, and non-state actors, including private companies, have been clients of private security providers, especially in those zones characterised by conflict and insecurity coupled with poor policing. International and regional organisations such as the UN and the ECOWAS Monitoring Group, ECOMOG, have also contracted private security providers for security and logistics support in their peace interventions.

Debate on the appropriate regulatory framework for the activities of the PSI and its roles in peace support and humanitarian and post-conflict reconstruction operations is ongoing. This debate is hampered by the lack of a definition of both mercenary and PMSCs. The biggest obstacle towards the acceptance of PMSCs, concerns reservations about the moral character of an industry which pursues profits in conflict zones. This is exacerbated by the fact that PMSCs are a new phenomenon, which means that Africa's response within security studies is new, too. The question is whether Africa can allow PMSCs to regulate themselves? There is general agreement that such an attitude would be fatal to the human lives involved. Careful vetting of the positive and the negative manifestations of private security sector is essential in the African context.

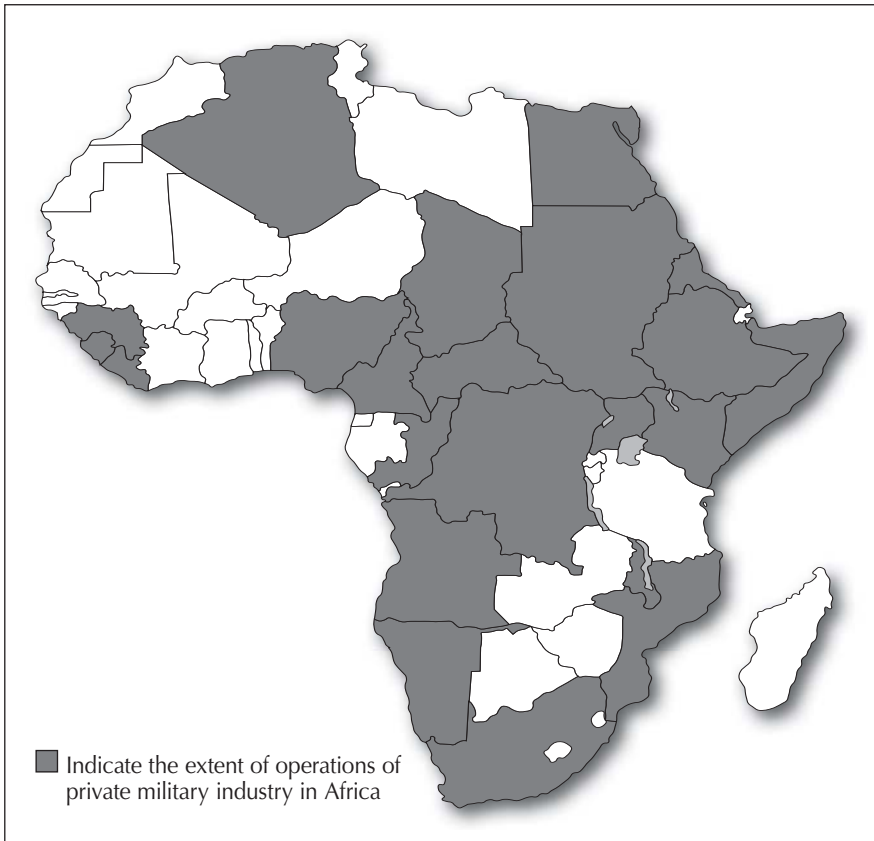
Mapping the extent of operations

Mapping the extent of operations of mercenaries in Africa is in essence an enterprise into locating where mercenaries operate and even to quantify the extent of their operations. It is one of the most challenging aspects of research on mercenaries. Figure 1 provides areas of concentration of mercenary activities.

Southern Africa

South Africa was one of the most prominent suppliers of traditional mercenaries in southern Africa. As shall become clear later, South African 'soldiers of fortune' provided services in post-colonial military conflicts from as early as 1960. A concomitant development of the demise of apartheid 14 years ago was the large-scale departure of mainly Afrikaner soldiers unwilling to serve under the new military dispensation, disbandment of units established for specific political purposes, such as 32 Buffalo Battalion, *Koevoet* (a police counter-insurgency unit) and later retrenchment of both white and black personnel from the new defence forces. This created a pool of highly skilled potential

Figure 1 Activities of the privatised military industry in Africa, 1991 to 2001



Source: Singer (2002:189)

recruits for the lucrative private military sector. This, combined with the wide availability of weapons, porous borders and presence of private airstrips, made South Africa a hive of mercenary activity. John Stremiau (quoted by Goering 2004) observed that ‘South Africa is one-stop shopping – capable, well-trained bodies with management skills and satellite phones’.

Table 1 lists the best-known military companies in Angola and South Africa. The most prominent South African mercenary company was Executive Outcomes (EO) which was established by Eeben Barlow, a former commander of the apartheid era’s counterinsurgency 32 Buffalo Battalion. EO did not maintain a permanent standing force but had a database of more than 2 000 contract soldiers (Isenberg 2005). These were

mainly ex-32 Battalion members, which enhanced EOs interoperability and potential for effectiveness. Notwithstanding its unsavoury origins, EO was prepared to export its services and marketed itself as a 'defender of African state security in the post-Cold War era'. EO conducted operations for the Popular Movement for the Liberation of Angola (MPLA), government, private mining and oil commercial facilities. Its well-documented military and security activities included training government fighters, air and logistical support for the national defence forces and protecting mining and oil fields. EO was dissolved on 1 January 1999 after South Africa introduced the 1998 Regulation of Foreign Military Assistance Act to bring to an end the country's reputation as 'a cesspool of mercenaries' (Stremlau quoted in Goering 2004: 4).

The South African government has taken the issue of mercenaries seriously, as is evidenced by the enactment of the Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act (No 27 of 2006). Section 2(1) of the Act deals directly with the pertinent issue of prohibition of mercenary activities in these words:

- 2(1) No person may within the Republic or elsewhere –
- (a) participate as combatant for private gain in an armed conflict
 - (b) directly or indirectly recruit, use, train, support or finance a combatant for private gain in an armed conflict
 - (c) directly or indirectly participate in any manner in the initiation, causing or furthering of –
 - (i) an armed conflict; or
 - (ii) a coup d'état, uprising or rebellion against any government;
 or
 - (d) directly or indirectly perform any act aimed at overthrowing a government or undermining the constitutional order, sovereignty or territorial integrity of a state

For a country like South Africa that has been the source of many mercenaries, an Act such as this sends a clear message and will hopefully assist in the prosecution of those who enlist and sell their military and security skills privately in furtherance of conflicts and violence.

EO and other companies that supply mercenaries may have officially closed shop in South Africa, but have been replaced by the emergence of a significant PSI. In May 2007 a total 1 083 659 individuals (active and inactive) were registered with the country's PSI Regulatory Authority.³ Of these, 301 586 were active in the industry. The total is particularly significant

if expressed in terms of a ratio of private security contractors to uniformed police, which was 4,4:1 in 1999 (Schönteich 1999).

Southern Africa: a market for mercenaries

Southern Africa exemplifies the nexus between extractive resources, neo-colonial commercial interests and conflict, insecurity and mercenaries. Mercenarism in the sub-region might have gained prominence with the Angolan civil war and currently the DRC (formerly the Belgian Congo and Zaire) conflict, but the phenomenon can be traced back to the attainment of independence in the 1960s. The DRC and Angola – two nations endowed with extractive resources – have been among the largest private military/mercenary markets in southern Africa since they gained independence.

The DRC was the formative territory for mercenary activity in post-colonial southern Africa. During its first decade of independence it was the theatre of three separate major mercenary incursions. In 1960 and 1961, soon after attaining independence, secessionist leader Moïse Tshombé, backed by the Belgian mining company *Union Minière du Haut Katanga* (UMHK), recruited about 200 *Compagnie Internationale* mercenaries who were mainly Belgian and South African nationals. Their secessionist mission regarding the mineral-rich Shaba province and protection of UMHK concessions was eventually thwarted by a joint UN-Congolese force. In 1964 to 1965 the CIA and then Katanga President Moïse Tshombé recruited a 1 000-strong Five Commando force, led by Colonel 'Mad Mike' Hoare, to fight patriotic nationalist forces led by Prime Minister Patrice Lumumba. The force, consisting of mainly South African, Belgian, French and Rhodesian nationals, defeated the nationalists. Patrice Lumumba was assassinated, resulting in a period of neo-colonialism. In 1967 the same force, then under the command of Bob Denard and Jacques Schramme, engaged in an abortive mission to overthrow President Mobutu Sese Seko.

From the late 1990s to the present the DRC was perhaps the ultimate illustration of a post-colonial market for mercenarism in southern Africa. In 1997 President Mobutu Sese Seko employed the White Legion⁴ in a vain attempt to help the weak Zairean army to ward off the onslaught of the Alliance of Democratic Forces for the Liberation of Congo-Zaire, which was headed by Laurent Désiré Kabila. Mercenary combatants were well represented in the armed rebellion against Kabila that ensued since 1998. They had been hired by the Kabila regime and private companies to protect mining and petroleum facilities, including Mbuji-Mayi, the diamond centre in Kasai Oriental.

The UN Mission in the DRC (MONUC) with the later mandate of securing peace in the DRC found it difficult to fulfil its security role in a complex situation, which led to proposals to privatise the peacekeeping function. In 1997 then UN Secretary-General Kofi Annan considered the possibility of recruiting a private firm to separate soldiers from refugees in Rwandan refugee camps in Goma. The UN High Commissioner for Refugees (UNHCR) later discussed the possible employment of private companies to ensure refugee security. This indicated how even the UN thought of using private forces in peace-keeping missions.

As recently as 2006, however, there were reports that 32 alleged mercenaries, including 19 South Africans, had been arrested for plotting a coup against President Joseph Kabila's government. They were employees of Omega Risk Solutions, a registered South Africa private security company, who had contracts with the Congolese government to train security personnel in Matadi, Boma and Mounda harbours. All were subsequently released.

Angola was a significant market for mercenarism in southern Africa between 1975 and 1998 and at least 26 mercenary operations were recorded during this period. The major contractors were the beleaguered MPLA government and insecure private business interests, mainly with mining and oil interests. Between 1993 and 1994 the government recruited EO on three separate occasions to provide military training and air and logistic support, with striking results. EO deployed about 500 contractors that paled into insignificance compared to Angola's defence force which numbered more than 100 000. The government stipulated that multinational corporations make provision for their own security – who mostly employed private security providers – which freed the army to confront UNITA. UNITA, on its part largely relied on mercenaries from South Africa, Namibia and Zaire to train its personnel and provide support in military operations.

West Africa

In the West African region private military service providers have been involved in the intertwined civil war dynamics of Sierra Leone, Liberia and Côte d'Ivoire. These countries are variously endowed with extractive mineral and petroleum resources, including high-quality diamonds and timber. Sierra Leone features prominently in West Africa as a link in the conflict-weak national army-strategic resource-mercenary chain. Multinational mining companies and the government of the day are the major customers of PMCs EO, Gurkha Security Guards, Control Risks Group and Defence Systems

Limited (DSL). As early as 1936, and again in the 1950s, mining giant De Beers used private security providers to protect its commercial interests. After an extended lull a significant resurgence in mercenary activities occurred at various stages during the 1991 to 2002 civil wars. In 1995 Sierra Leone's government hired EO to support its wavering war effort against the rebel Revolutionary United Front (RUF). The 500-strong EO force, comprising mostly South Africans, provided military training and support and received mining concessions as partial payment for its services.

Such was the scope of mercenarism that even peacekeeping forces made use of the services of PMCs. In its political-military initiatives in 1997 and 1998 to restore Tejah Kabbah, the deposed and democratically elected president of Sierra Leone, to power, ECOMOG relied on Sandline International, a British-based PMC, for logistics, intelligence and air support. The UN Development Programme (UNDP) is reported to have hired DSL to provide security for UN humanitarian relief convoys in 1998. The end of the decade-long war was accompanied by a lack of trust in the fledgling public policing force. This meant a continued demand for private security services by residential and commercial sectors. It is instructive that Sierra Leone has legislation in the form of the National Security and Central Intelligence Act of 2002 in place which is aimed at regulating the operations of the PSI.

The 2003 to 2007 Côte d'Ivoire armed conflict presented yet another opportunity in the region for mercenaries. According to reports by the UN special rapporteur, mercenaries from Eastern Europe, South Africa and Angola were involved alongside both President Laurent Gbagbo's embattled government and the rebels. The UN Special Rapporteur noted reports of this.

Central Africa

For the central African sub-region two stereotypical mercenary incidents linked with conflict and resources stand out. The first is the Central African Republic's 'forgotten conflict' in which former army chief François Bozizé employed mercenaries in a coup plot against then President Patassé in 2002. The mercenaries, dissatisfied with their material rewards, reportedly later organised into armed gangs which launched low-scale attacks against civilians as a form of self-recompense. The second is in Equatorial Guinea, where its vast oil reserves attracted 'dogs of war' in 2004, with 18 suspected mercenaries being arrested in the country and 67 in Zimbabwe on charges of plotting a coup against President Teodoro Obiang Nguema Mbasogo's government. Most of these had links with the former Battalion 32.

East Africa

Private military service providers have featured in conflicts in the unstable Horn of Africa region, too. Somalia, a typical example of a failed state, has predictably shown a preference for private security and the stateless economy, characterised by enforcement of protection money and kidnapping, stimulated dependence on private security networks (Grosse-Kettler 2004:11). In the absence of extractive mineral resources, security has become a commercial product. The extent of the privatisation of security is such that Médecins Sans Frontières and the International Committee of the Red Cross – two organisations reputedly averse to use of armed guards – purchased security to guarantee humanitarian access for aid convoys (Cockayne 2006a:6). Earlier, in 1992, the US Army Corps of Engineers contracted Kellogg, Brown & Root to provide logistical support for its UN-backed intervention in Somalia.

Mercenaries reportedly featured in both sides of the Ethiopian-Eritrean conflict of 1997 to 1999. Ethiopia hired Russian mercenaries to train its troops, leasing a complete air force from Russian aeronautics firm Sukhoi that included Su 27 jet fighter planes, pilots and ground staff (Singer 2002:205). Forces in Uganda's civil war also had interactions with mercenarism and PSCs, including EO, Saracen Uganda and AirScan, were recruited to provide military training and secure mining facilities between 1995 and 1998.

Impact of mercenary activity on human security in Africa

Wherever they went, civilians stopped dying. The trouble was that they only went where the pay-off was high (Harding 1997:92–93).

Mercenaries affect human security in Africa on a number of levels, both directly and indirectly. Before going into details, there is a need to understand what human security is about in the first place.

Human security has recently re-emerged as an addition to the traditional state-centric notions of security that are concerned with interstate security. It is not really a new concept. Households have always been concerned with human security and the emergence of states was in reality tied to the desire by groups of people to ensure their own security (Fell 2006:2). What is new is the entry of human security into mainstream studies of security, which led to new views on human security and its meaning in its various forms. While some analysts, such as Ruohomaki (2005:8), understood human security to be an alternative form of security, in reality it is a broadening of the

conception of security to cover even non-violent threats like disease, hunger and natural disasters (Ndlovu-Gatsheni 2003:297–322). In terms of human security, the human being is the core focus of protection instead of the state.

Many scholars who believe that human security is a new concept trace it to the UNDP Human Development Report, which brought the concept of human security into mainstream security studies. In this report human security was understood to be ‘the prerogative of the individual, and [it] links the concept of security inseparably to ideas of human rights and dignity to the relief of human suffering’ (Commission on Human Security 2003:1). Under this paradigm, security was broken into seven components, namely economic, food, health, environmental, personal, community and political security. Scholars such as Paris (2001:87) believe that human security is the ‘latest in a long line of neologisms – including common security, global security, cooperative security and comprehensive security – that encourage policy makers and scholars to think about international security as something more than military defence of states interests and territory’.

While the concept of human security incorporates elements of traditional security, it is new in that it moves the object of security from being the state to the people and their daily activities. Human security means that individual human beings are free from fear and want. Critics of the concept of human security argue that ‘the contemporary definition ... is ambiguous and vague, encompassing everything from physical security to psychological well being’ (Waisova 2003:59). Despite the fact that human security seems to encompass everything about human life and human needs, it is a useful concept that puts issues of human rights at the centre of the broader terrain of security.

The concept is important in the context of Africa where since the end of the Cold War, conflicts have tended to have an intrastate rather than interstate nature. Such intrastate conflicts have taken the form of civil wars, warlordism, and genocides (Reno 1998). The key examples are Sierra Leone, Sudan, Rwanda, Angola and the DRC. In these wars, non-combatants were direct targets of violence by rebels as well as government forces. Mercenary involvement added a third deadly element to the violation of human security in Africa. Peters (1996) noted that on a global scale ‘terrorists, mercenaries, guerrillas, warlords, militias, and other irregular armed forces are exacting a heavy toll from besieged populations and betraying the importance of national governments’, while Sir Walter Raleigh described mercenaries as ‘seditious, unfaithful, disobedient destroyers of all places and countries whither they are drawn as being held by no other bond than their own commodity’ (Mockler 1987:37).

The traditional mercenary has largely been replaced by security consultancies variously known as military security providers, private military companies and private security companies. Brooks (2000:1) is of the opinion that:

It is misleading and pejorative to use the term 'mercenary,' more correctly they are 'military service providers,' or MSPs. MSPs have little in common with the traditional image of a mercenary that stems from their activities in the 1960s and 1970s. MSPs are lawful, profit-seeking companies with corporate structures. They provide the whole gamut of legitimate services that were formally provided by national armies.

Brooks (2000:2) is not comfortable with the designation of MSPs, PMCs, and PSCs as latter-day mercenary firms that wreak havoc on human security in Africa. To him these firms are bringing hope to a hopeless continent through activities such as mine clearance and by addressing Africa's military security problems at affordable prices. To justify his positive evaluation of these military-security firms, Brooks (2000:3) groups them into three categories:

- *Non-lethal service providers:* These are companies that undertake a variety of non-combat operations that include provision of logistics for national armies, humanitarian operations, intelligence and mapping services, risk assessments for potential investors and mine clearance operations. Examples of such companies are the American company known as Brown & Root and the Zimbabwean company, Koch Mine Safe Ltd.
- *Private security companies:* These are companies that provide passive security for private and public facilities and operations in high-risk conflict zones. They generally guard resource mines and embassies, provide protection for personnel conducting humanitarian operations, and train indigenous security company personnel. Examples are South Africa's Saracen International and British Defence Systems Ltd (a subsidiary of the US company Armor Group).
- *Private military companies:* These are companies that provide active military services to states and multinational organisations. Their services range from training of military units and strategic advice to actual combat operations. Examples are British Sandline International, the American company MPRI, and the now defunct Executive Outcomes.

This categorisation is useful to a limited extent in the analysis of the impact of mercenarism on human security in Africa. It is an attempt to segregate MSPs into lethal and non-lethal operations. However, Brooks (2000:3) ends up

over-arguing his case to the extent of glossing over the negative impact that military-security firms have had on peace and security in Africa. For instance, he states that:

MSPs do not create wars. Instead, MSPs alleviate the immediate suffering and long-term legacy of war, they mitigate the effects of war, and they end war. Unlike mercenaries of the past, MSPs benefit from ending conflict rather than extending it (Brooks 2000:3).

The debate on the impact of mercenarism on human security in Africa has bifurcated analysts into apologists of MSPs and those who see these security-military companies as mercenary firms that wreak havoc on human security in Africa. Unlike Brooks, Shannon (2000:105) is of the opinion that these security-military firms 'have acquired significant capabilities and began wading into the brutal resource wars of sub-Saharan Africa, marketing their services to factions most able to pay'.

The complexities in the debate on the impact of mercenaries on human security in Africa stem in part from the fuzziness of the definition of a mercenary and the current attempt by private security providers to masquerade as protectors of weak African of states, promoters of democracy and human rights and guardians of property. However, Makki and his co-authors (1995:1–2) consider this to be a façade, noting that security-military firms have played a fundamental role not only because they provide large amounts of weaponry, but also because 'the military and security services and training that they provide contributes to the demand for weapons in the regions where they operate'. Security-military firms play a fundamental role in small arms proliferation in the following ways:

- Arms brokering and transportation activities
- Violation of UN arms embargoes
- Impact on human rights and humanitarian law
- Driving up the demand for small arms

The UK-based Sandline International is a case in point: this company sparked the 'arms to Africa' incident by delivering weapons to Sierra Leone in 1998 in open violation of the UN arms embargo (Isima 2007:7). Small arms proliferation is a direct threat to human security. South Africa is a good example of a country that is reaping the bitter fruits of uncontrolled small arms in the hands of citizens. Makki and his co-authors (1995:7) argue that 'arms procurement and brokering of small arms and light weapons (SALW) are integral aspects of the activities of mercenaries, private military

companies and private security companies'. Isima (2007:5) holds a more objective view, arguing that 'private sector engagement in Africa's security has been both constructive and injurious to security'. The reality is that their injurious activities outweigh the constructive activities when the security-military firms are closely examined, both from empirical and conceptual viewpoints. This argument is vindicated by a number of recent examples that include the failed attempt to overthrow the government of Equatorial Guinea in March 2004 and the role of security-military firms in exacerbating conflict in Sierra Leone, Ethiopia-Eritrea and the DRC.

The modern security-military firms have not lost some of the key features of traditional mercenaries, the most outstanding of these being that they are still driven by profits rather than ideology. They threaten not only state sovereignty but human security too. As Shannon (2000:107) noted, they 'compromised the state as an institution both through its alien impact on the already-meagre resources of several African countries and through its challenge to their citizens' ultimate loyalty'. Mercenaries affect human security directly and indirectly in their areas of operation. Directly, they exacerbate conflict by taking sides and indirectly, those mercenaries organised into consultancies or companies engage in appropriating resources meant for citizens.

The best way to transcend the duality between those advocating the role of security-military firms and those who see them as engaged in mercenarism, is to analyse empirical examples of how these firms operate or have operated.

Mercenaries and human security

The example of EO in Sierra Leone serves as a cautionary tale of the dangers of mercenarism to human security. EO swiftly became embroiled in the conflict on behalf of the National Provisional Ruling Council (NPRC) that was itself well known for its violent terrorisation of Sierra Leonean citizens in its drive to control diamond mines. EO assisted NPRC to repulse the Liberian-based RUF, who was within 20 kilometres of the capital, Freetown, by the spring of 1995 (Harding 1997:88). In return for this service, EO gained a foothold in Sierra Leone's lucrative diamond economy by securing three contracts worth a total of US\$35 million (Shannon 2000:107). Working together with Branch Energy, a British mining firm, EO acquired a sizeable portion of Sierra Leone's diamond fields four months after pushing RUF back (Shannon 2000:108).

This type of behaviour has a direct impact on human security in that the resources meant to benefit citizens end up being parcelled out by corrupt

and weak regimes to mercenary firms. In 'under-developing' weak African states mercenary firms contribute to the problem by appropriating strategic resources like oil and diamonds. The United Nation Economic and Social Council, in a report on the use of mercenaries (1996: 12) put it as follows:

Once a greater degree of security has been attained, the firm apparently begins to exploit the concessions it has received by setting up a number of associates and affiliates ... thereby acquiring a significant, if not hegemonic, presence in the economic life of the country in which it is operating.

Mercenary firms like EO have consistently rejected the label of mercenarism and frantically project their interventions in conflict as positive steps that have culminated in peace settlements or elections. For example, EO prided itself on having forced UNITA to come to the negotiating table and also on having forced RUF to the bargaining table, thus making elections possible. Furthermore, about 8 000 displaced Sierra Leoneans were resettled (Shannon 2000:108). These are indeed some of the positives, but these positives are not only achieved at a cost, they are also ephemeral and far outweighed by negatives. In both Angola and Sierra Leone, there was a resumption of conflict. Despite this reality, EO was able to promote itself as a force that upheld international order and global peace (Sellars 1997:26). Such attempts by EO have been duplicated by other mercenary firms as they try to shake off the unpalatable association with mercenarism.

Rubin (1997:48) captured perceptions of EO by some Sierra Leoneans, with some regarding them as 'racist killers with no interest in the country'. A trade unionist described EO mercenaries in a local newspaper as 'hard-core apartheid attack dogs' (Harding 1997:93), while others evaluated them positively, seeing their actions as a 'gesture of pan-African generosity' (Rubin 1997:48). What needs to be clearly understood, is whose security mercenaries protect in Africa. In the case of Sierra Leone, the ruling elite benefited in terms of regime security but the ordinary people paid the price.

Evaluating the impact of mercenaries on human security in Africa is complicated by the security vacuum created by weak states (Ndlovu-Gatsheni 2007:1-15). Weak states are not able to provide security to their citizens, and mercenary firms exploit this and masquerade as bringers of stability and peace in anarchical African societies (Kaplan 1994:67). In some cases mercenary firms are also seen as peacekeepers. Shannon (2000:110) responded to this by saying 'But this short-sighted enthusiasm for mercenary companies neglects the profound consequences that previous missions have had on human security

in the affected areas and beyond'. The UN added its voice, noting that 'the presence of mercenaries in armed conflicts tends to make them longer-lasting, more serious and bloodier' (UN Economic and Social Council 1996). Indeed, mercenary firms survive by profiting from conflict and as such, this would be a rationale for sustaining conditions of instability that create the demand for their services. Shannon (2000:111) concluded that:

In sum, the threat posed by mercenary firms lies less in their capacity to visit death and destruction on their opponents than in their ability to position themselves as more credible guarantors of stability than the weak, compromised states they claim to serve. In the end, it is on this level that private armies have the most deleterious effect on long-term individual security.

Conclusion: 'One man's volunteer is another man's mercenary'

The main concern of the emerging African security architecture is the 'darker' side of the proliferation of PMSCs and the broader private security sector. The immediate challenge is to find clear definitions of the private security sector and mercenarism. At present there is an uncomfortable overlap. Our first suggestion is therefore that the OAU/AU Mercenary Convention be revised with a view to clearly defining both mercenarism and private security. The challenge will be to clearly separate mercenary activity from other useful activities provided by the private security sector. There are many ways in which the issue can be approached. These include a rights-based approach to rid the private security sector of those aspects that have a feature of mercenarism; a mischief approach that entails de-registering and abolition of those companies that engage in what amounts to mercenary activity in Africa; and an accountability approach as the basis for segregating legitimate from illegitimate activities, which could dovetail with an activities-based approach. All these approaches have a number of limitations but they do provide a rich basis from which Africa can engage seriously with the issue of mercenarism.

The other challenge is that precise quantification of the extent of mercenary activities in Africa is an important but difficult empirical task. The same is true of the task of measuring the direct impact of mercenary activity on human security. The challenge stems from a number of causes. First, mercenary activities are conducted by cunning people and practiced in a clandestine, secretive and illegal manner. Second, present-day mercenary activities are embedded in complex corporate-political networks with legal and commercial connotations. Third, because of the complicity of some governments in the

use of mercenaries, these soldiers of fortune and dogs of war are shielded from public view, as they operate alongside regular national forces in defence of particular African regimes. Fourth, because modern-day mercenary groups have taken corporate identities, mercenaries take refuge under the encompassing umbrella of NSPs, PSCs or PMCs. In addition to these factors, the various security/military companies have embarked on effective public relations exercises in their endeavour to shake off the mercenarism label, and in the process they portray themselves as useful entities complimenting efforts by African states to provide security to its people and to safeguard their sovereignty. Worse still, the reality that 'one man's volunteer is another man's mercenary', complicates any endeavours to map the extent of mercenary activities and their impact on human security. The identity and definition of a mercenary is itself subject to debate within the field of security studies.

Despite these difficulties of profiling mercenaries and establishing the extent of mercenary activity together with its impact of human security, our study managed to provide a rather broad exploratory survey of mercenary activities in Africa. We adopted a simple methodological approach, in which we focused on zones of conflict across the major regions of Africa. We adopted this approach because we were convinced that mercenaries fish in troubles waters in Africa, and profit from conflict zones rather than peace zones. Therefore mapping the extent of mercenary activities also entailed mapping Africa's major conflict zones, as this is where mercenaries operate. To this we added the crucial variable of resource-rich areas, as regions in which mercenaries conduct their activities. This proved to be a useful entry point to at least track the extent of mercenarism. Mercenary activity was noticeable in southern Africa, with South Africa being the main source of mercenaries that conducted their activities in Angola, the DRC and as far away as Sierra Leone. Our paper therefore included some of the well-known examples of mercenarism, while at the same time highlighted broad regional zones within which mercenaries were concentrated.

In our measurement of the impact of mercenarism on human security, two discourses emerged. The first is a rather apologetic perspective on the impact of mercenaries that sees mercenaries in positive light. According to these proponents of the PSI, they provide protection to civilians, facilitate an end to wars and negotiations between warring parties and compliment and strengthen weak African security regimes. This perspective positively evaluate the military/security firms within which mercenaries have hidden themselves, as bringing some hope to a hopeless continent. Their supporting evidence is those firms that are engaged in mine clearance in for example Mozambique and other post-conflict zones. They further argue that security/

military firms do not create wars in Africa, but exist to alleviate suffering of civilians and mitigate the adverse effects of war.

The second perspective does not see security/military firms in any positive light in relation to issues of human security. According to these proponents, the PSI market their services to factions that are able to pay them (irrespective of the human rights record of these factions), they play a role in procurement of small arms and violate UN arms embargoes, they take sides in conflicts, they appropriate African resources for themselves and their intervention make war 'more serious and bloodier' with devastating consequences for human security.

Thus while we were tempted to agree with the conclusion of Isima (2007) that 'private sector engagement in Africa's security has been both constructive and injurious to security' our final analysis is that the 'injurious' impact on human security far outweighs the 'constructive' impact. Our conclusion is informed by an assessment of both the direct and indirect impact of mercenary activity on human security. A factor that is often ignored is that by exploiting Africa's resources, mercenaries contribute to underdevelopment of the African continent. As long as they earn their living in conflict zones, they make it hard for the continent to achieve its development goals. Development can only take place in a peaceful environment.

Finally, it is clear to us that further empirical research and in-country surveys are required to profile the scope and extent of the phenomenon in contemporary Africa. This will provide a more detailed regional picture that is essential for the formulation of effective policy.

Notes

- 1 Article 47 defines a mercenary as 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 a 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.
- 2 The OAU Convention defines a mercenary as anyone who is not a national of the state against which his actions are directed, is employed, enrolls or links

- himself willingly to a person, group or organisation whose aim is (a) to overthrow by force of arms or by any other means, the government of that member state of the OAU; (b) to undermine the independence, territorial integrity or normal working institutions of the said state; (c) to block by any means the activities of any liberation movement recognised by the OAU.
- 3 South Africa's Private Security Industry Regulation Act (Act 56 of 2001, which provided for the establishment of the Regulatory Authority, came into effect on 14 February 2002.
 - 4 The White Legion was a mercenary force formed by Bob Denard from Eastern European nationals, mostly Slavs.

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PART IV

**THE ROLE OF THE LEGITIMATE
PRIVATE SECURITY SECTOR
VIS-À-VIS MERCENARISM IN
AFRICA**

CHAPTER 4
COUNTING THE COST:
THE IMPACT OF CORPORATE WARFARE
ON THE HUMAN RIGHTS OF WOMEN
AND CHILDREN IN AFRICA

Cephas Lumina

Introduction

In recent years, there has been a proliferation of mercenaries in internal armed conflicts, both in Africa and around the world. A notable feature of these conflicts has been the emergence of private companies contracted to provide military and security services ranging from logistical support and training to armed security and combat activities to both state and non-state parties to armed conflicts. While the United Nations has emphasised that the use of mercenaries undermines the right of peoples to self-determination and enjoyment of human rights, the entrenchment of these private military and security companies (PMSCs) in contemporary armed conflicts has raised concerns related to the lack of accountability and absence of regulation of these entities with respect to human rights violations, in contrast to state armed forces which are accountable under international human rights and humanitarian law. In particular, there are documented instances where the activities of private military and security companies have prolonged or exacerbated conflict or facilitated human rights abuses. These violations have been committed as part of commercial security measures, in situations of armed conflict and in the context of extraction of natural resources especially in Africa – a continent with vast natural resources.

Although there are already a range of measures to prohibit the activities of mercenaries and regulate some of the activities of PMSCs through either national laws or international agreements, these are neither sufficiently comprehensive nor ratified widely enough to effectively control the activities of mercenaries and PMSCs as new and emerging manifestations of the mercenary problem. The situation is compounded by the fact that there are very few countries with legislation that criminalises mercenarism and supports, reinforces and implements at the national level, the international and regional conventions on mercenaries.

While the impact of mercenarism on human rights has traditionally been conceptualised in terms of the threat that the use of mercenaries poses to the right of peoples to self-determination and enjoyment of human rights, this

chapter examines how the activities of mercenaries and PMSCs contribute to violations of human rights in general and the human rights of women and children in particular, in Africa.¹ The chapter first presents a brief historical survey of the use of mercenaries. It then briefly discusses the current regulatory framework for mercenary activities, highlighting the inadequacy of this framework for regulating the modern manifestations of mercenarism. Next, the chapter makes some recommendations for an effective regulatory framework to combat new manifestations of mercenarism and protect human rights. Finally, the chapter examines the implications of the activities of mercenaries and PMSCs for the protection of human rights, especially of women and children, in African conflict situations.

The historical context

The use of foreign individuals or groups of individuals by a state or entity to serve in a combat role during armed conflict for private reward dates back to antiquity, a time when military forces consisted largely of professional soldiers seeking private gain.² Throughout recorded history, examples abound of the recruitment and deployment of mercenaries during wars: Ramses II's use of Numidian mercenaries in ancient Egypt; Greek mercenaries fighting for the Persian Empire; the Varangian Guard fighting in support of the Byzantine Empire; Caesar's use of mercenaries for his cavalry; mercenary Flemish soldiers fighting for William during the Norman Conquest; the Renaissance Italian city-states with their *condottieri*;³ and the Saika mercenary group during the Siege of Ishiyama Hongan-ji in Japan, to mention but a few.

Although mercenary activity is a worldwide phenomenon, most contemporary mercenary activity has taken place in Africa. From the onset of colonisation in the 1870s to the present times, mercenary forces have been involved in numerous situations around the continent. In particular, the post-colonial period in Africa was characterised by a surge of mercenary activity in a number of internal armed conflicts. During the 1960s and 1970s, Zaire,⁴ Nigeria, Sudan, Guinea, Angola, Benin, the Comoros, and the Seychelles all experienced mercenary activities, carried out by European and American mercenaries often supporting a particular ideological faction.

Mercenary activity has resurfaced in recent African conflicts. For example, during the internal armed conflict in Côte d'Ivoire which began in September 2002, both the government and rebel forces recruited and used mercenaries, particularly from Liberia and Sierra Leone. According to Human Rights Watch (2003), the government hired mercenaries from

other African and European countries, including Angolan, Burkinabe, Liberian, Malian, Sierra Leonean, South African and Ukrainian nationals. The various insurgent groups also recruited Burkinabe, Liberian, Malian and Sierra Leonean mercenaries. It is notable that many of the continent's armed conflicts have been prolonged largely because of the continued involvement of mercenaries (Arnold 1999).

Since the 1990s, however, the nature, scope and character of mercenary activity has transformed from the individual soldier of fortune type that occurred during the 1960s and 1970s to sophisticated corporate actors.⁵ Over the last decade, mercenarism has manifested itself in new, complex forms – that of private military and security companies selling a range of military and security services on the international market (Avant 2005; Arnold 1999:123–131).⁶ In Resolution 2005/2, the former UN Commission on Human Rights observed that mercenary activities were occurring worldwide but were taking on 'new forms, manifestations and modalities'. It therefore requested states to 'pay particular attention to the impact of the activities of private companies offering military assistance, consultancy and security services on the international market on the enjoyment of human rights by everyone' (Office of the High Commissioner for Human Rights 2005).

These new corporate military and security service providers are referred to by a variety of names including mercenary firms, private armies, private military corporations, military service providers, private security companies, private military contractors, and corporate security firms (Milliard 2003:8). The range of services offered by mercenaries and these private companies includes military advice and training, logistical support, intelligence gathering, de-mining, guarding of infrastructure, peace operations monitoring and full-scale active combat duty. It should be noted that while some scholars distinguish between mercenaries, private military companies and private security companies, there are areas of overlap between them, especially when PMSCs recruit mercenaries or where some companies offer both defensive security and offensive military services.⁷

Further, corporate actors have directly participated in contemporary conflicts, especially in Africa (Human Rights Council 2007). The most notorious of these corporate mercenaries are the now defunct Executive Outcomes, a South African company established in 1989 by former members of the apartheid military, and Sandline International, a British company linked to Executive Outcomes (Arnold 1999:115–117). Both these companies provided military operational support through the deployment of armed personnel on the battlefield: Executive Outcomes in Angola (1993–1994) and Sierra Leone

(1995–1996), and Sandline in Papua New Guinea in 1997 and Sierra Leone in 1998 (Avant 2005:17).⁸ In Iraq, private security companies are now the second largest contributor of foreign forces to the conflict after the US army, which in December 2006 had 130 000 troops deployed (Human Rights Council 2007).

The distinction between mercenary activity and legitimate private security activity is therefore not often clear-cut (Gaultier et al 2001:11; Vines 1999:47). As the United Kingdom's Foreign and Commonwealth report, *Private Military Companies: Options for Regulation* (2002), emphasises, '[t]he distinction between combat and non-combat operations is often artificial'.⁹ Thus, for the purposes of this chapter, and to avoid being tied up in a definitional knot, I will refer to PMSCs as including private companies which offer and perform all kinds of military and security assistance, training, consultancy services, logistical support and armed security guards, as well as combat activities in conflict regions.

Many reasons have been advanced to explain the new phenomenon of PMSCs. Some have contended that these PMSCs have burgeoned because of the increasing financial and human costs involved in multilateral intervention in seemingly intractable internal hostilities and the attendant reluctance of Western governments and multilateral organisations to intervene directly in civil conflicts, especially in Africa (Shearer 1998). Others have attributed the rise of PMSCs to the end of the Cold War which produced a surplus of large amounts of military equipment as well as highly trained, professional soldiers seeking employment opportunities (Howe 2001; O'Brien 2002:44–70).

The growth of the private military and security industry poses serious accountability and regulatory problems for the international community. PMSCs often operate beyond the realm of legal accountability and public oversight.¹⁰ According to the UN, the emergence of private security contractors and the new methods employed by mercenaries escape the international and national legal prohibitions on traditional mercenary activities. In its 2007 report, the UN Working Group on mercenaries expressed concern that PMSCs in Iraq 'commonly operate without control, without visibility, without being accountable beyond the private company itself, and in complete impunity' (Human Rights Council 2007). Of particular concern is the fact that some of these companies have recruited persons with 'questionable backgrounds', including former employees of repressive regimes (Human Rights Council 2007). The international community further faces the conundrum of defining mercenaries and mercenary activities in the context of the proliferation of private military and security activity.

The international regulatory framework

The current international regulatory framework concerning mercenarism consists of a number of instruments: the Hague Convention V Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land 1907 (Hague Convention V), the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts 1977 (Additional Protocol I), the OAU/AU Convention on the Elimination of Mercenarism in Africa 1977 (the OAU/AU Mercenary Convention), and the International Convention against the Recruitment, Use, Financing and Training of Mercenaries 1989 (the UN Mercenary Convention). There is, as yet, no international legal framework for the regulation of the activities of PMSCs in the context of armed conflict.

The Hague Convention V was the first international attempt to regulate mercenary activities. Article 4 of the convention provides that '[c]orps of combatants cannot be formed nor recruiting agencies opened on the territory of a neutral power to assist the belligerents'. However, article 6 states 'the responsibility of a neutral Power is not engaged by the fact of persons crossing the frontier separately to offer their services to one of the belligerents'. Thus, while the Convention enjoins a neutral state to prevent domestic recruitment of mercenaries or condone such activities, it is not required to ban the mercenary per se (Milliard 2003:21; Hampson 1991:7).

Article 47 of Additional Protocol I contains the most widely accepted definition of mercenaries. It provides that:

A mercenary is a person who:

- (a) is specifically 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

A person's qualification as a mercenary is therefore dependent on his or her fulfilling the cumulative conditions set out in article 47(2). A few points concerning article 47 are worthy of note. First, the provision does not proscribe mercenary activity per se; it merely deprives persons who fall within the definition of a mercenary of entitlement to combatant or prisoner of war status upon capture. Thus, article 47(1) makes it clear that such a person 'shall not have the right to be a combatant or a prisoner of war'. Second, the provision is (as in the case of the entire protocol) confined to international armed conflicts and armed conflicts 'in which peoples are fighting against alien occupation and against racist regimes in the exercise of their right to self-determination' (articles 1(3) and (4)). In this regard article 47 represents a significant departure from customary international law which afforded mercenaries the same protection as the members of the belligerent force for which they were fighting (Kwakwa 1990: 85). Prior to the adoption of Additional Protocol I, mercenaries had the same rights and obligations under international humanitarian law as other combatants.

The OAU/AU Mercenary Convention, adopted a month after the signing of Additional Protocol I, closely mirrors article 47 of the protocol. Article 1(1) of the convention defines mercenaries in broadly the same way as article 47(2), but refers to 'material compensation' as opposed to 'material compensation substantially in excess of that promised combatants of similar ranks and functions' as used in article 47. It similarly denies mercenaries combatant and prisoner of war status. Article 1(2) of the convention provides for the crime of mercenarism as follows:

The crime of mercenarism 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:

- (a) Shelters, organises, 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; or
- (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

However, this formulation has been criticised. In particular, it has been observed that there is a 'disparity' between the definition of a mercenary and the crime of mercenarism, which may allow individuals involved in

mercenary activities to escape prosecution on the basis, for example, that they do not satisfy either the mercenary definition or the elements of the crime of mercenarism. Thus, it has been contended that the OAU/AU Mercenary Convention cannot, in its current form, adequately address new manifestations of mercenary activity, such as PMSCs (Milliard 2003:55).

In similar vein, the UN Mercenary Convention replicates most of article 47 of Additional Protocol I, but extends the definition of mercenary in that provision, which applies only in international armed conflicts, to all conflicts. Thus article 1(2) of the convention refers to those who are specially recruited for the purpose of ‘participating in a concerted act of violence aimed at overthrowing a government or otherwise undermining the constitutional order or territorial integrity of a state’. This provision is similar to article 1(2) of the OAU/AU Convention, which prohibits individuals from engaging in ‘armed violence’ directed against ‘the stability or the territorial integrity of another state’. However, unlike the OAU/AU Convention, the UN Convention only prohibits states from opposing national liberation movements by recruiting, using, financing, or training mercenaries.

The UN Convention also imposes individual criminal liability on (a) anyone who recruits, uses, finances or trains mercenaries, (b) a mercenary who participates directly in hostilities or in a concerted act of violence, (c) anyone who attempts to commit these offences, and (d) anyone who is an accomplice of one who commits the offences specified above. Article 5(1) and (2) restricts the use of mercenaries by states.

Towards a new international regulatory framework

It is clear from the above survey that the current regulatory framework concerning mercenarism has a number of limitations and is insufficiently equipped to address the new forms of mercenarism typified by PMSCs. It is important to note that the two conventions and Additional Protocol I were designed to address the activities of mercenaries in post-colonial Africa, and do not therefore sufficiently address the use of PMSCs which are, arguably, new manifestations of mercenarism (Milliard 2003:4–5). According to Milliard (2003:5), this ‘flawed approach ignores mercenaries’ long history, their modern transformation into sophisticated PMSCs, and their increasing use by – not against – sovereign states engaged in the legitimate exercise of procuring foreign military services’.

Most employees of PMSCs do not fit the definition of ‘mercenaries’ contained in article 47 of Additional Protocol I. According to Shearer (1998:17–18),

there are 'significant problems' in applying the criteria of article 47 to military companies. These include:

- In terms of sub-paragraph (a), recruitment must be specifically for a particular armed conflict. Given that many individuals working for private military companies are employed on a long-term basis, it can be argued that they are not mercenaries
- The requirement of direct participation in hostilities under sub-paragraph (b) would exclude individuals functioning as foreign military advisers, although such activities are frequently decisive in hostilities. It is on this basis that most private security companies consider themselves outside the definition of mercenaries
- Under sub-paragraph (c), a member of the armed forces of a party to a conflict cannot also be considered a mercenary. Thus, by becoming a member of a country's military, contracted combatants may escape the label of mercenary under sub-paragraph (e)¹¹

Consequently, it has been asserted that the fact that these provisions are open to wide interpretation 'render Article 47 unworkable' (Hampson 1991:30).

Article 47 also has a number of other limitations. First, it is concerned only with international armed conflicts or national liberation movements (that is, struggles against colonial rule) and therefore does not apply to non-international armed conflicts. Second, article 47(2) imposes criteria relating to a mercenary's motivation and relative remuneration, which are very difficult to establish in practice. This difficulty potentially limits a state's 'legal basis to deprive mercenaries of lawful combatant and prisoner of war status' (Milliard 2003:42). Finally, the provision does not ban mercenaries or mercenary activity; it only discourages mercenary activity by denying individuals who fulfil the attributes of a mercenary entitlement to prisoner of war status. It also does not criminalise the recruitment, training or financing of mercenaries.

There are similar practical limitations with respect to both the OAU and UN mercenary conventions. The definition of 'mercenaries' in both conventions is essentially the same as in article 47 of Additional Protocol I. However, as stated above, the cumulative criteria of this provision are so restrictive that it is nigh impossible to prove that someone is a mercenary. Most of the services provided by PMSCs fall outside the purview of taking 'a direct part in hostilities'. Moreover, as with article 47 of Additional Protocol I, most employees of PMSCs would not fall within the definition of mercenaries in the conventions.

The two mercenary conventions each have a further limitation: because they either totally ban certain activities or do not regulate them at all, they do not address key issues concerning the use of PMSCs. Thus, the Working Group on mercenaries has stated with reference to the UN Convention that:

The problem with the current definition is twofold: either nearly everyone engaged privately in armed conflict is covered by the definition, or no one is, thus making the Convention very difficult if not impossible to implement (Human Rights Council 2007).

However, the Working Group has expressed the view that 'it cannot be said *strictu sensu* that PMSCs or their employees satisfy all of (the Convention's) requisites' (Human Rights Council 2007).

Finally, although both the OAU/AU and UN conventions on mercenaries are more extensive than article 47 of AP I in their application, they have been ratified by very few states.¹²

As stated above, the impact of traditional mercenary activity has been conceptualised in terms of the threat that the use of mercenaries poses to the right of peoples to self-determination and the enjoyment of human rights. This narrow conception does not, however, address the broader private security services phenomenon. Consequently, in order to devise a new and effective response to the challenge posed by PMSCs in contemporary armed conflicts, it is necessary to move beyond the narrow conception of the link between mercenary activity and the right to self-determination and enjoyment of human rights reflected in the current approach of the UN to the problem. This view is reflected in the 2002 report of the Special Rapporteur on mercenaries which calls for 'a clearer, more functional and comprehensive' definition of a 'mercenary' to cover the activities of PMSCs (Commission on Human Rights 2002: paras 82-89).

Three specific recommendations on the way forward can be made. First, both the UN and OAU/AU mercenary conventions should be amended to address the restrictions inherent in their definitions of mercenarism and to include PMSCs. Alternatively, member states of the UN and AU should adopt additional protocols to their respective conventions that specially address these limitations.

Second, the adoption of appropriate national and regional regulations concerning the operation of PMSCs in conflict situations may help states to comply with their obligations under international law, and in particular, the

obligation to respect and to ensure respect for international human rights and humanitarian law.

Finally, states should be encouraged to ratify both conventions. This is vital since the effectiveness of international norms depends, in large part, on their widespread acceptance and implementation by the states concerned.

Mercenaries, PMSCs and human rights

General principles of responsibility

It is important to note, at the outset, that the primary obligation to protect human rights rests with states. Thus, all human rights instruments enjoin states to respect and to ensure respect for the human rights norms that they proclaim. In addition, states and non-state parties to armed conflicts are obliged to observe the rules of international humanitarian law. These obligations are relevant not only for the states that engage the services of PMSCs, but also those states on whose territory these companies operate and states in which they are incorporated (Droege 2006:5; Gillard 2006:549–560).

It is notable further that while international law traditionally regulates interstate relations and does not typically address private actors, certain rules of international law are directly relevant to the activities of PMSCs. In particular, international humanitarian law and international criminal law both establish clear obligations for individuals, including employees of PMSCs. Individuals who commit serious breaches of international humanitarian law or gross violations of human rights may incur criminal responsibility under international law.

International human rights law imposes three types of obligations on states: to respect, protect and fulfil. The obligation to respect human rights entails a duty on the part of the state not to arbitrarily interfere with the enjoyment of human rights. This duty, which can arise even when states do not commit the act themselves, is especially relevant to the question of accountability of PMSCs for human rights. In terms of the Draft Articles on State Responsibility, acts are imputable to a state when they are committed by, among others, persons or entities exercising elements of governmental authority (article 5) or persons acting de facto on the instructions of, or under the direction or control of, the state (article 8). By implication, when a state engages a private company to perform functions usually assigned to governmental authority, their conduct will be attributable to the state (United Nations 2007: 47-48). The jurisprudence of human rights supervisory bodies lends weight to this view¹³.

The obligation to protect is a positive obligation in terms of which a state is required to prevent the violations of rights by third parties. This is usually considered to be a key function of states, which have to prevent irreparable harm being inflicted upon individuals. It requires that states (a) prevent violations of rights by an individual or non-state actor; (b) avoid and eliminate incentives to violate rights by third parties; (c) provide access to affordable legal remedies in the event of abuse of rights in order to prevent further violations; and (d) investigate and punish violations occasioned by private entities (Human Rights Committee 2004). However, in view of the fact that PMSCs operate in countries which generally lack the capacity to protect persons within their territory as a consequence, for example, of loss of control over parts of territory during hostilities, this obligation may be difficult to discharge in practice.

The obligation to fulfil entails a duty on the part of the state to adopt legislative, judicial, administrative and other appropriate measures in order to fulfil their human rights obligations. Taken together these obligations entail duties on the part of the state to regulate private activities which can impair the enjoyment of human rights, intervening whenever the activities of private companies pose a threat to human rights, and punishing violations of human rights by private entities, including PMSCs.

Thus, states that hire PMSCs have a number of obligations under international law which cannot be circumvented by the use of such companies. First, they are obliged to ensure respect for the applicable rules of international law by the companies they contract. Second, they are responsible for violations of international law committed by PMSCs that can be imputed to them. Finally, states have a duty to investigate and if necessary punish violations of international law (especially international human rights and humanitarian law) alleged to have been committed by these companies.

Threats to the protection of human rights posed by ‘corporate warriors’

It is generally accepted that international humanitarian law binds both state and non-state actors. However, the question of application of human rights standards to PMSCs is controversial (Clapham 2006a). Nevertheless, in *The Presbyterian Church of Sudan & Others v Talisman Energy Inc, Republic of Sudan*,¹⁴ a US court held that corporations do have obligations under international human rights law. According to the court, there is ‘substantial’ international and US precedent indicating that corporations may be held liable under international law, at least for gross human rights violations.

The UN has condemned the use of mercenaries as undermining the rights of peoples to self-determination and enjoyment of human rights in numerous pronouncements. With respect to PMSCs, the UN Commission on Human Rights has expressed the view that irrespective of the manner in which 'mercenaries or mercenary-related activities are used or the form they take to acquire some semblance of legitimacy, they are a threat to peace, security and the self-determination of peoples and an obstacle to the enjoyment of human rights' (Office of the High Commissioner for Human Rights 2005). Consequently, it has urged states 'to exercise the utmost vigilance against any kind of recruitment, training, hiring or financing of mercenaries by private security companies offering international military consultancy and security services' (Office of the High Commissioner for Human Rights 2005). In addition, the reports of the UN Special Rapporteur and Working Group on mercenaries have underlined the negative impact of mercenary activities on the protection of human rights (see Human Rights Council 2007). For example, in its 2007 report, the Working Group on mercenaries noted that PMSCs 'are committing human rights violations with impunity whilst operating in armed conflicts' (see also Benavides 2006).

Mercenary activities have resulted in loss of life and substantial damage to property and have adversely impacted on national economies. They also threaten the integrity and constitutional order of the countries in which they take place (Office of the High Commissioner for Human Rights 2005).

There are numerous documented violations of human rights committed by companies that provide private military and security services in contemporary conflict situations. These abuses have been divided into three general categories: violations committed as part of commercial security measures, abuses that occur in situations of hostilities, and abuses involving the exploitation of natural resources (Gaultier et al 2001:4).

It has been asserted that human rights violations as part of commercial security measures occur largely in the context of the protection of the property of multinational corporations by private security companies (Gaultier et al 2001:14). Common abuses in this context include invasions of privacy through interception of mail, phone tapping and other intelligence-gathering activities, suppression of trade union activity, and complicity with national law enforcement agencies in arbitrary detentions and involuntary disappearances of persons. The cases of a number of multinational corporations using private security companies – Congo-SEP in the Democratic Republic of Congo using Sapelli SARL, the Sierra Rutile mine in Sierra Leone using Executive Outcomes, and Shell in Nigeria with its infamous 'Shell Police' – demonstrate

the gravity of the human rights problem posed by the activities of PMSCs (Gaultier et al 2002:14).

In situations of armed conflict, human rights abuses may take the form of war crimes or crimes against humanity, both of which attract individual criminal responsibility under international law. Numerous incidents of attacks on civilian populations, such as destruction of homes, torture, summary executions, and the use of prohibited weapons, have been reported in conflict zones where private security companies have been actively involved. In Iraq, for example, employees of PMSCs have reportedly participated in violations of human rights which occurred in Abu Ghraib prison (Human Rights Council 2007). In Colombia, PMSC employees have been implicated in among others human trafficking and sexual violence against minors (Human Rights Council 2007). In Angola, the now defunct South African company Executive Outcomes was responsible for introducing indiscriminate weapons such as fuel-air explosives (Vines 1999:54).

Finally, the involvement of private security companies in the extraction of natural resources have resulted in, inter alia, violations of the right of peoples to self-determination as well as the right to development. It is worthy of note that the costs of securing the services of PMSCs have often been met either by diverting development aid or by granting considerable mining concessions to them. In the long term, a country's natural resources are 'mortgaged' and its economy adversely affected.¹⁵ Illustratively, in 1997, the government of Papua New Guinea engaged Sandline International to support its troops in the fight against the Bougainville Resistance Army and ultimately to recapture the Panguna copper mine, a joint venture between the PNG government and Rio Tinto Zinc.¹⁶ The mine had been inactive for several years due to the internal conflict. The contract was worth US\$36 million, and part of the payment was a stake in the copper mine. In order to raise funds for the Sandline contract, however, the government was forced to drastically reduce its health and education budgets. The government's measures arguably posed a threat to the realisation of the rights to, amongst others, health and education.¹⁷

Impact on the human rights of women and children in Africa

There is no repository of comprehensive information concerning human rights violations committed by mercenaries and PMSCs during armed conflicts. Consequently, it is difficult to assess the impact of the activities of mercenaries and PMSCs on the human rights of women and children in Africa. Such an assessment would be possible only after comprehensive studies of the activities

of these entities in the countries that have experienced or are undergoing conflict have been undertaken. However, there are some documented abuses of human rights committed by mercenaries and private companies providing military and security services in various internal conflicts in Africa.

Both Amnesty International (2007) and Human Rights Watch (2003) have documented numerous violations of internationally recognised human rights by mercenaries engaged by both the government and rebel forces in the internal armed conflict in Côte d'Ivoire – a conflict which Human Rights Watch (2003:1) has described as being 'characterised by relatively little in the way of active hostilities between combatants, but by widespread and egregious abuses against civilians'. The violations reported include systematic and indiscriminate attacks on civilians, summary executions, arbitrary arrests and detentions, 'disappearances', and recruitment and use of child soldiers. Other documented abuses include rape and other forms of sexual violence against women and girls. Many young women and girls were abducted and taken as 'wives' by the rebel groups which included mercenaries in their ranks (Human Rights Watch 2003:28–29).¹⁸ All of these abuses violated fundamental human rights guarantees, including the right to life, dignity, security of the person and freedom from torture, as well as the prohibition on discrimination.¹⁹

A particularly unpleasant feature of the conflict has been the recruitment by all parties, of mercenaries, including child soldiers, who were veterans of the brutal wars in Liberia and Sierra Leone, such as the indicted war criminal Sam 'Mosquito' Bockarie, an ex-leader of the Revolutionary United Front, a Sierra Leonean rebel group which gained notoriety for its abuses during the Sierra Leone conflict. The recruitment and use of mercenaries with well-established histories of serious abuses against civilians is in itself a recipe for disaster.

In a report released in March 2007, Amnesty International revealed the extent of rape and other forms of sexual violence committed against women and girls that were taking place in the context of the conflict in Côte d'Ivoire (Amnesty International 2007). Some of the worst abuses have been committed by mercenaries, notably from Liberia, who are attached to armed rebel groups in the western part of the country. Rape is often accompanied by beating and torture of the victim – often in public and in front of family members, including children. Survivors of these abuses are often stigmatised, rejected by their partners or families and socially excluded by their communities. Many are condemned to lives of extreme poverty, often with dependent children. To compound the problem, victims of sexual violence are usually unable to access the few available health care facilities. The rape and sexual violence committed in the context of the conflict have also exacerbated the

HIV/Aids crisis in the country. These acts are a violation of the prohibition on sexual violence against women guaranteed in, amongst others, article 14 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa and poses a threat to the right to health as enshrined in various human rights instruments, including the African Charter on Human and Peoples' Rights (art 16) and the International Covenant on Economic, Social and Cultural Rights (art 12).

The human rights violations briefly discussed above are indicative of the pattern of abuses committed in the context of several armed conflicts on the continent. Although both Amnesty International and Human Rights Watch have reported that some of the worst violations have been perpetrated by mercenaries, it is unclear to what extent employees of PMSCs have participated in the commission of abuses in the countries in which their companies are operating. However, in circumstances where many of the governments recruiting or using PMSCs are unable to pay them for their services except by granting them concessions concerning exploitation of the countries' natural resources, it is arguable that PMSCs are complicit in violations of several social and economic rights and the right to development of the people in the conflict-affected countries. However, this is an area that requires further research.

Conclusion

Over the last two decades, mercenary activity has manifested itself in new and complex forms which fall outside the existing legal framework for mercenaries. The traditional mercenary – an individual who for private financial gain, took a direct part in hostilities alien to their own nationality – has been supplemented by the emergence of PMSCs. These offer a range of military and security services on commercial terms to both state and non-state actors. Although some of these 'corporate mercenaries' have been implicated in violations of human rights in the countries in which they operate and there are indications that they have obligations under international human rights law, in the absence of an effective or appropriate regulatory and institutional framework, the activities of these companies pose a challenge to the state as the main provider of security and guarantor of human rights.

Notes

- 1 For a variety of reasons (including history, culture and tradition) women and children are vulnerable to human rights violations. Women are particularly

vulnerable to specific violations such as gender-based violence, human trafficking and sex discrimination while children are often victims of debt bondage, forced or compulsory labour (including forced participation in armed conflicts), and sexual exploitation. Consequently, specific universal and regional human rights instruments have been adopted to provide protection for them beyond the guarantees in the general instruments.

- 2 For an historical account of mercenaries, see Dupuy and Dupuy (1993); Arnold (1999); Milliard (2003:1–95); Musah and Kayode Fayemi (2002a:13–42).
- 3 A *condottiere* is 'a leader or a member of a troop of mercenaries in Italy etc' (see Tulloch 1995).
- 4 Now called the Democratic Republic of Congo (DRC).
- 5 For a comprehensive study of private military companies in Africa, see O'Brien (2002:43–75).
- 6 It should be noted that there are precedents for such mercenary companies. Examples include the Hessian forces which fought for the British during the American war of independence and the Pinkerton Company, which was established in 1850 as a detective agency but later provided armed guards and strike breakers to industrial firms in the US. However, the new PMSCs are transnational in character.
- 7 Private military companies (PMCs) are corporate entities that are generally contracted by governments to provide offensive services designed to have a military impact in a conflict situation, while PSCs are corporate entities that provide defensive services to protect individuals and property, and are often used by multinational companies in the extractive industry sector and by humanitarian agencies and individuals in situations of conflict or instability.
- 8 Executive Outcomes ceased operations after the South African government enacted the Regulation of Foreign Military Assistance Act which is designed to regulate the export of military services.
- 9 See also paragraph 8 of the *Report of the second meeting of experts on traditional and new forms of mercenary activities as a means of violating human rights and impeding the exercise of the right of peoples to self-determination*, in which the UN Special Rapporteur on mercenary issues speaks of 'the thin line dividing the activities of PSCs and the use of mercenaries'.
- 10 This is in stark contrast to the position of state armed forces which are clearly accountable under international human rights and humanitarian law.
- 11 For example, in its contract with the government of Papua New Guinea, Sandline International described its employees as 'special constables' (see Shearer 1998:18).
- 12 As at 28 February 2006, the UN Mercenary Convention had 28 states parties: Azerbaijan, Barbados, Belarus, Belgium, Cameroon, Costa Rica, Croatia, Cyprus,

- Georgia, Guinea, Italy, Liberia, the Libyan Arab Jamahiriya, Maldives, Mali, Mauritania, Moldova, New Zealand, Qatar, Saudi Arabia, Senegal, Seychelles, Suriname, Togo, Turkmenistan, Ukraine, Uruguay and Uzbekistan. As at 22 January 2008, there were 28 states parties to the OAU/AU Mercenary Convention: Algeria, Benin, Burkina Faso, Cameroon, Comoros, Congo, Democratic Republic of the Congo, Egypt, Equatorial Guinea, Ethiopia, Gabon, Ghana, Guinea, Libya, Lesotho, Liberia, Madagascar, Mali, Nigeria, Niger, Rwanda, Senegal, Seychelles, Sudan, Tanzania, Togo, Tunisia, Zambia and Zimbabwe.
- 13 See, for example, *Social Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001); *Commission Nationale des Droits de l'Homme et Libertés v Chad* (2000) AHRLR 66 (ACHPR 1995); *Costello-Roberts v the United Kingdom*, ECHR, Judgment of 25 March 1993, Series A No 247-c, para 27; *Velasquez Rodriguez v Honduras*, Inter-American Court of Human Rights, Judgment of 19 July 1988, Series C, No4.
 - 14 Civil Action 01 CV 9882 (AGS), US District Court for the Southern District of New York, Order of 19 March 2003, p 47 (cited in Clapham 2006b:515).
 - 15 The establishment of PMSCs and the practice of illegal exploitation of natural resources have been linked with the continuation of armed conflicts in several countries worldwide (see Human Rights Council 2007, par 54; see also Musah 2002:77).
 - 16 For a discussion of the Sandline debacle, see Dorney (1998).
 - 17 Although Papua New Guinea has not ratified the two 1966 UN covenants, it is a party to the Convention on the Rights of the Child (without reservation) which guarantees the rights to health and education with respect to children in articles 24 and 28, respectively.
 - 18 It is notable that the Protocol to the African Charter on Human and Peoples' Rights contains specific provisions concerning the right to dignity (art 3), prohibition of forced marriage (art 6), protection of women in armed conflict situations (art 11) and protection against sexually transmitted diseases, including HIV/Aids (art 14).
 - 19 These rights are enshrined in varying phraseology in core international human rights treaties such as the International Covenant on Civil and Political Rights 1966 (with 160 parties including 50 African states as at 25 January 2008); the International Covenant on Economic, Social and Cultural Rights 1966 (with 157 parties including 47 African states as at 11 October 2007); Convention on the Elimination of All Forms of Discrimination against Women 1979 (with 185 parties including 50 African states as at 25 January 2008); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (with 145 parties including 42 African states as at 2 October 2007); and the Convention on the Rights of the Child 1989 (with 193 parties including 52 African states as at 12 February 2008). They are also guaranteed in the African Charter on Human and

Peoples' Rights 1981 (ratified by all 53 member states of the AU); the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa 2003 (ratified by 21 states as at 26 May 2007) and the African Charter on the Rights and Welfare of the Child 1990 (ratified by 41 of the AU's 53 member states as at 19 June 2007). The exceptions are the Central African Republic, Djibouti, the DRC, Guinea-Bissau, Liberia, Sahrawi Arab Democratic Republic, Somalia, São Tomé & Príncipe, Sudan, Swaziland, Tanzania and Zambia).

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PART V

**COMBATING MERCENARISM
IN AFRICA AT THE
DOMESTIC, REGIONAL AND
INTERNATIONAL LEVELS**

CHAPTER 5
THE GOOD, THE BAD AND
THE UNREGULATED:
BANNING MERCENARISM AND REGULATING
PRIVATE SECURITY ACTIVITY IN AFRICA

Sabrina Schulz¹

Mercenarism and Africa have traditionally formed an uneasy relationship. Since the 1870s, when colonising powers started to draw on mercenary forces to defend their interests, mercenarism has been equated with several evils. At different times, mercenarism in Africa has been ‘an instrument of colonial resistance to self-determination, of support for secessionist movements and general destabilization’ (McIntyre & Weiss 2007:67). Today, private security companies (PSCs) and private military companies (PMCs) are sometimes regarded as the seamless continuation of old-style mercenarism. This is not least because of the real or perceived link between the exploitation of Africa’s natural resources and the use of illegitimate force. This perspective neglects, however, the vast number of legitimate companies filling ‘security gaps’ where states have insufficient capacity of their own to police places, territories and borders and to ensure the day-to-day security of their citizens.

This article addresses the intricate question of where illegal mercenary activity ends and where legitimate private security services start. It will suggest a framework for the control and regulation of legitimate private security activity, explore options for a new approach to contain mercenary activity, and demonstrate the possibilities and limitations of any future regulatory process.² Crucially, it will be argued that from a legal perspective it is irrelevant whether violations of human rights are committed by a mercenary or an operator of a legitimate PSC. States are obliged to enforce existing human rights law and, where applicable, international humanitarian law (IHL) within their jurisdiction but they currently fail to do so in an effective manner.

The article will first address the development of mercenarism in Africa and the discourses that have emerged out of the involvement of non-state actors in both providing and undermining security. Subsequently, the different non-state actors in African (in)security will be defined and their roles will be examined in greater depth. The next part of the article is dedicated to a discussion of how the entire range of non-state actors could be integrated meaningfully within the ongoing processes of Security Sector Reform (SSR) and Demobilisation, Disarmament and Reintegration (DDR) programmes. Finally, the chapter will draw on empirical findings to suggest a future

regulatory framework or 'matrix' for the regulation and control of both mercenarism and legitimate private security activity in Africa.

Narratives on mercenarism in Africa – tales and realities

In order to understand the current debate on mercenarism and private security in Africa it is essential to be aware of the historical background of mercenary activity in Africa and the discourse that has developed from it. Although mercenary activity in Africa had been prevalent long before the 20th century, European mercenary activity only came to prominence in the 1960s when African states gained their independence from former colonial powers. When the rule of former colonies was handed over to (or taken by) native liberation movements the former colonial powers' economic interests still had to be protected (McIntyre & Weiss 2007:67). The most notorious example may be the Congolese civil wars but mercenarism was equally important in places like Angola, Nigeria and Sudan.

The Congo represented the first occasion since the end of the Second World War that white mercenaries were hired as fighting units by separatist leaders. The turmoil arising from the chaotic situation after independence lasted from 1960 to 1965 and involved a wealth of rival actors, interests and ideologies. Among those involved on both sides of the conflict were the Congolese government; the United Nations; the former colonial power, Belgium; the two Cold War superpowers; the separatist forces of Moïse Tshombé, who declared the independence of his resource-rich Katanga province; child soldiers known as 'Simbas' (lions); and about 400 mercenaries – among them Les Affreux (the dreadful ones), who were former members of the French Foreign Legion (see also Arnold 1999:1–17; Drohan 2004:94–133; Lanning 2005:152–63). All of them were pursuing their own agendas and shared rival economic and financial interests, in particular with regard to Katanga's abundant natural resources.

The most notorious representatives of the mercenary forces involved in the Congo between 1960 and 1965 were the Frenchman Bob Denard (whose real name was Gilbert Bourgeaud) and the Irishman 'Mad' Mike Hoare. Their continuous involvement in the Congo and other African states (such as Algeria, Benin, Comoros Islands, Guinea and Mozambique) in the 1960s and 1970s made them the most infamous mercenaries of the 20th century. Theirs and other white mercenaries' involvement in the atrocities committed by all sides of the conflict in the Congo certainly set the tone for the debate on mercenarism in Africa:

In Africa ... the activities of the mercenaries, inevitably, were seen as a form of neo-colonialism while their brutality served only to reinforce anti-white and anti-imperialist views. Mercenary conduct in the Congo did great damage to the White image in Africa which, in any case, was coming under increasingly close and adverse scrutiny as a result of the race policies being pursued in the southern part of the continent. Moreover, direct and indirect evidence of western government support for the mercenaries ensured that they were regarded as an arm of western policy and not simply as maverick individuals who could not be controlled. The image of *les affreux* coloured the African response to mercenaries for years to come (Arnold 1999:16; see also Beshir 1972:4).

The involvement of white mercenaries in the Congo; in the Nigerian civil war (1967–1970) following the attempted secession of Biafra; in Rhodesia throughout the 1970s; and in Angola (1975–1990s) only fuelled these perceptions.

Yet, while the initial surge of mercenary activity in Africa in the 1960s and 1970s can largely be attributed to persisting colonial or (neo-)imperialist interests, subsequent mercenary activity was due to broader structural as well as domestic developments:

In the three turbulent decades of liberation struggles and Cold War proxy interventions, the market for private force in Africa changed dramatically in response to broad economic adjustment programs and a sharp escalation in intrastate and small insurgent wars (McIntyre & Weiss 2007:67).

After the Cold War, in particular when internal tensions in many African states developed into fully-blown civil wars, a new generation of ‘mercenary forces’ started to gain a foothold on the continent. The operations of Executive Outcomes (EO) and Sandline International epitomise these activities. Both firms represent a type of company that has largely ceased to exist in the field of legitimate private security actors. Their understanding of their role was that of PMCs providing boots on the ground and combat forces in support of legitimate governments (Spicer 2000:19f). As Tim Spicer (2000:41), the founder of Sandline, explains:

Private military companies are organisations which do more than provide passive assistance in areas of conflict. The accent is on the word passive – PMCs are not passive; they do not stand about

murmuring soothing words, and their operations extend beyond the guarding role. PMCs offer practical military help in an acceptable form to legitimate governments.

However, Eben Barlow, the founder of EO, makes it clear in his account of the history of his company that his initial goal had not been to conduct military operations. Instead, EO was first registered in 1989 with the aim of using 'it purely as an income generator and clearing house to cover ... operational and other expenses' (Barlow 2007:59) incurred during operations for the Civil Co-operation Bureau (CCB), a covert assassination and espionage unit used to eliminate enemies of the South African apartheid regime abroad (Singer 2003:102). The company soon started to run operations outside South Africa, in particular in the areas of mine security efforts; infiltrating and penetrating organised crime smuggling syndicates; and operations for a South American government (rumoured to be Columbia), where it conducted clandestine counter-drug raids that it termed 'discretionary warfare' (Singer 2003:107). According to Barlow it was only much later, in 1993, that EO was used as a vehicle to conduct operations in Soyo, Angola, on behalf of Heritage Oil and in so doing became a PMC (Barlow 2007:89ff). If Barlow's account is even partially correct we have to assume that the private military industry after the end of the Cold War emerged in response to a demand rather than merely because of the ingenuity of would-be 'soldiers of fortune'.

Private companies providing combat services may now be banned or at least ostracised, but mercenary activity continues across Africa (O'Brien 2007:36). Mercenaries now appear in the guise of insurgents, freedom fighters, militia groups and other armed factions. What they have in common is their attachment to a lifestyle in conflict from which it is difficult to return to 'civvy street':

The failure of re-education or training programmes to provide hope to former combatants has, no doubt, played a major role in making them continue life as warriors. Whether as guerrillas or members of statutory forces, for these men, who have spent the last two to three decades in combat, the realization that they do not fit into civil society has been a prime motivator in this tendency towards mercenary activity (O'Brien 2007:36).

Although this analysis is correct for both 'Western' and African mercenaries, the attention of the international community has, so far, largely been on those of Western origin. This may be slightly misleading as the role and presence of African mercenaries in African conflicts outweighs that of non-Africans

by far (O'Brien 2007:36). For instance, the armed conflicts in Liberia, Sierra Leone, Guinea and Côte d'Ivoire since the late 1980s have produced a whole generation of combatants whose sole means of survival has become the business of the most brutal of warfare:

Thrust into a world of brutality, physical hardship, forced labor and drug abuse, they emerged as perpetrators, willing to rape, abduct, mutilate and even kill. Later, as veteran fighters struggling to support themselves within the war-shattered economy at home, they were lured by recruiters back to the frontlines – this time of a neighbor's war. There, they took the opportunity to loot and pillage; an all too familiar means of providing for their families or enriching themselves (Human Rights Watch 2005:1).

Moreover, when the South African Defence Force experienced a massive downsizing after the end of the apartheid era thousands of individuals – both black and white – with combat skills were released onto the 'market for force'. The arrest of South African mercenaries in Zimbabwe and Equatorial Guinea who were involved in the failed coup on Equatorial Guinea in 2004 is only one of many manifestations of the problem (see, for instance, BBC News 2004).

Ongoing civil wars and insurgencies feed the supply of mercenary forces, and post-conflict initiatives to reintegrate former fighters into their communities are not always successful. Moreover, whenever a state reduces the number of its armed forces after a conflict, a pool of professional soldiers is released from active service. Lacking skills-sets for careers outside the battlefield, their opportunities to find employment in a 'regular' sector are usually close to zero. Frequently, the private security sector is the main job market for former combatants in civil wars; post-conflict Sierra Leone is a case in point (Abrahamsen & Williams 2005:7, 12). Failing employment in the PSC industry, former combatants will sell their fighting skills on the market to the highest bidder:

All those who were trained and mobilized for war remain, and they will continue to seek employment in the profession they know best. They may also retain their ideological orientation, and seek to continue the struggle in a freelance way, making opportunistic alliances as necessary (De Waal 2002:122).

This means that an appropriate level of control and regulation of mercenary and private security activity can only be achieved if the issue of mercenarism

is addressed politically within the framework of SSR and DDR programmes. As the Handbook on Security System Reform of the Development Assistance Committee of the Organisation for Economic Development and Cooperation (OECD-DAC 2007:20) emphasises:

If states are to create the conditions in which they can escape from a downward spiral wherein insecurity, crime and underdevelopment are mutually reinforcing, socioeconomic, justice and security dimensions must be tackled simultaneously.

Definitional challenges in 'hybrid' security structures

The incorporation of both mercenarism and private security activity in SSR and DDR processes requires a clear definition of all of the actors involved. This is rather challenging in the African context for 'there has never been a clear-cut distinction between private and public security in most African states' (Isima 2007:4). The most important reason for this may be the failure of the Weberian model of the territorial nation-state with its monopoly over the legitimate use of force in many parts of Africa (Clapham 1999). Public and private security structures have coexisted in Africa throughout colonial times and the transition to the state's monopoly of legitimate force after independence remained incomplete in most sub-Saharan African states. In fact, the new ruling elites frequently maintained the 'artificiality' and 'remoteness' of the colonial state (Azarya & Chazan 1998:112–114).

But there are at least two further reasons for public–private grey areas in the provision of security, at least at the domestic level. First, authoritarian governments have been misusing public security forces for private interests (Isima 2007:4). And second, wherever citizens' real and perceived insecurity is increasing because of escalating crime rates and the failure of the state to combat them, the need for alternative 'private' solutions emerges more or less automatically. The resulting 'hybrid' security structures especially at the domestic level, where allegiances seem to be in constant flux, make the regulation and control of private security activity extremely challenging.

The picture gets even murkier where non-nationals are involved in the provision of security or where they take sides in an ongoing internal conflict because they were hired by one of the parties to the conflict. This is where clear-cut distinctions between legitimate private security operators and mercenaries become difficult. And it is here that we cross the lines between domestic, usually bottom-up answers to insufficient state capacity to provide

security on the one hand and external, that is, cross-border, involvement in the provision (or disruption) of security of a state and its citizens on the other. Both domestic and external involvement in the provision of security can be either legitimate and beneficial or illegitimate and harmful. Both need to be addressed in any regulatory framework that aims to eliminate mercenarism and the use of illegitimate force by private actors – be it with or without the use of lethal weapons – and to reign in the use of excessive force by legitimate private security actors.

These observations are key determinants for the argument in this article. From a human rights perspective, it is irrelevant *where* harmful and illegal acts are committed. Equally, it is irrelevant *who* is committing them, thus a mercenary or an operator of a legitimate PSC. Any debate on possible ways of eliminating mercenarism has to start with the systematic enforcement of existing laws by states party to the relevant treaties in international law and human rights law.

When starting the regulatory debate we must be aware, of course, that there might be limits to the range of (armed) actors that can be encompassed by any legal frameworks. For example, there are instances where private security solutions, either locally or at the state level, are used in a beneficial way but are illegal under domestic or international law. Examples are vigilante groups at the domestic level, for instance in South Africa, and the use of PSCs or PMCs by governments confronted with an escalation of violence on their territories. The latter include the operations of EO in Angola and Sierra Leone where the company was engaged by the respective governments to influence ongoing conflicts on their behalf.

In this article I argue that these challenges will have to be addressed within a broader framework of SSR and in the last section I attempt to offer some suggestions as to how this could be done. Yet in order to draft a meaningful and comprehensive regulatory framework, it is crucial to clearly define the actors and activities regulation is aiming to cover. The following categories and comments may be helpful guidelines to structure the regulatory debate.³

Vigilante groups

Private security arrangements at the community level such as vigilante groups – at least in their benevolent form – are frequently perceived to be legitimate in that they merely make up for the state's failure to police, secure and enforce the legal rights of its citizens (Dixon & Johns 2001; Schärf & Nina 2001). Other authors, such as Buur (2006:4), argue that

... vigilantism is not an implicit critique of the application of the law, but of the moral and ethical foundations of the law itself. Vigilantism is therefore more than a critique in so far as it seeks to provide an 'alternative' moral and ethical framework around the control of women and youth, thus challenging the foundation of human rights and the state's monopoly on violence by applying corporal punishment.

In other words, 'the very legitimacy of vigilante formations ... is based on the fact that they are dealing with issues that the state is felt to be undermining' (ibid). This means that the problem of vigilante groups can only be addressed by political rather than purely security-oriented means, such as more and better equipped police. The examples of 'concerned residents' groups or 'conservative vigilantes' in South Africa, such as *AmaAfrika* (Port Elizabeth) and *Witdoeks* (Cape Town), are cases in point (Buur 2007:127). As the arguments below will demonstrate more clearly, a political solution can be achieved if the security needs of ordinary people, usually in the poorer strata of society, are addressed within the framework of SSR and related development programmes.

Mercenaries

A similar conclusion can be drawn from ongoing mercenary activities in large parts of Africa. Because mercenary activity is fuelled by economic and financial interest if not sheer poverty, it cannot necessarily be offset by 'better', that is, more efficient, government solutions to security problems. Any attempt to tackle the problem has to be addressed at the political level. Existing definitions of what constitutes a mercenary clearly demonstrate the political nature of the problem.

A mercenary is defined here as an individual professional soldier who sells his fighting skills and labour to a country other than his home country or to a warring faction in return for (usually disproportionate) financial gain.⁴ The UN's definition of a mercenary in the International Convention against the Recruitment, Use, Financing and Training of Mercenaries sets a wider range of criteria which have to be added to the short definition given here. Accordingly,

- 1 A mercenary is any person who
 - (a) Is specially recruited locally or abroad in order to fight in an armed conflict;
 - (b) Is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation substantially

- in excess of that promised or paid to combatants of similar rank and functions in the armed forces of that party
- (c) Is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict
 - (d) Is not a member of the armed forces of a party to the conflict; and
 - (e) Has not been sent by a State which is not a party to the conflict on official duty as a member of its armed forces
- 2 A mercenary is also any person who, in any other situation
- (a) Is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at
 - (i) Overthrowing a Government or otherwise undermining the constitutional order of a State
 - (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

These criteria indicate that mercenarism is not merely a security problem; nor is it merely an issue to be tackled under the notion of human rights. Rather, the problem of mercenarism can only be dealt with when the political nature of the phenomenon is acknowledged and when mercenarism is understood as a crime and not necessarily a profession of choice. It is frequently fuelled by the rivalling economic interests of states and elites on the one hand and by poverty and a lack of opportunities for legitimate jobs on the other.

The fact that, throughout history, mercenarism has been morally disapproved if not condemned demonstrates its illegitimate nature. As Percy (2007:1) argues, '[f]or as long as there have been mercenaries, there has been a norms against mercenary use'. The reasons for moral disapprobation are twofold: first, mercenaries 'use force outside legitimate, authoritative control'; and, second, 'they fight wars for selfish, financial reasons as opposed to fighting for some kind of larger conception of the common good' (Percy 2007:1).

Yet, throughout history, it has proved close to impossible to eradicate mercenary activity because cooperation between states on the issue was both ineffective

and insufficient. International cooperation is a key requirement, however, because mercenarism can only be addressed through such cooperation across national borders. Any form of cooperation, however, has to be based on a common definition of what constitutes a mercenary.⁵ Ideally, it should also be informed by hard empirical data on mercenary activity – but these are scarce and extremely difficult to acquire. This is not least due to the high risks for individual researchers undertaking field work in zones of armed conflict, low-level insurgencies or generally high crime rates. Any attempt to monitor and eliminate mercenarism in Africa will have to take these circumstances into account.

Local and domestic private security companies

The most prevalent category of private security activity in Africa is the local PSCs that are offering armed and unarmed protective security services on the domestic market. These services comprise armed and unarmed guard duties, personal protection, CCTV monitoring, rapid response, fire alarm response, cash in transit protection and related tasks. Most of these services replace or prop up insufficient or ineffective public policing services.

Local and domestic PSCs have the potential to significantly improve the security situation for ordinary people where the state fails to live up to its duties. This can happen if their services are delivered in a professional and accountable manner. On the other hand, in the absence of enforceable professional standards, their activities may aggravate a problematic security situation. Their operations may also be rather ineffective because they fail to address the underlying causes of insecurity. Furthermore, there is a chance for private security activity to have counter-productive effects if security comes at a price which only the rich can afford, and thus excludes the majority of a population from its benefits.

Ineffective legislation or a lack of standards may also have severe consequences for the private security guards themselves, for instance because they might be denied the minimum wage and the benefits of other basic labour rights. The Kenyan case provides probably the best-researched evidence for this (Kamenju et al 2004). Thus, more often than not security guards operate at the lowest end of the food chain and insufficient protection by labour laws makes them susceptible to criminal activities. The resulting consequences for the reputation of the entire industry in turn threaten to undermine any potential benefits of private security services that are delivered in a responsible and accountable manner.

International Private Security Companies

International PSCs, sometimes with business relations to local security companies, provide protective security services in high-risk environments. They ‘specialize in providing security and protection of personnel and property, including humanitarian and industrial assets’ (Caparini & Schreier 2005:2). This comprises tasks such as static guarding, convoy security and personal security, but also mine clearing – especially in the aftermath of an armed conflict – and the provision of training for local security forces in post-conflict reconstruction processes. The latter usually take place in the context of SSR and DDR programmes.

Among international PSCs there are multinational corporations that are listed on global stock markets as well as companies with a more restricted regional remit. A common feature is that they hire security forces from third states and deploy them in their overseas operations. This is a key feature when addressing the regulation of private security activity alongside the elimination of mercenary activity. More often than not it is difficult for outsiders to determine unambiguously where the activities of a private security operator end and that of a mercenary start. To observers, an armed guard may seem ready to engage in offensive action at any time or stand ready for recruitment for hostile operations if the pay appears attractive enough.

Thus, there are considerable tensions between public perceptions and the potential for PSCs to positively contribute to SSR operations to improve the overall security situation of the societies they work in. While to some, international PSCs are modern-style ‘corporate warriors’ (Singer 2003), others hail the industry as a blessing for the downtrodden in conflict-ridden societies in Africa (Brooks 2000). However one views them, it seems obvious that PSCs can both save and endanger lives. Wielding armed force in unstable environments always implies both a risk of accidents and a possibility of intentional abuse of force.

As will become clearer in the next section of the article, the best way to tackle the many problems associated with international PSCs – such as legitimacy, accountability and transparency – is an unambiguous regulatory framework for private security activity that includes a set of binding standards. Regulation has to include provisions for the control of private security activity at the national, regional and international level; it has to address the problem of the illegitimate use of force by private actors; and it has to provide guidelines for professional standards and best practice. Moreover, a regulatory framework has to emphasise the obligation of states to enforce existing international law, in particular international humanitarian law and international human rights law.

The client structure of international PSCs consists of governments, international bodies and agencies, NGOs and aid agencies, international businesses and their representatives, as well as individual wealthy clients. Generally speaking, however, international PSCs are increasingly catering for private businesses seeking to expand their existing operations or making new investment decisions to move into unstable, high-risk or post-conflict environments, in particular in Africa. In this case, the PSC offers an entire range of services that are necessary to facilitate such an investment: in the beginning this involves market research, political risk analysis and due diligence processes, subsequently it means advising and protecting their clients when they first visit the location in question to build local relations, and finally any investment decision has to be backed up by the necessary security measures in theatre.

Private military companies

Many of the benefits and criticisms of PSCs apply to PMCs as well. PMCs are defined here as 'private companies that specialize in military skills, including combat operations, strategic planning, intelligence collection, operational support, logistics, training, procurement and maintenance of arms and equipment' (Caparini & Schreier 2005:2).

This implies that their clients are usually governments, but may include insurgents, militia groups, and other armed factions. The most notorious instances of PMC activity are probably the operations of Executive Outcomes and Sandline International in the 1990s. EO's overt actions in Angola and Sierra Leone may have helped save numerous lives but their actions have frequently been questioned on the grounds of not only legitimacy and ethics but also long-term effectiveness.

The times when companies were openly offering combat services are certainly over. What remains is the PMC label which today refers to companies offering support services to the armed forces of either their own or a foreign country. In real terms, the distinction between PSCs and PMCs may be largely semantic and reflect cultural preferences and caveats. This can best be illustrated by a comparison of the two biggest export markets of private security services, the United Kingdom and the United States. Whereas the term PMC may be perfectly acceptable for US companies working directly for the US government – thereby acting as force multipliers of the US military – the same is not true for the UK. This is largely because up to 90 per cent of the contract value of UK companies is generated through contracts

with the commercial sector and other clients who may not want to be seen to be working with a private *military* company. Only about 10 per cent of the turnover of British PSCs derives from government contracts. In the US, the ratio is the reverse.

This categorisation of actors may not be exhaustive and it is certainly not clear-cut. It could, however, serve as a valuable starting point for the development of different regulatory schemes and political strategies to deal with each category of actor within an overarching framework. For Africa, such a framework could be developed, for instance, in the context of SSR under the auspices of an international or Pan-African panel.

PSCs – Providing SSR or subjected to SSR?

As stated above, the majority of the problems arising from private security and military activity in Africa can be traced back to weak state capacity in many African countries (Bearpark & Schulz 2007; Clapham 1999; Isima 2007). This has led to the simultaneous trends of the bottom-up (eg vigilante groups, local PSCs) and the top-down (eg state-sponsored) privatisation of security. All legitimate private security providers have the potential to improve the security situation for a number of social groups and even become ‘force multipliers’ (Abrahamsen & Williams 2006:20) thereby enhancing the real and perceived security for an entire society. Yet in order for the benefits of privatisation to be reaped it is essential to formulate clear standards and guidelines for the delivery of private security services. Private security activity should therefore be addressed in the framework of SSR, because

[i]n countries where private companies perform vital security functions, focusing on public security forces alone may significantly reduce the effectiveness of reform and, at worst, have unintended negative outcomes (Abrahamsen & Williams 2006:3).

This suggestion is supported by existing approaches to and analyses of SSR programmes, in particular by the OECD’s development agency, OECD-DAC. It is increasingly acknowledged amongst SSR practitioners that security services are frequently provided by non-statutory security forces who therefore have to be included in SSR measures (OECD-DAC 2007:22). The purpose of SSR is to help ‘create a secure environment conducive to other political, economic and social developments, through the reduction of armed violence and crime’ (OECD-DAC 2007:21) and it is aimed at the entire security sector of a country.⁶

In order for SSR programmes to be successful they have to be based on democratic norms, human rights principles and the rule of law; they have to ensure local ownership; and they need to enable greater civilian participation and oversight. Moreover they have 'to provide freedom from fear and measurable reductions in armed violence and crime' (OECD-DAC 2007:21). In other words, they have to mirror the basic tenets of democratic civil-military relations in Africa:

the principles of democratic [civil-military relations] are couched in reference to accountability, adherence to rule of law, transparency, respect of human rights, political control, consultation with civil society, professionalism, and collaborative peace and security (Ngoma 2004:104).

To local actors, many of these suggestions, especially if they are made by international agencies and foreign governments, may sound overly prescriptive and general. Moreover, SSR efforts can be criticised for their focus on the tactical level and their failure to provide a larger strategic plan integrating SSR and development programmes for a country or a region. These problems are aggravated if SSR programming is not based on personal experience or reliable empirical data. It is therefore essential to keep three things in mind. First, whilst the international community is increasingly making funds available for the conduct of SSR programmes in Africa, it may not always be wise to prescribe a particular course of action in the design and implementation of SSR measures. Second, SSR programmes need to be embedded in an overarching strategy, devised in partnership by donors and local stakeholders, to further both security and development. And third, more of the available funding for SSR needs to be set aside for indigenous research on specific local conditions and requirements.

It is beyond the scope of this article to make precise suggestions as to how PSCs could be incorporated in local SSR programmes. There are, however, several issues that any initiative aimed at the regulation and control of the private security sector – comprising both local PSCs and those operating at a regional level – has to cover:

- Guidelines for comprehensive vetting for PSC operators, including criminal record checks, as well as their accreditation
- Guidelines for comprehensive operational training (eg weapons training)
- Guidelines for legal, human rights and, where possible, gender training

- Guidelines for transparent internal complaints procedures
- Guidelines on the creation of clear structures of accountability, including post-incident reporting systems
- Labour rights, including minimum wage arrangements and insurance cover, for PSC operators

This list is far from exhaustive and certainly has to be adjusted to specific local needs. But unless all of these issues are addressed it will be difficult to turn PSCs into meaningful building blocks of a national security sector and to eliminate 'rogue' companies. As argued above, once PSCs abide by binding standards and are subject to effective mechanisms to control their activities, they can become legitimate actors and as such make a meaningful contribution to the provision of security in a number of communities in Africa. Moreover, they can then provide meaningful and legitimate employment opportunities for ex-combatants and even mercenaries.

At the same time, wherever foreign private companies are involved in the conduct of SSR on behalf of governments or intergovernmental agencies they need to be subject to quality control and abide by internationally recognised standards. The fact that private security actors may be both involved in the delivery of and subject to SSR, is a function of the increasingly complex structures of security governance. Private actors are now involved in the training of other private actors among whom there may be former insurgents and, in fact, mercenaries. Alongside such programmes on behalf of governments and other donors, PSCs are also frequently involved in the remediation and eradication of discarded or outdated weaponry and ammunition stockpiles. Governments and inter-governmental agencies who sponsor SSR and DDR projects, award the contracts and monitor performance are therefore equally challenged to implement standards and structures of accountability and to work towards the regulation of the international private security sector.

A matrix approach to regulation

Only if a 'matrix approach' to the regulation and control of private security activity in Africa is used, would it be possible to tackle the challenges posed by a transnational industry with a serious potential for human rights abuses and criminal activity (Bearpark & Schulz 2007). Bad practice and low standards by some companies and individuals mar the image of the entire industry. This can have disastrous consequences because private security

services have become an indispensable feature of post-conflict reconstruction as well as the more mundane day-to-day security of ordinary people in an increasing number of African countries. In other words, private security activity has an enormous potential both to cause harm and to improve the security situation of many Africans.

In order to attain the positive aspects of private security and to eradicate illegal and immoral activity, several circumstances have to be taken into account. First, with weak state capacity in many African countries, governments and public authorities may not always be in a position to effectively control and regulate private security activity. It is therefore crucial to co-opt private security actors in any ongoing or future debate on regulation. Second, regulatory questions have to be addressed in the framework of ongoing or future SSR programmes, ideally with the support of the international community, to share best practice. Third, any new laws and standards will have to be drafted in a way that makes them enforceable at the domestic level and that allows for international cooperation concerning their enforcement. This means that there has to be a core of regulatory and legislative tools which are common to as many African countries as possible. Moreover, when designing new laws it has to be taken into account that companies might be driven underground if legislation is too harsh.⁷ Thus a delicate balance has to be struck between an improvement of standards, better enforcement (including the effective punishment of non-compliance in the case of voluntary standards), and laws that do not impose unnecessary financial and other burdens on existing companies.

It is crucial that an international or regional regulatory framework be specific regarding categories of actors but indistinct as to the processes leading to the implementation of its requirements. It must be the task of individual governments to integrate the framework into their legal systems and penalise breaches of the law accordingly.

Alongside a meaningful framework for the regulation of PSCs there needs to be an amended regional AU convention on the elimination of mercenarism in Africa (see Gumedze 2007). A new convention has to be very precise about definitions of terms such as 'mercenary', 'armed conflict', and 'hostilities'. Most importantly, it has to provide clear guidelines on the cooperation between states who are party to the new convention, regarding its implementation. For instance, article 10 of the OAU/AU Mercenary Convention on 'mutual assistance' has to be amended, so as to provide more detailed guidelines and obligations on the nature and extent of 'the greatest measure of assistance' in the investigative process and in criminal proceedings.

An amended convention should also, ideally, take account of the bigger picture of mercenary activities in contemporary Africa and oblige the signing parties to address the problem through additional means, such as SSR and DDR programmes. Moreover, the convention should establish a clear link between security and development, which is also addressed by international SSR efforts, and oblige states to tackle the problem of mercenarism through political means as well as social and developmental programmes.

As stated above, alongside an amended mercenary convention there needs to be a matrix approach to the regulation of legitimate actors in the area of private security. Such a matrix would consist of regulatory schemes at different levels, namely the national and regional (that is, the AU through a multilateral initiative) levels and the international level, as well as within the industry itself. The different regulatory schemes would have to be complementary and, ideally, mutually reinforcing. Moreover, it will be essential to ensure that different regulatory frameworks are interlocking, in particular when it comes to definitions: they need to be clear and applicable across a range of countries. Furthermore, there have to be enforcement mechanisms allowing the prosecution of PSCs and individual operators that are not compliant with the law across national borders. Only such a matrix approach can ensure that the widespread impunity of PSCs and their employees, in particular as far as human rights abuses are concerned, will stop.

At the same time, it is imperative that clients, including governments, of PSCs be aware of existing standards, guidelines and laws. They need to be in a position to choose the right company which complies with international standards of accountability and transparency. Moreover, clients need to be able to set the right terms and conditions of contract in order to further professionalism, ensure the prosecution of criminal behaviour, and prevent incidents in the first place. The current initiative by the Swiss government and the International Committee of the Red Cross to promote respect for international humanitarian law and human rights law by PSCs and PMCs working in conflict zones is an excellent starting point. It should be replicated and refined at regional and national levels.

Conclusion

This article has demonstrated that mercenary activity in Africa can best be tackled in the framework of a comprehensive, regional regulatory agenda and an equally widespread SSR programme in multiple countries. The goals of this twin approach are to increase the chances for the implementation of

a long-term human security agenda; to separate the wheat from the chaff among private security actors; to enable the legitimate players to make a meaningful contribution to the day-to-day security of all people regardless of class, race and gender; and to provide the basis for long-term sustainable development in regions where insecurity is currently the biggest hurdle for widespread education, investment and economic growth.

Notes

- 1 The author wishes to thank Dr Rita Abrahamsen for comments on earlier versions of this chapter.
- 2 In the absence of any reliable data sets the suggestions are based on a relatively small number of qualitative case studies and anecdotal evidence.
- 3 The categories of insurgents and militia groups are not covered in this overview of private actors in the areas of security and defence, because their mission is usually politically or economically motivated rather than strategically or security oriented.
- 4 For the internationally agreed legal definitions of mercenarism, see the 1977 OAU/AU Convention on the Elimination of Mercenarism in Africa; the 1976 Luanda Draft Convention on the Prevention and Suppression of Mercenarism; and Additional Protocol I to the Geneva Conventions of 12 August 1949.
- 5 For an in-depth discussion of the definitional problem, see Gumedze (2007).
- 6 In terms of the OECD-DAC Guidelines on Security System Reform and Governance, agreed to by ministers in 2004, the security system includes 'core security actors (eg armed forces, police, gendarmerie, border guards, customs and immigration, and intelligence and security services); security management and oversight bodies (eg ministries of defence and internal affairs, financial management bodies and public complaints commissions); justice and law enforcement institutions (eg the judiciary, prisons, prosecution services, traditional justice systems); and non-statutory security forces (eg private security companies, guerrilla armies and private militia)' (OECD-DAC 2007:5). This definition has become established internationally and is adopted here as well.
- 7 The South African Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act, which was enacted after President Thabo Mbeki had signed it on 12 November 2007, is a good example of how both mercenary activity and legitimate private security services can be controlled. However, an effective enforcement of the Act will only be possible if more countries introduce similar legislation, which will prevent mercenaries and PSCs from moving into unregulated environments where they are not subject to any form of control.

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PART VI

**TOWARDS AN EFFECTIVE
REGULATORY FRAMEWORK
FOR ADDRESSING THE PRIVATE
SECURITY SECTOR AND
MERCENARISM IN AFRICA**

CHAPTER 6

WORKING TOWARDS EFFECTIVE LEGISLATIVE AND REGULATORY SOLUTIONS FOR THE PRIVATE SECURITY INDUSTRY IN AFRICA

JJ Messner

Introduction

Thirty years after the adoption of the OAU/AU Convention for the Elimination of Mercenarism in Africa (the OAU/UN Mercenary Convention), the African continent, and indeed the world, continues to lack an effective, clear and robust regulatory framework that adequately deals with the parallel issues of ‘mercenarism’ and the legitimate private security sector. Since the OAU/AU Convention, many attempts have been made to regulate both the private security sector and the ambiguous concept of ‘mercenarism’. Attempts have thus far fallen short of providing an adequate framework, let alone properly defining the actors and issues central to the regulation.

This paper attempts to propose an ideal worldwide legislative and regulatory template to adequately deal with illegitimate non-state activity in conflict while at the same time allowing and encouraging the legitimate private security sector to flourish. Humanitarian security has value, and the private security sector is making a positive difference in multiple conflict and post-conflict zones around the world in places like Afghanistan, Iraq and Sudan. Unfortunately, too often regulation that attempts to deal with the ill-defined concept of ‘mercenarism’ impinges on the work of the legitimate private security sector. Indeed, the lack of adequate definitions results in a ‘scorched earth’ effect and the private security sector is conflated – either accidentally or deliberately – with illegitimate non-state activity in conflict.

The goal of effective regulation should not be to penalise legitimate firms engaged in providing irreplaceable services, but rather to find a way to best utilise these services. Regulation of transnational industries is a challenging undertaking for the international community. Rather than seeking to regulate minutiae, international conventions that address private security should act as an enunciation of the basic goals and ideals to which nation states should aspire when formulating their own domestic legislation on the matter. Individual nation states should be encouraged to adopt standardised legislation that marginalises armed illegitimate non-state actors, while providing clear guidelines and enforcement mechanisms for use by legitimate

private security. Further, nation-states should be discouraged from forming policy that unnecessarily restricts the activities of the legitimate private security sector. Useful elements for effective regulation of the private security sector can be found in current legislative frameworks.

It is worthwhile to examine current worldwide legislative and regulatory frameworks to determine best practices for formulating effective, reasonable and realistic regimes in countries that currently lack such frameworks or to improve currently flawed legislation where it does exist. Somewhat effective regulatory frameworks do exist, which address issues such as arms and human trafficking, transparency and accountability, labour conditions, employee training, and operational standards. Many of these regulations could be effectively applied to other jurisdictions around the world, including countries in Africa. A prospective revision of the OAU/UN Mercenary Convention would benefit from the inclusion of many of these basic concepts, providing clear guidelines for effective domestic legislation in individual nations.

Furthermore, regulatory frameworks are useless without adequate enforcement mechanisms. Despite leading the world in establishing regulations, the United States, like all countries, continues to lag behind in terms of adequacy of enforcement. International conventions and domestic legislation can go a long way towards improving the currently weak link between regulation and enforcement. Only with sound regulation of the private security sector and the recognition of illegitimate non-state actors in conflict as a separate issue, can the full positive potential of the private sector in conflict and post-conflict zones be realised. While academics and trade associations can take the lead on drafting these measures, such regulation will require a concerted effort by both the international community and individual nation states to properly manage this transnational industry without unreasonably curtailing its critical effectiveness.

Definition and importance of the private peace and stability operations industry

The private peace and stability operations industry has expanded significantly over recent years as governments, international organisations and certain non-governmental clients realised the effectiveness of the industry in assisting their operations aimed at achieving peace and stability in conflict, post-conflict and disaster areas. The private sector is most notably engaged in these environments by the US and British governments, the United Nations, NATO and the African Union. These entities have realised their gaps in capacity, and have enjoyed significant success through their operational engagement with the

private sector in places such as Afghanistan, the Balkans, Democratic Republic of Congo, Iraq, Liberia, Sierra Leone and Sudan, among others. It is important to note that the private peace and stability operations industry is particularly broad. A common misconception is that the industry is comprised solely of 'big men with guns'. Although this image may be acceptable to the sensationalist media, the true make-up of the industry is actually far more mundane.

In reality, less than 10 per cent of the industry falls into the category of private security, and an even smaller percentage of the security sector is actually armed. The vast majority of the private peace and stability operations industry consists of companies engaged in logistics (including airlift capacity, base support and construction, shipping, ground transportation and engineering), equipment manufacturing, medical support, training, satellite tracking, commercial intelligence and insurance services. The private sector offers high levels of accountability and professionalism. Most companies within the industry are staffed by ex-military and professionally trained personnel equipped with the appropriate skills and expertise and very high levels of experience. The private sector is also particularly attentive to risk management in conflict situations, since jeopardising the life of their employees – let alone that of anyone else in the environment – is, apart from anything else, highly unprofitable.

Since the end of the Cold War, many nations have scaled down their military capabilities. Hence, a significant motive for utilising the private sector is the fact that some services, such as heavy aviation, are not readily available to most of the world's militaries, and thus are often outsourced to private contractors. Even where militaries do possess the capability for certain tasks, they may still choose to outsource because the private sector can complete the task faster and cheaper.

Although the use of private contractors has increased since the end of the Cold War, it is still important to realise that it is by no means a new phenomenon. The US military, for example, has a long tradition of utilising the services of private security companies; indeed, there were over 80 000 private contractors at any one time supporting the US military in the Vietnam War, when the military was at Cold War strength (Zamparelli 1999). In 1985 the US Army established the Logistics Civil Augmentation Program (LOGCAP) to incorporate the use of private security companies into combat operations planning and thus to maximise the benefits of services the private sector could offer. Other countries around the world, including Australia, Canada and the United Kingdom, are either instituting their own versions of LOGCAP or are seriously considering doing so. The private peace and stability operations industry has proven its abilities in enhancing the operations of

militaries and peacekeeping operations worldwide. However, it is also true that legislative and regulatory frameworks for dealing with this industry have been incredibly slow to catch up to the significantly increased utilisation of the private sector in conflict, post-conflict and disaster areas. The key to ensuring the continued success of the private sector in these operations is to understand how best to utilise this potential while ensuring effective controls, but at the same time not regulating the industry out of existence.

The need for good legislative and regulatory frameworks

Why the private peace and stability operations industry should be regulated and what incentive there is for it to be regulated are important questions. Although these questions may seem somewhat self-evident, it is nevertheless necessary to understand them, to justify the entire basis of legislation and regulation.

State interest

States have a significant interest in regulating the private peace and stability operations industry for a number of reasons. First, it has become accepted within the international system over the last 200 to 300 years that states hold a monopoly on violence. Although only a very small portion of the private peace and stability operations industry even has the potential for violence (and even then only in self-defence) and by its nature works within legal frameworks, it is understandable that states would wish to regulate such an industry. Second, as Avant (2005:65) points out, the services provided by companies within the industry have the potential to affect the 'power projection capabilities of potential rivals', and states find it within their interests to regulate such power projection. Third, there is the potential that the behaviour of private companies in any industry could 'affect the reputation of the state from which it hails' or, more so in the case of the private peace and stability operations industry, informally involve a state in a conflict to which it is not a party (Avant 2005:65). For these reasons, it is reasonable that states would seek to regulate the private peace and stability operations industry.

International interest

The private peace and stability operations industry is truly a global one. When regulating international commerce, states have limited jurisdiction outside of

their own borders, and so international cooperation is necessary to properly regulate transnational transactions and operations. In a given operation, a British company may be engaged on a US government contract in Sudan, and may be employing workers from Croatia, Fiji, Nepal, South Africa and Uruguay. The company may also receive airlift support from a Russian company flying a Ukrainian-registered aircraft crewed by pilots from Moldova. The potential combinations are endless. But this example, though fictitious, does demonstrate the international nature of the industry. To truly internationally regulate the private peace and stability operations industry, like any type of industry, the international community must agree on legal norms, and properly apply and enforce them.

African interest

It is worth pointing out why Africa and individual African nations in particular would wish to properly regulate the private peace and stability operations industry. Unfortunately, Africa has consistently been the venue of countless conflicts over the past half-century. Africa has also hosted numerous UN and regional organisation-led peacekeeping missions. International peacekeeping missions would struggle to operate were it not for the support of the private sector. Indeed, almost every peacekeeping mission today is supported by the private sector in one way or another. African peacekeeping missions and the private sector are largely inseparable. Given this reality, it is reasonable that African nations would seek to clearly define laws and regulations that adequately deal with the widespread role of the private sector in conflict, post-conflict and disaster areas. Furthermore, Africa has also borne witness to multiple incidents of intervention by illegitimate non-state actors in conflict situations. In view of this historical context, it is important that African nations guard against illegitimate actors, whilst allowing the legitimate private sector to continue their positive work in support of peace and stability, unhindered.

Private interest

Companies within the private peace and stability operations industry are themselves strong advocates for better regulation. Good legislative and regulatory frameworks are positive for good companies. If regulatory frameworks are robust and effective, it then becomes easier for less capable and less reputable companies to be marginalised. This is especially important in terms of competitive advantage. It is far cheaper for a company to operate if it is less concerned about operating within the law and

similarly if it is not concerned with meeting minimum benchmarks of ethics and good practice. These 'bottom-feeder' type companies are then able to undercut more reputable companies on price. A reality of privatisation and competition is that all too often the winning bid will be the competitor with the lowest price. So, if reputable companies are able to compete on an equal footing, without risk of being undercut by less reputable companies, this has advantages not only for the companies but the clients, too. Hence, better regulation is beneficial for all concerned.

Avoidance of bad legislation and regulation

Although the necessity of strong and practical legal and regulatory frameworks for the private peace and stability operations industry is clear, it is also critical that a balance be struck between sensible frameworks and unreasonable, draconian ones. To be sure, gaps do currently exist in both domestic and international law in regard to the industry. However, key concerns about the legal accountability of companies and the application of laws in conflict, post-conflict and disaster areas should be addressed by sensible regulation. It is incumbent upon states and the international community to seek clearly-defined frameworks that allow the legitimate industry to continue its positive work, while at the same time ensuring that they are accountable. It is further incumbent upon the international community to marginalise illegitimate or disreputable actors. It is also important that at all stages of creating or amending legislation or regulation, all stakeholders – in particular the private peace and stability operations industry itself – be engaged in the process. Laws and regulations instituted to ban the legitimate industry or to severely curtail its operations – largely as a result of knee-jerk or ill-conceived policy – is counter-productive and makes peace and stability in unstable environments more difficult to achieve.

Enabling or prohibitive industrial legislation

The private peace and stability operations industry, unlike illegitimate non-state actors, operate according to relevant legal frameworks. Therefore the activities of the private peace and stability operations industry are either enabled or prohibited by these very legal frameworks. Where they are enabled, it is either through explicit regulation or by the failure to prohibit, in other words in the absence of law. This division is often unclear, with the laws of a country prohibiting illegitimate non-state actors or 'mercenaries' but failing to provide an adequate legal basis for legitimate private companies.

This confusion must be resolved, not only from the perspective that any law on illegitimate non-state actors must be clear and robust enough to deal with that problem adequately, but also to enable legitimate actors to carry out their work.

This section deals with the legality of non-state operations in conflict, post-conflict or disaster relief operations from a big-picture conceptual perspective. In other words, are the operations themselves deemed legal or illegal, criminal or not? The following section will examine legislation and frameworks for dealing with crimes committed during operations, on the assumption that the operations take place within a permissive legislative and regulatory environment.

Domestic frameworks

Australian law regulates the activities of private companies in conflict, post-conflict and disaster areas in terms of the Crimes (Foreign Incursions and Recruitment) Act, 1978. However, this law is particularly narrow in its scope, for it only deals with non-state entities where they engage in hostile activity outside of Australia and are not accompanied by the armed forces of a state. In 2003, France enacted the *Loi relative à la répression de l'activité de mercenaire*, a law that prohibits mercenary activity. The law enacted the Geneva Protocols as they refer to 'mercenaries' into domestic French law, and applies to French citizens, permanent residents and legal entities. However, the French law, in applying the Geneva Protocols, encounters the same systemic problems from which the Protocols themselves suffer. This issue will be analysed later in this section.

New Zealand introduced the Mercenary Activities Prohibition Act in 2003, as an enactment of the International Convention against the Recruitment, Use, Financing, and Training of Mercenaries (Goff 2003, par 2). The intent of the legislation is to prohibit any New Zealand citizen from 'making a profit from participating in conflict' and that a person would be 'paid substantially more than members of the armed forces of the parties to the conflict for corresponding duties' (Goff 2003, parr 11–12). Arguably, this could encompass civilians working in the private peace and stability operations industry. Such employees are paid for their work, which is often in conflict or post-conflict zones, and sometimes they are on the face of it paid more than an average soldier in the same situation. However, the legislation is not designed to 'catch' New Zealanders who are 'working overseas for companies or non-governmental organisations in security related activities, as long as those

activities do not include fighting in a civil conflict' (Goff 2003, par 15). In this sense, the New Zealand legislation does distinguish employees of private companies whose operations are legitimate. The crux of the enforcement of the law is therefore that it places the onus on a company or an employee of a company to prove that their operations are legitimate and do not contravene international law. The intent of the legislation is clearly to legislate against illegitimate non-state actors in conflict and post-conflict zones.

The South African legislative framework is currently in flux. Its current legal instrument is the Regulation of Foreign Military Assistance Act of 1998, which prohibits 'mercenary' activity and also regulates foreign military activity in areas of conflict. This Act shall be replaced by the Prohibition of Mercenary Activities in Country of Armed Conflict Act No. 27 of 2006 (the new Act), which was published on 16 November 2007. The new Act which is yet to come into operation on a date determined by the President by Proclamation in the *Gazette*. The new Act was drafted as a response to the arrest of 69 South Africans in Zimbabwe, who were alleged to be in transit to Equatorial Guinea with the intent of overthrowing the government of Teodoro Obiang Nguema Mbasogo in August 2004, and the ongoing recruitment of South African citizens to work for private companies engaged in operations in Iraq (Leon & Williams 2006, 15). Although this Act has been used to investigate and even prosecute and convict South Africans engaged in illegal activity, the current legislation is viewed as ineffective and cumbersome in achieving successful convictions, and its penalties too weak to provide an effective deterrent (Taljaard 2005:9). At this time, new legislation which was passed in 2006 continues to languish, awaiting assent by the President of South Africa.

The new Act suffers from significant definitional problems, an overly broad scope and onerous licensing requirements for non-state actors. It will prohibit South African citizens from working for private companies in conflict zones. Once operationalised, the new Act will have a chilling effect on private operations throughout the African continent, and will also deprive thousands of South African citizens from legitimate, gainful employment within the private peace and stability operations industry.

The new Act is especially complicated by a particularly arbitrary definition of what actually constitutes an 'area of conflict'. The arbitrary nature of the definition would mean that a person or company could legally provide security services one day, but their status could become illegal the following day if that conflict or post-conflict zone was reclassified by the South African authorities as an 'area of conflict'. This would mean that such a person or entity could potentially break the law without their knowledge (Leon & Williams 2006:18).

The Bill also fails to properly define 'security services', with the result that a person or company that provides security services to an entity that is not engaged in conflict would be just as guilty under the legislation as a person or company that provided direct armed support to a combatant, since the law focuses on the environment of conflict rather than that actual specific activities within that conflict (Leon & Williams 2006:18). There is also confusion over another aspect of the bill that allows South African humanitarian organisations to operate in conflict zones (so long as they register with the South African National Conventional Arms Control Committee) but does not define what constitutes such an organisation (Leon & Williams 2006:18).

The South African experience highlights the critical need for balance. While it is imperative that there is a strong and practical legislative and regulatory framework to deal with the private peace and stability operations industry, it is just as important that the industry not be regulated out of existence due to preconceived notions that the industry and illegitimate non-state actors are one and the same. Furthermore, it is important that definitions be clear, especially on basic issues such as what constitutes an area of conflict, a security service or a humanitarian organisation.

Finally, frameworks and legislation must differentiate between actors providing legal and illegal services in conflict or post-conflict zones, and recognise that providing services in such an environment does not ipso facto equate to illegality. The United Kingdom introduced the Private Security Industry Act in 2001, but it is of little relevance to the private peace and stability operations industry due to its focus on the domestic provision of security, and not the operation of private companies in conflict, post-conflict or disaster areas overseas. To cover this gap, a Green Paper on Private Military Companies was drafted in 2002. The Green Paper sets out a series of options for regulating the private peace and stability operations industry, including a complete ban on such operations abroad; a complete ban on the recruitment of British citizens for employment in such operations abroad; a licensing regime for peace and stability operations service providers; a registration and notification system; a 'general licence' for private companies; and a system of self-regulation within the industry (UK House of Commons 2002). At this stage, the Green Paper has progressed no further, and it is unclear whether the British government will enact legislation and/or regulations concerning the industry, and if so, when this will occur.

The legal history with private contractors in the US can be traced back to the Anti-Pinkerton Act of 1893 that forbade the use by the US government of private contractors to assist in industrial strike breaking. Apart from being

114 years old, this particular piece of legislation has no relevance to the private peace and stability operations industry, since it deals with the issue of strike breaking (and not conflict, post-conflict or disaster areas) and does so domestically, with no consideration of operations overseas. The use of private companies by and/or from the US in conflict, post-conflict and disaster areas is authorised annually by two specific pieces of legislation. The House and Senate Armed Services Committees are responsible for drafting National Defense Authorisation Acts that essentially outline what activities may be carried out in the defense realm, and by whom. This particular legislation enables the government to contract with private companies and can also define in what capacity they may be contracted. Meanwhile, the House and Senate defense appropriations committees are responsible for drafting the Department of Defense Appropriation Acts that determine the budget allocation and sets conditions for activities authorised by the National Defense Authorisation Acts. In addition, various Department of Defense regulations govern issues such as the use of weapons by private contractors and rules for the use of force, among other considerations. In many ways, enabling the use of private companies by the US government in conflict, post-conflict and disaster areas is treated in a particularly administrative manner.

International frameworks

There are three international frameworks of particular note that have been deemed to apply to the private peace and stability operations industry, namely the Geneva Protocols, the OAU/AU Mercenary Convention and the UN's 1989 International Convention Against the Recruitment, Use, Financing and Training of Mercenaries (the UN (International) Mercenary Convention). A common flaw of each of these instruments is the definition of 'mercenary'. These definitions are problematic due to their broad scope and outdated nature. The current legal definition of 'mercenary' is such that almost no one could ever be defined as one. This is problematic, as it is an exercise in futility to define something out of existence and then attempt to regulate it. It is especially disadvantageous to legitimate companies in the private peace and stability operations industry, for so long as true illegitimate non-state actors exist in conflict and post-conflict zones, it only serves to undermine the image and reputation of the legitimate industry.

The term 'mercenary' has changed dramatically over time, and it has been used to 'describe everything from individuals killing for hire, to troops raised by one country working for another, to PSCs [private security companies] providing military services to their own country' (Avant 2005:22). In many

ways, the transitory nature of the term 'mercenary' and its lack of an adequate legal definition today render it a useless term. Moreover, the term has become pejorative and 'mercenary' will often be applied to the private peace and stability operations industry by the industry's opponents as a linguistic tool to undermine and hijack otherwise rational debate. The definitional issues are problematic, too. Not only does it mean that private companies are not properly regulated in an international sense, but the definitions cannot even properly deal with illegitimate non-state actors. The failure to properly define the subject of these instruments will continue to frustrate international attempts to create a genuine, practical and realistic framework for the industry. In many ways, the state of the current international frameworks is akin to attempting to regulate international shipping with laws on piracy. International law simply does not work if it cannot define what it is that must be regulated.

It should be noted that there is currently an ongoing project, jointly convened between the Federal Department of Foreign Affairs of Switzerland and the International Committee for the Red Cross, which seeks to formulate a new international legal framework for the private peace and stability operations industry. Known as the Swiss Initiative, it seeks to

contribute to the intergovernmental discussion on the issues raised by the use of private military and security companies; to reaffirm and clarify the existing obligations of states and other actors under international law, in particular under international humanitarian law and human rights law; [and] to study and develop good practices, regulatory models and other appropriate measures at the national, possibly regional or international level, to assist states in respecting and ensuring respect for international humanitarian law and human rights law (FDFA 2007, par 2).

The process began in January 2006, a follow-up meeting was held in November 2006 and another in November 2007 (FDFA 2007, parr 4–7). The Swiss Initiative is laudable, but the non-binding nature of the final product is unlikely to improve the effectiveness of the current international legal framework.

The private peace and stability operations industry continues to operate in an uncertain and underdeveloped legal environment. At an international level, the current legal framework is unwieldy and heavily flawed. Furthermore, only a few individual countries have attempted to grapple with the issue on a domestic level. Certain lessons have emerged in cases where countries have managed to formulate domestic legislative regimes that either allow or attempt to prohibit the existence of the private peace and stability operations industry. First, it is

futile for a country to simply enact an existing international framework into its own domestic law, since the current international frameworks are themselves flawed. However, where 'mercenary'-like definitions are adopted, it is useful to provide definitions that specifically exclude – and hence permit – the legitimate peace and stability operations industry. Second, it is critical that legislation provide clear definitions that adequately define types of activities and venues of activities in order to avoid arbitrariness, loopholes or legal uncertainty. Third, it is important that legislation be properly focused, and deal with the activities of people or organisations, rather than simply the venues of those activities. Fourth, given the global reach of the private peace and stability operations industry, it is necessary that legislation and regulation be similarly global in their perspective, for it is pointless to regulate a global industry only on home soil. Finally, the temptation to enact grand, cumbersome legislation should be weighed against the utility of plain, simple administrative regulations, which although less glamorous and perhaps perceptively less of a public relations achievement for a government, can nevertheless provide a more flexible, practical and successful regulatory basis.

On the other hand, it is imperative that an industry that provides considerable and necessary services in the assistance of peace and stability operations worldwide not be hampered by ill-conceived, populist or knee-jerk legislation, but be allowed to continue unmolested by unreasonable legislation, while being governed by sensible, proactive and practical regulatory frameworks.

Criminality

The private peace and stability operations industry is no different to any other industry in the sense that it is not immune to criminal activity. It is imperative, therefore, that there be robust legal and regulatory frameworks that adequately deal with unlawful activity by employees of these companies. Whereas the previous section examined the legality of non-state operations in conflict, post-conflict or disaster areas from a conceptual perspective, this section deals with legislative aspects and frameworks that are concerned with crimes committed during operations, assuming that the operations take place within a permissive legislative and regulatory environment.

Domestic frameworks

Australian law relies on three different legal instruments, namely the Defence Force Discipline Act of 1985, the Crimes (Overseas) Act of 1964 and the

Criminal Code Act of 1995 (Oswald 2006:13). The Defence Force Discipline Act places employees of private contractors – who have consented in writing – under the jurisdiction of Australian Defence Force disciplinary rules and procedures (Oswald 2006:13). Essentially, the Australian model evades some of the concerns in the American example which will be examined below. Australia subjects its contractors to military law, but with the consent of the civilian in question. Where Australian contractors are declared ‘defence civilians’ under the Defence Force Discipline Act, they are subject to the very same legal framework as the soldiers they work alongside. However, the jurisdiction of the Criminal Code Act is extremely limited and can only be applied to serious crimes committed by Australian citizens, such as war crimes and crimes against humanity, outside Australian borders (Oswald 2006:13). The Crimes (Overseas) Act can only be applied to Australian citizens in ‘declared foreign countries’ of which there are only four – Iraq, Jordan, Papua New Guinea and the Solomon Islands (Oswald 2006:13). This means that, where Australian citizens are operating in conflict, post-conflict or disaster areas outside of Australia or a declared foreign country, where they are not working for the Australian Defence Force, and where they do not commit serious crimes, Australian courts lack jurisdiction.

The US has probably the most sophisticated legal frameworks when it comes to jurisdiction over crimes committed by civilians working for private companies in conflict, post-conflict and disaster areas. However, this issue is a hot topic of debate in the US, and the current frameworks may soon be significantly overhauled. At present a number of bills are being considered by the US Congress to clarify the criminal legal framework for civilian employees of private companies. The two key pieces of legislation in effect are the civilian Military Extraterritorial Jurisdiction Act (MEJA) and the military’s Uniform Code of Military Justice (UCMJ). MEJA was enacted in 2000 to extend US criminal law jurisdiction over civilians working for the Department of Defense in conflict, post-conflict and disaster areas. A major flaw of the legislation was that it did not apply to civilians working for other US departments, such as the Department of State. In 2004, a clarification of MEJA was enacted, to expand the law to include any civilian working for or alongside a Department of Defense operation. MEJA is applicable not only to US citizens or permanent residents, but also to any civilian of any nationality that is working for companies who have contracted with the Department of Defense. Offences may come under the jurisdiction of MEJA so long as they fulfil two basic requirements, namely that the offence was committed by civilians employed by private companies working for or alongside US armed forces overseas, and that if the alleged crime – if committed in the US – would be punished by at least one year imprisonment (Vainshtein 2007:12).

Investigation and prosecution is the responsibility of the Department of Justice, which refers cases to US attorneys. Jurisdiction is based on the last known residence of an accused. For example, if the accused last resided in New York, then the New York US attorney would be entrusted with the case; where an accused is a third country national who has never visited the US, jurisdiction defaults to the District of Columbia. When a US attorney proceeds with a prosecution, he or she may enlist the assistance of the Department of Defense in arresting and transferring the accused to the US.

MEJA has come under heavy criticism for its lack of effectiveness. However, the major problem is not the quality of the law itself, but rather shortcomings in enforcing the law. To conduct an investigation into a crime committed in a conflict, post-conflict or disaster zone overseas is not only an expensive and dangerous undertaking for US attorneys with limited budgets, but such investigations are also undermined by the difficulties in obtaining evidence and witnesses in such environments. All of these shortcomings are major impediments to achieving convictions, with the result that MEJA has only been applied in a relatively small number of instances. Though the Department of Justice has not provided accurate figures, it is believed that only 50 to 60 cases have been tried under the MEJA legislation over a period of eight years, and the vast preponderance of those cases have involved offences committed in or around US military bases in countries such as Germany, Japan and Turkey, and not as may be expected, in conflict or post-conflict zones.

In response to perceived problems with MEJA, Lindsay Graham, a Republican Senator from South Carolina, inserted a five-word modification to the National Defense Authorisation Act for the Fiscal Year 2007 that expanded the jurisdiction of the UCMJ (Mangan 2007:23). The UCMJ was established in 1950 as a criminal code for the US military (Vainshtein 2007, 11). Until the Graham amendment, UCMJ jurisdiction only applied to civilians 'in time of war' (NDAA 2007). To convene a court martial for a civilian, three conditions must be met. The civilian must be either serving with or accompanying the military, they must be 'in the field', and the trial must take place in a 'time of war' (Vainshtein 2007:12). US courts had previously interpreted this clause as excluding civilian jurisdiction where war was not formally declared by Congress (*US v Avarette*). However, the last war that was declared by Congress was World War II, on 8 December 1941. Since then, the US has engaged in a long line of contingency operations, in among others Afghanistan, the Balkans, Iraq, Korea, Somalia and Vietnam. This demonstrates that despite the number of military operations engaged in by the US, Congress is reluctant to actually declare war. Hence, UCMJ would almost never be applied to civilians in US military operations. The

amendment expanded this jurisdiction to operations that are not wars as declared by Congress, by replacing the word 'war' with the phrase 'declared war or contingency operation' thereby including the types of operations conducted since World War II.

However, even if the wording of UCMJ now allows it to include civilians under its jurisdiction in contingency operations, the constitutional question of allowing civilians to be subject to military law remains problematic. In four separate cases since World War II, the Supreme Court has steadily eroded the ability of the military to extend its legal jurisdiction over civilians (Mangan 2007:23). There is little chance that a civilian could be brought before a court martial because of the nature of the military judicial process and the Supreme Court has ruled that the constitutional right of civilians to trial by jury supersedes the court martial jurisdiction of the UCMJ (Vainshtein 2007:12).

While the American legislation and regulation on criminal law is probably the most advanced in the world, the current battle between competing frameworks does provide a useful lesson. First, it demonstrates the complications of placing civilians under military jurisdiction in not only a philosophical or conceptual sense, but especially, in terms of US law, a constitutional sense. The potential scenario of a civilian being convicted in a court martial only to have the conviction overturned on appeal on constitutional grounds is counterproductive and makes the entire court martial jurisdiction over civilians a futile endeavour. Second, there should be a clear definition in any legal framework as to when a law applies. For example, before the Graham amendment, the fact that UCMJ was applicable to civilians only in a time of war declared by Congress – a condition that has not occurred for 66 years – is similarly without use. Finally, any legal or regulatory framework, no matter how robust, must be balanced with effective enforcement. If there is no political or organisational will to enforce even the greatest legal or regulatory regime ever constructed, it means that that framework can never be effective.

Arms trafficking

Although a relatively small percentage of the private peace and stability operations industry consists of armed personnel, the importance of properly regulating this aspect of the industry cannot be overemphasised. The transport of arms is a risky venture, particularly when personnel move from country to country, and more so when they move between countries where oversight and regulation may be insufficient. Therefore, it is of critical importance that whenever private entities require the use of arms as part of their contract

in a conflict, post-conflict or disaster relief operation, that their receipt, use and disposal of arms be properly managed by the contracting entity and the relevant governmental authorities.

The US domestic framework

The US has two primary legislative and regulatory instruments that deal specifically with this very issue, namely the US Arms Export Control Act and the International Traffic in Arms Regulation. The regulation contains an exhaustive list of items subject to its regulation, including small arms, large arms, aircraft, ships, ammunition and other equipment. This list is known as the US munitions list. The regulation in particular has been a critical piece of regulation for private companies active in Iraq. Companies transferring arms from the US to Iraq for use in their operations are obliged to apply for an export licence from the US Department of State. On completion of operations these companies must account for these weapons and re-import them to the US. The regulation is the regulatory instrument that implements the US Arms Export Control Act.

All armed employees of private companies in Iraq are obliged to carry weapons cards that were previously issued by the Coalition Provisional Authority and are now issued by the Iraqi Ministry of the Interior. With a weak government, porous borders and a well-organised insurgent element, the regulation of arms in Iraq has significantly deteriorated. There have also been allegations of illegal arms purchases by private companies in Iraq, fuelled by a need to fulfil their contracts and frustration at the slow and often non-existent issuing of relevant licences by the Iraqi Ministry of the Interior.

International frameworks

The regulation of arms trafficking has also been attempted internationally, but it has not been as successful as domestic regulation in the US. The UN has attempted to create a treaty that helps to regulate the trade in arms worldwide. If such a treaty were brought into effect, it would 'establish legally binding international safeguards for the import and export of weapons' (Gallu 2006, par 3). However, the current status of the draft treaty on the international instrument to enable states to identify and trace, in a timely and reliable manner, illicit small arms and light weapons, is at a stalemate (UN General Assembly 2006, par 28). In late 2006, the resolution to adopt the draft treaty

was defeated by the veto of the US, with notable abstentions by China and Russia (UN General Assembly 2006, par 5). In voting against the treaty, the US argued that the UN standard would fall well below its own threshold of regulation evident in its two instruments (UN General Assembly 2006, par 6).

There have also been attempts at the regional level to regulate arms trafficking. In 1998, the Economic Community of West African States (ECOWAS) declared a three year moratorium on the importation, exportation and manufacture of small arms and light weapons that has since been renewed (IANSA 2006a, par 1). Though the intent of the moratorium is laudable, there is significant concern about its voluntary nature, its lack of enforceability and its neglect of regulating non-state actors (IANSA 2006a, par. 3).

The European Union has also made significant efforts at regulating the trafficking of small arms. Since 1994, the EU has gradually built up a regulatory framework on the issue, culminating in a 1998 Code of Conduct on Arms Exports (IANSA 2006b, par. 3). The EU regulation focuses more on the brokering of arms transfers rather than the transfers themselves. The EU adopted a Common Position on the Control of Arms Brokering in 2003 that attempts to regulate the brokering of arms through a licensing regime (NISAT 2003, par 1). However, this framework does not require licensing on an individual transaction basis, a significant flaw that seriously undermines the effectiveness of the framework. Good regulation of arms transfers is very much in the interests of legitimate private companies.

A serious risk to civilians, local authorities, military forces and private companies alike in conflict, post-conflict and disaster areas is the proliferation of illegal arms among violent elements. It is worth noting that illegitimate non-state actors do not require licences to acquire or carry arms. However, so long as there is no effective framework for arms transfers, the proliferation of arms will continue; as long as there is inadequate accounting for weapons in conflict, post-conflict and disaster areas, the likelihood that arms may fall into the wrong hands remains high; and as long as there is no competent licensing authority, the greater the danger legitimate actors are subjected to, and the greater the incentive for even legitimate actors to acquire weapons illegally.

In the case of a small fraction of companies active in conflict, post-conflict and disaster relief operations, their employees need to be armed. However, with this necessity comes the concomitant risk of the misuse or misappropriation of these arms. To ensure proper conduct of armed

operations, it is critical that there be a strong regulatory framework that ensures that only legitimate actors are in possession of weapons in conflict, post-conflict and disaster areas; that these weapons are sourced from legitimate and licensed brokers; that these weapons are properly handled and maintained during the existence of the contract; and that these weapons are returned and accounted for at the end of a contract. There must also be an accompanying authority that is well-equipped to handle such regulation, as well as being committed to the successful implementation of such a regime. Furthermore, such an authority must be competent enough to not only oversee the system, but to enable legitimate actors to use licensed weapons, and to not stymie and potentially endanger these actors by failing to issue proper licences. As long as there is no framework that adequately addresses these issues, the risk of illegal proliferation of arms, a problem that plagues civilian populations, governments and private companies alike, will remain.

Labour issues

A major issue for the private peace and stability operations industry is the issue of labour. The industry is global in nature, and given this fundamental fact, it is important that there are strong international frameworks to properly deal with this reality.

Vetting

If companies are employing staff in potentially dangerous and volatile environments, it is important that the companies and their clients confidence in the abilities of their staff. Apart from ensuring basic levels of skill and proficiency, it is also necessary that companies properly account for the backgrounds and experiences of potential employees. For example, it is illegal in the US for anyone convicted of domestic violence offences to carry arms; accordingly, it is illegal for anyone convicted of a domestic violence offence to be employed in private security on a US government contract. This is just one minor example of the importance of ensuring the competence of employees before they begin working for a company in conflict, post-conflict and disaster areas. However, it should be noted that some countries, especially those in conflict or transitioning from conflict, do not necessarily possess reliable legal records, if any records at all. Therefore it may be unreasonable in some circumstances to regulate a base level of vetting.

It is often more useful to expect companies to achieve a base level of employee vetting appropriate to the prevailing conditions than to set a general standard. In Sierra Leone, one logistics firm published the photographs of potential local employees in a newspaper, allowing members of the public to dispute an individual's employment if they had for example allegedly committed war crimes. In Iraq, it has become customary for companies to consult senior community leaders to determine who among the local population is fit for employment. It is difficult to codify these practices, but it does demonstrate the potential for ensuring proper vetting and the understanding and flexibility of the industry, even in challenging circumstances.

Employee rights

In any industry, it is imperative that the rights of employees be recognised and enforced. The private peace and stability operations industry employs personnel from a broad spectrum of backgrounds. They include expatriates (ie citizens often from the same country as either the company or the contracting entity); third-country nationals (ie citizens from countries other than that of the company or the contracting entity); and local nationals (ie Iraqis in Iraq, Sudanese in Sudan). One issue is recruitment. Given that the private peace and stability operations industry often operates in austere and sometimes dangerous environments, it is important to ensure that employees are fully informed of the activities they are expected to undertake prior to their employment with a company.

Furthermore, employees must be free at all times to terminate their employment and return to their home countries, without any fear of physical or practical impediment, such as the withholding of passports or travel documents. Many of these labour issues are governed by domestic laws and regulations, such as the US federal acquisition regulations and internationally by International Labour Organisation conventions. Other aspects of employment, such as minimum age requirements, are also regulated at an international level. Furthermore, given the nature of these operations, there should also be adequate provision for compensating employees who are injured in the line of work, or compensating their families in the case of deaths. The US provides for this eventuality through the Defense Base Act, legislation that was enacted in 1941 to ensure that civilians working on US government contracts overseas were properly insured against injury or death. This form of regulation is important for any sector, and not merely the private peace and stability operations industry. Nevertheless, it is important that any legal or regulatory framework for the industry properly includes the rights of employees.

Trafficking in persons

Given that the private peace and stability operations industry often involves the global transfer of labour, it is important that regulations are in place to prevent trafficking in persons. Trafficking in persons is often related to organised crime, drug trafficking and even terrorism and it is a major concern for both states and companies themselves to ensure that these employees do not become victims of trafficking. The US recently revised the federal acquisition regulations to not only prohibit trafficking in persons by companies that contract with the US government, but also to raise awareness among these companies, so that they help to identify trafficking in persons where it occurs. This is also a good example of ensuring legal and regulatory compliance among private companies by use of the power of contractual obligations, an issue that will be discussed further below. Internationally, there are two instruments that deal with trafficking in persons, namely the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons and the UN Convention against Transnational Organised Crime. It should be noted, however, that neither instrument deals specifically with private contractors, and nor do they deal specifically with the issue of conflict, post-conflict and disaster areas. It behoves the international community – and indeed individual national governments – to ensure that trafficking in persons is expressly prohibited and adequately policed in what is a global industry.

Contract law

A key consideration of contracting services to the private peace and stability operations industry is the very fact that these companies are private and are contracted. This very fundamental issue means that these companies are first and foremost subject to contractual constraints. The performance of private contractors is not only dependent upon, but can also be measured by, their contractual agreements. Any successful company, and for that matter any company that wishes to stay in business, will act within its key interests, which is commercial sustainability. If a company fails to fulfil a contract it is unlikely that a client will continue to contract with such a company. Of course, it is incumbent upon a client to act in their own interests, which is to get value for money, ensure that a contract is properly fulfilled, and take action – whether it is legal action for specific performance or not renewing a contract with a bad company – where a contractor fails to fulfil its contractual obligations. It is also up to the employing organisation (ie government, non-governmental organisation, or international organisation) to establish the framework and set the limits on the private contractors' activity and to insist on accountability.

This is a logical arrangement, since private contractors should, by their nature, be contractually accountable to their clients (Dickinson 2006:5).

Domestic contract law

From a governmental point of view, there is plenty of scope for states to successfully regulate private companies by way of good contractual regulation and oversight. The US has a particularly advanced series of regulations, known as the federal acquisition regulations and the defense federal acquisition regulations that govern every aspect of the way all private contracted services are provided to the US government, and provide methods for performance reviews and oversight. Where a state or non-state actor contracts with private companies, particularly in conflict, post-conflict and disaster areas, it is imperative that there be a strong regulatory framework that defines exactly how a contract is to be carried out, and outlines courses of action and remedies for situations where contractual obligations and conditions are not met.

International contract law

Internationally, there is no significant scope for the international community to regulate contracts, perhaps apart from the UN Convention on the International Sale of Goods. However, that convention is more concerned with providing guidance on how contract law should be enacted worldwide, than regulating how contracts should be fulfilled by entities contracting with a state, or engaging in international transactions that involve services to be provided in conflict, post-conflict or disaster areas. That is not to say that international organisations such as the UN or AU should not ensure that they have robust and exhaustive regulations that govern contracting with private companies as part of their own peace and stability operations.

Professional standards

One of the recommendations of the UK Green Paper was that the private peace and stability operations industry should regulate itself. From the industry point of view, a self-regulatory regime would be insufficient and would necessarily require backing by strong domestic and international legal and regulatory regimes. In other words, a stand-alone system of self-regulation, in which states would abdicate their legislative and regulatory responsibilities, is unacceptable. It is nevertheless worthwhile examining a self-regulatory

framework that currently does exist within the industry. the International Peace Operations Association (IPOA) was established in 2001, and has become the trade association to the world's peace and stability operations industry. Based in Washington, DC, IPOA has close to 40 members from Germany, Hungary, Kuwait, South Africa, Spain, Sweden, the United Arab Emirates, UK and the US. Basically, IPOA is a standards-bearing organisation. Membership is by no means automatic, and in the past, companies have been barred from joining due to ethical concerns among the current members about certain applicants.

Once companies join IPOA, they are subject to the organisation's code of conduct, a document that outlines company responsibilities in the fields of human rights, transparency, arms, safety and workplace relations. The code which was originally adopted in 2001 and has been revised multiple times, was the outcome of discussions between non-governmental organisations, human rights lawyers and private companies active in the conflict in Sierra Leone during the late 1990s. The code of conduct is an actionable document and any person may lodge a complaint against an IPOA member company based on an alleged transgression of the code. The IPOA Standards Committee is charged with investigating such complaints, and where a company is found to be in violation of the code of conduct, remedial action – including expulsion from the Association – may be recommended to the full membership of IPOA.

Though some may argue that this method of self-regulation is weak and ineffectual, such arguments highlight a lack of understanding of the reputation of the industry. For a company to be either refused membership or to be expelled from IPOA on ethical grounds, would be a considerable blow to its reputation and could significantly harm its future potential for retaining or gaining contracts.

Although the IPOA disciplinary system is ground-breaking from an internal industry regulation perspective, self-regulation alone is not the answer. Though individual states and the international community should recognise the value of standards-bearing professional organisations, they should not abdicate their own responsibilities regarding regulation of the private peace and stability operations industry.

Conclusion and recommendations

The current international legal and regulatory framework has proved to be inadequate to deal with the reality of the role of the private peace and stability operations industry in conflict, post-conflict and disaster areas. This framework

has suffered at a domestic and international level from unworkable definitions, confusion between legitimate and illegitimate actors and a lack of enforceability. There are effective laws and regulations in different countries around the world and it would be worthwhile to extract these best practices and construct a new, practical framework that successfully marginalises the illegitimate and disreputable actors. This will allow the legitimate private peace and stability operations industry to flourish and continue to make a positive contribution to the achievement and maintenance of peace and stability around the world. This is especially necessary in Africa, a region that has been and continues to be beset by conflict. Africa is host to numerous international peacekeeping missions, but yet does not possess an effective legal and regulatory regime for the industry.

In constructing an effective international legal and regulatory framework, a number of key considerations need to be taken into consideration:

Definitions

1. Simply enacting current international legal norms into domestic legislation is futile, since current international norms are heavily flawed, in particular due to its definitions.
2. The term 'mercenary' should be avoided due to its pejorative nature and its lack of an agreed, practical legal definition.
3. Legislation and regulation must be clearly defined, to avoid arbitrariness on issues such as what constitutes an area of conflict.
4. Legislation and regulation should avoid confusing activities and venues; the fact that activities are conducted in a conflict zone does not of itself mean that these activities are in any way furthering, prolonging or contributing to the conflict.
5. Any framework must be clear in defining when and where it applies; defining applicability in a time of war is useless if war is never formally declared.

Jurisdiction

6. Any framework must be international in perspective, given the global nature of the private peace and stability operations industry, and the global nature of modern-day conflict.

7. Legislative and regulatory frameworks must avoid being self-defeating in nature, and should avoid constitutional or other human rights considerations that potentially place civilians under military jurisdiction.

Practicality

8. The temptation to enact grand, cumbersome legislation should be weighed against the utility of plain, simple administrative regulations, and neither should be considered to be mutually exclusive.
9. For any framework to be effective, it must be enforceable, lest it become simply a shopping list of grand aspirations.

Arms

10. For the small proportion of the private peace and stability operations industry that is armed, there should be adequate checks and balances to ensure the proper receipt, handling, maintenance, storage, use and disposal of weapons, to ensure that they do not fall into the hands of illegitimate actors.
11. For the small proportion of instances where private actors are armed, there should be adequate and universally agreed upon rules for the use of force, and these rules must be adequately policed.

Labour

12. Any framework should take into account the importance of properly vetting employees who may be active in conflict, post-conflict or disaster areas.
13. Laws and regulations should safeguard the rights of employees and ensure that they are employed under reasonable conditions.

Contracts

14. The power of contract law should not be underestimated, and particular emphasis should be given to ensuring that all contracts in conflict,

post-conflict and disaster areas are not only strong, but are used as an effective tool in ensuring and measuring the high performance of private companies.

Professional standards

15. Though professional standards and industry self-regulation are important, and should be supported, they should not exist devoid of proper legislative and regulatory frameworks and must not be used as a substitute for such. This would allow states and the international community to abdicate their legislative and regulatory obligations.

These recommendations are the result of an assessment of the current legislative and regulatory frameworks around the world, and an appraisal of those that are effective and those that are not. It behoves any legislative or regulatory body that attempts to create a new framework or amend an existing framework, to incorporate these recommendations, or at the very least take them into consideration. It is important to engage all stakeholders in the industry – and in particular, the private peace and stability operations industry itself – in the formulation of new legal norms. In constructing these frameworks, it is important to balance effective regulation against unworkable, draconian laws that would only serve to foil the legitimate industry. In addition, it is critical to ensure that such frameworks are enforceable, and are not simply an expression of intentions without any mechanism to ensure implementation. An effective, practical and reasonable international legislative and regulatory framework for the private peace and stability operations industry is in the interests of all.

Appendix I: Proposed convention for the regulation of the private peace and stability operations industry and the elimination of illegitimate non-state actors in conflict in Africa

Preamble

We, the Heads of State and Government of the member states of the African Union,

Recognising the positive contributions of the legitimate private peace and stability operations industry to the achievement and maintenance of peace and stability in areas of conflict, post-conflict and disaster in Africa;

Determined to take all necessary steps to provide a strong legal and regulatory framework to ensure the ethical and legal activities of the private peace and stability operations industry in Africa;

Determined to differentiate between legitimate and illegitimate non-state actors in conflict in Africa;

Considering the grave threat which the activities of illegitimate non-state actors present to the independence, sovereignty, security, territorial integrity and harmonious development of member states of the African Union;

Concerned with the threat which the activities of illegitimate non-state actors pose to the legitimate exercise of the right of African people to their independence and freedom;

Convinced that total solidarity and cooperation between member states are indispensable for putting an end to the subversive activities of illegitimate non-state actors in Africa;

Considering that the resolutions of the UN and the AU, the statements of attitude and the practice of a great number of states are indicative of the development of new rules of international law making illegitimate non-state intervention in conflict an international crime;

Determined to take all necessary measures to eliminate from the African continent the scourge that illegitimate non-state intervention in conflict represents;

Have agreed as follows:

Article 1: Definition

- 1 A legitimate non-state actor, or a private peace and stability operations industry company is any organisation who:
 - (a) is engaged in a properly, legally-executed contract directly or by manner of a sub-contract with a legitimate, recognised state, international organisation or other organisation or corporation that is legally constituted in a state that has ratified international legal norms regarding illegitimate non-state actors in conflict or has domestic legal equivalents;
 - (b) is engaged to support the legal and legitimate operations of its client;

- (c) is subject to codified rules for the use of force; and
 - (d) only uses force in self-defence, and does not engage in hostile or offensive action.
- 2 A legitimate non-state actor, or a private peace and stability operations industry employee is any person who:
- (a) is recruited and employed by an entity that is engaged in a properly, legally-executed contract directly or by manner of a sub-contract with a legitimate, recognised state, international organisation or other organisation or corporation that is legally constituted in a state that has ratified international legal norms regarding illegitimate non-state actors in conflict or has domestic legal equivalents;
 - (b) is employed to support the legal and legitimate operations of his employer;
 - (c) is subject to codified rules for the use of force; and
 - (d) only uses force in self-defence, and does not engage in hostile or offensive action.
- 3 An illegitimate non-state actor is any person who:
- (a) is recruited locally or abroad in order to engage in illegitimate offensive armed operations;
 - (b) does in fact willingly take a direct part in the hostilities;
 - (c) is motivated to willingly engage in illegitimate offensive action essentially by the desire for private financial or material 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;
 - (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; and
 - (g) is not contracted by directly or by manner of a sub-contract with a legitimate, recognised state, international organisation or other organisation or corporation that is legally constituted in a state that has ratified international legal norms regarding illegitimate non-state actors in conflict or has domestic legal equivalents.
- 4 The crime of illegitimate non-state intervention in conflict 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, practises any of the following acts:

- (a) Shelters, organises, finances, assists, equips, trains, promotes, supports or in any manner employs armed forces partially or wholly consisting of persons who are not nationals of the country where they are going to act, for personal gain, material or otherwise;
 - (b) Enlists, enrolls or tries to enrol in the said forces;
 - (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.
- 5 Any person, natural or juridical, who commits the crime of illegitimate non-state intervention in conflict as defined in paragraph 3 of this article commits an offence considered as a crime against peace and security in Africa and shall be punished as such.

Article 2: Status of non-state actors

- 1 Private companies, as defined in article 1, paragraph 1, engaged in the peace and stability operations industry and their employees, as defined in article 1, paragraph 2, shall be entitled to prisoner of war status where they are contracted to a legitimate, recognised state or international entity.
- 2 Illegitimate non-state actors, as defined in article 1, paragraph 3, shall not enjoy the status of combatants and shall not be entitled to prisoner of war status.

Article 3: Scope of criminal responsibility

- 1 An employee of a private company engaged in the peace and stability operations industry, as defined in article 1, paragraph 2, where he is contracted to a legitimate, recognised state or international entity, shall not be responsible for the crime of illegitimate non-state intervention in conflict.
- 2 An employee of a private company engaged in the peace and stability operations industry, as defined in article 1, paragraph 2, where he is contracted to a legitimate, recognised state or international entity, shall be responsible for criminal offences as defined by the prevailing criminal law jurisdiction of the contract, for which he may be prosecuted.
- 3 An illegitimate non-state actor, as defined in article 1, paragraph 3, is responsible both for the crime of illegitimate non-state intervention in

conflict and all related offences, without prejudice to any other offences for which he may be prosecuted.

Article 4: General responsibility of states and their representatives

- 1 When the representative of a state is accused by virtue of the provisions of article 1, paragraph 3 of this Convention for acts or omissions declared by the aforesaid article to be criminal, he shall be punished for such an act or omission.
- 2 When a state is accused by virtue of the provisions of article 1, paragraph 3 of this Convention for acts or omissions declared by the aforesaid article to be criminal, any other state may invoke such responsibility:
 - (a) in its relations with the state responsible; and
 - (b) before competent international organisations or bodies.

Article 5: Obligations of states

The contracting parties shall take all necessary measures to eradicate all activities of illegitimate non-state intervention in Africa. To this end, each contracting state shall undertake to:

- (a) prevent its nationals or foreigners on its territory from engaging in any of the acts mentioned in article 1, paragraph 3 of the Convention;
- (b) prevent entry into or passage through its territory of any illegitimate non-state actor or any equipment destined for use by illegitimate non-state actors;
- (c) prohibit on its territory any activities by persons or organisations who use illegitimate non-state actors against any African state member of the African Union or the people of the continent of Africa;
- (d) communicate to the other member states of the African Union either directly or through the Secretariat of the AU any information related to the activities of illegitimate non-state actors as soon as it comes to its knowledge;
- (e) forbid on its territory the recruitment, training, financing, and equipment of illegitimate non-state actors and any other form of activities likely to promote illegitimate non-state intervention;
- (f) take all necessary legislative and other measures to ensure the immediate entry into force of this Convention.

Article 6: Penalties

Each contracting state shall undertake to make the offence defined in article 1, paragraph 3 of this Convention punishable by severest penalties under its laws, excluding capital punishment.

Article 7: Jurisdiction

Each contracting state shall undertake to take such measures as may be necessary to punish, in accordance with the provisions of article 6, any person who commits an offence under article 1, paragraph 3 of this Convention and who is found on its territory if it does not extradite him to the state against which the offence has been committed.

Article 8: Extradition

- 1 The crimes defined in article 1 of this Convention are not covered by national legislation excluding extradition for political offences.
- 2 A request for extradition shall not be refused unless the requested state undertakes to exercise jurisdiction over the offender in accordance with the provisions of article 7.
- 3 Where a national is involved in the request for extradition, the requested state shall take proceedings against him for the offence committed if extradition is refused.
- 4 Where proceedings have been initiated in accordance with paragraphs 2 and 3 of this article, the requested state shall inform the requesting state or any other member state of the AU interested in the proceedings, of the result thereof.
- 5 A state shall be deemed interested in the proceedings within the meaning of paragraph 4 of this article if the offence is linked in any way with its territory or is directed against its interests.

Article 9: Mutual assistance

The contracting states shall afford one another the greatest measure of assistance in connection with the investigation and criminal proceedings brought in respect of the offence and other acts connected with the activities of the offender.

Article 10: Judicial guarantee

Any person or group of persons on trial for the crime defined in article 1, paragraph 3 of this Convention shall be entitled to all the guarantees normally granted to any ordinary person by the state on whose territory he is being tried.

Article 11: Settlement of disputes

Any dispute regarding the interpretation and application of the provisions of this Convention shall be settled by the interested parties in accordance with the principle[s] of the Charter of the African Union.

Article 12: Signature, ratification and entry into force

- 1 This Convention shall be open for signature by the members of the African Union. It shall be ratified. The instruments of ratification shall be deposited with the Administrative Secretary-General of the Organisation.
- 2 This Convention shall come into force 30 days after the date of the deposit of the 17th instrument of ratification.
- 3 As regards any signatory subsequently ratifying the Convention, it shall come into force 30 days after the date of the deposit of its instrument of ratification.

Article 13: Accession

- 1 Any member state of the African Union may accede to this Convention.
- 2 Accession shall be by deposit with the Administrative Secretary-General of the Organisation of an instrument of accession, which shall take effect 30 days after the date of its deposit.

Article 14: Notification and registration

- 1 The Administrative Secretary-General of the African Union shall notify the member states of the Organisation of:
 - (a) The deposit of any instrument of ratification or accession;
 - (b) The date of entry into force of this Convention.
- 2 The Administrative Secretary-General of the African Union shall transmit certified copies of the Convention to all member states of the Organisation.
- 3 The Administrative Secretary-General of the African Union shall, as soon as this Convention comes into force, register it pursuant to article 102 of the Charter of the United Nations.

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CHAPTER 7

STATUS AND OBLIGATIONS OF MERCENARIES AND PRIVATE MILITARY/SECURITY COMPANIES UNDER INTERNATIONAL HUMANITARIAN LAW

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Introduction

During times of armed conflict, whether characterised as international or non-international, international humanitarian law (IHL), also known as the law of armed conflict, is applicable. As a body of law, IHL does not question the lawfulness of a conflict (*jus ad bellum*) but seeks to apply humanitarian principles in warfare (*jus in bello*). IHL recognises that even war has its limits, irrespective of its cause, and strives to establish humanitarian parameters to the means and methods of warfare and to alleviate the suffering that conflict so often causes to persons taking no part in the hostilities. The core IHL instruments are the four Geneva Conventions of 1949 and their Additional Protocols of 1977.¹

As this paper will show, despite arguments to the contrary, there is no legal vacuum as such in relation to the activities of non-state actors from the private security industry or mercenaries operating in conflict zones. IHL is applicable, and with it comes certain explicit obligations and rights. Contemporary armed conflicts are vastly different creatures from those prevailing in the early part of the 20th century. The two world wars saw for the most part the armed forces of belligerent states confronting one another. Those actively engaged in the fighting were usually soldiers who were easily distinguishable from civilians and others not in combat. They wore military uniforms and bore their arms openly. By contrast, more recent conflicts such as those in Iraq and Afghanistan have included a greater variety of actors, with soldiers, peacekeepers, humanitarians and private contractors, to name but a few, present in the field of combat. In particular, we have witnessed a greater presence of private contractors, individuals working for private security or military companies (PSCs/PMCs).²

The functions of PSCs/PMCs vary, and have included the provision of logistics, communication and security services, the protection of convoys and personnel

* The views and opinions expressed in this article are those of the author alone and do not necessarily reflect those of the ICRC.

for multinational companies, the staffing of checkpoints, and in some situations, even the interrogation of prisoners, the collection of intelligence, and direct participation in combat operations. Their omnipresence in conflict zones such as Iraq has given rise to numerous issues, be they legal, ethical or practical. One recurring view is that these individuals are merely glorified mercenaries whose activities are contrary to a number of international and regional instruments. Another point of view is that PSCs/PMCs are legitimate corporate entities providing essential security services in conflict and post-conflict zones. Passions aside, mercenaries and persons working for PSCs/PMCs are subject to IHL. As will be reviewed in this paper, IHL is clear as it relates to mercenaries. To be labelled a mercenary in an international armed conflict strips the individual of any combatant status and of the right to be accorded prisoner of war (POW) status.

With regard to PSCs/PMCs, however, there is no clear-cut niche for them under IHL. Personnel of these entities are either civilians or combatants, and much will depend on the nature of their activities and their relationship with the armed forces of one of the belligerents. If seen as combatants, the PSC/PMC personnel will be required to distinguish themselves from civilians. If deemed to be civilians, the selfsame personnel will not be permitted to take a direct part in the hostilities. To do so would deprive them of any protection to which they might be entitled under IHL and may leave them open to prosecution under the relevant domestic law. The paper will review the status and IHL implications of PSCs/PMCs and mercenaries operating in armed conflict zones. A review the relevant provisions of IHL will be presented as well as individual and state obligations in terms of it. It will be underscored that irrespective of functional labels, those operating in international armed conflicts must respect IHL and will be held criminally responsible for any serious violations thereof.

Distinction between civilians and combatants

An underlying IHL principle is that of distinction between civilians and civilian objects and combatants and military objectives. There are two aspects to this principle. First, in carrying out their military actions, the parties to the conflict must at all times make a distinction between the civilian population and combatants and between civilian objects and military objectives (Additional Protocol I, art 48). Second, combatants are to distinguish themselves from the civilian population while they are engaged in an attack or in military operations in preparation of an attack (art 44). This basic rule has been incorporated into numerous military manuals and is considered to form part

of international customary law (see ICRC 2005, paras 93–101). The *raison d'être* of this fundamental principle is to ensure not only that civilians do not bear the brunt of the effects of the hostilities due to the co-mingling of combatants and civilians,³ but also to enable combatants to benefit from the treatment to which they are entitled under IHL when captured by the enemy forces. Unlike civilians, combatants operating in international armed conflicts possess a so-called *combatant's privilege*. They are entitled to take part in the hostilities, to fight the 'enemy forces' and are legitimate targets.

Civilians do not enjoy the same privilege to do battle, and will lose their protection under IHL if they take part in hostilities. Moreover, when captured, they do not benefit from POW status, to which recognised combatants are entitled. Civilians are defined in the negative as persons who are not members of the armed forces of a party to the conflict or members of volunteer corps and resistance movements, not participants in a *levée en masse* and not combatants in general. As persons taking no part in the hostilities, they enjoy protection against the dangers of military operations (Geneva Conventions 1949b; Additional Protocol I, art 50). Civilians cannot be targeted as such, and the parties to the conflict must take the necessary precautions to ensure that no harm comes to civilian persons and objects (see for example Additional Protocol I, arts 57 and 58).

It has been argued that a difficulty in relation to mercenaries and staff of PSCs/PMCs is that they are frequently not distinguishable from civilians, except for the fact that they are often heavily armed and at times wearing military attire. In such situations, this may pose a risk for those civilians who happen to be within their vicinity, as the parties to the conflict may consider the mercenaries and their staff who are taking part in the hostilities to represent valid military targets. The effect therefore is that the presence of non-state actors taking a direct part in hostilities compromises the protection provided by IHL to civilians during hostilities.

Mercenaries under international humanitarian law

The issue of distinction is particularly significant as with regard to mercenaries, who, according to IHL, are civilians taking part in hostilities without being members of the armed forces of parties to the conflict. To speak of mercenaries conjure images of covert privateers profiteering from less than honest enterprise. Whilst the business of military-for-hire, or mercenarism as it is commonly known, has existed and was even condoned for centuries as a form of legitimate military entrepreneurship, vital to advancing the

commercial, political and land interests of noblemen and merchants, it is only in recent times that it has taken on a generic negative meaning.

Whilst mercenaries are specifically mentioned in Additional Protocol I to the Geneva Conventions (Additional Protocol I), IHL does not delve into the legality of mercenaries. Rather, the focus is on the status to be granted to mercenaries if captured during international armed conflicts. Mercenaries do not have a right to a combatant or a POW status and they are in other words seen as 'unprivileged combatants'.⁴ Individuals who fit the definition of article 47 of Additional Protocol I are deemed to be mercenaries:

- 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 sub-paragraphs are cumulative, which means that the various elements listed from (a) to (f) must all be met if the person is to be deemed a mercenary. The definition excludes volunteers who enter service on a permanent or long-lasting basis in a foreign army, nationals of one of the belligerents, as well as residents of territory controlled by or members of the armed forces of one of the parties to the conflict. Also excluded are individuals who have been sent by another state to provide one or the other party to the conflict with assistance, as well the likes of foreign advisers and military technicians who do not take a direct part in hostilities.

The crux of the definition lies in part in the motives for joining, with a mercenary seen by many to have been drawn by financial rather than by

humanitarian or altruistic considerations. Oftentimes, mercenaries will receive remuneration that is substantially higher than that of members of similar rank or function in the regular armed forces of the party that has specially recruited them to fight in the armed conflict. It should be noted though that mere recruitment to fight in the armed conflict does not suffice. An individual meeting the above criteria ‘becomes’ a mercenary only if he or she does in fact take a direct part in the hostilities. If such participation is absent, the individual will be categorised as being a civilian not taking part in hostilities (ICRC 1987:1801–1814). Quite often it is argued that personnel of PSCs/PMCs are in fact mercenaries. However, unless they are hired to fight per se in the armed conflict, and unless the services they provide consist in taking a direct part in hostilities, they do not fit within the definition of ‘mercenaries’.

The definitions of mercenary found in the 1977 OAU/AU Convention on the Elimination of the Mercenarism in Africa (OAU/AU Mercenary Convention), adopted less than one month after the adoption of the 1977 Additional Protocols to the Geneva Conventions of 1949⁵ and the 1989 United Nations Convention against the Recruitment, Use, Financing and Training of Mercenaries (UN Mercenary Convention), are derived from article 47 of Additional Protocol I.⁶ The latter Convention goes further by distinguishing between on the one hand situations of armed conflict and, on the other, any other situation involving concerted acts of violence aimed notably at overthrowing a government or undermining the territorial integrity of a state.⁷ In addition, in the same vein as Additional Protocol I, the OAU/AU Convention stipulates that mercenaries shall not enjoy the status of combatants.

However, while the definitions in these two conventions are comparable to that found in Additional Protocol I, this is where the similarities end. Indeed, IHL through Additional Protocol I merely clarifies the status to be given to mercenaries in times of armed conflict and the protections they are to be afforded when captured. By contrast, the UN and OAU/AU conventions serve a different purpose in that they seek to criminalise mercenarism and the use of mercenaries. Under IHL, mercenaries are civilians not entitled to take a direct part in hostilities. To do so may invite criminal prosecution.

The place of PSCs and PMCs

As in the case of mercenaries, certain activities of personnel from PSCs/PMCs operating in international conflict zones also touch upon the principle

of distinction. Unlike mercenaries though, PSCs/PMCs are not expressly covered by IHL, and they can be labelled either as civilians or as combatants in times of international armed conflicts. The status they are to be granted under IHL will depend on a number of factors, including their roles and the nature of their formal relationship with a party to the armed conflict.

At first glance, the majority of private contractors are observably civilians, providing protective security services for civilian and governmental institutions and involved in post-conflict reconstruction efforts. The manifold activities may include guarding key facilities such as water works, escorting food convoys and VIPs, and assisting with logistics and communications. Those in the industry argue that private security companies have a number of competitive advantages over the armed forces of a state, including the minimal built-in costs and streamlined infrastructures (Bearpark 2006). With an estimated 20 000-plus private contractors said to be working in Afghanistan and Iraq, and an industry worth in excess of US\$100 billion, it is undeniable that the services of private security firms are in great demand.

However, recent allegations of improper conduct by certain civilian contractors and images of private security personnel involved in military-type operations and attacks have shed a disquieting light on the role of PSCs/PMCs in conflict zones. Questions abound as to their regulation, their accountability for transgressions of the law, whether domestic or IHL and their position under IHL. In addition, the overlap of roles between civilian contractors and the standing military of a party to conflict, risks blurring the distinction between combatants and civilians during the hostilities, with the latter again in harm's way.

As mentioned above, the rights and obligations of persons taking part in the hostilities depend for the most part on that person's status as either a civilian or a combatant. There being no specific acknowledgment under IHL instruments of PSCs/PMCs, the label to attribute to PSCs/PMCs in international armed conflicts is to be decided on a case-by-case basis. Much will rest on the functions they provide for, and contractual relationships with the armed forces of one of the parties to the conflict. If a state considers a PSC/PMC to form part of its armed forces, then it should take the necessary steps to clarify this, for instance by notifying the other parties to the conflict, as it is obliged to do in relation to paramilitary groups or law enforcement agencies that are incorporated into its armed forces (Additional Protocol I, art 43(3)). If clear integration into the armed forces is absent, any assessment has to be pragmatic with due consideration being given to for instance the nature of their operations, their closeness to core military activities, the existence of chains of command and wearing of recognised uniforms.

A PSC/PMC should consider itself to be on sure legal footing when it asserts its right to take part in hostilities and engage in combat on behalf of a state to the conflict. It does not suffice to contend that it took defensive action when under fire. IHL does not draw a line between offensive or defence action, stipulating in article 49(1) of Additional Protocol I that 'attacks' mean acts of violence against the adversary, whether in offence or defence. Consequently, unless PSC/PMC employees are unmistakably combatants, they are not lawfully entitled to take part in the hostilities and may be prosecuted under the relevant domestic legislation for having done so. Moreover, if captured by the enemy forces, they are not entitled to POW status.

Prisoners of war

The Geneva Conventions and Additional Protocol I list specific categories of individuals who are to be treated as prisoners of war if captured in the context of an international armed conflict (Geneva Convention 1949a, art 4(A); Additional Protocol I, art 43). Generally those entitled to POW status are recognised combatants, namely individuals who take part in the hostilities whilst representing one of the parties to the armed conflict, whether as members of the regular the armed forces or of certain clearly defined groups. Mercenaries do not have the right to POW standing. Personnel of a PMC/PSC could theoretically benefit from this status, if they satisfy the requirements necessary to be recognised as combatants.

The Third Geneva Convention of 1949, spanning 135 articles, delves in quite some detail into the treatment to be afforded to prisoners of war falling into the enemy hands. As recognised combatants, POWs are not prisoners as such. They were entitled to take part in the hostilities and are not to be tried for merely having done so.⁸ Being held 'prisoner' is to be understood to be kept from taking further part in the armed conflict. IHL stipulates that POWs are to be released and repatriated without delay after the cessation of active hostilities (Additional Protocol I, art 118). An unjustifiable delay in doing so constitutes a war crime (art 85).

The Third Geneva Convention (art 4(A) lists the categories of persons who, if they fall into the hands of the enemy, are to be granted the status of a POW, and to be protected accordingly. Those entitled to the POW label are first and foremost members of the armed forces of a party to a conflict, as well as members of militia or volunteer groups forming part of such armed forces. Members of other militias, volunteer corps and resistance movements

are also to be treated as prisoners of war if captured, provided that they are under responsible command, have fixed a distinctive sign recognisable at a distance, carry arms openly and conduct operations in accordance with the laws and customs of war.

In addition, persons accompanying the armed forces without actually being members thereof, such as supply contractors and members of services responsible for the welfare of the armed forces, if captured, are deemed to be POWs. To be within this category, which is arguably the most applicable to staff from PSCs/PMCs, the concerned individuals must have been authorised by the party to the conflict to accompany its armed forces and are to be issued with the necessary identity cards. Failure to obtain such express authorisation and identification cards to accompany the armed forces may trump the possibility of benefiting from POW status.

Article 43 of Additional Protocol I complements the above by providing a succinct definition of 'armed forces':

The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict.

Mercenaries, as they are not considered as combatants under IHL, will *ipso facto* not benefit from POW status. Additional Protocol I and the OAU/AU Convention (art 3) are categorical in this regard, stipulating that mercenaries shall not be entitled to POW status. Likewise, personnel of PSCs/PMCs who do not qualify as combatants as defined by the Geneva Conventions and their Protocols will also not be entitled to POW status.

In the midst of battle, and given the myriad of actors operating in combat, it may be difficult to determine whether an individual is a recognised or unprivileged combatant, and, once captured, whether he should be accorded POW status. IHL recognises that, for obvious reasons, such a determination should not be left to the whim of the detaining military personnel who have captured the potential POW. Instead, there is a legal presumption in favour of the 'prisoner' that he is entitled to PoW status. It is up to the detaining authority to adduce evidence to rebut this presumption.

Under IHL a person who has fallen into the hands of the adverse party and claims to be entitled to POW status, shall be entitled to such status and treated accordingly. There may be situations where a combatant has failed to distinguish himself from the civilian population before or during an attack, for instance by failing to don a military uniform due to the nature of the military operations. As long as arms are carried openly during the military engagement or if it is visible to the adverse party prior to the attack, the individuals do not forfeit their POW status. However, in the eyes of the 'enemy', there may be doubts as to whether a person is a *de jure* member of the armed forces in its broad sense or an unprivileged combatant, such as a mercenary. In these cases, article 45 of Additional Protocol I provides that the status is to be determined by a competent tribunal, with the 'prisoner' continuing to benefit from the protections granted to POWs by the Third Geneva Convention pending the tribunal's determination.

When an individual is found to be a mercenary or someone working for a PSC/PMC not recognised as being part of the 'armed forces' of a party in an international armed conflict, entitlement to POW status and protection falls by the wayside. Without such a status and in the absence of the so-called combatant's privilege, the individual can be tried for having taken part in the hostilities. In these situations, the treatment, detention and trial of the individual must respect the minimum fundamental guarantees listed in article 75 of Additional Protocol I.⁹

Individual criminal responsibility

As explained above, mercenaries and members of PSCs/PMCs who are civilians and not combatants can be prosecuted for mere participation in the hostilities, subject to the necessary domestic legislation being in place. In addition, under IHL all individuals, whether combatants or civilians, can be held criminally responsible for the most serious violations of the Geneva Conventions and Additional Protocol I, commonly referred to as grave breaches, which include willful killing, torture or inhumane treatment, and willfully causing great injury.¹⁰ Grave breaches are subject to universal jurisdiction, whereby any state may prosecute any individual of any nationality irrespective of where the offence was committed. States party to the Geneva Conventions and their Protocols are under the obligation to prosecute or to extradite alleged perpetrators of grave breaches.¹¹ Prosecutions for grave breaches and other war crimes may also be held before the permanent International Criminal Court, subject to the relevant jurisdiction requirement being met.

Recent jurisprudence of the various international criminal tribunals has determined that individuals will incur criminal responsibility for the commission of grave breaches of IHL, both as a matter of convention and custom. Mercenaries as well as staff of PSCs/PMCs who commit such offences therefore can be tried. It is irrelevant whether the individual is a civilian or a combatant, or whether the culpable act was committed while operating on behalf of a party to the conflict or working for civilian entities such as multinational companies. As the Appeals Chamber of the International Criminal Tribunal for Rwanda (ICTR) underscored, with reference to common article 3 of the Geneva Conventions, though applicable *mutatis mutandis* to all war crimes:

Now, such punishment must be applicable to everyone without discrimination, as required by the principles governing individual criminal responsibility as laid down by the Nuremberg Tribunal in particular. The Appeals Chamber is therefore of the opinion that international humanitarian law would be lessened and called into question if it were to be admitted that certain persons be exonerated from individual criminal responsibility for a violation of common Article 3 under the pretext that they did not belong to a specific category.¹²

A key requirement for an act, such as murder of a protected person, to constitute a war crime, is that it must be connected to armed conflict. By 'connected' the UN International Criminal Tribunals have explained that the perpetrator must have acted in furtherance of or under the guise of the armed conflict. Furthermore, the existence of an armed conflict must have played a substantial part in the perpetrator's ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed.¹³

In addition to the principle of individual criminal responsibility, superiors of those who have perpetrated the war crime can also be held responsible. The superiors can incur liability for ordering the commission of the offence or failing to prevent or punish subordinates when they had reason to know that the latter were about to commit or have committed war crimes. This responsibility is applicable to both military and other superiors, including civilians.¹⁴ In practice therefore, in the case where a PSC/PMC forms part of the armed forces of a state party to the conflict, responsibility for IHL violations committed by employees can be attributed to not only the direct superior but also further up the military hierarchy of the contracting authorities. The cases against Slobodan Milosevic in The Hague, Jean Kambanda in Arusha and Charles Taylor before the Special Court for Sierra Leone are evidence that those at the very top of the pyramid, including

heads of state and government, can be held accountable for acts of their 'subordinates'.

Even in the case of PSCs/PMCs hired by civilian companies and corporations, if their personnel commit war crimes, the civilian superiors of the offending personnel could also be held accountable under the doctrine of command responsibility.¹⁵ How far up the corporate ladder could this criminal responsibility extend, is yet to be tested before the courts. Theoretically though, both the CEO of a company that has contracted the services of a PSC/PMC in a zone of international armed conflict as well as the manager of the PSC/PMC could be held responsible as 'superiors' for war crimes if they had 'reason to know' that their subordinate employees committed or were about to commit war crimes yet took no preventive action. This would be the case even if the chief executive officer or manager has never have set foot in the conflict zone.

The responsibility of states to ensure respect for IHL

Under common article 1 to the Geneva Conventions, states undertake to respect and ensure respect for the Conventions in all circumstances. This obligation extends to all those over whom the relevant state has authority, which would include members of its armed forces, personnel of PSCs/PMCs it has hired as well as its citizens, including those said to be operating as mercenaries. States must not only themselves respect the provisions of the Conventions, but are also obligated to make sure that all those under their authority or jurisdiction do not foul those provisions, either.¹⁶ It is not sufficient for states merely to give orders and directives to the military and relevant civilian authorities, leaving it to them to implement these as they see fit. In accordance with common article I, a state must supervise not only the execution of the orders and directives but must also ensure that the activities of those under its authority acting in zones of international armed conflict comply with IHL.

With regard to PSCs/PMCs the manner in which this obligation is translated into practice will depend in part on the relationship between the state and the PSC/PMC concerned. States may decide to develop the necessary regulations to cater for incorporation of PSCs/PMCs within their jurisdiction, or to recall the nature of activities in which its citizens are permitted to engage in zones of armed conflict.¹⁷ Where states have PSCs/PMCs operating on their territory, they may also need to adopt relevant domestic legislation to police their activities and determine their liability.¹⁸ The industry itself may also wish to regulate its members to ensure compliance with law and ethics,

as can be seen through the actions of the International Peace Operations Association and the British Association of Private Security Companies (BAPSC). For instance, one of the aims of the BAPSC is to ensure 'compliance with the rules and principles of international humanitarian law and human rights standards' and the Association believes that this can best be achieved through 'effective self-regulation in partnership with the UK Government and International Organisations'.¹⁹

A number of states have recognised the need for regulation in this domain, for instance the United Kingdom, the United States, South Africa and Switzerland. Recently states and representatives from the private security sector have been brought together through an initiative launched by the Federal Department of Foreign Affairs and the ICRC to confirm existing legal obligations and develop non-binding good practices.²⁰ The 'Swiss initiative', as it is commonly referred to, which is primarily a process *between states*, is looking into the role of *states* in promoting respect for IHL and human rights law by PSCs/PMCs. It has set itself three main objectives. The first is to contribute to the intergovernmental discussion on the issues raised by the use of private military and security companies. The second is to reaffirm and clarify existing obligations of states and other actors under international law, in particular under IHL. The third is to study and develop good practices, regulatory models and other appropriate measures at the national and possibly regional or international level, to assist states in respecting IHL and human rights law.

The range of participants at the two governmental and other experts meetings held in 2006 demonstrated that representatives from governments and the private security sector recognised that states could not escape their obligations under international law by hiring/using PMCs/PSCs, and rejected the argument often made that PMCs/PSCs operate in a legal vacuum. Thus for states to meet their IHL obligations to ensure the respect of IHL, requires not only legislation to enable prosecution of war crimes but also to regulate the non-state actors in zones of armed conflict so that their activities comply with IHL. States will as such need to adopt the necessary civil and criminal legislation as well as codes of conduct and regulations that address those PSCs/PMCs over which they have jurisdiction in times of armed conflict.

Conclusion

From an outsider's point of view, modern-day conflict zones are chaotic landscapes, with a multitude of actors, ranging from members of recognised

armed forces to personnel from the private security industry as well as potential mercenaries. Roles of the various actors often overlap, blurring the distinction between legitimate combatants and civilians. Although both have rights and obligations, this mix of actors brings with it the risk that those protected by IHL, namely civilians and others not taking part in the hostilities, will be caught up in the fighting and placed in harm's way. IHL as a body of law defines the protection to be afforded to individuals in the midst of armed conflicts as well as the parameters and aspect to be taken into consideration when conducting hostilities. Combatants are entitled to take part in hostilities, civilians are not. Mercenaries are civilians and not recognised combatants. Personnel of PSCs/PMCs could be either, depending on their relationship with the conflicting parties and nature of their activities.

In the final analysis all persons, whether civilians or combatants, are under an obligation to respect IHL, and it is for states to advocate and ensure this respect. Serious violations of IHL are to be punished. Likewise, participation in hostilities when not permitted to do so may justify prosecution under relevant domestic legislation or international law.

Notes

- 1 At the time of writing, the Geneva Conventions have been universally ratified and 166 states have ratified Additional Protocols I and II.
- 2 For the purposes of the present paper, the terms PMCs and PSCs will be used interchangeably.
- 3 It should be noted that article 50 of Additional Protocol I further safeguards civilians from the effects of the hostilities in that the presence within the civilian population of persons who do not come within the definition of civilians does not deprive the population of its civilian character.
- 4 The task of IHL is not to make distinctions based on the motives which induce a particular person to participate in an armed conflict (see ICRC 1987: Additional Protocol I).
- 5 Signed in Libreville, Gabon, on 3 July 1977 and entered into effect on 22 April 1985.
- 6 Adopted and opened for signature and ratification by UN General Assembly resolution 44/34 of 4 December 1989.
- 7 Article 1 reads: For the purposes of the present Convention, 1.A mercenary is any person who: (a) Is specially recruited locally or abroad in order to fight in an armed conflict; (b) Is motivated to take part in the hostilities essentially by the

desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar rank and functions in the armed forces of that party; (c) Is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict; (d) Is not a member of the armed forces of a party to the conflict; and (e) Has not been sent by a State which is not a party to the conflict on official duty as a member of its armed forces. 2. A mercenary is also any person who, in any other situation: (a) Is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at: (i) Overthrowing a Government or otherwise undermining the constitutional order of a State; or (ii) Undermining the territorial integrity of a State; (b) Is motivated to take part therein essentially by the desire for significant private gain and is prompted by the promise or payment of material compensation; (c) Is neither a national nor a resident of the State against which such an act is directed; (d) Has not been sent by a State on official duty; and (e) Is not a member of the armed forces of the State on whose territory the act is undertaken.

- 8 See article 43(2) of Additional Protocol I: 'Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.'
- 9 The relevant part of article 75 (Fundamental guarantees) of Additional Protocol I reads: '1. In so far as they are affected by a situation referred to in Article 1 of this Additional Protocol, persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Additional Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria. Each Party shall respect the person, honour, convictions and religious practices of all such persons. 2. The following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents: (a) violence to the life, health, or physical or mental well-being of persons, in particular: (i) murder; (ii) torture of all kinds, whether physical or mental; (iii) corporal punishment; and (iv) mutilation; (b) outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault; (c) the taking of hostages; (d) collective punishments; and (e) threats to commit any of the foregoing acts. 3. Any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken. Except in cases of arrest or detention for penal offences, such persons shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist. 4. No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed

conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure, which include the following: (a) the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence; (b) no one shall be convicted of an offence except on the basis of individual penal responsibility; (c) no one shall be accused or convicted of a criminal offence on account or any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby; (d) anyone charged with an offence is presumed innocent until proved guilty according to law; (e) anyone charged with an offence shall have the right to be tried in his presence; (f) no one shall be compelled to testify against himself or to confess guilt; (g) anyone charged with an offence shall have the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (h) no one shall be prosecuted or punished by the same Party for an offence in respect of which a final judgement acquitting or convicting that person has been previously pronounced under the same law and judicial procedure; (i) anyone prosecuted for an offence shall have the right to have the judgement pronounced publicly; and (j) a convicted person shall be advised on conviction or his judicial and other remedies and of the time-limits within which they may be exercised.'

- 10 Grave breaches are listed in articles 50, 51, 130 and 147 of the four Geneva Conventions and in articles 11 and 85 of Additional Protocol I.
- 11 Under the Geneva Conventions and Additional Protocol I, a state must enact national legislation prohibiting and punishing grave breaches, either by adopting a separate law or by amending existing laws. Such legislation must cover all persons, regardless of nationality, committing grave breaches or ordering them to be committed and include instances where violations result from a failure to act when under a legal duty to do so. It must cover acts committed both within and outside the territory of the state
- 12 *The Prosecutor v Jean Paul Akayesu*, Case No ICTR-96-4-A, Judgment, 1 June 2001, para 443.
- 13 See for instance *Prosecutor v Dragoljub Kunarac and others*, Case No IT-96-23 & IT-96-23/1-A, Judgment, 12 June 2002 delivered by the International Criminal Tribunal for the former Yugoslavia and *The Prosecutor v Georges Rutaganda*, Case Number ICTR-96-3-A, Appeal Judgment 26 May 2003, delivered the ICTR.
- 14 See articles 86 and 87 of Additional Protocol I, as well as article 28 (Responsibility of commanders and other superiors) of the Rome Statute of the International Criminal Court, 17 July 1998.

- 15 See for instance the ICTR case of *The Prosecutor v Alfred Musema*, where with regard to civilian superiors, the director of a tea factory was found to be liable for acts of his employees during the genocide in Rwanda in 1994.
- 16 As explained in the ICRC's Commentary (first published in 1952), the contracting parties do not undertake merely to respect the Convention, but also to *ensure respect for it*. The wording may seem redundant. When a State contracts an engagement, the engagement extends *eo ipso*, to all those over whom it has authority. The use of the words 'and to ensure respect' was intended to emphasise and strengthen the responsibility of the contracting parties.
- 17 See for instance Sierra Leone's regulations in section 19 of the 2002 National Security and Central Intelligence Act and South Africa's 1998 Regulation of Foreign Military Assistance Act.
- 18 For instance in Iraq, the Coalition Provisional Authority Memorandum 17: Registration Requirements for Private Security Companies, 26 June 2004.
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CHAPTER 8
MERCENARISM:
LOOKING BEYOND THE CURRENT
INTERNATIONAL AND REGIONAL
NORMATIVE REGIMES

Laurence Juma

Introduction

Although the use of private soldiers and military personnel is as old as the phenomenon of war itself, concerted normative response to the practice only began in the later part of the 20th century. Since then, however, the corpus of international and domestic regimes that have articulated what could be regarded as the legal response to the practice have been relatively sparse, their thrust directed towards elimination rather than regulation. Driven by an amalgam of factors, including claims to sovereignty by newly independent African states, collective security aspirations and the liberal consciousness of the post-World War II era, these normative responses have relied on the realist formula for achieving global security.¹ The belief (backed by empirical experiences of some nations) that such private military ventures, mainly perceived as ‘mercenarism’, constitute threats to sovereignty, have provided grounds for forging international consensus towards the evolution of norms aimed at abolishing the practice. This is the reason why ‘mercenarism’ has provided a focal point for the convergence of international and regional normative efforts in this regard.

Despite these efforts the use of private military personnel and services has continued to grow, taking advantage of the general downsizing of national armies after the Cold War, the high demand for security services in conflict zones and the insatiable needs for military services by weak regimes in many parts of the developing world (Lock 1999). Today, the providers of private military services are more visible as they move out of the ‘shadows’ that hitherto defined the nature of mercenary activity. The newer ventures (variously called private security companies (PSCs) or private military firms (PMFs)) distinguish themselves from mercenaries who remain illegal under international law.² Their claim is that they champion legitimate causes such as protection of elected governments and defence of sovereign territory from rebel attacks, and often fulfil a substitute role as the private military wing of the state.³ In recent times, the use of PSCs/PMFs by the United States and Great Britain in Iraq and Afghanistan has lent legitimacy to such claims. Thus, despite some overlap in the nature of the services provided by mercenaries and by PSCs/PMFs, the latter seem to have acquired broad legitimacy

within the international security industry. This is reflected not only in the proliferation of these outfits the world over, but also in the nature of the debate that currently rages with regard to their relationships with other public bodies, their regulation and the nature of their responsibility vis-à-vis that of the state (Avant 2005; Singer 2003; Mandel 2002).

Given these developments, it is improbable that a legal regime constructed solely on the basis of 'mercenarism' can adequately address all the imperatives of security demands, use and administration in the context of peace or armed conflict in Africa. To begin with, distinguishing a distinctly 'mercenary' phenomenon from the morass of players performing in a theatre of conflict has become more challenging than before. This is because the security landscape the world over has changed and the players have adapted to the demands of political and economic forces brought about by developments in the international realm. Added to the fact that the current laws still reflect the thinking of the 1960s and 1970s, when private soldiers were considered criminals, and therefore prohibit mercenary activity without providing a clear-cut definition of who qualifies as a mercenary, the effect of law in this regard is clearly diminished (Major 1992). The observation by Singer (2004:526) that the 'international law is altogether too primitive ... to handle such a complex issue that has emerged just in the last decade' neatly summarises the state of uncertainty in which mercenary law finds itself today. The African continental regime, which is anchored on the 1977 OAU Convention on the Elimination of Mercenarism in Africa, is a product of this thinking and carries the same deficiency. It has created a vacuum in the law that allows private security companies to operate without legal oversight and their employees to escape punishment for criminal acts and violations of human rights.⁴ Ideologically, the uncertainty and irresponsibility that characterise the behaviour of some actors within the industry, and the inability of the international legal system to respond to such actions, present us with one of the most bewildering ironies of modern jurisprudence. From a more practical point of view, however, the lack of normative growth has bred a sense of obscurity on the true intentions of the international community and diminished the role of law in providing impetus for the growth of the security infrastructure crucial to the improvement of human rights and achievement of peace in the world.

The imbalance created by a deficient normative order imposing itself on an expanding private security sector is certainly one of the most poignant issues of the current security debate in Africa. This article contributes to this debate by identifying points for legal intervention and asserting the relevance of law in the improvement of peace and security on the continent. It endeavours to analyse the existing regimes against the emerging trends; seeks to unravel

the foundations or assumptions that inform these legal regimes and their key conceptual and practical problems; and makes practical suggestions on how to develop new strategies to harness the changes in the security industry. The article also evaluates alternative approaches that can supplement law so as to enhance the ability of states to respond meaningfully to emergent global security situations.

Looking beyond current regimes: the debate

Given that the definition and status of mercenaries in international law are far from settled, is it possible to look beyond the current international and regional legal regimes and begin building consensus towards the evolution of a new framework for the regulation of mercenarism and the security sector in general? Undoubtedly, as will be suggested in this paper, this can only be possible if the international as well as the regional polities can overcome the obstacles that have made them normatively inactive since the 1970s. Some of these obstacles sit at the core of international relations and mirror the imbalance in the international body politic, reflected only nominally by the disparity in resource base, technological advancement and military capability between the poorer countries in the south and their wealthy counterparts in the north. In a way therefore, they represent the same kind of ideological and political dilemmas which plague the majority of international normative projects.

As far as the development of mercenary law at the continental level is concerned, three distinct factors are mentioned here to contextualise the main discussion in this paper. First, the emergence of new threats to international peace and security in the form of terrorism, human and drug trafficking, and internal armed conflicts in many parts of the world, have diminished the role of states and instead created an acute need for privatised security/military arrangements. These threats have redefined the contours of the domestic and international security infrastructure, redirected normative response towards limiting civil and human rights liberties and lessened the urge to limit the role of private military operatives capable of lending support in the war against terror. These developments have also put the plight of Africa at a crossroads. On the one hand African countries are blamed for providing safe heaven for terrorists, while on the other they are denied the economic support that could enable them improve their security infrastructure.

Second, the disintegration of the Soviet Union and the emergence of the USA as the sole superpower have driven into maturation the neo-liberal orthodoxy consistent with the ideas of deregulation, privatisation of enterprises and the

limitation of governmental control. With the emergent system of corporate globalisation and free trade, the reins of power are now held by international institutions and multinational corporations (Held 1999). The 'new world order' envisioned by George Bush or 'assertive multilateralism' of Bill Clinton resonate these ideas and imply both political acquiescence from the holders of power and the placement of normative architecture that allows for their implementation (Falk 1999). These ideas have changed the way the world does business and also encouraged the deployment of PSCs/PMFs in the conflict arena.

In the US, for example, the privatisation of the military is a deliberate government policy that began in 1983 when President Reagan's budget director, David Stockman, issued a circular directing government institutions to rely on commercial services to supply products and services to the government (Baum 2003). However, this policy document simply outlined a procedure which had begun in the military many years before. During the Vietnam War in 1969, the US military awarded contracts to private military companies totalling US\$236 million (Davidson 2000:235). Since then, the Pentagon has outsourced kitchen duties, laundry, recruitment and as 'many tasks as possible to enable the military ... to focus on its core competency – fighting' (Schwartz & Watson 2003:102). In the last decade, the US has hired PSCs/PMFs to protect military assets, provide staff at checkpoints, train and advise military personnel, maintain weapons, interrogate prisoners, collect intelligence and even to engage in combat. According to the 2006 report of the US Government Accountability Office, there were approximately 181 PSCs with just over 48 000 employees working in Iraq (Gillard 2006:526). It is estimated that before the second Iraq war, the US government had paid close to US\$30 billion to PSCs (Schwartz & Watson 2003:102). A study by Equitable Services Corp conducted in 1997 predicted that the global market for PSCs would increase from US\$55,6 billion in 1990 to US\$202 billion in 2010 (Schrader 2002). With powerful nations resorting to PSCs/PMFs to further their military interests, the status of mercenary debate in Africa has to change. After all, almost all African states depend on bilateral and multilateral assistance from these countries. Irrespective of what Africans consider to be their priorities, the path of normative development is still dictated by events in the West.

The third factor is what could be called the arrogance of power, which has characterised the foreign policy of the US and Britain in the last two decades. This arrogance can be seen in the multiplicity of unilateral military projects, the deliberate weakening of the United Nations, and the refusal particularly by the US to ratify major international instruments, including the International Convention against the Recruitment, Use, Financing and Training of Mercenaries (the UN (International) Mercenary Convention). Remarkable in

this regard is the withdrawal of its signature from the implementation of the International Criminal Court (ICC) treaty and the subsequent passage of American Service-Members' Protection Act of 2002 which allows the military to free American citizens held at The Hague and grants immunity to American soldiers from the ICC (Desai 2005). It has become apparent, especially after the US invasion of Afghanistan and Iraq, that the pursuit of 'national interest' is now the guiding principle in America's approach to international security. This means that the influence that African nations had in the early decades of their independence which enabled them marshal support for the enactment of anti-mercenary laws has diminished. Whereas Africans may be uncomfortable with private military operatives that threaten their political stability and aid while siphoning off their natural wealth through multinational agencies residing outside their borders, it is likely that their voice in the realm of international politics will be subdued and completely overridden by the 'national interests' of powerful nations.

These three factors indicate the necessity for Africans to develop their own security agenda and put in place a normative infrastructure that will further their own interests. Whereas the maintenance of security within and across borders remains Africa's greatest challenge, the efforts towards streamlining the security sector has merely attracted superficial attention. From the above it is clear that there are serious impediments to normative growth. A lack of accountability among leaders, diminishing respect for electoral laws and poor governance, economic inequality, unfair distribution of national resources and regime weaknesses are among the plethora of reasons that drag the continent down. Amid these debilitating conditions, governments have shown reluctance at the national and even continental level to strengthen legal and other institutions that are capable of enhancing stability by providing avenues for resolving disputes. This is the situation despite the post-colonial experience which has shown that enhancing the general development of the continent is contingent upon improving the security sector and creating conditions for peace among the millions of Africans currently embroiled in civil strife in one form or another.

No matter how one looks at it, the security debate is crucial for Africa. In view of the above three factors, the imperatives of such a debate must anticipate the role that privatisation of military and other security services will play in the future. Already, the emergence of PSCs/PMFs and the willingness of legitimate governments to engage their services are bringing into question the assumptions that hitherto informed the anti-mercenary debate. The challenge is to match these changes to well-informed norms to ensure that the legitimacy of governments is not overtaken by narrow interests of individual entities.

Constructing a basis for normative intervention

A realistic appraisal of the state of mercenary law today must take into account the imperatives of sovereignty, the burgeoning need for security services at multiple levels of society; the diverse interests of players in any theatre of conflict; the expanding regimes of law in related fields such as human rights and humanitarian law; and the unavoidable consequences of globalisation. It has become apparent that we can no longer talk of reforming mercenary law without addressing the surrounding issues that relate not only to the widening scope of the private security debate but also the emergent players who for all intents and purposes may offer some services that were hitherto exclusive to the quintessential mercenary. One might even argue that whereas the legal discourse on 'mercenarism' may be inclined towards the absolute prohibition of private military industry (Musah and Fayemi 2000), the reality on the ground is that governments are still willing to engage the services of these firms when they consider it expedient to do so. The province of 'anti-mercenary' law seems to have been eroded by the evolving practice in view of the realisation that the participation of PSCs/PMFs in the field of security, whether in the context of armed conflict or peace, extend beyond the perpetration of violence against civilians and government to the restoration of constitutional order, fight for self-determination and protection of humanitarian work. One should also take into consideration that as international law does not prohibit states from using private contractors to provide military and security services, a synthesis of what one might call the 'mercenary problematique', from the legal point of view, rests on the normative accommodation of security needs and the desire to punish rogue activities of security organisations or persons. Be that as it may, the broad range of functions the private security/military organisations perform argues for an evolution of regimes of law that isolate the undesirables with caution and regulate activities that are legitimate so as to enhance human security.

Scholars have argued that evolving proper regimes for dealing with the emerging concerns cannot be possible unless a legal classification is made of the diverse players in the security field (Singer 2004a; Avant 2005; Desai 2005). Already, there seems to be a consensus that the different categories of actors in any security operation should each bear a different legal responsibility. This perspective seems to encourage, albeit with little success, a distinction between 'mercenaries' and 'legitimate and legally recognised' private security arrangements. The idea seems to be that not all PSCs/PMFs are different from the mercenary whose activities are illegal under international law. As already mentioned, PSCs/PMFs is a general term used here to refer to private operatives who provide military and other professional

services in a theatre of conflict. PSCs/PMFs are varied and their activities give rise to a need for further categorisation.⁵

Singer (2003:91-93) has attempted to illustrate this by classifying PSCs/PMFs into three broad categories depending on their proximity to combat. Using the military 'tip of spear' image, he places the military provider firms who provide command and implementation services at the tip of the spear; military consultants who provide training and advisory services in the middle of the spear; and the military support firms who provide non-lethal aid and assistance at the lower end. Even using Singer's classification it is difficult to see how one category of PSC/PMF could be prevented from pursuing some of the activities that are illegal or mercenary in nature, especially in the context of an armed conflict. Moreover, relying on a classification based on proximity to combat may obscure the strategic and tactical influence that private services may have on the conflict. Clearly, private services that are offered away from the battlefield may not meet the test of 'direct participation in hostilities' required by international law.

The 'mercenary' on the other hand, is the undesirable soldier of fortune: the amoral ruthless thug who aggravates conflicts, threatens struggling regimes, commits human rights atrocities and serves the interests of colonialist capitalist entities. Against the background of the exploits of 'Mad' Mike Hoare in Congo and Bob Denard in Comoros in 1995 (the two archetypes of modern mercenarism), and more recently, the 2004 Simon Mann case in Zimbabwe, the practice of mercenarism still seems to be very much alive and its legal prohibition the best strategy for preventing the commercialisation of violence (Sapone 1999). According to Davis (2002), the individual soldiers of fortune whose activities are evident in African trouble spots are the 'freebooters'; the quintessential mercenaries of the 21st century whose activities must still be outlawed.

From the foregoing, two issues which impinge on the reassessment of mercenary law become clear. The first is that the current continental legal mercenary regime is inadequate and a new framework for regulation is indeed necessary. Indeed, legal analysts have come to the ineluctable conclusion that there is a connection between the dearth of norms and the relative confusion and complicity in situations of insecurity and conflict. Currently, the blame is placed on the weaknesses of international instruments, and their lack of clear definitive criteria and general incongruity. According to Frye (2005:2639)

Even if the definitions of mercenary were clear, the current regimes would still suffer from the problem of providing unclear legal status in

the *jus in bello*, lack of monitoring and enforcement, no extraterritorial force, and no transnational co-ordination. Mercenary use and its prohibition also raise complex issues for both source states and the weak or failed states.

The second issue is that it is no longer possible to normatively address mercenary concerns without recourse to the role of PSCs/PMFs. Moreover, there is a constituency that argues that mercenarism has mutated into near acceptable forms, shaking off its vile and abhorrent characteristics and adapting to the forces of globalisation rendered by the expansion of capitalism after the demise of the Cold War. For example, Clapham has observed that the term mercenary is a political one which is usually 'applied to express the speaker's disapproval, rather than to describe an individual satisfying a criteria under international law' (Clapham 2006:299). Davis (2000) sees the PSCs as 'privately run mercenary organizations that conduct combat or combat support operations' but remains officially unaligned. Thus, the terminology may have shifted a little, but the leitmotif, from an international normative standpoint, has remained basically the same.

According to Kritsiotis (1998:12) private military firms are the new breed of mercenaries, but the ones that 'champion legitimate causes'. In his view the international community made a mistake when they denied mercenaries prisoner of war status in the article 47 of Additional Protocol I of the Geneva Conventions because this hinders legitimate security functions of the private security firms. Another aspect that is worth considering is that while the current regimes are bent towards abolition of mercenary activity, they leave open the question as to whether the use of private military personnel that do not usurp the functions of the state and are directed towards maintenance of law and order or protection of legitimate governments could be accommodated within the framework of the current anti-mercenary law, or should be regulated separately.

The convergence of these two issues outlines the basis for any normative intervention in this area. The position taken in this article is that PSCs/PMFs define the future of the world's security infrastructure and cannot be ignored in the overall mercenary debate. Moreover, the concern about violence combined with the lack of control and accountability that was inherent in the anti-mercenary debate also affects the PSCs/PMFs. Therefore, the article suggests that the best way forward is to evolve regulatory systems that will take care of PSC/PMF excesses and at the same time provide mechanisms for enforcement of rules that prohibit the activities of the undesirables. By doing this, the rogue aspects of mercenarism may be taken care of without

isolating mercenaries from persons, groups and companies involved in the industry. The point being made here can be best understood by examining the existing legal regimes and weighing their suitability for dealing with the emerging practices.

The current law

The regimes of law applicable to mercenary activity fall into three categories. The first set of laws fit into the general category of international law. These include the international conventions specific to mercenary activity, international humanitarian law and customary international law. The second set of laws comprises what could be referred to as the African continental regime. They include the basic text of the OAU/AU Mercenary Convention and the Luanda Conventions. The last set is the different domestic laws that either deal with mercenary issues exclusively or create regulatory frameworks for the privatised military industry in general.

There is a great deal of literature on all these regimes and it will not be useful to delve into details here (see for example Fallah 2006; Desai 2005). However, very little jurisprudence has emerged from these laws that indicate how disputes related to anti-mercenary law arise and how they have been solved. Most cases that have been tried on the domestic scene have not centred on the offence of conducting mercenary activity *per se*, but on related offences such as illegal acquisition or transportation of firearms or violation of immigration laws. On the international scene, very little has happened since October 2001 when the UN Mercenary Convention came into force. What is perhaps of more relevance to the development of mercenary law is that the international treaty law and the continental regimes both treat mercenary activity as a crime.⁶ This is understandable given the imperatives of international political reorganisation that characterised the post-1945 world, and the fact that the newly independent African states approached all matters affecting their status as new members of the community of world nations armed with sovereignty principles. But in the current period, much of the conventional attitudes are tested by the evolution of the security industry as determined by the imperatives of globalisation.

African continental regimes

The African continental regime, considered to be the 'bastion of anti-mercenary' law, grew from the ashes of anti-imperialism movements to

become a major factor in the protection and consolidation of the nascent democracies of the post-independent states. Mercenaries, according to the African states, threatened their sovereignty and fought against liberation movements, thus hindering the political and economic development of the continent. African states were able to push this agenda to the forefront of international concern. Although the apathy towards mercenarism could have come to an end concomitantly with the enactment of the Charter of the UN and the Universal Declaration of Human Rights, it was the reintroduction of the idea by Africans that made it such a compelling normative issue.

By the time the 1949 Additional Protocol I of the Geneva Conventions was drafted, a reasonable constituency opposed to the reckless war by white soldiers for hire against nascent African states and other weaker groups had been canvassed. Their demands were strengthened by their attainment of independence in the late 1950s and early 1960s and the growing spate of coups that occurred thereafter. Independent African states that had joined the UN were instrumental in pushing the anti-mercenary agenda. For example, in 1973, at the insistence of African states, the UN General Assembly passed the Declaration on Basic Principles of Legal Status of Combatants Struggling against Colonial and Alien Domination and Racist Regimes (resolution 3103). The aim of this resolution was to eliminate threats to liberation processes. It declared mercenarism by colonial and racist regimes to be a criminal act. In the next year, the General Assembly included mercenarism in its definition of aggression (resolution 3314).

When the African states adopted the OAU Charter in 1963, they declared in it their determination to protect their sovereignty and to work towards the liberation of other states still under the yoke of colonialism. Mercenarism was still seen as one obstacle to achieving these goals. Thus, through a collective effort, they pushed for normative action at the continental level. The first attempt came in the wake of the arrest and trial of mercenaries in Angola in 1976. As a result, the International Law Commission of Inquiry on Mercenaries prepared a draft convention on the prevention and suppression of mercenarism in Luanda (Lockhood 1977). The aim of the convention as stated in its preamble was to stem the 'use of mercenarism in armed conflicts with the aim of opposing by armed force the process of national liberation from colonial and neo-colonial domination'. The Convention enacted a definition of mercenaries that reflected the regional approach to mercenarism. Although not as elaborate as that of Additional Protocol I, it introduced the elements of 'financing, supply, equipping, and training' into its corpus, to provide a new line of measures against mercenary activity that was to be adopted in the later treaties.

The following year, African states under their umbrella organisation, the OAU, came together at Libreville and enacted the Convention on the Elimination of Mercenarism in Africa. This convention contains what could aptly be described as the continental legal regime on mercenary activity. Basically, the Convention codifies the criminality of mercenarism and places the responsibility for prosecuting offenders on member states. In terms of article 6 states are required to forbid the recruitment, training, financing, procurement of equipment, or any other activity related to mercenarism being conducted in their territory. The convention also calls for cooperation among states in dealing with offenders. Article 10 requires that states offer each other 'the greatest measure of assistance in connection with the investigation and criminal proceedings brought in respect of the offence'.

The convention was the culmination of efforts by African states to protect themselves against the threats by rebel movements and the use by such movements of foreign mercenaries. By that time the African experiences reflected a rather grim picture: the UN had sent peacekeeping forces to prop up the regime of Mobutu, threatened by Belgian mercenaries in Katanga soon after Congo's independence; the South African mercenaries joining the Nigerian civil war to fight alongside Biafra in 1970s; and both sides had hired mercenaries in the Angolan civil war. Apart from civil wars, mercenaries effected or threatened military coups against legitimately elected governments in the Comoros in 1975, Benin in 1976 and the Seychelles in 1981 (Zarate 1998:89). To a largely extent, therefore, 'mercenarism' in this context was seen as being inimical to the aspirations of the OAU.

However, even among the loudest of voices calling for the elimination of mercenaries, there was some reluctance to deny legitimate governments the opportunity to acquire military support from private sources. That is why the text of the Convention does to some extent accommodate the idea that governments may hire non-nationals to defend themselves from 'dissident groups within their own borders'. The reason is not removed from the overall purpose of OAU. Indeed, as Singer (2004) noted, the organisation itself sponsored armed struggles against colonial regimes and allowed the use of external fighters to achieve its goals.

United Nations treaty law

The idea that there were 'good' and 'bad' mercenaries came with the era of regulation which begun soon after the enactment of the UN Charter and the establishment of the United Nations. Acceptable and unacceptable types

of military services offered by foreigners were distinguished on the basis of transparency and state responsibility. Article 2(4) of the Charter, which was the key normative formulation of the rule on the use of force, required all states 'to refrain in their international relation from the threat or use of force against territorial integrity or political independence of any state, or in any other manner inconsistent with the purpose of the United Nations'.⁷ In the 1970 Declaration on the Principles of International Law, the non-use of force was given a more encompassing meaning. The main principle was the declaration that wars of aggression may constitute a crime against peace, which was accountable under international law. The principle was derived from article 19(3) of the International Law Commission draft articles on state responsibility, which provided that a serious breach of an international obligation of essential importance for the maintenance of international peace and security may constitute an international crime for which a state may be criminally liable (Rosenstock 1971; Arangio-Ruiz 1979).

The other principles contained in the declaration were the prohibition against use of force to solve international disputes, the duty to refrain from acts of reprisals and the use of force to deny people the right to self-determination.

The fifth principle which is perhaps more directly relevant to the discussion here, was the requirement that states refrain from organising, instigating, assisting or participating in acts of civil strife or terrorist acts in another state and from encouraging the formation of armed bands for incursion into another state's territory. This idea was enacted much more succinctly in the 1991 International Law Commission's draft code of crimes against peace and security of mankind which adopted the definition of mercenary as contained in the OAU Convention except for the omission of the phrase that a mercenary 'does in fact take part in the hostilities'.⁸ However, when the draft code was revisited in 1995, the crime of 'recruitment, use, financing and training of mercenaries' was omitted. The code later formed the basis for the ICC treaty, which perhaps explains why the ICC treaty did not include the crime of mercenarism within its jurisdiction.

The most recent UN treaty that is devoted to the criminalisation of mercenary activity is the International Convention against the Recruitment, Use, Financing and Training of Mercenaries, which came into force on 20 October 2001. Apart from providing a relatively expansive definition of what a mercenary is, the convention prohibits recruitment, use and financing of mercenary activity by member states for the purpose of 'opposing legitimate exercise of the inalienable right of peoples to self-determination, as recognised by international law' (art 2). It enjoins states to make offences outlined in the

convention illegal under domestic law and prescribe appropriate penalties for such violations. The offence created makes no exception for 'good' mercenaries and therefore conform to the definition of mercenary provided in article 1. It further recognises the link between mercenary activity and drug trafficking, both of which promote violent actions and undermine 'the constitutional order of states'. But while the convention recognises the importance of cooperation in combating the offence, it still places most responsibility on the state on whose territory the offence has been committed. This notwithstanding, the convention strengthens interstate relations by echoing the intension of the Declaration on the Principles of International Law Concerning Friendly Relations and Cooperation among States. It thus attempts to create a regime of law that is sensitive to the maintenance of good relations among member states. The convention has elaborate notification procedures, which are set out in article 10. The states on whose territory the alleged offence is committed are required to conduct an enquiry, and they must notify all other states with an interest in the matter and the UN of the outcome of such enquiry. In addition, states who have either taken suspects into custody or consider themselves privy to any matter related to an offence alleged to have been committed under the Convention, must notify other states having an interest in that same matter to that effect. However, in discharging their responsibilities under the convention, states must take into account the principles of international law, including humanitarian law. At the same time, states are allowed latitude to apply their laws in respect of trial and punishment of the offences created by the convention.

It is noteworthy that the convention regulates mercenary activity inside and outside the conflict situation – both in war and at the times of peace. Thus its reach goes beyond the limitations of article 47 of Additional Protocol I. The mercenary, without consideration of the nature of conflict in which he finds himself, will be criminally liable. Also, the convention forges cooperation between the home state and the contracting state in curbing mercenarism. The other strength of the convention is in its specific regulations on the protection of the rights of suspects. In terms of article 10 persons who have been detained or any other measures taken against them with regard to the convention have the right to contact the representatives of the state in which they claim residence. They are also entitled to be visited by a representative of such a state. Article 11 guarantees the right to a fair hearing and 'all other rights and guarantees' to such persons, but limits them to the laws of the putative state. This is in tandem with the current development in the law relating to the rights of diplomatic protection. In *Kaunda v President of the Republic of South Africa* [2004 (10) BCLR 1009 (CC)] the South African Constitutional Court stated that the state has a duty to protect citizens rights

that are contained in section 7(2), which requires that they be provided with diplomatic protection against threatened violations of fundamental human rights. Although such obligation was discretionary, the decision made by government was justiciable.⁹

Customary international law

Whether there is a rule of customary international law that prohibits mercenarism has been inconclusively debated by scholars (De Freitas & Ellis 2005; Coleman 2004). The debate arises from an equally contested premise that international treaty regimes have gaps that can only be filled by evoking rules of customary international law. Those who support the argument that there is a customary international law ban on mercenarism have based their claim on other international norms and the seemingly uncompromising approach of UN institutions towards the threat of mercenarism. Thus, according to the UN Special Rapporteur on mercenary activity, the rule against mercenarism has become customary international law because the activity infringes on individual rights and freedoms, and is inconsistent with political aspirations of the international community. In his report on the question of the use of mercenaries as means of violating human rights and impeding the exercise of the rights of peoples to self-determination,¹⁰ the rapporteur stated

The aim of customary international and treaty law is to condemn a mercenary act as the buying and selling of criminal services in order to interfere with the enjoyment of human rights, sovereignty, or the self-determination of people; and there is international jurisprudence condemning interference by one state, not to speak of individual organizations, in the internal affairs of another state and in the lives of its peoples (Zarate 1998:133).

Burmeister alluded to the repeated calls by the UN Security Council for governments to curb the supply of mercenaries as being evidence that a state now has an obligation under international law to 'control the recruitment of its nationals in a situation where threat to peace and security exists' (1978:56). The argument that UN activity could point to the existence of the rule of customary international law was advanced decades earlier by Cheng (1965). His view was that custom could be deduced from declarations made in General Assembly resolutions, such resolutions constituting at once elements of state practice and evidence of necessary *opinio juris*. Although this opinion was popular at the time, it

was subsequently rejected by the International Court of Justice in the two cases.¹¹ Whereas in the court's opinion, Security Council and UN General Assembly resolutions could comprise the *opinio juris*, evidence of state practice was needed for a rule to become custom. In classical international law, a rule of customary international law requires two ingredients: an established, widespread and consistent practice on the part of states, and a psychological element usually referred to as *opinio juris*. The ICJ judgement in *North Sea Continental Shelf* (ICJ Reports 1969:3, para 77) is considered the *locus classicus* of this legal position. Here the International Court of Justice stated in connection to this rule:

Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief ie, the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitates*.¹²

Some scholars have suggested a mixed approach that considers whether a mercenary activity has violated a norm against territorial sovereignty, political independence and rules against non-interference, before it can be said to be contrary to customary international law (Gaultier et al 2001). Then the determination would not be based on mercenary activity as such but on the purpose of the activity and who the beneficiary is. In such an event, however, a total ban could be seen to be contrary to some norms of international law, especially those that relate to the maintenance of international peace and security and the protection of national sovereignty.

Given the evolving character of privatised security/military industry and the individual country's approach to security, the notion that the ban on mercenaries has become a norm of customary international law seems untenable. Moreover, state practice has never supported wholesale the ban on mercenarism. The slow growth of mercenary law has not helped to establish any consistent pattern of legislative behaviour from which state practice and the rather elusive concept of *opinio juris* could be derived. The entry into force of the International Convention against the Recruitment, Use, Financing and Training of Mercenaries in 2001 merely added to the number of UN resolutions that signify the international apathy towards the use of mercenaries to destabilise governments or to suppress recognised national liberation movements.¹³ But it has not elevated the ban to a rule of customary international law. Indeed, as evidently surmised by contemporary literature, the pendulum had already swung in favour of absence of such a rule.

Revisiting the definitional conundrum

The emergence of PSCs/PMFs in the 1990s have completely dismantled the very assumptions and even prejudices upon which international mercenary law were predicated. The ban on mercenarism that international instruments have so far created, do not seem cover the PSCs/PMFs. And even though some private security firms may perform the same functions as mercenaries, they still fall outside the definition of the prohibited mercenarism provided by existing law. The report of the UN Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of right of peoples to self-determination (the UN Working Group) submitted to the General Assembly by the Secretary General in August 2007 indicate that some PSCs/PMFs hire ex-policemen and former military personnel from third world countries to work as 'security guards' in conflict zones. These guards are actually private armed soldiers and they constitute new modalities of mercenaries.

In light of all these arguments, addressing the definitional conundrum should therefore be the first step towards creating a basis for normative reform. But this will by no means be an easy task. Finding a suitable definition for mercenaries has been a perennial problem that has impinged on the development of mercenary law for generations and the current situation has been exacerbated by the proliferation of PSCs/PMFs. Enrique Bernales Ballesteros, a former UN special rapporteur on the question of the use of mercenaries, acknowledged this difficulty in his report to the UN Economic and Social Council in February 1997 when he observed that such an undertaking may be complex if not impossible. In his view the drafters of the 20th-century international mercenary law 'confused the principles of *jus ad bellum* and *jus in bello* thereby producing questionable and ultimately tenuous attempts at international regulation' (Ballesteros 1997). It has been acknowledged by recent writers that, 'definitional ambiguities create problems for the existing international and domestic regimes because it renders them incapable of ascribing a proper status to persons or organizations against which sanctions are being sought' (Zarate 1998:123).

The earliest definition, which has become the basis for subsequent enactments at the international and regional fora, are contained in the instruments of international humanitarian law. A fundamental precept of the law of armed conflict has always been the distinction between *jus ad bellum* and *jus in bello*: the former refers to the authority to resort to war and the later to the rules applicable to war, and thus forms the corpus of humanitarian law. The main concern of international humanitarian law has been the protection of

persons in times of war. Since mercenaries have always been actors in the war arena, it is no surprise that they became a subject of this law. The first humanitarian instrument to deal with mercenaries and so provide a definition was the 1977 Additional Protocol 1 of the Geneva Conventions. Basically, it had the effect of excluding individuals considered to be mercenaries from the benefits the law accords to combatants, namely prisoner of war status. Article 47(2) defines a mercenary as a 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 combatants of similar rank 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.

In many ways, the OAU/AU Mercenary Convention adopted the definition of mercenaries contained in Additional Protocol I. The significant additions were the declaration that mercenarism was a crime and provision for the imposition of the death penalty on persons found guilty of the offence. When the UN Mercenary Convention was enacted in 1989, the definition of mercenary was extended to include activities that undermine the state. Specifically, the Convention defined mercenary activity in two parts. The first part adopted the definition of mercenaries in Additional Protocol I and the OAU/AU Convention, and extended the POW restrictions to all conflicts, internal and external (Kwaka 1990). The second part defined a mercenary as a person who is, 'specially recruited locally or abroad for the purposes of participating in a concerted act of violence aimed at (i) overthrowing a government or otherwise undermining the constitutional order of the state; or (ii) undermining the territorial integrity of a state' (art 2).

Commentators from different fields have analysed the weaknesses of these definitions, pointing to the narrow threshold, lack of uniformity and the general orientation towards abolition rather than regulation. Another weakness is that they exclude private companies and many other operatives who may be capable of performing the same activities as mercenaries. For example, condition (b) of article 47(2) requires the 'direct participation in hostilities', but the involvement of persons or companies in any conflict may not necessarily be in direct combat. Financial or military support and assistance to belligerent groups from outside the combat zone may have just as serious

an effect. Furthermore, it may be difficult to prove direct participation in such circumstances. Condition (e) of the same article strips the definition of any practical or legal significance. By incorporating mercenaries into the national army their status obviously changes.¹⁴

The concept of motivation which runs through all of them has attracted considerable criticism as well. Additional Protocol I uses the concept of the desire for private gain, a promise of material compensation exceeding that payable to persons of the same rank. The OAU Convention has the same threshold but omits the comparative requirement. The UN Convention echoes this requirement. However, it is not only the promise of material gain that motivates individuals or groups to wage wars far away from home. A person or group could be motivated by political, personal, ideological or religious factors. One might conclude that the UN Convention definition which hinges 'on vague, restrictive criterion of financial gain', and the OAU/AU Mercenary Convention that targets private military outfits whose aim is to overthrow governments and incapacitate liberation movements, suffer from the same constraints and may be unable to address the current security needs.

It is improbable that the definition of mercenaries could be expanded to include private security companies. If, for example, the definition of mercenaries in Additional Protocol I of the Geneva Conventions were to include private companies, it would mean that their personnel might not have the protection of POW status. Moreover, such an undertaking may not be feasible considering the trend of normative action at the international level. It is also unlikely that states such as the US and Great Britain will support such a measure. These states have already refused to ratify the UN Mercenary Convention. The British House of Commons report which examined the role of private military companies and their possible regulatory systems in view of the existing international and regional regimes, found the definitions of mercenaries in existing laws to have been made by those with vested interests and therefore largely un-useful. The reason that the attempt to categorise mercenarism in accordance with their activities, the intention behind them and their effect has failed, is because in practice 'the categories will often merge into one another' (Foreign Affairs Committee 2001–2002). The report concluded that an outright ban on all military activity abroad by private military companies would be unproductive. The option seems to be for nations to seek a more regulatory approach to PSC/PMF operations that takes into account the existing regimes and creates a more rigid framework for enforcement. At least this is what was suggested in the report of UN Working Group of 2007.

Parameters for regulation: a two-pronged approach

Evidently, the use of mercenaries and PSCs/PMFs by governments is unlikely to stop, as states continue to assert their sovereignty in matters of national security. Even though the historical and political factors that made mercenaries such abhorred creatures have not come to an end, the current trends indicate that the abolitionist attitude is slowly giving way to an accommodative approach. Governments as well as regional bodies are beginning to acknowledge the need for efficacious and economically prudent security arrangements that do not place heavy burdens on national budgets and constrain economic growth (Holmqvist 2005). At the same time, they remain ambivalent to blank cheque arrangements that would allow PSCs/PMFs to operate without any oversight. There is also the lingering belief that outlawing PSCs/PMFs completely may have the undesired effect of driving their operations underground and thus create a suitable climate for clandestine operations (Millard 2003:8). Considering too that the current state of international law does not prohibit states from engaging PSCs/PMFs to restore social order or defend themselves against external aggression, the anti-mercenary debate finds itself at a crossroads. It is in this regard that writers have alluded to the tension that exists between the ban on the use of mercenaries and the rights of states to provide for their internal security. This tension is the major driver of the legal reform agenda; the conceptual *point d'appui* for the construction of a legal framework in response to the 'mercenary problem'. Reinforced by the ever-present danger of private security services being available to non-state entities – even those that challenge the authority of the state – the tension has created a rather urgent need for legal intervention.

In view of the fact that most private security organisations function within and across borders, legal responses to their activities must operate on the domestic as well as the international level. Thus, the development of mercenary law is envisaged as a two-pronged approach that targets the development of security law at the domestic level and encourages the creation of an overarching international regime to ensure common standards and curb transnational excesses that may be beyond the purview of the domestic legislation. The UN Working Group recommended that member states urgently ratify the UN Convention, despite its shortcomings, so as to reinforce their commitment to the elimination of mercenarism. The Working Group noted that the regime created by the Convention was not sufficient, and recommended that international efforts should be reinvigorated by action at the domestic level. Taking into account the emergent PMC/PMF phenomenon, the group proposed that that regulatory action should aim at establishing minimum requirements for PMC/PMF activities, encouraging

training of personnel on human rights and humanitarian law and practice, instituting complaint and monitoring procedures and imposing a ban on certain practices. These objectives could be realised through a licensing procedure anchored on the domestic legal systems of both importing and exporting nations. These proposals echo suggestions by scholars and are likely to inform normative reforms in this area. The question is how are these proposals likely to influence reform of Africa's mercenary law?

The domestic approach

It is imperative that African states adopt a holistic approach to address all issues that influence internal security regimes and allocate power to constituencies that support democratic governance, promote the peaceful co-existence of nations in accordance with the UN Charter, human rights and constitutional development, and enhance the security of their citizens. This presupposes that governments importing security services are legitimate and not themselves threatened by instability arising from their inability to forge democracy.

In Africa few governments enjoy such stability. The dynamics of power relations in African countries has been a subject of much debate, and although it is outside the purview of this paper. But it raises interesting questions about security sector reform. As portrayed so eloquently by Cilliers and Cornwell (1999), the edifice of government in most African countries is plagued by illegitimacy and its exercise of power compromised by political and commercial subjugation, and exploitation of natural resources in the interest of the few elite and authoritarianism. In the circumstances, private security firms have been used to sustain their hold on power and not for the common good of all citizens. While a case may therefore be made for outsourcing security services to private firms, the question as to whether their work is for the good of the public is often doubtful. And even if we are able to overcome this challenge, there still is the obvious question of what legal framework ought to be in place to ensure that the use of private security arrangements do not become anathema to forging internal peace and security.

Objectives of a domestic regulatory framework

It seems clear therefore, that the objective of a regulatory framework should be to ensure that private military firms observe their contractual obligations, maintain codes of conduct, and introduce professionalism in the performance of their work. Governments can ensure that these functions are performed

through licensing and administrative oversight procedures which are instituted through domestic legislation. The licensing procedures employed by the US government could provide a model for other countries (Zarate 1998). Under section 38 of the Arms Export Control Act, the President of the US has the power to control import and export of defence services and articles, defined as ‘furnishing of assistance including training to foreign persons whether in the United States or abroad in the design, development, engineering, manufacture, production, assembly, testing, repair, maintenance, modification, operation, destruction, processing or use for defence articles’. For purposes of the observance of this law, companies engaged in defence matters are required to register with the office of Defence Trade Control. These licences are valid for four years and have a built-in continuous monitoring process as well. The licensing procedure is also subject to Congressional oversight, but only for contracts whose value exceeds \$50 million.

Other countries that have anti-mercenary laws are Australia, Canada, Denmark, Finland, Greece, Italy, Netherlands, Norway, Portugal, Russia, Switzerland and Ukraine (Frye 2005). Obviously, the US regulatory framework has not been successful in curbing the excesses of PMCs operating abroad. Its shortcomings include the rather high threshold for contracts within its ambit, large exemptions for contracts not related to the Department of Defense, and limited jurisdiction.

The recipient countries must have their own procedures to deal with these matters. Since most African countries merely appropriate services offered by companies that are resident in developed countries, their inclination should be to create regimes that would lay down transparent procedures for contracting and supervising their work. The notion that the market itself may regulate such undertakings is false because PMCs have shown the tendency to manipulate their employers, especially in conflict situations. Also, the incidence of corruption and lack of respect for ideals of peace and security have in the past resulted in overpriced security services and the exploitation of natural resources. Invariably, the need for legal and regulatory mechanisms that would ensure that both the hirers and the hired operate above board – all the parties observing standards that are consonant with the general or particular principles of international law – cannot be overstated. Private military or security organisations that function within these parameters would be subject to national jurisdiction. In this way, the responsibility under international law for actions of private military firms will shift from the home states to the contracting states. At the political level, it is imperative that leading nations such as South Africa should encourage other African nations to enact legislation that creates common standards that will

harmonise the procedures relevant to the development of the security sector on the continent.

The South African Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act, 2006 (Act 27 of 2006)

The only African country that has enacted legislation to create a mechanism for the enforcement of anti-mercenarism as intended by the OAU/UN Mercenary Convention, is South Africa. The original version of anti-mercenary law in South Africa was the Regulation of Foreign Military Assistance Act of 1998, enacted in reaction to the activities of Executive Outcomes in Sierra Leone. The law required all security firms operating on South African soil to seek government approval for the performance of all military contracts, whether domestic or foreign. This blanket requirement did not distinguish between firms that were hired by legitimate governments and those which could loosely be categorised as clandestine. More importantly, the Act created a licensing process to be handled by the National Conventional Arms Control Committee but overseen by the Ministry of Defence. It imposed a ten-year sentence and fines of up to ZAR1 million for contravention of the Act. The stringent licensing process and the general disquiet with which mercenarism has been regarded made such firms leave the country. For instance, the infamous Executive Outcomes, a firm responsible for providing jobs for former apartheid military officers with a substantial presence in many African civil wars, simply moved from South Africa in order to continue their business free from government regulation (Singer 2003).

The Regulation of Foreign Military Assistance Act has since been replaced by Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act of 2006. The Act deals with the issue of mercenarism in two ways. First, it purports to prohibit mercenary activity in the Republic of South Africa or elsewhere. These activities are listed in section 2 and they contain some of the elements that are mentioned in international instruments. These include the objective of private gain; the participation, directly or indirectly, in acts aimed at furthering armed conflicts; instigating or supporting rebellion against legitimate governments; coups d'état; and the undermining of constitutional order, sovereignty and territorial integrity of states. The Act also prohibits the direct or indirect recruitment, use, training or support of combatants in armed conflicts. It prohibits negotiating or offering assistance (including rendering service) to a party to an armed conflict or regulated country; providing any assistance or rendering any service to a party to an armed conflict or regulated area; recruiting, using, training, supporting or financing a person to provide or render any service to

a party to an armed conflict or regulated area; and performing any other act that has the result of furthering the military interests of a party to an armed conflict or in a 'regulated country'. These prohibitions echo the intension of the UN Convention and must have been inserted in the Act to allow ease of enforcement at the domestic level.

The second aspect of the Act is the establishment of what could be called a licensing procedure for military or military-related assistance rendered by South African citizens and other legal persons. While the Act prohibits the rendering of assistance and certain services, the enlistment of South Africans in armed forces other than South African Defence Force, and the provision of humanitarian services in countries where there is an armed conflict or regulated country under section 3, 4, and 5, persons seeking to perform or participate in such acts may apply for authorisation through a procedure set out in section 7. The Act retains the functions of the National Conventional Arms Control Committee as the authorisation body. The Act has an extra-territorial component (section 11) which determines that acts committed outside South Africa by South African companies, citizens or permanent citizens may be tried as though they had been committed in South Africa. The main criticism of the Act is that it is likely to hamper South Africans doing humanitarian and legitimate security work abroad. Ideologically therefore, it serves the purpose of prohibition rather than regulation and fails to provide a model for a regulatory framework that other African nations could emulate.

Creating a continental framework

When the OAU/UN Mercenary Convention was adopted, the concern of independent African states was the protection of their sovereignty and the provision of assistance in liberation struggles. Although all the countries on the continent are now independent and the threats to sovereignty of the nature that mercenaries posed have assumed new dimensions, the law has remained the same. Considering too, that the emergent PSCs/PMFs have given activities that would otherwise fit the mercenary definition an aspect of legality, the normative void is now more apparent than ever. There is also another reason why the PSCs/PMFs have complicated the anti-mercenary debate. Today, PSCs/PMFs have become almost synonymous with African civil wars and are the parties most responsible for catapulting the image and character of internal conflicts into the realm of multilateralism. And because they have had an increasing impact on the oil and mineral-rich areas of the Middle East and Africa, their image has become tainted by its connection to the crude exploitation of natural resources in poor countries, the proliferation

of the illegal arms trade, black market and racketeering, all ensconced in the 'shadow economy' that thrives in these areas (Juma 2007). Most PSCs/PMFs are transnational in nature, their activities spread across borders far away from their home states. But because of the transmutation and permutation of these companies, their typology is characterised by fluid patterns incapable of being regulated by single domestic regimes.

Given that the OAU/UN Mercenary Convention has been out-paced by recent developments in the security industry, African governments should consider enacting a new legal regime aimed at achieving three related purposes. The first would be to set common standards for the regulation of PSCs and to outlaw illegitimate activities. The second purpose would be to give already existing organs both at the regional and sub-regional levels powers to promulgate regulatory measures that uphold the continental standards. Third, the aim would be to encourage member states to enact laws that set up domestic regulatory frameworks and enforcement procedures. Member states could also be encouraged to insert limited universal jurisdiction provisions in their laws so as to create reliance on them in the enforcement of common continental and international standards.

Continental legal architecture must capture all the nuances of typology of the players in the security industry and seek to design regimes that reflect the current trends. According to Singer (2004b), any regulatory measure that is to have a meaningful effect must be international in scope. He suggests the creation of a public international body, perhaps under the auspices of the UN, to oversee the activities of such companies. This body would implement regulations that have been developed by a task force of international experts drawn from the academia, non-governmental organisations, security firms themselves and governments. Singer suggests that the body would audit PSCs and review their contracts to ensure that they do not 'work for unsavoury clients or engage in contracts that are contrary to public good'. As part of the enforcement scheme, Singer envisages that PSCs would accede to the jurisdiction of contracting states and eventually come under the jurisdiction of international judicial bodies such as the International Criminal Court. The bottom line, however, is that if such a body is to operate at the international level, it must have the force of international law (although, as has become clear from the above, international law has been weak in curbing excesses of transnational entities). Such a framework will also have to be developed at the regional level to ensure that it is enforced by recipient states. Given that one of the reasons why normative processes at both levels have been slow is political incongruity, it is probable that any such instrument will not be developed in the foreseeable future. Moreover, the recipient states

whose political agenda favour stricter regimes are likely to advocate rather for prohibition than regulation, thereby diminishing any chance of the international anti-mercenary law changing its current orientation.

African Union guidelines for monitoring PSCs/PMFs

In the current environment, the more immediate concerns could be addressed by the formulation of guidelines on the use of PSCs/PMFs – something akin to the Organisation for Economic Cooperation and Development (OECD) guidelines for multinational enterprises. Like the OECD guidelines, the AU guidelines could be a tool for ensuring the harmonisation of the operations of PSCs/PMFs within policies of individual member countries. Initially, however, they could offer general guidelines on the formulation of policies on the use and regulation of private security. They could also form the first code of conduct for PSCs operating in Africa and create a kind of quality assurance mechanism that provides users with the appropriate information and assists them in making an informed choice and also defines the nature of legal responsibilities that parties have with regard to security contracts. These guidelines would not contravene the OAU/UN Mercenary Convention, but instead assist in separating clandestine and illegal military projects from the legitimate ones. On the whole, the AU assertion of control in this way could help create harmony in normative development throughout the continent.

The AU could go further and establish a mechanism for implementation of the guidelines so as to ensure that member countries benefit the most from them. In this regard, a committee of member countries charged with the responsibility of promulgating and revising the guidelines, creating a data bank of information and ensuring its dissemination could be established. The committee could be housed in a secretariat capable of providing service to the committee and member countries on matters that relate to the operation, management and regulation of PSCs/PMFs. Thus one of its tasks could be to hear complaints on the observance of the guidelines and help resolve them through mediation. An institutional setup of this nature could also serve as a regional think tank on all matters that relate to PSCs/PMFs.

Enforcement mechanisms

One handicap of the current regime is its lack of a monitoring and enforcement mechanism. Article 5 of the OAU/UN Convention refers to the criminal liability and punishment of persons found guilty of engaging in mercenary activity. Although the Convention envisaged the participation of member states in the creation of domestic judicial systems capable of trying such offences (arts 6

and 7), it did not create any mechanisms at the continental level to monitor compliance with the Convention nor establish a judicial means through which mercenary offences could be tried beyond the national legal systems

An argument could be made that such an undertaking was inconceivable at the time given the imperatives of continental politics and the fragility of the new African democracies. But at this point in time, the AU boasts of development in fields such as human rights and trade where regional and continental judicial or quasi-judicial organs have been established. The African Human Rights Commission and the African Human Rights Court are perfect examples. In this regard, one commentator has suggested a human rights approach which envisions the definition of mercenarism as a crime against humanity. This would make it possible for states to invoke the jurisdiction of International Criminal Court. However, such an approach is unlikely to receive much support because most states that currently export and make use of the services of PSCs/PMFs are not signatories of the ICC treaty.

Conclusion

While it is still necessary to maintain the abolitionist stand against 'traditional' mercenaries, and maybe perfect the existing regimes to make the practice both illegal and impossible, newer regimes need to be developed for the burgeoning private security industry to regulate activities of companies providing such services across borders and in conflict zones, so as to bring transparency to the whole industry. At the continental level, impetus towards developing such framework must come from the concerted programme of action that begins with the formulation of general guidelines for export and import of private security services, and the regulation of PSCs/PMFs. Individual states would then be encouraged to enact appropriate legislations that will conform to these guidelines and therefore streamline their security sectors. Also, such an approach will bring harmony in the efforts towards streamlining the sector by eradicating activities that are undesirable. Establishing domestic and continental regulatory frameworks is fraught with problems, but it is the only option currently available to address concerns about the general expansion of the security sector and the proliferation of private security companies in Africa.

Notes

- 1 The traditional principles of international law distinguish between matters of domestic jurisdiction and those of international concern. Article 2(7) of the UN

Charter, which prohibits the intervention 'in matters which are essentially within the jurisdiction of any state' strengthens this position. The normative architecture within the international realm is thus preoccupied with the security among states.

- 2 PSCs could roughly be defined as private companies providing security services for profit. This paper adds PMFs merely to provide a complete understanding and description of these types of organisations. Some literature uses terms such as Military Service Providers to describe the same organisations. (See for example UK Foreign and Commonwealth Office 2002:3).
- 3 Eeben Barlow, the director of Executive Outcomes, stated regarding his company's involvement in the Sierra Leone civil war: 'Our role in Sierra Leone, as it was in Angola, is to give support to a country moving towards democracy. No one could dispute the fact that private military companies were a stabilizing factor in Africa' (Hooper 1996:45).
- 4 A Kenyan newspaper responding to a local mercenary scandal, made a scathing attack on the paralysis of the international legal system that has in the past 'allowed 12 mercenaries to land at an African country in the morning and overthrow the government by lunch time' (*Sunday Nation* 2006).
- 5 As used here, the term PSC excludes the security activities of the armed or unarmed security companies that offer services on the domestic market. Thus, if their services are mainly like that of the police, confined to private businesses and wealthy individuals, they benefit classification as domestic security agencies which are regulated solely by domestic law. However, if such companies are multinational in nature and offer services abroad, their activities may be covered by the discussion in this paper.
- 6 The definition of crime is broader under the OAU/AUMercenary Convention and includes a range of perpetrators such as individuals, groups, associations, state representatives and states themselves (art 2). Under the UN Mercenary Convention criminal liability arises from the direct participation in hostilities as mercenaries or in recruiting, financing or hiring mercenaries (art 3(1)).
- 7 Undoubtedly, it is more difficult to define what 'threat' of force would be even in terms of attaching legal responsibility to states or individuals, than would be in the case of the 'use' of force. The 1991 draft code of crimes against peace and security of mankind (International Law Commission 1991) provides in article 16 that, '(i) An individual who as a leader or organizer commits or orders the commission of a threat of aggression shall on conviction thereof be sentenced to ... And (ii) Threat of aggression consists of declarations, communications, demonstrations of force, or any other measures which would give good reason to the government of a state to believe that aggression is being seriously contemplated against that state'.
- 8 The Code (*International Law Commission* 2004, vol 1), was adopted by the ILC on first reading at its 43rd session in 1991. The offence of recruitment, use, financing

and training of mercenaries was included in it, only to be omitted four years later (1995) at the 47th session when the 13th report of the special rapporteur was considered and six out of the 12 crimes initially listed were dropped.

- 9 This was an application by South African citizens held in Zimbabwe on allegations that they were mercenaries hired to unlawfully overthrow the government of Equatorial Guinea, to compel the South African government to intervene diplomatically so as to ensure that their rights under South African constitution were protected. Although the application was unsuccessful, the court acknowledged that there was indeed 'some' obligation on the part of the state to protect its citizens abroad.
- 10 Ballesteros (1997, par 89).
- 11 See *Military and paramilitary activities in and against Nicaragua* (ICJ Reports 1986 (p 14, paras 183 and 207) and the *Legality of the threat or use of nuclear weapons* (ICJ Reports 1996 (p 226 para 73).
- 12 Further judicial opinion is provided in *Continental Shelf (Libyan Arab Jamahiriya/ Malta) Judgement*, ICJ Reports 1985:13, par 27; *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v USA) Merits Judgement* ICJ Reports 1986:14, parr 183 and 207.
- 13 UN resolutions that have indicated a position of apathy towards mercenary activity fall into four categories: those condemning the use of mercenaries to destabilise neighbouring states (UN SC Res 581, UN SCOR, 2662nd mtg., UN Doc. S/Res/581 1986; GA Res UN GAOR 37th Sess 90th mtg, P 8 UN Doc A/Res/37/43 (1982)); those condemning the instigation of coups (UNSC Res UN SCOR 2314th mtg., UN Doc.S/REs/496 (1981); GA Res 79 UN GAOR 44th Sess, 78th mtg P 34, UN Doc A/Res/44/51 (1989)); those condemning persons fighting against liberation movements (GA Res 89 UN GAOR 46th Sess 74th mtg UN Doc A/Res/46/89 (1992)); and those condemning mercenaries that assist in the violation of human rights (GA Res 89 UN GAOR 46th Sess 89th mtg UN Doc A/Res/46/89 (1992). All these resolutions were explicit, narrow and issue specific. It may be argued that they do not generally affirm the UN position on this matter.
- 14 In 1997, Papua New Guinea gave employees of Sandline International special constable status. In the 2006 mercenary scandal in Kenya, two questionable foreign operatives alleged by opposition leaders to be 'mercenaries' who had been hired by the government, were found with documents showing that they were members of the Kenyan Police force. They even had official passes to very sensitive parts of the international airport in Nairobi.

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