

A. Art. 47 of Protocol I

[See also Montreux Document on Private Military and Security Companies [Full text in PDF format ^[1] and Armed Conflicts in Sierra Leone, Liberia and Guinea ^[2]]

N.B. As per the disclaimer ^[3], neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

[Source: Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977; available on <http://www.icrc.org/ihl> ^[4]]

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.

B. International Convention against the Recruitment, Use, Financing and Training of Mercenaries, 4 December 1989

[Source: United Nations, A/RES/44/34 (4 December 1989), available on <http://www.icrc.org/ihl> ^[4]]

The States Parties to the present Convention, [...]

Being aware of the recruitment, use, financing and training of mercenaries for activities which violate principles of international law, such as those of sovereign equality, political independence, territorial integrity of States and self-determination of peoples,

Affirming that the recruitment, use, financing and training of mercenaries should be considered as offences of grave concern to all States and that any person committing any of these offences should be either prosecuted or extradited [...],

Have agreed as follows:

Article 1

For the purposes of the present Convention,

1. A mercenary is any person who:
 - a. Is specially recruited locally or abroad in order to fight in an armed conflict;
 - 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.

Article 2

Any person who recruits, uses, finances or trains mercenaries, as defined in article 1 of the present Convention, commits an offence for the purposes of the Convention.

Article 3

1. A mercenary, as defined in article 1 of the present Convention, who participates directly in hostilities or in a concerted act of violence, as the case may be, commits an offence for the purposes of the Convention. [...]

Article 5

1. States Parties shall not recruit, use, finance or train mercenaries and shall prohibit such activities in accordance with the provisions of the present Convention.
2. States Parties shall not recruit, use, finance or train mercenaries for the purpose of opposing the legitimate exercise of the inalienable right of peoples to self-determination, as recognized by international law, and shall take, in conformity with international law, the appropriate measures to prevent the recruitment, use, financing or training of mercenaries for that purpose.
3. They shall make the offences set forth in the present Convention punishable by appropriate penalties which take into account the grave nature of those offences. [...]

Article 9

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over any of the offences set forth in the present Convention which are committed :
 - a. In its territory or on board a ship or aircraft registered in that State;
 - b. By any of its nationals or, if that State considers it appropriate, by those stateless persons who have their habitual residence in that territory. [...]

Article 10

[...]

3. Any person regarding whom the measures referred to in paragraph 1 of this article are being taken shall be entitled:

- a. To communicate without delay with the nearest appropriate representative of the State of which he is a national or which is otherwise entitled to protect his rights or, if he is a stateless person, the State in whose territory he has his habitual residence;
 - b. To be visited by a representative of that State.
4. The provisions of paragraph 3 of this article shall be without prejudice to the right of any State Party having a claim to jurisdiction in accordance with article 9, paragraph 1 (b), to invite the International Committee of the Red Cross to communicate with and visit the alleged offender. [...]

Article 11

Any person regarding whom proceedings are being carried out in connection with any of the offences set forth in the present Convention shall be guaranteed at all stages of the proceedings fair treatment and all the rights and guarantees provided for in the law of the State in question. Applicable norms of international law should be taken into account. [...]

Article 16

The present Convention shall be applied without prejudice to:

- a. The rules relating to the international responsibility of States;
- b. The law of armed conflict and international humanitarian law, including the provisions relating to the status of combatant or of prisoner of war. [...]

[**N.B.:** On 1 January 2010, 32 States had ratified or acceded to this convention, which entered into force on 20 October 2001.]

C. UN Report, Question of the Use of Mercenaries

UN Report submitted by M. E. Bernales

Ballesteros, Special Rapporteur on the Question of the Use of Mercenaries

[Source: UN. E/CN.4/2004/15, 24 December 2003; available on <http://www.ohchr.org>

[5]

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

Use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination; report submitted by Mr. Enrique Bernales Ballesteros, Special Rapporteur

[...]

Introduction

1. The present report is the last submitted to the Commission on Human Rights by the Special Rapporteur, after 16 years in the discharge of the mandate established by Commission resolution 1987/16.
2. By resolution 2003/2 of 14 April 2003 the Commission [...] reaffirms [...] its condemnation of mercenary activities as a violation of the principle of self-determination to which all peoples have a right, pointing out that such activities constitute a danger to peace and security in developing countries, particularly in Africa and in small island States. [...]
3. The Commission, pursuant to the investigations conducted by the Special Rapporteur, recognized that armed conflicts, terrorism, arms trafficking and covert operations by third Powers, *inter alia*, encourage the demand on the global market for mercenaries. [...]

4. The Commission reaffirmed, *inter alia*, that the use of mercenaries and their recruitment, financing and training were causes for grave concern to all States and violated the purposes and principles enshrined in the Charter of the United Nations. It welcomed the entry into force of the International Convention against the Recruitment, Use, Financing and Training of Mercenaries; it welcomed the cooperation extended by those countries that had received a visit from the Special Rapporteur and welcomed the adoption by some States of national legislation that restricted the recruitment, assembly, financing, training and transit of mercenaries.
5. The Commission also requested the Special Rapporteur to hold consultations on implementation of the resolution and to report, at its sixtieth session, with specific recommendations, his findings on the use of mercenaries. [...]
6. The Commission called upon all States to consider taking the necessary action to ratify or accede to the International Convention; it invited them to investigate the possibility of mercenary involvement whenever and wherever criminal acts occurred; and it urged them to cooperate fully with the Special Rapporteur in the fulfilment of his mandate. [...]

II. MERCENARY ACTIVITIES IN AFRICA

[...]

21. The destabilizing activities undertaken under apartheid affected all southern Africa. In South Africa and outside South African territory, members of the African National Congress (ANC) were persecuted and, in more than one case, murdered by mercenaries. During the 1990s South Africa freed itself from that regime, which was replaced by a multiracial democracy that respected its various ethnic communities and was firmly committed to the protection of human rights. In that new context the Special Rapporteur visited South Africa in 1997. Today South Africa has interesting legislation that, in particular, prohibits any kind of mercenary activity, the country having moved forward in the regulation and supervision of private companies that offer security services internationally so as to prevent them from employing mercenaries.
22. The situation in West Africa is of particular concern to the Special Rapporteur. The

presence of mercenaries has been observed in the armed conflict that has affected Sierra Leone since the 1996 elections, particularly during the so-called “cleansing operation” in 1998 and the invasion of Freetown in January 1999. [...]

23. Sierra Leone is well on the way towards peace and an improved human rights situation. Nevertheless violent acts continue in some areas, particularly along the border with Liberia. In January 2003 a village in Kailahun district was attacked by irregular Liberian armed groups. The situation in the diamond-producing areas is also disquieting, in that it has not proven possible to consolidate State authority and the presence of mercenaries guarding installations has been observed. [...]
25. The Special Rapporteur was informed that at the end of August 2003 a group of mercenaries that was preparing to travel to Côte d’Ivoire was arrested by the French police at a Paris airport. The group had reportedly been recruited by Sergeant Major Ibrahim Coulibaly. [...]

III. DEVELOPMENT OF MERCENARY ACTIVITIES AND OF THE MANDATE

26. The mandate on the use of mercenaries was created in 1987 in a context in which it was necessary to reaffirm the right of peoples to self-determination, particularly as it was threatened by mercenary activities in Africa. However, the Special Rapporteur soon needed to concern himself with the presence of mercenaries in Central America, another centre of conflict at that time. Guatemala and El Salvador were experiencing internal armed conflict, and in Nicaragua the Sandinista National Liberation Front, which had succeeded in freeing the country from the bloody Somoza dictatorship, had to confront the Contras. The Iran-Contra scandal revealed the involvement of mercenaries in the conflict. The Special Rapporteur received numerous reports of this on his visits to the United States of America and Nicaragua in 1989 and investigated various covert operations.
27. In the early 1990s, the Special Rapporteur had to make a visit to Maldives, following an attempted coup d’état by mercenaries and young Sri Lankans belonging to the Tamil ethnic group. The Special Rapporteur was thus able to observe the particular risk to which small island developing States, facing the possibility of external aggression involving a mercenary element, are exposed. The Special Rapporteur also observed that any State, organization, or rich political adventurer with territorial

ambition or designs on power could relatively easily arm groups of mercenaries by recruiting inexperienced young men in exchange for payment.

28. The disappearance of bipolar tensions and the end of the cold war gave birth to the hope that more favourable conditions would arise for greater respect for the self-determination of peoples and for a gradual lessening of armed conflict. Regrettably this has not come to pass. On the contrary, new sources of tension, stoked by various dominant interests, have emerged. The use in practice of mercenaries has increased, as has their use in the commission of violations of human rights and of international humanitarian law. The disappearance of the Soviet Union generated friction between some of the sovereign, independent States that emerged on its former territory. In the former Yugoslavia the “weekend mercenaries” appeared, and in both Bosnia and Herzegovina and Afghanistan the presence of mujahedin, or Muslim combatants, fighting for a cause and not for money, has been observed. [...]
29. Subsequently, the Special Rapporteur was called upon to consider the new problem represented by the use, recruitment and training of mercenaries by private military security companies offering their services on the international market. He analysed the activities of Executive Outcomes in Angola and Sierra Leone and of Sandline International in Sierra Leone and Papua New Guinea. Today hundreds of new companies have emerged that have developed the model for the delivery of international military security services; they now operate on the five continents. The downsizing of a number of national armies has given rise to an abundant supply of well-trained military professionals, who suddenly lost their jobs.
30. Whether acting individually, or in the employ of contemporary multi-purpose security companies, the mercenary is generally present as a violator of human rights. On occasion he acts as a professional agent in terrorist operations; he takes part in illicit trafficking; he commits acts of sabotage, among others. The mercenary is an element in all kinds of covert operation. In comparison with the cost of mobilizing armed forces, the mercenary offers an inexpensive means of conducting operations, and is available to governments, transnational corporations, organizations, sects and groups, simply for payment. The mercenary is hired because he has no scruples in riding roughshod over the norms of international humanitarian law or even in committing

serious crimes and human rights violations. The Special Rapporteur conducted an in-depth study of military security companies during a visit in January 1999, at the invitation of the British Government, to the United Kingdom of Great Britain and Northern Ireland.

31. At the Special Rapporteur's suggestion, the issue of military security companies was taken up at the two meetings of experts on mercenaries organized by the Office of the United Nations High Commissioner for Human Rights in 2001 and 2002. There are continued reports of crimes and offences committed by employees of these companies, including murders, rapes and kidnappings of children, which generally go completely unpunished. International law and domestic legislation in States must regulate the activities of these companies and establish oversight and monitoring mechanisms that clearly differentiate military consultancy services from participation in armed conflicts and from anything that could be considered intervention in matters of public order and security that are the exclusive responsibility of the State. [...]

IV. TERRORISM AND MERCENARY ACTIVITIES

35. On several occasions the Special Rapporteur has requested the inclusion of the link between terrorism and mercenary activities in his mandate. [...] Nothing prevents mercenaries, for payment, from taking part in the commission of a terrorist act, understood as a criminal act committed for ideological reasons with claims of political legitimacy, and with the aim of promoting collective terror. The possibility of mercenary involvement should not be discarded in the investigation of any terrorist attack.
36. The terrorist act does not necessarily need to be carried out by a member of the clandestine organization. Such organizations may make use of mercenaries with sound experience in the military arts, piloting of aircraft, handling of sophisticated weapons, preparation of high explosives, etc. These relationships are not, however, organizational or ongoing. Yet those who plan terror do not always rely on fanatical devotees to the cause. This connection has been overlooked in the recent, extensive international counter-terrorism legislation. The involvement of mercenaries in the commission of terrorist acts must always be investigated. The impunity of mercenaries must not continue.

V. PROPOSAL FOR A NEW LEGAL DEFINITION OF A MERCENARY

37. In the course of his work, the Special Rapporteur has found that one of the greatest problems in combating mercenary activities is the absence of a clear, unambiguous and comprehensive legal definition of a mercenary.
38. Article 47 of Protocol I Additional to the Geneva Conventions of 1949 contains a definition of a mercenary intended to deny the mercenary the rights of a combatant or of a prisoner of war. Given its nature as an instrument of international humanitarian law, the Protocol does not legislate on mercenaries themselves, but on their possible involvement in an armed conflict. It restricts itself to regulation of a specific situation. It provides what is to be understood by mercenary for this purpose, stipulating a set of elements that must be present, cumulatively, to determine who is and who is not a mercenary. The loopholes and shortcomings in the international legislation are compounded by the fact that the domestic legislation of most States does not criminalize mercenary activity. A mercenary may become a social outcast, but the law can take no action against him.
39. In 1989, by its resolution 44/34, the General Assembly adopted the International Convention against the Recruitment, Use, Financing and Training of Mercenaries. However, the Convention entered into force only in 2001. Some of its provisions could be considered progress towards eradicating mercenary activity, since the International Convention includes provisions that facilitate the prosecution of mercenaries and promote inter-State cooperation in that regard. But the Convention essentially maintains the concurrent elements required to define a mercenary. Article 1, paragraph 1, repeats almost word for word the definition of mercenary found in article 47 of Additional Protocol I, while article 1, paragraph 2, refers to the use of mercenaries in concerted acts of violence against the constitutional order or territorial integrity of a State.
40. International legislation contains a number of loopholes regarding the requirements relating to nationality, residence, changes in nationality to conceal identity as a mercenary, the participation of mercenaries in illicit trafficking or in organized crime, and, lastly their participation in terrorist acts. [...]
43. The Special Rapporteur has formulated a proposal for a new legal definition of a

mercenary, with the following major elements:

- a. Empirical evidence shows that because international law does not deal thoroughly enough with mercenary activity, such activities have expanded. In cases in which mercenaries have been brought to trial for crimes such as aggravated homicide, the fact that they were mercenaries was never taken into account, even as an aggravating circumstance;
- b. Mercenary activities seriously violate one or more legal rights. The motivation for a mercenary's activities always threatens fundamental rights such as the right to life, physical integrity or freedom of individuals. Such activities also threaten peace, political stability, the legal order and the rational exploitation of natural resources;
- c. Mercenary activity must be considered a crime in and of itself and be internationally prosecutable, both because it violates human rights and because it affects the self determination of peoples. In this crime, the mercenary who participates directly in the commission of the crime must be considered a perpetrator with direct criminal responsibility. It must also be borne in mind that mercenary activity is a complex crime in which criminal responsibility falls upon those who recruited, employed, trained and financed the mercenary or mercenaries, and upon those who planned and ordered his criminal activity;
- d. Where mercenary activity is proved to have occurred because of a decision by a third Power which uses mercenaries to intervene in another State, that activity must be considered a covert crime. Hiring mercenaries in order to avoid acting directly cannot be considered a mitigating factor, as international law tolerates neither direct nor indirect intervention. States which use mercenaries to attack another State or to commit unlawful acts against persons must be punished;
- e. Mercenaries themselves use their professional know-how and sell it for the commission of a crime which involves a dual motivation: that of the purchaser, and that of the person who, for payment, sells himself;
- f. The term "mercenary" signifies, and applies to, persons with military training who offer paid professional services to take part in criminal activity. Mercenary activity has usually involved intervention in an armed conflict in a country other

than the mercenary's own;

- g. The presence of mercenaries has been noted in such activities as arms and drug trafficking, illicit trafficking in general, terrorism, destabilization of legitimate governments, acts related to forcible control of valuable natural resources, selective assassination, abduction and other organized criminal activities. What is involved, therefore, is an activity that can take multiple forms, all of them criminal, where the highly skilled professionalism of the agent is what is prized and paid for;
- h. The new legal definition of a mercenary includes the use of mercenaries by private companies offering military assistance, consultancy and security services internationally, which generally employ them in countries experiencing internal armed conflict. Accordingly, there would need to be an international legal method of prohibiting these companies from hiring mercenaries and from engaging in any type of intervention that would mean their direct participation in military operations in the context of international or internal armed conflicts;
- i. [...] The principle that should be adopted in elaborating the new legal definition of mercenary is that the State is not authorized to recruit and employ mercenaries. International law and the constitutional law of each State assign the tasks of security, public order and defence to the regular military and police forces, by virtue of the concept of sovereignty;
- j. The proposal for a new legal definition of a mercenary should also take into account the fact that the current norms of international and customary law referring to mercenaries and their activities condemn mercenary acts in the broad sense of paid military services that are not subject to the humanitarian norms applicable in armed conflicts services which usually lead to the commission of war crimes and human rights violations;
- k. The provisions in force include a requirement that a mercenary be a "foreigner" in the affected country, along with other requirements for defining a person involved in such acts as a mercenary. This requirement of being a foreigner should be reviewed, so that the definition rests mainly on the nature and purpose of the unlawful act to which an agent is linked by means of a payment. To the

question of whether a national who attacks his own country and commits crimes can be defined as a mercenary, the reply would need to be affirmative if that national is linked to another State or to an organization of another State which has paid him to intervene and commit crimes against the country of which he is a national. Such a paid criminal act would be a mercenary act because of its nature and purpose.

44. First, the concept of a mercenary should be inclusive; that is, it should cover the participation of mercenaries in both international and internal armed conflicts. Second, and going well beyond article 47 of Additional Protocol I, the definition should include both the mercenary as an individual agent and mercenarism as a concept related to the responsibility of the State and organizations concerned in the planning and execution of mercenary acts. Third, mercenary activity should be considered not only in relation to the self-determination of peoples but also as encompassing a broad range of actions, including the destabilization of constitutional governments, various kinds of illicit trafficking, terrorism and violations of fundamental rights. [...]
46. The proposal should affect neither the status nor the treatment of the obligations of mercenaries and of the parties to a conflict under international humanitarian law; in other words, the amendment should be debated and approved within the text of the Convention, without prejudice to article 47 of Additional Protocol I to the 1949 Geneva Conventions.
47. The Special Rapporteur has proposed the following amendments to the first three articles of the 1989 International Convention against the Recruitment, Use, Financing and Training of Mercenaries:

“Article 1

For the purposes of the present Convention,

1. A mercenary is any person who:
 - a. Is specially recruited locally or abroad in order to participate in an armed conflict or in any of the crimes set forth in article 3 of this Convention;

- b. Is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict or of the country in which the crime is committed. An exception is made for a national of the country affected by the crime, when the national is hired to commit the crime in his country of nationality and uses his status as national to conceal the fact that he is being used as a mercenary by the State or organization that hires him. Nationality obtained fraudulently is excluded;
 - c. Is motivated to participate in an armed conflict by profit or the desire for private gain;
 - d. Does not form part of the regular armed forces or police forces at whose side the person fights or of the State in whose territory the concerted act of violence is perpetrated. Similarly, 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, legal, economic or financial order or the valuable natural resources of a State; or
 - ii. Undermining the territorial integrity and basic territorial infrastructure of a State;
 - iii. Committing an attack against the life, integrity or security of persons or committing terrorist acts;
 - iv. Denying self-determination or maintaining racist regimes or foreign occupation;
 - b. Is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict or of the country in which the crime is committed. An exception is made for a national of the country affected by the crime, when the national is hired to commit the crime in his country of nationality and uses his status as national to conceal the fact that he is being used as a mercenary by the State or organization that hires him. Nationality

- obtained fraudulently is excluded;
- c. Is motivated to participate in an armed conflict by profit or the desire for private gain;
 - d. Does not form part of the regular armed forces or police forces at whose side the person fights or of the State in whose territory the concerted act of violence is perpetrated. Similarly, 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.

Article 2

Any person who recruits, uses, finances or trains mercenaries, as defined in article 1 of the present Convention, commits an offence for the purposes of the Convention.

Article 3

1. A mercenary, as defined in article 1 of this Convention, who participates directly in hostilities or in a concerted act of violence, as the case may be, commits an international crime for the purposes of the Convention. A mercenary who participates in the following acts also commits an internationally prosecutable offence: destabilization of legitimate governments, terrorism, trafficking in persons, drugs and arms and any other illicit trafficking, sabotage, selective assassination, transnational organized crime, forcible control of valuable natural resources and unlawful possession of nuclear or bacteriological materials.
2. Nothing in this article limits the scope of application of article 4 of this Convention.
3. Where a person is convicted of an offence under article 1 of the Convention, any dominant motive of the perpetrator should be taken into account when sentencing the offender.”

[...]

VII. COMMENTS ON CONTINUANCE OF THE MANDATE

[...]

A. Difficulties and problems encountered in discharge of the mandate

52. Unlike other thematic mandates discharged within the established framework of an international legal instrument under which reality can be verified, the mandate on the use of mercenaries lacks a clear and precise legal framework. [...] The limitations of the definition of a mercenary contained in the 1997 Protocol I Additional to the General Conventions of 1949, the shortcomings in the International Convention and the general lack of national legislation on the subject and of precedent involving cases of mercenaries who have been tried and convicted constitute serious lacunae in the work of analysis and identification of situations that the mandate should cover.
53. The Special Rapporteur was called upon to make good this deficiency, by having recourse to international customary law, legal doctrine, and expert views, and by seeking the opinion of Governments, jurists, politicians in government posts and members of international and non-governmental organizations. Unfortunately the scientific literature on the matter is limited, and the available material comprises newspaper articles, television reports, fictional accounts, leaflets, and other materials that deal superficially with the topic of mercenaries. Popular imagination has been fed by the belief that the mercenary is a redeeming hero, a being who kills evil oppressors without let or hindrance and whose watchword is freedom. The criminal nature of mercenary activities is hidden. These widespread beliefs have had an impact on the work of the Special Rapporteur, particularly on some missions, where he has suffered from a lack of understanding and ideological attacks on his work.
54. In interviews that he conducted with young men held in prison on charges of being mercenaries, the Special Rapporteur noted the damage created by heroic propaganda extolling mercenaries, stoked by low quality literature in Western countries. These young men said that they felt like superheroes of freedom. Their awareness was generally clouded when they acted as criminal agents. They accepted that they had received money for the commission of their crimes, but not that they had acted as mercenaries.

55. In any event, the confessions of these young men indicated the existence of complex networks for recruitment, hiring and military and ideological training, and of links with paramilitary organizations, extremist groups and intelligence services. It is very difficult to disentangle these complex networks and connections. It is very difficult to gain access to this level, well protected as it is. The Special Rapporteur has had to work for the most part on the basis of confessions, reports by third parties, State investigations, circumstantial evidence and logical inferences.

[...]

57. Mercenaries are used by drug cartels, terrorist organizations, organized criminal gangs and organizations engaging in trafficking in persons, weapons, diamonds and precious stones, among other things. They are also used by legally constituted private companies offering military security and assistance services on the international market. The Special Rapporteur has noted the growth and diversification of these companies, which are today active on the five continents. Their publicity and propaganda services even go so far as to represent them as alternatives to regular armed forces, and the Special Rapporteur is aware of treatises that propose the replacement of government forces in international peacekeeping operations by such private companies.

[...]

VIII. CONCLUSIONS

63. At the conclusion of 16 years and in submitting his final report to the Commission on Human Rights, the Special Rapporteur notes that despite efforts by the United Nations and inter-State regional organizations to combat mercenary activities and curtail them as far as possible, such activities have not disappeared. On the one hand, the traditional type of mercenary intervention which impedes the exercise of the right of peoples to self-determination remains; on the other hand, there are the beginnings of a process of change, in which the mercenary becomes a multi-role, multipurpose professional, recruited, hired and trained to commit criminal acts and violate human

rights.

[...]

67. The Special Rapporteur suggests that private companies offering military assistance, consultancy and security services on the international market should be regulated and placed under international supervision. They should be warned that the recruitment of mercenaries constitutes a violation of international law. Accordingly the legal instruments that allow effective legal prosecution of both the mercenary agent and of the company that hires and employs him must be refined. A particular concern must be for the crimes and offences committed by employees of such companies not to go unpunished, as is usually the case.

[...]

D. Report submitted by the Working Group on the Use of Mercenaries

[Source: Human Rights Council, “Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of people to self-determination”, A/HRC/7/7, 9 January 2008, available at www.un.org ^[6]. Footnotes omitted]

United Nations

General Assembly

A/HRC/7/7 9 January 2008

HUMAN RIGHTS COUNCIL Seventh session [...]

Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of people to self-determination

[...]

I. INTRODUCTION

1. The 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 was established in 2005, pursuant to resolution 2005/2 of the Commission on Human Rights and assumed by the Human Rights Council, which replaced the previous mandate of the Special Rapporteur established in 1987.

[...]

3. For the purpose of this report, and while recognizing the definitional challenges, the Working Group refers to private military and private security companies (PMSCs) as including private companies which perform all types of security assistance, training, provision and consulting services, i.e. ranging from unarmed logistical support, armed security guards, and those involved in defensive or offensive military and/or security-related activities, particularly in armed conflict areas and/or post-conflict situations.

II. ACTIVITIES OF THE WORKING GROUP

A. Second session of the Working Group

4. [...] During the session, the Working Group held consultations with Member States, United Nations agencies and organs, including different divisions and branches of the Office of the United Nations High Commissioner for Human Rights (OHCHR), the International Labour Organization (ILO), the International Committee of the Red Cross (ICRC), regional and other intergovernmental organizations, non-governmental organizations (NGOs), and an association of PMSCs.
5. A representative of ICRC continued dialogue with the Working Group on approaches of international humanitarian law, including the definition of mercenaries and the responsibilities of States with respect to PMSCs and their employees. The ICRC

representative noted that few PMSC employees are regular combatants and members of armed forces, and they are thus civilians and lose protection under international humanitarian law when taking direct part in hostilities.

[...]

III. THEMATIC ISSUES: THE STATE AS PRINCIPAL HOLDER OF THE USE OF FORCE

A. Privatization of warfare and security

23. The Working Group observes that in the last 20 years there has been, primarily in Western European and North American countries and particularly in the United States and the United Kingdom, a significant increase in private military and security companies which provide its services in zones of low-intensity armed conflict and post-conflict situation such as Afghanistan, the Balkans, Iraq, Colombia, Somalia and the Sudan. [...]
24. The globalization of the world economy and the shifting from centralized government to diffused “governance” or “ungovernance”, together with the downsizing of regular armed forces of States, which have had important reductions in the public sector both in developed and developing countries are some of the causes behind the rapid development of the privatization of violence. [...] Classical inter-State wars with clear front lines have almost disappeared. Instead, we witness low-intensity armed conflicts; a widespread use of light weapons; and the privatization of military functions and asymmetry of the parties in the conflict.
25. The outsourcing of a number of basic functions which traditionally were carried out by national armies or police forces, known as the top-down privatization, has blurred the borderlines between the public services of the State and the private commercial sector creating a dangerous “grey zone”. In zones of armed conflict the employees of transnational private military and security companies, contracted as civilians but armed as military personnel, operate in these “grey zones” with uncertainties as to whether their status is that of a combatant or of a civilian. As has been synthesized by one analyst, the development of private military and security companies has produced

a new type of security guards and private soldiers who operate in war zones and high-risk insecurity areas under murky legal restraints. These new modalities have replaced to a certain extent the use of traditional individual mercenaries.

26. Private military and security companies fill the vacuum mainly left in three types of unstable situations: (i) in zones of low-intensity armed conflict (the new asymmetrical wars) where the armies are not fully deployed or in post-conflict situations with a high level of insecurity; (ii) in armed conflicts when international organizations do not intervene; and (iii) in troubled areas in developing countries where there is no presence of the State and extractive transnational corporations operate. [...]
28. The distinction between humanitarian non-profitable organizations and corporations working for pecuniary gain is also being blurred by PMSCs. In conflict or post-conflict areas, such as Afghanistan and Iraq, where PMSCs sometimes provide security details and protection work to humanitarian NGOs, it has become difficult for the population as well as government officials to distinguish one from another. Humanitarian and aid-type assistance risk becoming associated with an intervening force and PMSCs which may be perceived as biased. PMSCs do not hesitate to utilize the aims of humanitarian non-profit organizations to advertise their activities. One of such companies recurrently puts an ad in the Journal of International Peace Operations (IPOA) in relation with its activities in Afghanistan, Somalia, Congo, Bosnia and Herzegovina, the Sudan and Iraq displaying a picture of an individual feeding a malnourished baby with the following message "*Through selfless commitment and compassion for all people, Blackwater works to make a difference in the world and provides hope to those who still live in desperate times*". The increasing importance of these PMSCs poses a number of essential questions regarding the way they operate in these various situations as well as to the need for regulatory mechanisms.

B. The PMSC industry

29. The Working Group notes that the PMSC industry currently provides in the international market a broad spectrum of services such as building and site security, convoy and transport security, close individual security, advisory and training of local

forces, air support, logistical support, prison security, propaganda tactics, intelligence, covert operations and surveillance. These tasks were traditionally fulfilled by the national armed forces and the police. PMSCs also provide armed protection for transnational corporations in unstable regions. Their services are used by Governments and NGOs, transnational corporations, humanitarian organizations, the media and international organizations.

[...]

31. In Iraq, the number of “private contractors” fulfilling a number of military and quasi-military tasks varies according to different sources and the manner they are counted, ranging between 20,000 and 100,000 persons working for PMSCs. Most estimates agree to a figure between 20,000 and nearly 50,000 foreign armed “private contractors”. According to the Private Security Company Association of Iraq there would be some 70,000 persons providing armed protection, out of which 14,000 would be unregistered Iraqis and 20,000 unregistered foreigners. Other semi-official estimates give the following figures: 3,000 to 5,000 United States security contractors, 7,000 to 10,000 expatriates such as Australians, British, Canadians and South Africans, 15,000 to 20,000 third-country nationals from countries such as Bulgaria, Colombia, Chile, El Salvador, Fiji, Honduras, Nepal, Peru, the Philippines, Romania, Russian Federation, Ukraine and others, as well as 25,000 to 30,000 Iraqi host-country nationals. [...]
32. [...] In addition, the Working Group received estimations of some 4,000 to 6,000 expatriates from the United States of America, the United Kingdom, Australia, New Zealand and South Africa, some 1,500 to 2,000 third country nationals from Nepal, Fiji, Singapore, the Philippines and Nigeria, and some 15,000 to 20,000 Afghan nationals performing private security functions in Afghanistan. [...]
33. A number of the contracts for Afghanistan and Iraq outsourced by United States government departments to PMSCs are in their turn subcontracted to other companies registered in the United States or abroad. Many of them are private employment agencies (and some of them “ghost” companies, which may have never been legally registered) entrusted with the selection of former military and police personnel from

third countries. [...]

34. One of the major PMSCs providing military and security services in armed conflicts or post-conflict zones is Blackwater, a PMSC based in the United States. It is estimated to have some 2,300 private soldiers in nine countries and a database of more than 20,000 former military personnel ready for deployment and engagement on a short notice anywhere in the world. Its division in the Barbados, Blackwater's Greystone Ltd., employs third-country nationals from countries such as Chile, Nepal, El Salvador, Honduras and others at salaries which are lower than those recruited in the United States. Behind the humanitarian façade, one of the main objectives of the corporation, as indicated by its founder, Erik Prince, would be to obtain for his own private military force a substantial piece of the current United Nations peacekeeping US\$ 6-10 billion budget. Blackwater has been involved since the very first days of the occupation in Iraq and its convoys have been ambushed, its helicopters brought down, and it had 30 casualties including in a high-profile incident in Fallujah. [...]

C. Recruitment, working conditions and compensation of “private security guards”

38. The Working Group is concerned that private contractors perform military and quasi-military tasks in situations of conflict. PMSC employees often find themselves working in a situation of armed conflict where they are constantly exposed to “great risk and immediate danger” in a “hostile environment” including but not limited to “the threats inherent in a war situation”. Recruited by PMSC these individuals often operate in a grey area with limited oversight or army control. Most of them are neither nationals of one of the parties to the conflict nor residents of the country in conflict. Although they were not specifically recruited to take part in hostilities, their contracts did not specify either that they would receive military training and would be militarily armed. Recruited in their respective countries from all over the world as “private security guards” to provide protection, most of them have in fact taken part in an internal low-intensity armed conflict. These third-countries nationals are not members of the armed forces of a party to the conflict and they have not been officially sent by their respective States. Many individuals interviewed by the Working Group on its missions have been essentially motivated by private gain. These are all characteristics

of the mercenary-related activities and modalities of the conflicts of the twenty-first century.

[...]

D. Lack of accountability

45. In Iraq, by Order 17 issued by the Administrator of the Coalition Provisional Authority on 27 June 2004, contractors are immune from prosecution. Something similar occurs in Colombia where any of the abuses which may be committed by United States military personnel and private contractors working under Plan Colombia can neither be investigated nor judged. Furthermore, following an agreement between Colombia and the United States of America in 2003, the Government of Colombia would not be able to submit to the jurisdiction of the International Criminal Court United States armed forces personnel and private contractors working for transnational private security companies who have committed crimes against humanity.
46. The Working Group has reported the alleged involvement in human rights abuses in the prison of Abu Ghraib in Iraq of employees of two PMSCs who have never been subject to external investigations nor legally sanctioned, despite assurances given by the Government of the United States of America. [...] It has also been alleged that “private security guards” would also detain Iraqis without authorization. According to Iraqi officials and information from the United Nations Assistance Mission in Iraq (UNAMI), on 16 September 2007, in al-Nusur Square in the neighbourhood of Mansour in Baghdad, security contractors protecting a United States State Department convoy, which was allegedly attacked, opened fire on civilians killing at least 11 persons, with alleged use of security company helicopters firing into the streets, resulting in civilian casualties and injuries. The security firm Blackwater claimed that its personnel came under attack by “armed enemies” and fired back in self-defence. Iraqi authorities and witnesses claim the security personnel opened fire unprovoked. [...]

Discussion

1. Which dangers arise from the phenomenon of mercenarism? For the exercise of the right to self-determination? How do the UN Convention, Art. 47 of Protocol I, and the UN Special Rapporteur address these dangers?
2. (*P I, Art. 47*)
 - a. Why should only foreigners come within the definition of mercenaries? Do you agree with the Special Rapporteur that the notion should not be restricted to foreigners? (*Part C, para. 43(k)*) What was the reason for this limitation in Protocol I? Why should only those motivated by profit come within the definition?
 1. Does Art. 47(1) of Protocol I mean that mercenaries are not protected by IHL? Or does it, on the contrary, mean that they are protected as civilians? Could mercenaries be neither combatants nor civilians? (GC III, Art. 4 ^[7]; GC IV, Art. 4 ^[8])
 - b. Does Art. 47 of Protocol I prohibit the use of mercenaries? Is it a violation of Art. 47 or any other rule of IHL to be a mercenary? What are the consequences of Art. 47 for a mercenary? Does Art. 47(1) state the obvious, taking into account Art. 47(2)(e)?
 - c. What are the differences between the definition given by Art. 47 of Protocol I and that given by the UN Convention? Why was it deemed necessary by the drafters of the Convention to add the provisions of Art. 1(2)?
3.
 - a. Under IHL, may mercenaries be directly targeted? If they are not combatants, does it mean that they are entitled to the same protection as civilians directly participating in hostilities? May mercenaries be targeted at any time, or only when they are involved in hostilities? [See ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities* ^[9]]
 - b. Under IHL, are mercenaries detained by the enemy during an international armed conflict protected as civilians? Are they protected persons? May the ICRC visit them? (GC IV, Arts 4(1) and (4), 5 ^[10] and 143 ^[11]; P I, Art. 47 ^[12])
 - c. Under IHL, may a mercenary be prosecuted for the mere fact of being a mercenary? Under the UN Convention? Under IHL, may he be prosecuted only

if he commits war crimes? Are those persons accused of being mercenaries and who fall into the hands of the enemy in an international armed conflict protected persons under IHL? Are they protected civilians or prisoners of war? Should the judicial guarantees provided for in international law “be taken into account” or must they be respected? (*UN Convention, Art. 11*) Are they applicable? (GC III, Arts 4, 5(2) ^[10] and 82-108 ^[8]; GC IV, Arts 4(1), (4) and 5 ^[10]; P I, Arts 47 ^[12] and 75)

4. Does the fact that Protocol I contains the definition of a mercenary reduce the possibilities of that provision’s application, as only States party to Protocol I are bound by it? What is the status of a mercenary, as defined in Art. 47 of Protocol I, in the hands of a State not party to Protocol I? (GC III, Art. 4 ^[13]; GC IV, Art. 4 ^[14])
5. Does the status of mercenary exist in non-international armed conflicts? Would it be useful to introduce a rule similar to Art. 47 into the law of non-international armed conflicts? Does the absence of such a rule make it more difficult to punish mercenaries?
6. What is the probability of a person falling under Art. 47 of Protocol I? Can a State ensure that anyone fighting for it does not fall under Art. 47?
7. Could an intervention by mercenaries in an armed conflict transform that conflict into an international armed conflict between the mercenaries’ State of origin and the State in which the mercenaries are about to fight?
8. If mercenarism was to be radically prevented, what should be done? Should not the prohibition on mercenaries’ activities have been based on a prohibition at State level and not, or not solely, at the individual level? Why does IHL not have any provision to that effect?
9. Does the prohibition of mercenarism imply that the general trend of outsourcing State tasks to private companies may not concern the defence and security sector? What risks does the privatization of defence, security and police activities entail? How could these activities be privatized while safeguarding the values of IHL and human rights?
10. (*Part C, Report of the Special Rapporteur*)
 - a. (*Paras 43 and 47*) What do you think of the amended articles of the UN Convention suggested by the Rapporteur? From the standpoint of IHL? From

the perspective of combating the mercenary phenomenon?

- b. (*UN Convention, Art. 1(2); Part C, paras 43 and 47*) May a person who meets the definition of a mercenary in the UN Convention, but who fights in favour of a people's self-determination or a "legitimate government", still be called a mercenary? What would be the status of such a person under the UN Convention? Protocol I? Would the UN Special Rapporteur consider that person to be a mercenary? Would he tolerate mercenaries who defend a "legitimate government" or the "territorial integrity and basic territorial infrastructure of a State", or who fight against an "illegitimate government"? Would he consider that they are committing an international crime? Would you agree that a distinction should be made between mercenaries fighting against "legitimate governments" or against the self-determination of a people, and those fighting against "illegitimate governments" or in favour of self-determination? What would the risks of such a distinction be?
- c. Are the suggested new Arts 1(2) and 3 dealing with a *jus in bello* or with a *jus ad bellum* issue?
- d. Is the suggested Art. 1(2) applicable (only or equally) in armed conflicts? If it is applicable (as the terms "conflict" in subpara. (b) and "armed conflict" in subpara. (c) suggest), would it be admissible to deprive anyone of IHL protection because he or she is fighting for the aims mentioned in subpara. (a)?
- e. May a person who has combatant status under IHL be prosecuted for some or all of the crimes mentioned under the suggested Art. 3? May a person who is protected by the IHL of non-international armed conflicts be prosecuted for such crimes?
- f. (Paras 30 and 43) Why does the Special Rapporteur assume that mercenaries commit more war crimes and human rights violations than other participants in armed conflicts?

11. (*Part D, Report of the Working Group*)

- a. What is the difference between traditional mercenaries and employees of PMSCs? Are the latter defined under IHL? May employees of PMSCs be considered as mercenaries as defined by Art. 47 of Protocol I? Under which conditions?

- b. Under IHL, what, if any, activities in armed conflicts may a State not outsource to PMSCs? May a State outsource direct participation in hostilities to a PMSC that is not made up of combatants of that State?
- c. (*Paras 5 and 25*) Do you agree with the ICRC representative that “few PMSC employees are regular combatants and members of armed forces, and they are thus civilians and lose protection under international humanitarian law when taking direct part in hostilities”? Do you agree with the Working Group that PMSC employees operate in grey zones and that it is difficult to determine whether they are combatants or civilians? Or do they rather act in a grey zone between direct participation in hostilities, self-defence and law enforcement?
- d. When are PMSC employees combatants? When are they considered as civilians directly participating in hostilities? When are they considered, if ever, as only indirectly participating in hostilities? Do they lose their protection as civilians in such a case?
- e. (*Para. 29*) What are the consequences of the diversification of the activities undertaken by PMSC employees? Do they enjoy a different protection under IHL according to their activities? When are activities mentioned in para. 29 covered by Art. 47 of Protocol I?
- f. (*Para. 29*) When does the provision of convoy and transport security, the guarding of military bases or the guarding of government offices constitute direct participation in hostilities? If force is used in performing those tasks, when can it be classified as self-defence under criminal law rather than as direct participation in hostilities? Does it depend on against whom force is used? [See ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities* ^[91]]
- g. (*Para. 29*) When does advice to and training of local forces constitute direct participation in hostilities? When does the provision of prison security? When does intelligence? When do covert operations? [See ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities* ^[91]]
- h. (*Paras 31 and 32*) What are the consequences of the diversification of nationalities of persons recruited by PMSCs? Under IHL, are their employees protected according to their nationality? What status and protection would an

Iraqi national employed by an American PMSC in Iraq have? An American employee of the same company? Any other foreign employee? Would any of them be considered a protected person under IHL? (GC IV, Art. 4 ^[10])

- i. Are PMSC employees operating in an armed conflict bound by IHL? Only by criminalized rules of IHL? Is there a higher risk of them, rather than combatants, violating IHL?
 - j. How can PMSC employees know whether a given activity constitutes direct participation in hostilities? Why does it matter for them? Must a State hiring them make sure that they can know? May a State hire them for activities in which they will not know when they are directly participating in hostilities?
12. (*Part D, para. 28*) What are the risks of having PMSCs ensuring the protection of humanitarian organizations? Does it become dangerous because the same company may simultaneously also be involved in the conduct of hostilities? Is it realistic to expect the enemy and the local population to distinguish between employees involved in hostilities and employees protecting humanitarian workers? Should PMSCs be prohibited from engaging in both activities at the same time?
13. a. (*Part D, paras 45 and 46*) Who has an obligation and who has jurisdiction to prosecute violations of IHL committed by employees of PMSCs? The contracting State? The State on whose territory the violations were committed? The State(s) of nationality of the employee(s) concerned? All these States?
- b. When is the international responsibility of a State engaged when violations of IHL are committed by employees of a PMSC that it has hired? Beyond that, has a State a due diligence obligation to ensure respect for IHL by PMSCs it hires? What is the legal basis for such an obligation?
- c. (*Part D, para. 33*) Is the international responsibility of the State that hired the PMSC engaged for violations committed by employees of a company subcontracted by that PMSC?
14. (*Part D, paras 45 and 46*) Would immunity from prosecution for employees who have committed war crimes be lawful under IHL? May a State decide that violations committed by private contractors can be neither investigated nor judged? May a State agree to accord immunity to certain persons, even for war crimes? At least if another State has jurisdiction and undertakes to prosecute those persons? (GC IV, Arts 146 ^[15])

and 149 ^[16]; CIHL, Rule 158 ^[17])

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[9] <https://casebook.icrc.org/case-study/icrc-interpretive-guidance-notion-direct-participation-hostilities>

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