

Corporate actors: the legal status of mercenaries in armed conflict

Katherine Fallah

Katherine Fallah is Ph.D. candidate at the University of Sydney, presently working as a Research Associate to the Judges of the Federal Court of Australia.

Abstract

Corporate actors are taking on an increasingly significant role in the prosecution of modern warfare. Traditionally, an analysis of the law applicable to corporate actors in armed conflict commences with inquiry into the law as it applies to mercenaries. As such, the rise of the private military industry invites a reconsideration of the conventional approach to mercenaries under international law. This article critically surveys the conventional law as it applies to mercenaries, and considers the extent to which corporate actors might meet the legal definitions of a “mercenary”. It demonstrates that even mercenaries receive protection under international humanitarian law.



The debate about the definition and status of mercenaries is not new. It is one which has provoked a polarized response from different groups of nations, with some arguing that mercenary activity should be prohibited outright, and others contending that mercenaries should not receive any differential treatment under international law. In the second half of the twentieth century, objections to mercenary activity were grounded in concerns about preserving the right of post-colonial states to self-determination. This approach is reflected in the language adopted by the United Nations in its persistent consideration of the use of mercenaries “as a means of violating human rights and impeding the exercise

of the right of peoples to self-determination”¹. Until recently, legal consideration of corporate actors in armed conflict was limited to the question of mercenaries. Contemporary interest in corporate actors, however, is largely attributable to the role of private military contractors in Iraq and elsewhere. Private military contractors are not necessarily mercenaries under international law but, like mercenaries, they are perceived to act according to commercial or private interests in armed conflict. The significance of the private military industry in present-day warfare calls for a re-examination of the role and regulation of corporate actors in armed conflict.

The role of corporate actors in Iraq has attracted considerable international attention, particularly in the light of reports that in some instances private military contractors have been specifically targeted and subjected to degrading treatment.² This is unquestionably the kind of conduct that international humanitarian law seeks to prevent, and it has led to concern in humanitarian circles. The role of corporate actors in Iraq has also attracted the attention of governments. The impetus behind the UK Green Paper on options for regulation of the industry,³ for example, was the British government’s concern that highly trained members of the British armed forces, particularly SAS troops, were resigning (or taking leave of absence) to assume contract positions in Iraq.⁴ The South African government has gone one step further, with the flood of South African contractors to Iraq prompting a formal review of the country’s mercenary legislation.⁵

- 1 See, by way of an illustrative sample: “Report of the Third 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”, December 2004, UN Doc. E/CN.4/2005/23; “Report on the question of the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination”, submitted by the Special Rapporteur of the Commission on Human Rights, UN GAOR, 49th sess., Annex, UN Doc. A/49/362 (1994); Resolution on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, GA Res. 59/178, 59th sess., 74th plen. mtg, UN Doc A/RES/59/178 (3 March 2005); Shaista Shameen, “Use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination”, Report of the Special Rapporteur on the right of peoples to self-determination and its application to peoples under colonial or alien domination or foreign occupation, UN Doc A/60/263 (2005).
- 2 See, e.g., “Bodies mutilated in Fallujah attack”, *BBC News* (UK), 31 March 2004, available at <http://news.bbc.co.uk/2/hi/middle_east/3585765.stm> (visited 2 Nov. 2006).
- 3 Private Military Companies: Options for Regulation, British Foreign and Commonwealth Office (Green Paper), 2002 (hereinafter UK Green Paper).
- 4 Robert Fisk and Severin Carrell, “Britain’s secret army in Iraq: Thousands of armed security men who answer to nobody”, *Independent* (UK), 28 March 2004, available at <http://news.independent.co.uk/world/middle_east/story.jsp?story=505826> (visited 2 Nov. 2006).
- 5 The South African Commission on the Review of the Regulation of the Private Security Industry is charged with examining the efficacy of the Regulation of Foreign Military Assistance Act (Act 15 of 1998) as well as the Private Security Industry Regulation Act 2001 (Act 56 of 2001). The Commission’s documents are available at <<http://www.crsi.co.za>> (visited 2 Nov. 2006). The Commission took submissions on the Prohibition of Mercenary Activities and Prohibition and Regulation of Certain Activities in Areas of Armed Conflict Bill (Bill 42 of 2005). See, e.g., Mariette le Roux, “South Africa: What are 5000 South Africans doing in Iraq?”, South African Press Association, 6 July 2006.

Private military activity in Iraq also gives rise to questions about the *accountability* of corporate actors in armed conflict.⁶ Private military companies have tended to assert that, in the absence of a specific legal framework to deal with corporate actors, their industry is “self-regulated”. For example, prior to its cessation of operations in 2004, Sandline International asserted, “In the absence of a set of international regulations governing Private Military Companies, Sandline has adopted a self-regulatory approach to the conduct of our activities.”⁷ On the contrary, international humanitarian law and mercenary-specific conventions do provide an international framework for the regulation of private military contractors. Unfortunately, that legal framework is disjointed and, in some respects at least, contradictory. Sandline’s depiction of the industry as “self-regulated” is an example of how private military contractors, and the governments that support them, sometimes take advantage of the ad hoc nature of international attempts to regulate corporate actors.

In this article I do not purport to address the normative implications of the private military industry. This is not to detract from the concerns of states, particularly within post-colonial Africa, that have actively and consistently opposed the use of corporate actors in waging war on their soil. These concerns continue today. In a scathing piece on this year’s mercenary scandal in Kenya, a local reporter captured the essence of post-colonial anxiety regarding corporate actors, claiming failure to suppress mercenary activity amounts to “the kind of paralysis ... which in the past allowed 12 mercenaries to land at an African country in the morning and overthrow the Government by lunch time”.⁸ There may well be room for a stronger international legal framework to prohibit the use of corporate actors in armed conflict. However, that is a question for another article.⁹

Instead, I write against the backdrop of the law as it stands today. I outline some of the difficulties with the specific treatment of mercenaries under international law and highlight the disparity between international humanitarian law and mercenary-specific conventional law. Perhaps most importantly, I demonstrate how international humanitarian law binds and protects mercenaries.

6 Most notoriously, private contractors have been implicated in the Abu Ghraib torture scandal, prompting Alien Tort litigation in the United States. To date, the plaintiffs have been unsuccessful in their respective actions. See *Saleh v. Titan Corp.*, 436 F.Supp.2d 55 (DDC 2006) and *Ibrahim v. Titan Corporation*, 391 F.Supp.2d 10 (DDC 2005). For academic consideration of the issue, see Tina Garmon, “Domesticating international corporate responsibility: Holding private military firms accountable under the Alien Tort Claims Act”, *Tulane Journal of International and Comparative Law*, Vol. 11 (2003), pp. 325–54, and Jennifer L. Heil, “African private security companies and the Alien Tort Claims Act: Could multinational oil and mining companies be liable?”, *Northwestern Journal of International Law and Business*, Vol. 22(3) (2002), pp. 291–310.

7 “Corporate overview”, Sandline International, available at <www.sandline.com/company/index.html> (visited 2 Nov. 2006).

8 “The makings of a civilian coup”, *Sunday Nation* (Kenya), 18 June 2006.

9 For an excellent consideration of the question of state responsibility for the actions of private military contractors, see “Private military contractors: Status and responsibility for their actions”, report of the Expert Meeting on Private Military Contractors, CUDI, Geneva, 29–30 Aug. 2005.

Terminology and questions for international humanitarian law

Traditionally, an analysis of the law applicable to corporate actors in armed conflict commences with an inquiry into the law as it applies to mercenaries. In examining the specific legal provisions dealing with mercenaries, it is necessary to turn to two primary issues. The first relates to the threshold definitional question of who is to be labelled a mercenary. The second is to determine the consequences of mercenary status. In the next section, I shall consider the present status of the law in respect of these two issues.

The increasing use of “private military contractors” in the modern sense raises further questions.¹⁰ Private military contractors tend to be seen as predominantly motivated by monetary gain rather than ideological or patriotic allegiance.¹¹ This raises the question: are private military contractors “mercenaries” for the purposes of international humanitarian law? If not, what is their status? It is critical to note that the term “private military contractor” is one of art rather than law – no international legal instruments make reference to or define the term, or its synonyms.¹² All too often, political commentators and corporate actors attempt to use “private military contractor” as a term of exception, arguing that contractors are neither bound nor protected by international humanitarian law. The term “mercenary” takes on a number of definitions under international legal instruments, but its use is not reserved for legal discourse. Instead, the “mercenary” label is frequently “applied to express the speaker’s disapproval, rather than to describe an individual satisfying the specific criteria under international law”,¹³ taking on a political rather than legal meaning. In order to defuse the loaded uses of these terms, I shall instead use the expression “corporate actor” to refer inclusively to those actors who are variously considered to be mercenaries and private military contractors, except where the law makes specific reference to “mercenaries”.

Conventional treatment of mercenaries

It was with considerable reluctance that states at the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in

10 For examples of academic interest in the issue, see the work of Peter Warren Singer and others: Peter Warren Singer, *Corporate Warriors: The Rise of the Privatized Military Industry*, Cornell University Press, Ithaca and London, 2003; Peter W. Singer, “Corporate warriors: The rise of the privatized military industry and its ramifications for international security”, *International Security*, Vol. 26(3) (2002), p. 186; Peter W. Singer, “Peacekeepers, Inc”, *Policy Review*, Vol. 119 (2003), available at <<http://www.policyreview.org/jun03/singer.html>> (visited 2 Nov. 2006); Deborah D. Avant, *The Market for Force: The Consequences of Private Security*, Cambridge University Press, New York, 2005; Deborah Avant, “Mercenaries”, *Foreign Policy*, Vol. 143 (2004), p. 20; Robert Mandel, *Armies without States: The Privatization of Security*, Lynne Rienner, Boulder, 2002.

11 It is on this basis that many commentators distinguish “mercenaries” from “volunteers” under international humanitarian law. See, e.g., Marie-France Major, “Mercenaries and international law”, *Georgia Journal of International and Comparative Law*, Vol. 22(1) (1992), pp. 103–50, at p. 111, citing Yves Sandoz and Abdulgawi Yusuf.

12 Such as “private security contractor” or “civilian contractor”.

13 Andrew Clapham, *Human Rights Obligations of Non-State Actors*, Oxford University Press, Oxford, 2006, pp. 299–300.

Armed Conflicts¹⁴ acquiesced in the demands of Organization of African Unity (OAU)¹⁵ and socialist nations to insert a provision dealing specifically with mercenary activity.¹⁶ The constant tug-of-war between states seeking an inclusive system of international humanitarian law and states seeking a formal, exclusionary categorization of corporate actors in armed conflict has undoubtedly undermined the force of the mercenary-specific conventional law. This is so in terms of the limited number of states willing to ratify the mercenary-specific conventions,¹⁷ and in terms of the wording of mercenary-specific articles in general international humanitarian law instruments.

International humanitarian law instruments

The overarching concern of the international humanitarian law instruments is to provide protection, including legal protection, in times of armed conflict, and it is rare for the conventions to sideline particular categories of actor. International humanitarian law's approach to mercenaries is controversial in this respect. The mercenary provisions have a primarily symbolic significance, to the extent that mercenaries are the subject of particular attention and are accorded fewer protections than combatants. However, there are difficulties with the conventional definitions of "mercenary", and international humanitarian law instruments do little to clarify the legal consequences of mercenary status. A brief outline of the conventional treatment of mercenaries under international humanitarian law is given below.

The Hague Conventions of 1907

While the Hague Conventions do not expressly refer to mercenaries, Hague Convention V deals with the implications of mercenary activity in terms of neutrality.¹⁸ Article 4 provides that corps of combatants are not to be formed, nor are recruiting agencies to be opened, on the territory of a neutral state to assist belligerents in an armed conflict. Article 5 places a direct responsibility on the neutral state to ensure that the acts to which Article 4 refers do not take place on

14 Geneva, 1974–7 (hereinafter Diplomatic Conference of 1977).

15 Now the African Union.

16 Many states were at pains to express their difficulty with the provision, although Article 47 of Protocol I to the 1949 Geneva Conventions was ultimately adopted by consensus (CDDH/SR.41, 26 May 1977). *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts (CDDH)*, Federal Political Department, Berne, 1978, Vol. VI, p. 488.

17 Of 192 UN Member States only 16 have signed and 28 have become party to the UN Convention: Status of Multilateral Treaties Deposited with the Secretary-General, UN Treaty Series (October 2006). Only eight of the parties to the UN Convention are African Union member states. Of 53 African Union member nations, only 31 signed and 27 ratified or acceded to the OAU Convention. See "List of Countries which have signed, ratified/acceded to the Convention for the Elimination of Mercenarism in Africa", available at <<http://www.africa-union.org>> (visited 19 Oct. 2006).

18 Hague Convention (V) respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, of 18 October 1907 (Hague Convention V).

its territory. The effect of Article 17 is that an individual who acts in favour of a belligerent by taking up arms as a mercenary or private military contractor “cannot avail himself of his neutrality”. Nonetheless, the same article provides that such an individual is still entitled to the level of protection afforded to nationals of belligerent states.

The Geneva Conventions of 1949 and the 1977 Additional Protocols

Mercenaries receive no mention in any of the four Geneva Conventions of 1949.¹⁹ The first mainstream international humanitarian law instrument to deal specifically with mercenaries was the 1977 Additional Protocol I thereto.²⁰ It applies exclusively to international armed conflicts and fewer states are party to it than to the Geneva Conventions of 1949. Nevertheless, the ICRC considers Article 47 of Additional Protocol I as reflecting customary international humanitarian law.²¹

This mercenary provision was first proposed in 1976 by the Nigerian delegation to the Diplomatic Conference, albeit in slightly different terms.²² In 1977, following significant debate and consideration of the issue by a working group,²³ the article was adopted by consensus. Many delegations stated that they supported the inclusion of the provision, “in the spirit of compromise”.²⁴ Indeed, the working group dealing with the mercenary provision reported that “It should not be thought that all delegates were fully satisfied with the final text.”²⁵

Article 47.1 of Additional Protocol I provides that individuals who are found to be mercenaries are to be deprived of the rights of combatant or prisoner-of-war status. Article 47.2 defines a mercenary as any person who:

19 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, of 12 August 1949; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, of 12 August 1949; Geneva Convention (III) relative to the Treatment of Prisoners of War, of 12 August 1949; Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, of 12 August 1949.

20 Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts of 8 June 1977 (Protocol I).

21 See Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law: Vol. 1: Rules*, ICRC and Cambridge University Press, Geneva, 2005, pp. 391–5. Rule 108 reads: “Mercenaries, as defined in Additional Protocol I, do not have the right to combatant or prisoner-of-war status. They may not be convicted or sentenced without previous trial.”

22 The Nigerian delegation proposed an article in the following terms (CDDH/236/Rev.1) (note 16): 1. The status of combatant or prisoner of war shall not be accorded to any mercenary who takes part in armed conflicts referred to in the Conventions and the present Protocol. 2. A mercenary includes any person not a member of the armed forces of a party to the conflict who is specially recruited abroad and who is motivated to fight or to take part in armed conflict essentially for monetary payment, reward or other private gain.

23 See “Report to Committee III on the work of the Working Group submitted by the Rapporteur”, Geneva, 17 March–10 June 1977, CDDH/III/369.

24 See note 35 below. The Australian delegation went so far as to comment that, if the provision had been put to a vote, it would not have been able to vote in favour: Australia (CDDH/III/SR.58 at 205).

25 “Report to Committee III on the work of the Working Group submitted by the Rapporteur”, CDDH/III/369 and Corr.1., Geneva, 17 March–10 June 1977.

- (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 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.²⁶

Legal commentators expressly acknowledge that Article 47 of Additional Protocol I was inserted to appease African nations and was intentionally narrow in its scope of application.²⁷ For an individual to be classified as a mercenary under Article 47.2, he or she must meet all six requirements, (a) to (f). It is virtually impossible to find an individual who falls within the Article 47.2 definition of a mercenary.²⁸

One of the most contentious requirements of Article 47.2 is contained in subparagraph (c) and relates to motivation. For some, it is essential that the definition distinguishes mercenaries from other actors on the basis of their motivation. As one commentator has suggested, “it is impossible satisfactorily to define a mercenary without reference to his motivation”.²⁹ Some state delegations to the Diplomatic Conference of 1977 were of the same mind.³⁰

The second limb of subparagraph (c), that the mercenary must “in fact, [be] 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”, is an attempt at mitigating the subjectivity of the motive requirement, balancing it with an objective test that can be more easily adjudicated by an outsider. Nevertheless, the wording of subparagraph (c) is such that the excessive material compensation requirement is *in addition* to the motive requirement, as is apparent from the use of the word “and” to join the two limbs. This leaves unresolved the difficulties with

26 Emphasis added.

27 See, e.g., Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War: An Introduction to International Humanitarian Law*, 3rd edn, ICRC, Geneva, 2003, p. 90.

28 This point is widely acknowledged. For example, the US position is that “[t]he definition of ‘mercenary’ in [Protocol I] is so narrow that few persons would fit within it”: US, *Air Force Commanders’ Notebook*, 1980, §5-3, as cited in Henckaerts and Doswald-Beck, above note 21, Vol. 2, ch. 33, pp. 2576–7. See also Peter W. Singer, “War, profits and the vacuum of law: Privatized military firms and international law”, *Columbia Journal of Transnational Law*, Vol. 42 (2004), p. 521, at p. 524.

29 Riley Martin, “Mercenaries and the rule of law”, *Review of the International Commission of Jurists*, Vol. 17 (1977), p. 51, at p. 53.

30 See, e.g., Syrian Arab Republic, CDDH/III/SR.57, p. 196; Cameroon and Mali, CDDH/III/SR.57, p. 201.

interpreting an individual's motivation for participation in hostilities. Indeed, as the United Kingdom's Diplock Committee stated in its 1976 report on the recruitment of mercenaries:

any definition of mercenaries which required positive proof of motivation would ... either be unworkable or so haphazard in its application as between comparable individuals as to be unacceptable. Mercenaries, we think, can only be defined by reference to what they do, and not by reference to why they do it.³¹

This concern about the difficulty in judicially assessing an individual's motivation stands in addition to more general concerns as to the desirability of attaching motive to legal status in armed conflict.

The shortcomings of Article 47 are clearest when we read it in the light of the rest of the Protocol. Although the article goes some way to providing a *definition* of mercenary activity, it is of little significance when we consider the *consequences* of mercenary status under Protocol I. The only consequence flowing from Article 47 is that mercenaries are not entitled to combatant or prisoner-of-war status. In other words, Article 47 is presented as an exception to the rules regarding who can be a combatant. However, as Keith notes, the provision is "concerned to isolate a category within a wider group" who, as a matter of law, are not combatants.³² Article 43.2 of Additional Protocol I defines a combatant as a member of the armed forces of a party to the conflict (with the exception of medical and religious personnel).³³ Yet Article 47.2(e) requires that a mercenary "is not a member of the armed forces of a Party to the conflict". This means that any individual who satisfies the definition of a mercenary is not entitled to combatant status in the first place. Article 47 cannot be considered a true exception to the rules regarding combatant and prisoner-of-war status because, when read together with Article 43, it is effectively rendered meaningless.

When considering the consequences of mercenary status, it is important to note that even those individuals who are classified as mercenaries for the purposes of Additional Protocol I are afforded certain protections under international humanitarian law. Despite being deprived of combatant and prisoner-of-war status, mercenaries are to be treated as non-combatants who have taken part in hostilities. Such individuals are entitled to the protection of the "fundamental guarantees" contained in Article 75 of the same Protocol.³⁴ The Article 75 fundamental guarantees are broad in scope and include the right to be treated humanely in all circumstances and the right to be protected against

31 Diplock Committee, Report of the Committee of Privy Counsellors Appointed to Inquire into the Recruitment of Mercenaries (UK Cmnd. 6569, 1976), at [7].

32 Kenneth J. Keith, "The present state of international humanitarian law", *Australian Yearbook of International Law*, Vol. 9 (1985), pp. 13–35, at p. 23. See also Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War: An Introduction to International Humanitarian Law*, 3rd edn, ICRC, Geneva, 2003, p. 90.

33 Cf. Third Geneva Convention, Art. 4.1.

34 Additional Protocol I, Art. 45.3.

murder, torture, corporal punishment and outrages upon person dignity. Article 75.4 guarantees the right to a fair trial and due process in respect of penal offences. Delegations to the Diplomatic Conference of 1977 were firm in their insistence that mercenaries were to be protected by these fundamental guarantees. Indeed, a number of states explicitly indicated that they would read the article as affording mercenaries the right to be protected by Article 75.³⁵ Such a position was consistent with the overall aims of the Diplomatic Conference of 1977. Accordingly, the popularly held view that mercenaries receive no protection under international humanitarian law is misguided.

Mercenary-specific instruments

The primary focus of mercenary-specific conventions has been to criminalize mercenary activity. Many of the definitional difficulties with Article 47 of Additional Protocol I also apply to the mercenary-specific conventions. In terms of the consequences of mercenary status, the conventions depart in a number of respects from the legal position adopted in that article.

The Draft Luanda Convention

In 1976 the International Commission of Inquiry on Mercenaries produced a Draft Convention on the Prevention and Suppression of Mercenarism in Luanda, Angola (Draft Luanda Convention).³⁶ The preamble to that convention refers to the drafting states' concern at "the use of mercenaries in armed conflicts with the aim of opposing by armed force the process of national liberation from colonial and neo-colonial domination". Article 1 defines the "crime of mercenarism" as liable to be committed by individuals, groups or associations, representatives of states and states themselves. The elements of the crime are roughly drafted. The relevant legal person is guilty of the crime of mercenarism if he or she, "with the aim of opposing by armed violence a process of self-determination", commits any of the following acts:

- (a) organises, finances, supplies, equips, trains, promotes, supports or employs in any way military forces consisting of or including persons who are not nationals of the country where they are going to act, for personal gain, through the payment of a salary or any other kind of material recompense;
- (b) enlists, enrolls or tries to enrol in the said force;
- (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

35 See, e.g., the explanations of the representatives for: Italy (CDDH/III/SR.57, p. 193); Australia (CDDH/III/SR.57, p. 195); Portugal (CDDH/III/SR.57 at 198); United States (CDDH/III/SR.57, p. 199); Ireland (CDDH/III/SR.57 at 199); Canada (CDDH/III/SR.57, p. 201); and Sweden (CDDH/III/SR.57, p. 202).

36 Draft Convention on the Prevention and Suppression of Mercenarism (produced by the International Commission of Inquiry on Mercenaries in June 1976).

or affords facilities for transit, transport or other operations of the abovementioned forces.

The Luanda definition of the “crime of mercenarism” is considerably remote from Protocol I’s definition of a mercenary, but it formed the basis for debate and discussion at the Diplomatic Conference of 1977.³⁷ Importantly, the Draft Luanda Convention was the first product of efforts to deal with mercenaries at a regional level.

The Organization of African Unity Convention

In Libreville in 1977 the OAU adopted the Convention for the Elimination of Mercenarism in Africa (OAU Convention).³⁸ The OAU Convention is more structured in its approach than the Draft Luanda Convention. Article 1.1 of the OAU Convention mirrors the Protocol I definition of a mercenary in all respects but for that part of the definition that deals with motivation. Whereas Protocol I includes in its criteria the requirement that a person be “motivated to take part in the hostilities essentially by the desire for private gain” and, in fact, be “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”, the OAU Convention, in Article 1.1(c), simply requires that a party to a conflict (or its representative) promises the person “material compensation”.

The most significant difference between the OAU Convention and Protocol I, however, is the aspect of criminalization. The OAU Convention’s provisions dealing with criminality are broad and loosely drafted. Under the OAU Convention it is a criminal offence to be a mercenary, and mercenaries are also criminally responsible for any specific criminal acts they commit in course of duty. Pursuant to Article 1.2, the crime of mercenarism is also the subject of unusually extended forms of participation.³⁹ Article 3 provides that mercenaries are not to enjoy the status of combatants and are not entitled to prisoner-of-war status. Article 7 requires each state party to ensure that the crime of

37 Jean de Preux, “Article 47: Mercenaries”, in Yves Sandoz et al.(eds.), *Commentary to 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, ICRC, Geneva, 1977, p. 572.

38 Adopted in Libreville, Gabon, on 3 July 1977 and entered into force on 22 April 1985. OAU Doc CM/817 (XXIX) Annex 11 Rev.

39 Like the Draft Luanda Convention, the OAU Convention extends criminal liability to “the individual, group or association, representative of a State and 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, that practises 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; (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”.

mercenarism is “punishable by severest penalties under its laws, including capital punishment”.⁴⁰

The United Nations Convention

The International Convention against the Recruitment, Use, Financing and Training of Mercenaries (UN Convention)⁴¹ was opened for signature in 1989, but did not come into force until October 2001. Like the OAU Convention, the UN Convention is concerned with defining the “crime of mercenarism”, and setting out measures for its enforcement. The UN Convention’s definition of a mercenary is divided into two parts. The first part is similar in its terms to Protocol I’s definition, except that it excludes the requirement that the person “does in fact take part in the hostilities”.⁴² This alone renders the UN Convention’s definition of mercenary status broader than that in Protocol I. However, part two of the definition is broader still. It states:

2. A mercenary is also any person who, in any other situation [that is, not in the context of an armed conflict]:
 - (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.

As such, the UN Convention provides a much lower threshold for assigning “mercenary” status to an individual. The implications of this weakening of the definition are compounded by the fact that the UN Convention criminalizes all mercenary activity.

40 To this extent, the OAU Convention conflicts with Article 75.2(iii) of Protocol I, which prohibits corporal punishment.

41 Opened for signature 4 Dec. 1989, 29 ILM 91 (entered into force 20 Oct. 2001), annex to GA Res 34, UN GAOR, 72nd plen. mtg, 44th sess., supp. no. 43, at 590, UN Doc A/44/43 (1989).

42 UN Convention, Art. 1.1; cf. Protocol I, Art. 47.1(b).

The International Law Commission Draft Code

The International Law Commission's 1991 Draft Code of Crimes against the Peace and Security of Mankind (ILC Draft Code)⁴³ also made specific reference to mercenaries. Article 23.2 defined a mercenary in the same terms as the OAU Convention, except that (like the UN Convention) it did not include the requirement that a mercenary "does in fact take part in the hostilities".⁴⁴ The crime of "recruitment, use, financing and training of mercenaries" was omitted from the second reading of the ILC Draft Code in 1995.⁴⁵ The ILC Draft Code formed the basis of the initial drafting of the Rome Statute for the International Criminal Court. In line with the ILC's position, the International Criminal Court does not hold jurisdiction over a "crime of mercenarism", although the matter may be revisited when states parties come to consider the definition of aggression, in accordance with Articles 5, 121 and 123 of the Rome Statute.

Concluding remarks

It is clear that not all corporate actors fall within the definition of a mercenary under international law. Indeed, due to the narrow scope of the definitions, very few individuals are classified as mercenaries. However, in singling out mercenaries as a specific category of actor in armed conflict, Protocol I and the mercenary-specific conventions deliver a firm message that mercenarism (or perhaps, more broadly, corporate combat) is at least discouraged under international law.

There are some significant differences between international humanitarian law and the mercenary-specific conventions. The major point of distinction is that Protocol I does not criminalize mercenary activity, whereas the mercenary conventions do. The only consequence of Article 47 of Protocol I is to deprive the mercenary of combatant or prisoner-of-war status. As I have discussed, an individual who falls within the Article 47.2 definition is not entitled to combatant status in any case. It is reasonable to suggest that international humanitarian law's treatment of mercenaries is more symbolic than practical. The mercenary-specific conventions, on the other hand, spell out more significant consequences for the mercenary in terms of criminal sanctions. The mercenary can be criminally punished for his or her *status* as a mercenary, as well as for any other criminal conduct in the course of being a mercenary. However, the mercenary-specific conventions have not translated into a significant body of prosecutions for the crime of mercenarism. With a few notable exceptions, such as the Angolan

43 The Draft Code, which included "recruitment, use, financing and training of mercenaries" in its list of international crimes, was adopted by the ILC on first reading, at its forty-third session in 1991. *The Work of the International Law Commission*, 6th edn, UN, Geneva, 2004, Vol. 1.

44 See UN Convention, Art 1.1.

45 At its 47th session, in 1995, the Commission considered the 13th report of the Special Rapporteur. The Special Rapporteur had omitted from his report six of the 12 crimes included on first reading, including "recruitment, use, financing and training of mercenaries". UN, above note 43.

mercenary trials,⁴⁶ most reported “mercenary” prosecutions have in fact been prosecutions under existing domestic law, with charge sheets that make no mention of the word “mercenary”.⁴⁷ To this extent, the implications of the mercenary-specific conventions have not been as far-reaching as was perhaps originally anticipated.

Importantly, while Additional Protocol I expressly states that mercenaries are not entitled to combatant or prisoner-of-war status, mercenaries do not fall into a legal vacuum. They are still entitled to the Protocol’s fundamental guarantees. This is of critical significance, as it is in line with the general effort to ensure that international humanitarian law’s protection extends to the widest possible range of individuals in armed conflict.

The mercenary provisions of international conventions are likely to be the subject of increased debate (and, perhaps, revision), in the light of the rise of the private military industry. If there is to be law reform in this area, it is important to bear in mind the difficulties with the existing conventional law. At the same time it is important to ensure that individuals are protected, as well as bound, by international humanitarian law in situations of armed conflict. However strong the stand nations might take in prohibiting mercenary activity, it is of critical importance that mercenaries be entitled to the fundamental guarantees of international humanitarian law and, where responsible for committing criminal offences, be duly prosecuted according to law.

46 In the famous Angolan trials of 1976, the defendants were convicted of “the crime of being mercenaries ... in a mercenary war of aggression carried out with the aim of extinguishing the independence of the country, enslaving, oppressing, and dividing the Angolan people and pillaging the natural resources of the territory for the benefit of foreign, neo-colonialist and imperialist interests”: M. S. Hoover, “The laws of war and the Angolan trial of mercenaries: Death to the dogs of war”, *Case Western Reserve Journal of International Law*, Vol. 9(2) (1977), pp. 323–406, Appendix 1 (Indictment). Note, however, that the Angolan mercenary trials preceded the adoption of the OAU and UN Mercenary Conventions.

47 For example, in June 2006, a French court convicted Bob Denard of “belonging to a gang who conspired to commit a crime”. While Bob Denard was widely dubbed a “mercenary” in the media for his role in four attempted coups in the Comoros Islands, he was not convicted of a specific “mercenary” offence. See “French ‘dog of war’ spared jail”, *BBC News* (UK), 20 June 2006, available at <<http://news.bbc.co.uk/2/hi/europe/5097618.stm>> (visited 2 Nov. 2006).