

Critical Report n° 8

Issue: Business and Human Rights

Part of a series of the Human Rights Programme



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November 2010

URL: http://cetim.ch/en/publications_cahiers.php

MERCENARIES, MERCENARISM AND HUMAN RIGHTS

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I. INTRODUCTION

The term 'mercenary' comes from the Latin *mercenarius* (from *merces -edis*, wages) which means 'working only for personal gain'.¹ Mercenaries have not always been seen as they are today, as unprincipled lawless adventurers. In the Middle Ages, for example, mercenaries were used by monarchs as a mere commodity to be bought and sold according to the needs of the moment, but they were respected, and if they were captured they were treated as prisoners of war. Their support was even solicited, since their commitment could be decisive in wars of conquest or defence.

With the creation of the United Nations in 1945, mercenaries became something akin to 'outlaws', since the UN Charter forbids wars of conquest and one of its missions is to promote friendly relations among States, based on the equal rights of peoples and a people's right to self-determination (Article 1.2).

However, mercenaries, in the usual sense of the word, have been used extensively since the 1960s to prevent colonised people from achieving independence, and to destabilise newly independent States or legitimate governments whose political views have not suited the international and colonial powers.

Over the last two decades, a new form of mercenary activity has emerged in the form of private military and security companies (PMSCs) who have taken over military and security functions that were previously the preserve of sovereign states.

¹ Cf. www.larousse.fr/encyclopedie/nom-commun-nom/mercenaire/69404

The aim of this Report is to analyse the problems posed by mercenarism. We also describe the measures already taken or proposed, in particular within the United Nations, to stamp out this phenomenon which has a detrimental impact on the enjoyment of human rights, particularly on a people's right to self-determination and sovereignty over natural resources, as well as on the exercise of democracy.

II. MAIN REASONS FOR THE USE OF MERCENARIES

UN experts have identified several contributory factors that make the use of mercenaries more likely. They include: a weak political system or political instability in some countries; the interventionism of certain powerful states (which some might call imperialism); the transition from conscripted to professional armies; and the exploitation (again, some might say looting) of raw materials by transnational corporations (TNCs).

The UN Special Rapporteur on mercenaries considers in this context that: “the phenomenon of mercenarism occurs in inverse proportion to peace, political stability, respect for the legal and democratic order, the ability to exploit natural resources in a rational manner, a well-integrated population and a fair distribution of development which prevents extreme poverty. Where all these factors coincide, the risk of mercenary activity is minimal. Conversely, when these factors are not present or occur in haphazard, insufficient, intermittent or contradictory ways, the likelihood of mercenary intervention increases, either because violence, intolerance and the lust for power create conditions that facilitate instrumental links of some kind with mercenaries; or because a third Power, which does not want to be directly involved or to be accused of interventionism, resorts to such action for its own advantage.”²

He draws particular attention to the fact that “some States display an interventionist tendency in the context of their regional or hemispheric strategies, with covert operations by their intelligence services which result in criminal attacks on individuals and countries. The commission of such acts has frequently involved the recruitment, training, financing and use of mercenaries.”³

The end of the Cold War played an important role in reducing the size of armies (in the West in particular),⁴ but it has also become increasingly difficult to mobilise citizen-soldiers (in democratic countries) to fight in wars that are often unjustifiable, which has led to the development of private armies, and to governments relying increasingly on private military and security companies (PMSCs).

Currently, it is ‘weak states’ that provide fertile ground for the development of mercenarism.⁵ For example, the United States has played a key role in the development of private armies in Afghanistan and Iraq, because “it was keen to deploy contractors in order to lessen its liability, avoid the risk of high military casualties, which would undermine domestic support for the wars, and to use its military forces to best effect in active combat operations. In light of its inability to raise troops from Asia to support the Iraq campaign, the United States was now making efforts to bring in private people from the region indirectly, principally in order to supply support services.”⁶

² See § 33 of the *Annual Report of the Special Rapporteur 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* (hereinafter the Special Rapporteur on mercenaries), presented at the 55th session of the UN Commission on Human Rights, E/CN.4 / 1999/11, dated 13 January 1999.

³ Cf. *Annual Report of the Special Rapporteur on mercenaries*, presented at the 58th session of the Commission on Human Rights, E/CN.4 / 2002/20, dated 10 January 2002.

⁴ Emanuela-Chiara Gillard, “Business goes to war: private military/security companies and international humanitarian law”, in *Private military companies. Humanitarian debate: law, policy, action*, International Review of the Red Cross, Volume 88, number 863, September 2006.

⁵ Jean-Didier Rosi, *Privatisation de la violence. Des mercenaires aux sociétés militaires et de sécurité privées*, Ed. L'Harmattan, Paris, 2009.

⁶ § 34 of the *Note by the United Nations High Commissioner for Human Rights at 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*, presented at the 61st session of the Commission on Human Rights, E/CN.4/2005/23, dated 18 January 2005.

III. AREAS OF ACTIVITY OF MERCENARIES AND THEIR USERS/ SPONSORS

A) Range of activities undertaken by mercenaries

Apart from participating directly in armed conflict, the PMSCs provide not only security services but training of government forces, logistics, protection of persons and strategic sites, mine clearance, construction of military infrastructure, intelligence, consultation and military advice, etc.

Mercenaries are now being used in illegal activities such as “trafficking in persons, whether of migrants or women, arms and munitions trafficking, drug trafficking, terrorism, acts to destabilize legitimate governments and acts to take forcible control of valuable natural resources, as well as organized crime such as abduction or the theft of vehicles on a large scale.”⁷

B) The Users / Sponsors of mercenarism

These are mainly governments and transnational corporations (TNCs) who use mercenaries in both international and internal conflicts, but sometimes armed opposition groups also make use of mercenaries.

The United Kingdom, France, South Africa and Israel have been among the major providers of these mercenaries. During the years of decolonisation and the Cold War, King Hassan II of Morocco, the Gabonese president Omar Bongo, the white regime of Ian Smith in Rhodesia (Zimbabwe), French leaders including Jacques Foccart – the Secretary General for African Affairs at the Elysée Palace – and former Prime Minister Michel Debré, Deputy for the island of Reunion, supported mercenaries more or less openly⁸. These mercenaries were usually controlled by Western intelligence services and TNCs, and had a reputation for brutality, rape and general indiscipline.⁹

For example, during the period of decolonisation in Congo (which became Zaire and is now the Democratic Republic of the Congo) Belgian, French and South African mercenaries were recruited by Belgium and by the Belgian private sector to support the secessionist movement led by Moïse Tshombe in order to regain control of the rich mining region of Katanga, and Belgian mercenaries were involved in torture and the assassination of Patrice Lumumba, Prime Minister of Congo.¹⁰ The United Kingdom used mercenaries during the Biafran war in order to safeguard its share of Nigeria's oil, following concern about French influence in the region.¹¹

Some opposition groups have also resorted to the use of mercenaries. For example, UNITA (National Union for the Total Independence of Angola) paid in diamonds (from mines in northern Angola) for weapons purchased in Belgium and Bulgaria, which then were shipped through Togo. According to some estimates, this traffic yielded between three and four billion US dollars with which to finance military preparations and the recruitment of mercenaries.¹²

⁷ See § 74 of the *Annual Report of the Special Rapporteur on mercenaries*, presented at the 57th session of the Commission on Human Rights, E/CN.4 / 2001/19, dated 11 January 2001.

⁸ Philippe Leymarie, “En Afrique, une nouvelle génération de ‘chiens de guerre’”, in *Le Monde diplomatique*, November 2004.

⁹ Idem.

¹⁰ See *Annual Report of the Special Rapporteur on mercenaries*, presented at the 58th session of the Commission on Human Rights, E/CN.4 / 2002/20, § 46, dated 10 January 2002.

¹¹ Angela Mc Intyre and Taya Weiss, “Weak governments in search of strength. Africa's experience of mercenaries and private military companies”, in *From mercenaries to market. The rise and regulation of private military companies*, Edited by Simon Chesterman and Chia Lehnardt, Oxford University Press, New York, 2007.

¹² Cf. § 32 of the *Annual Report of the Special Rapporteur on mercenaries*, presented at the 57th session of the Commission on Human Rights, E/CN.4 / 2001/19, dated 11 January 2001.

PMSCs, which are a new form of mercenarism, may be involved in the trafficking of diamonds, oil or even drugs (in Angola, Liberia, Sierra Leone, Colombia and Afghanistan, and elsewhere).¹³ In Latin America, it was established that “members of private military and security companies (...) had been found to have been involved in the drug trade, trafficking in persons, extra-judicial killings and money laundering. (...) Mercenaries had also been recruited by the military and private companies to ensure control over natural resources throughout Latin America.”¹⁴

We should also remember that mercenaries have been used in acts of terrorism. Mercenaries were recruited to carry out attacks against hotels and other tourist facilities in Cuba. They were paid sums of between 1500 and 5000 US dollars for each bomb they exploded. Between 1995 and 1998, the country suffered some 30 attacks on what constituted one of its vital economic sectors.¹⁵

The use of mercenaries may exacerbate political conflict or render more opaque the business partnerships forged between governments and the private sector. The NGO Global Witness points out that, with the growing demand for raw materials, TNCs are operating in areas of armed conflict where repression is widespread and there is little or no legal framework for regulating the observance of human rights.¹⁶

The business empire Lonrho plc,¹⁷ headed by the famous British businessman Tiny Rowland between 1962 and 1994, employed Defence Systems Ltd in order to defend its pipeline in Mozambique against the threat of the rebel forces of RENAMO (The Mozambican National Resistance). It is worth remembering that Rowland tended to play both sides off against each other in internal conflicts and civil wars in Africa. In Angola, for example, where he gave his support to the rebel movement while negotiating with the government for mining rights; in Sudan, where he concluded an agreement with the government while providing support for southern rebels; and in Rhodesia, now Zimbabwe, where on the eve of national independence he supported the rebel leader Joshua Nkomo, while financing Robert Mugabe.¹⁸

Over the last twenty years, mercenarism has taken on a new form: private military and security companies (PMSCs) have been created and now provide a variety of ‘services’ (see below), even to international organisations like the UN and some of the larger humanitarian NGOs.¹⁹ PMSC activity is

¹³ § 59 *Annual Report of the Special Rapporteur on mercenaries*, presented at the 58th session of the Commission on Human Rights, E/CN.4 / 2002/20, dated 10 January 2002.

¹⁴ § 43 & 44 of the *Note by the United Nations High Commissioner for Human Rights at 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*, presented at the 61st session of the Commission on Human Rights, E/CN.4 / 2005/23, dated 18 January 2005. By way of example, it has been established that the Medellin cartel recruited Israeli mercenaries who not only trained commandos as assassins but also provided ‘assistance in military operations by taking part in attacks and in operations involving the trafficking of drugs and arms.’ (cf. § 148 to 153 of the *Annual Report of the Special Rapporteur on mercenaries*, presented at the 47th session of the Commission on Human Rights, E/CN.4/1991/14, dated 27 December 1990.

¹⁵ Cf. *Annual Report of the Special Rapporteur on mercenaries*, presented at the 56th session of the Commission on Human Rights, E/CN.4 / 2000/14, dated 21 December 1999, pp 10 to 17.

¹⁶ Global Witness *Annual Report 2008*; see www.globalwitness.org

¹⁷ Lonrho Plc is a transnational conglomerate involved in the production of coal, gold and platinum in Africa. At its peak, Lonrho controlled 900 subsidiary companies operating in Africa, Europe, Asia and North America, generating revenues in excess of US\$ 7 billion and employing over a quarter of a million workers. See: www.referenceforbusiness.com/history2/9/Lonrho-Plc.html

¹⁸ Madelaine Drohan, *Making a killing. How and why corporations use armed force to do business*, Ed. The Lyons Press, Guilford, Connecticut, 2003.

¹⁹ Cf. § 26 of the *Annual Report of the Working Group 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* (hereinafter the Working Group of Experts), presented at the 62nd session of the Commission on Human Rights, E/CN.4 / 2006/11/Add.1, dated 3 March 2006. By way of example, in 2002, the PMSC ArmorGroup counted amongst its clients: UNICEF, CARE, Caritas and the Red Cross (cf. article written by Yves Engler, entitled “La privatisation de l’occupation: les mercenaires et les ONG”, of

currently at a peak in Iraq and Afghanistan. There are as many as 100,000 PMSC employees working in Iraq for the United States and this figure does not include employees of sub-contractors nor those employed by firms working for other clients.²⁰ In Afghanistan the United States is also the largest employer of PMSC personnel whose number is estimated at somewhere between 18,000 and 28,000.²¹ Furthermore, according to official information, there are 2,500 unauthorized armed groups operating in those areas controlled by the Afghan government (which represents less than half the country's territory).²²

30 September 2010: www.michelcollon.info/-La-privatisation-de-l-occupation.html)

²⁰ Cf. § 43 of the *Annual Report of the Working Group of Experts*, presented at the 7th session of the Human Rights Council, A/HRC/7/7, dated 9 January 2008.

²¹ Cf. § 24 of the *Working Group of Experts Report on the Mission to Afghanistan*, presented at the 15th session of the Human Rights Council, A/HRC/15/25, dated 14 June 2010.

²² *Idem* § 14.

IV. WHO ARE THE MERCENARIES AND THE PMSCs?

Between the 1960s and 1980s (the period of decolonisation and the Cold War), mercenaries were usually linked to a government army. One of the most famous mercenary, known as Bob Denard, was a colonel in the French army (he always claimed to be fighting for his country when he did his dirty work in Benin, the Comoros, in the former Zaire, etc.) It was he who provided the presidential guard for Gabon and the Comoros.²³ Likewise, Oliver North was a colonel in the U.S. Army when he organized support for the Contras to overthrow the legitimate government of Nicaragua.²⁴ As for South Africa under the apartheid regime, the use of mercenaries was openly state policy. Indeed, “a direct link could be established between the use of mercenaries and the policy of apartheid and the criminal repression of opponents ...”²⁵

This type of mercenary activity gradually gave way to mercenarism as a business enterprise (the PMSCs), motivated entirely by financial gain and offering a wide range of 'services' (see above). The Human Rights Council Working Group on the use of mercenaries as a means of impeding the exercise of the right of peoples to self-determination (hereinafter “Working Group of Experts”) defines private military and private security companies as: “including private companies which perform all kinds of security assistance, training, provision and consulting services, including unarmed logistical support, armed security guards, and those involved in defensive or offensive military activities.”²⁶

The PMSCs’ market is mainly dominated by North American, British and South African companies.²⁷ They operate in every continent and have become global players, providing a challenge to the coercive

²³ Gilbert Bourgeaud, real name, Bob Denard was finally convicted (in 1993 and 2006) in France for “criminal association” for his attempts at coups in Benin and the Comoros and sentenced to five years in prison (see inter alia § 68 of the *Annual Report of the Special Rapporteur on mercenaries*, presented at the 47th session of the Commission on Human Rights, E/CN.4 / 1991/14, dated 27 December 1990 and the following sites:

www.afrik.com/article12688.html; www.polis.sciencespobordeaux.fr/vol12ns/article6.html

www.afrique2010.fr/la-francafrique/francafricains/article/robert-Bob-denard

www.lesoleil.sn/article.php3?id_article=12959)

²⁴ Cf. *Annual Reports of the Special Rapporteur on mercenaries*, presented at the 45th and 46th sessions of the Commission on Human Rights, E/CN.4/ 1989/14, dated 16 January 1989 and E/CN.4/ 1990/11, dated 3 January 1990.

²⁵ Cf. § 183 of the *Annual Report of the Special Rapporteur on mercenaries*, presented at the 47th session of the Commission on Human Rights, E/CN.4/1991/14, dated 27 December 1990.

²⁶ Cf. § 3 of the *Report of the Working Group of Experts*, presented at the 4th session of the Human Rights Council, A/HRC/4/42, dated 7 February 2007.

²⁷ Here are some examples of PMSCs studied in 2005 by Deborah Avant. The private British security firm Defense Systems Limited worked for a large number of clients: between 1992 and 1995, it provided security and logistics staff to the UN mission in the former Yugoslavia, protected British Petroleum oil installations in Colombia, provided security services for the American construction company Bechtel in Iraq, and has also been employed by De Beers, Shell, Mobil, Amoco, Chevron, CARE and GOAL. The South African PMSC Executive Outcomes has had contracts in Angola, Sierra Leone, Zambia, Ghana, Algeria, Indonesia, Papua New Guinea, and - according to rumours - in Colombia, Namibia, Uganda and Burundi. North American security and private military companies providing training services are: MPRI, Booz Allen and Hamilton, Cubic, DynCorp, Global Options, Logicon, O’Gara Protective Services, Science Applications International Corporation (SAIC) Trojan Securities International and Vinnell. British PMSCs offering military training are: Limited Aims, DSL, Global Impact, Gurkha Security Guards, KAS Enterprises, Watchguard International and Sandline International. The Canadian security company Black Bear offers peacekeeping services, while the French company Secrets is contracted to provide private security to Paul Biya, the President of Cameroon. The Israeli PMSCs (Beni Tal and Levden), the Australian PMSCs (International Port Services Training Group Party Ltd. and Fynwest Party Ltd.) and the Belgian PMSC (International Defense and Security), provide only military training. The PMSCs Sandline and MPRI also offer humanitarian protection services and have participated in United Nations peacekeeping missions. However, many other North American PMSCs served less noble goals, such as Global Risk Holdings, which has provided mercenaries to mining and oil companies, Gray Security, which took care of securing sites for oil companies and diamond companies in Angola; Lifeguard Security has provided security services to diamond mines in Sierra Leone; and Erinys which is under contract to the U.S. government to train forces to secure Iraqi oil fields (cf. Deborah Avant, *The market for force. The consequences of privatizing security*, Cambridge University Press, New York, 2005).

power normally exercised only by sovereign states. The hugely professional US and British PMSCs represent 70% of the market.²⁸

Operating in over 50 countries worldwide, PMSCs have an estimated annual income of about US\$100 billion.²⁹

Working at every level within the PMSCs are former senior military officers, former ministers and high-level civil servants including from the intelligence services. There are even former South African officers, who committed crimes against humanity under apartheid, now responsible for training Iraqi police,³⁰ and then there are simply the unemployed or former police and military personnel looking for a job. Their salaries vary, depending on which company signs the contract (PMSC holder or sub-contractors), but can be anywhere between 1000 and 11000 U.S. dollars per month, in a country where there is conflict: “it is common for the originally contracted PMSC to engage a second, third or fourth subcontracting private entity to fulfil the original contract in full or in part. These processes often result in subcontractors recruiting staff, and performing training, in countries with low labour costs and high unemployment rates.”³¹

Some large PMSCs

1. Executive Outcomes

Widely considered the first modern mercenary company (PMSC), Executive Outcomes was founded in the late 1980s in South Africa. According to the UN Special Rapporteur on mercenaries, Executive Outcomes presented itself in 1996 as “a security company which provides ‘technical advisers whose area of specialization is basically military’. Its personnel³² provides training for situations such as: low-grade armed conflicts with counter-insurgency preparation, enemy infiltration, intelligence, sabotage, protection of the population and territory; infantry training, including motorized and parachute infantry; use of tanks; artillery and anti-aircraft artillery defence; combat engineering training; intelligence; military police; medical support services; communications; special rapid reaction forces; officer and support staff training; logistics; air force; navy and technical support.... Executive Outcomes uses equipment (which) includes aeroplanes, helicopters and aerial photography Aircraft... about 700 persons are regularly employed by this company (soldiers, police, doctors, pilots, engineers, technicians, etc.), with high salaries; the salaries of every rank from general to non-commissioned officer may be 5 times higher than in an army such as that of South Africa ...”³³

Executive Outcomes, the first PMSC, came to public notice in 1992 when it was commissioned by the Angolan government to retake control of the Soyo oil zone, then in the hands of Jonas Savimbi’s UNITA (National Union for the Total Independence of Angola). In 1995, Executive Outcomes intervened in Sierra Leone to liberate and pacify the capital Freetown from Foday Sankoh’s RUF (Revolutionary United Front) and to help the government regain control of one of the most important diamond-producing areas of the country, to protect the mines and secure the elections. According to some sources, Executive Outcomes received nearly \$30 million and mining concessions in the Koidu

²⁸ See: www.sourcewatch.org

²⁹ § 12 of the *Report of the Special Rapporteur on mercenaries*, presented at the 61st session of the Commission on Human Rights, E/CN.4/2005/23, dated 18 January 2005.

³⁰ Cf. §§ 33 & 38 of the *Report of the Working Group of Experts*, presented at the 4th session of the Human Rights Council, A/HRC/4/42, dated 7 February 2007.

³¹ Cf. § 36 of the *Report of the Working Group of Experts*, presented at the 4th session of the Human Rights Council, A/HRC/4/42, dated 7 February 2007.

³² It was composed of soldiers of the South African 32nd ‘Buffalo’ Battalion, regiments of the Rhodesian Selous Scouts, members of the British SAS and Angolan reconnaissance units.

³³ Cf. §§ 81 to 83 of the *Annual Report of the Special Rapporteur on mercenaries*, presented at the 54th session of the Commission on Human Rights, E/CN.4/1998/31, dated 27 January 1998.

district, for the work done by its mercenaries.³⁴ In 1996, Executive Outcomes conducted operations in Sierra Leone to save threatened UN observers. It was disbanded in 1998 and its 'collaborators' were dispersed. In 2004, Simon Mann and Nick Van Der Bergh, two former directors of Executive Outcomes and of SRC (Strategic Resource Corporation, created by Barlow and Anthony Buckingham), were arrested in Zimbabwe as they prepared a well armed coup, with a hundred men, against the government of Equatorial Guinea. Logistical support had been provided by Mark Thatcher, the son of the former British Prime Minister.³⁵

2. Sandline International

The mercenary activities of another PMSC provide a good illustration of how these companies operate. Sandline International Ltd was founded in 1997 by Timothy Spicer, currently CEO of Aegis Defense Services Ltd., which in 2004 won one of the largest contracts in the Iraqi conflict. In 1997, Sandline came to public notice in the 'Bougainville Case' when the Prime Minister of Papua New Guinea, Julius Chan, engaged their services to quell the rebellion in the island of Bougainville. The initial payment for this contract, which was partly outsourced to Executive Outcomes, may have been as much as US\$ 36 million. The contract caused riots in the country, Julius Chan was forced to resign and Tim Spicer was arrested and later released.³⁶ In the same year, Sandline International Ltd was engaged by the Indian financier, Rakesh Saxena, in order to reinstate President Ahmad Tejan Kabbah in Sierra Leone, who had been ousted by the coup led by the Revolutionary United Front in May 1997. According to an investigation by the British Parliament, Rakesh Saxena promised to fund the recruitment of mercenaries from Sandline International and the purchase of equipment necessary to conduct a counter coup in exchange for diamond concessions. Spicer purchased light arms in Bulgaria and shipped them to Sierra Leone, in violation of the UN embargo, with the tacit approval of the British government.³⁷ Sandline was dissolved in 2004, citing lack of government support for PMSCs such as Sandline.³⁸

3. Blackwater

Undoubtedly the most powerful PMSC operating today is Blackwater.³⁹ It has been described by a member of U.S. Congress as "an army capable of overthrowing most governments in the world."⁴⁰ In fact, Blackwater has "one of the largest private stocks of heavy weapons, a fleet of planes, Blackhawk helicopters, ships, armored vehicles, shooting ranges, and its U.S. bases train 30,000 (thirty thousand) soldiers and police officers per year."⁴¹ Together with fifteen subsidiaries (U.S. Training Center, Paravant, Greystone, etc..) Blackwater signed contracts worth \$1.5 billion between 2001 and 2009, with the Pentagon and the CIA.⁴² Its founder, billionaire and Christian fundamentalist Erik Prince,⁴³ does not hide his ambitions to obtain "a substantial piece of the current United Nations peacekeeping US\$ 6-10 billion budget".⁴⁴ Like other PMSCs, Blackwater presents itself as a respectable defender of the rule of law and good governance, but the atrocities committed by its employees in Iraq have hit the headlines. Indeed, the company was found guilty of 'war crimes' for the murder of civilians by its

³⁴ Cf. § 65 of the *Report of the Special Rapporteur on mercenaries*, presented at the 52nd session of the Commission on Human Rights, E/CN.4/1996/27, dated 17 January 1996.

³⁵ Jean-Didier Rosi, mentioned before.

³⁶ Cf. § 93 to 99 of the *Report of the Special Rapporteur on mercenaries*, presented at the 54th session of the Commission on Human Rights, E/CN.4/1998/31, dated 27 January 1998.

³⁷ Jean-Didier Rosi, mentioned before.

³⁸ Cf. www.sandline.com/site/

³⁹ Although this company was renamed 'Xe' in February 2009, its employees continue to call it Blackwater (cf. *Le Nouvel Observateur* of 6-12 May 2010).

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² Ibid.

⁴³ Ibid.

⁴⁴ Cf. § 34 of the *Annual Report of the Working Group of Experts*, presented at the 7th session of the Human Rights Council, A/HRC/7/7, dated 9 January 2008.

employees in Iraq between 2005 and 2007.⁴⁵ It is worth noting that Blackwater is not only employed in armed conflicts such as Afghanistan or Iraq for 'targeted killings' (members of Al Qaeda for example),⁴⁶ but was also employed by the Bush administration, along with Armor Group International, to reinforce the army and to establish martial law in New Orleans when Hurricane Katrina hit the city in 2005.⁴⁷

⁴⁵ Cf. § 91 of the *Report of the Working Group on the Mission to the United States of America*, presented at the 15th session of the Human Rights Council, A/HRC/15/25/Add.3, dated 15 June 2010.

⁴⁶ Cf. *Le Nouvel Observateur* of 6-12 May 2010.

⁴⁷ Mariano Aguirre, "Mercenaries and the new configuration of world violence", in *Open Democracy*, 16 October 2007, www.opendemocracy.net

V. IMPACT OF MERCENARISM ON HUMAN RIGHTS

According to UN figures, at least one third of existing states (!) are currently affected or have been affected in the recent past by mercenary activities. This trend is likely to increase because employing PMSCs “enables the prompt use of force in a foreign country, extends the technological and geopolitical influence of the great powers, bypasses parliamentary scrutiny, avoids any adverse consequences arising from the questionable legitimacy of the action, and provides a cheaper alternative to an official army.”⁴⁸

Although Africa remains the continent most affected by the activities of mercenaries,⁴⁹ no continent is immune to the phenomenon. Political instability and the interests of third parties (whether states or TNCs) favour the proliferation of mercenaries.

In this regard, UN experts have identified a number of very serious problems: “at present, the subject of mercenaries has many facets which include the involvement of mercenaries in armed conflict; sabotage and participation in covert activities that undermine the constitutional order of a State; interference in the internal affairs of States calculated to bring about political instability by violent attacks on political leaders; unlawful trafficking of weapons, precious stones, oil and drugs; mercenaries hired by authoritarian regimes as professional military experts to carry out military training; participation by mercenaries in terrorist activities; participation by mercenaries in crimes against State security and economic well-being; mercenary operations carried out by private security companies; and impunity aided by the absence of enabling national legislation to punish mercenaries.”⁵⁰

Another disturbing aspect of the problem is that mercenary activities deplete the resources of a country while its people struggle for survival. The UN Special Rapporteur on mercenaries in 2002 wrote the following about an African country still riven by conflict: “Forty-one years after the Democratic Republic of the Congo gained its independence, the civil war which besets the country, and in which other African States are involved, is costing the country 80 per cent of its resources.” He concluded by calling for respect for “the right of the peoples of Africa freely to decide their future, their political systems and the rational use that they wish to make of their resources. Otherwise, armed conflicts, together with hunger, poverty and disease, will cast their shadow over millions of Africans, threatening them like a deadly plague.”⁵¹

A) Human rights violations

The use of mercenaries leads to “a massive violation of human rights in all areas while impeding the right of peoples to self-determination.”⁵²

The UN Special Rapporteur on mercenaries adds that “the mercenary as an individual, in common with mercenarism as criminal conduct involving a State or organization making use of mercenaries for specific aims, meets the purposes of evil interests that can affect the right of a people to self-determination, the stability of a constitutional Government, peace in one region or public security and

⁴⁸ Sami Makki, “Sociétés militaires privées dans le chaos irakien”, in *Le Monde diplomatique*, November 2004

⁴⁹ Between 1988-2002, the Special Rapporteur on mercenaries examined the involvement of mercenaries in armed conflict and / or armed violence in the following countries: South Africa, Angola, Benin, Botswana, Burundi, Cameroon, the Comoros, Djibouti, Lesotho, Liberia, Mozambique, Namibia, Niger, Democratic Republic of Congo, Rwanda, Somalia, Sudan, Chad, Togo, Zambia and Zimbabwe (See: www2.ohchr.org/english/issues/mercenaries/specialrap.htm).

⁵⁰ § 10 of the *Note by the United Nations High Commissioner for Human Rights on the second meeting of experts on traditional and new forms of mercenary activities as a means of violating human rights and impeding the exercise of the right of peoples to self-determination*, presented at the 59th session of the Human Rights Commission, E/CN.4/ 2003/4, dated 24 June 2002.

⁵¹ §§ 44 to 47 of the *Annual Report of the Special Rapporteur on mercenaries*, presented at the 58th session of the Commission on Human Rights, E/CN.4 / 2002/20, dated 10 January 2002.

⁵² Cf. *First annual report of the Special Rapporteur on Mercenaries*, presented at the 44th session of the Commission for Human Rights, E/CN.4/1988/14, dated 20 January 1988.

tranquillity in others, or the breakdown of the legal order through illegal trafficking which severely disrupts life, liberty, health, physical integrity and positive social coexistence.”⁵³

Mercenaries are also used to repress demands for social rights: “An emerging trend in Latin America but also in other regions of the world indicates situations of private security companies protecting transnational extractive corporations whose employees are often involved in suppressing the legitimate social protest of communities and human rights and environmental organisations of the areas where these corporations operate.”⁵⁴

B) Impunity of perpetrators of human rights violations

In general, PMSCs and their employees are immune from any prosecution resulting from their activities. For example, Order 17 issued on June 27 2004 by the Administrator of the Coalition Provisional Authority in Iraq, Paul Bremer, granted immunity from prosecution to PMSCs and their employees.⁵⁵ A Blackwater employee told a reporter recently that “no one can touch us; if anyone challenges us, someone in the hierarchy quietly smuggles us into the boot of a car (...)”⁵⁶

A similar situation exists in Colombia, where infringements committed by U.S. military personnel or private providers (PMSCs) operating within the framework of Plan Colombia⁵⁷ will not result in any investigation or trial. Moreover, under an agreement between Colombia and the United States of America concluded in 2003, the Colombian Government cannot bring members of the U.S. military or private agents working on behalf of PMSCs, who are guilty of crimes against humanity, before the International Criminal Court.⁵⁸

Non-accountable and not subject to control, the PMSCs “have often reinforced the potential for conflict as has been the case in the Balkans, Sierra Leone, Liberia and the Democratic Republic of the Congo.”⁵⁹

Employees of PMSCs make no secret of the situation. A British employee of a PMSC “working” in Afghanistan said that “the American and British armies and others are here to win a war. For us, the more the security situation deteriorates, the better.”⁶⁰ In fact, as we have already seen, some PMSCs are complicit in various forms of trafficking including that of weapons “without any concern as to what use will be made of the weapons or what damage they may cause.”⁶¹

Ironically, PMSC employees can themselves become victims of violations of human rights inflicted by their employers.⁶²

⁵³ Cf. § 48 of the *Annual Report of the Special Rapporteur on mercenaries*, presented at the 58th session of the Commission on Human Rights, E/CN.4/2002/20, dated 10 January 2002.

⁵⁴ Cf. § 26 of the *Annual Report of the Working Group of Experts*, presented at the 7th session of the Human Rights Council, A/HRC/7/7, dated 9 January 2008.

⁵⁵ Cf. § 45 of the *Report of the Working Group of Experts*, presented at the 7th session of the Human Rights Council, mentioned before. This order was finally rescinded in January 2009 after the new “Status of Forces Agreement” came into force (See § 85 of the *Report of the Working Group on the Mission to the United States of America*, mentioned before).

⁵⁶ Cf. *Le Nouvel Observateur* of 6-12 May 2010. Note that the Blackwater contract was revoked by the Iraqi government, following the shooting by employees of the SMSP on civilians which left 17 dead and over 20 wounded in Nissouri Square Baghdad on September 16, 2007, but the U.S. continued working with Blackwater until September 2009 (See § 85 of the *Report of the Working Group on the Mission to the United States of America*, A/HRC/15/25/Add.3, presented at the 15th session of the Human Rights Council, A/HRC/15/25/Add.3, dated 15 June 2010.)

⁵⁷ Cf. the CETIM statement presented at the 57th session of the UN Commission on Human Rights (March – April 2001) E/CN.4/2001/NGO/184: www.cetim.ch/en/interventions_details.php?iid=155

⁵⁸ § 45 of the *Annual Report of the Working Group of Experts*, 7th session of the Human Rights Council, mentioned before.

⁵⁹ *Ibid* § 44.

⁶⁰ Cf. Marie-Dominique Charlier in her article “Mercenaires d'État en Afghanistan” in *Le Monde Diplomatique*, February 2010.

⁶¹ Cf. § 59 of the *Annual Report of the Special Rapporteur on mercenaries*, presented at the 58th session of the Commission on Human Rights, E/CN.4/2002/20, dated 10 January 2002.

⁶² A number of contracts for Afghanistan and Iraq entrusted by the U.S. administration to PMSCs are then subcontracted to other companies registered in the U.S. or abroad, who are, in most cases, private recruitment agencies, whose function is the selection of former members of the armed forces or police of third countries. Their goal is to maximize their

VI. WHAT ARE THE SOLUTIONS?

It is commonly accepted that: “the proliferation of PMSC activities 'fuels the ungovernance of political violence and undermines, or makes more difficult the establishment of, the state monopoly on legitimate violence'.”⁶³

According to the Working Group of Experts, PMSC activities: “are carried out without legitimacy regardless of the level of ethics in their performance, efficiency and professionalism.”⁶⁴

One obvious answer would be to ban PMSCs. Currently, however, the international debate is considering two approaches: either self-regulation (by PMSCs) or binding regulation.

In order to deal with the authorities and gain international respectability, the PMSCs today frequently cite a statement from the World Bank on the rule of law and ‘good governance’⁶⁵, and have developed codes of conduct and other ethical charters while claiming only to work with legitimately constituted governments.

For example, the British Association of Private Security Companies (BAPSC) invites its members to build an open and transparent relationship with the British government and to respect international legal statutes regarding ethical practices and standards of good governance.⁶⁶

The 2005 Code of Conduct of the association of private security companies (International Peace Operations Association, IPOA) is another PMSC initiative. This association, which counts among its 56 members the PMSCs MPRI⁶⁷, ArmorGroup⁶⁸ and DynCorp International,⁶⁹ present themselves as

profits by exploiting the latter or even to evade legal action in the national courts as it could be problematic for such activities. Indeed, when individuals sign their contract, they often give up certain rights, including the right to bring an action against the subcontractor that has selected and engaged them, or against the company employing them, including when the company is wholly or partially responsible for loss, damage, injury or death. Many Chileans, Fijians, Hondurans and Peruvians who took on security work in Iraq were victims of contractual irregularities and poor “working” conditions (excessive working hours, non-payment or partial payment of wages, mistreatment and lack of attention to basic needs such as access to medical services), cf. § 39 & 40 of the *Annual Report of the Working Group of Experts*, presented at the 7th session of the Human Rights Council, A/HRC/7/7, dated 9 January 2008.

⁶³ Cf. *Annual Report of the Special Rapporteur on mercenaries*, 58th session of the Commission on Human Rights, op. cit., § 44.

⁶⁴ Cf. § 38 of the *Working Group of Experts Report*, presented at the 4th session of the Human Rights Council, A/HRC/4/42, dated 7 February 2007.

⁶⁵ Cf. the written declaration by CETIM, presented at the 60th session of the Commission on Human Rights, E/CN.4/2004/NGO/123: www.cetim.ch/en/interventions_details.php?iid=46

⁶⁶ Charter of the British Association of Private Security Companies (BAPSC): www.bapsc.org.uk

⁶⁷ Created in 1988 by United States Army generals, MPRI is considered “the armed guard of the United States administration”. This company drew the Croatian army into a full civil war with the former Yugoslavia. It is believed to have played a determining role in Kabila's taking power in the Democratic Republic of the Congo, where exclusive development contracts were signed, even before the fall of Kinshasa, between Kabila and mining consortiums including the American giant Barrick Gold Corporation. It is also accused of protecting United States oil interests in the Cabinda Enclave in Angola. In 2000, MPRI was bought out by L-3 Communications.

⁶⁸ The extent to which Defense system Colombia (DSC), a subsidiary of Defence System Limited (bought out by ArmorGroup in 1997) was willing to go in protecting the pipeline included training troops in psychological warfare operations and setting up spy organisations in communities that were not ambivalent to BP's destructive path and inconsideration. Troops (armed with equipment brought to them by DSC, OCENSA, and Israeli firm Silver Shadow) were responsible for disposing of dissenters, setting examples for others, and gathering more information under torture. Cf. www.sourcewatch.org/index.php?title=Defence_Systems_Limited

⁶⁹ Dyncorp employees were involved in arms trafficking, people trafficking and sexual abuse in Bosnia in 1999. In 2001 this same company signed a contract for three million dollars with the US State Department for logistical support and the training of rebels in southern Sudan (see, *inter alia*, *Transnational Corporations and Human Rights*, CETIM, 2005: www.cetim.ch/en/publications_stn-bro2.php)

peacemakers and promoters of the principle of good governance. Their code of conduct aims to ensure that all member companies uphold the ethical standards of the IPOA in conflict and post-conflict situations.⁷⁰

In this context, the *Montreux Document on Pertinent International Legal Obligations and Good Practices for States regarding the operations of private military and security companies during armed conflict* (hereafter referred to as the Montreux Document), which was adopted by 17 states⁷¹ on September 17, 2008, is an unusual document, because “this document is not a legally binding instrument...” (§ 3 of the Preface), as the authors in fact acknowledge, but at the same time the states are supposed to enact binding legal norms and are held responsible for their implementation.

Launched jointly by Switzerland and the International Committee of the Red Cross (ICRC), the Montreux Document⁷² is a response to the “unwelcome resurgence of the use of private military and security companies” and “reaffirms the obligation on States to ensure that private military and security companies operating in armed conflicts comply with international humanitarian and human rights law.”⁷³ According to the initiators, the two key points that should be noted in this document are: “that delegating tasks to a contractor does not relieve a State of its responsibilities, and that governments should not let contractors take part in combat operations.”⁷⁴

The main criticism of this document by the Working Group of Experts, is that: “the Montreux Document has nevertheless failed to address the regulatory gap in the responsibility of States with respect to the conduct of private military and security companies and their employees”.⁷⁵

Among the other criticism voiced by the Working Group of Experts, we would like to mention the following in particular:⁷⁶

- The Montreux Document places a heavier burden of responsibility on 'Territorial States' (States where PMSCs operate) than on 'Contracting States' or 'Home States' from where these companies originate or operate;
- International humanitarian law only applies in armed conflict;
- The Document fails to include a reference to the State obligation to protect and to apply the principle of due diligence;
- There is no provision in the Document to ensure that existing law, including criminal law, are enforced, particularly, but not exclusively, the prohibition on torture and cruel, inhumane or degrading treatment and that private military and security companies and their employees be held accountable for serious crimes;
- The Document only concerns itself with 'Territorial States', 'Contracting States' and 'Home States', and ignores those States from where the manpower is recruited by private military and security companies, in most cases without consultations with the respective Governments.
- The Document also fails to provide for a centralized State system which would be responsible for registering all private military and security industry contracts for applying common standards and for monitoring contracts.

⁷⁰ International Peace Operations Association (IPOA) Code of Conduct: www.ipoaworld.org

⁷¹ Afghanistan, South Africa, Germany, Angola, Australia, Austria, Canada, China, United States of America, France, Iraq, Poland, United Kingdom, Sierra Leone, Sweden, Switzerland and Ukraine.

⁷² Cf. www.icrc.org/eng/assets/files/other/icrc_002_0996.pdf

⁷³ Cf. www.icrc.org/eng/resources/documents/misc/montreux-document-170908.htm

⁷⁴ Cf. www.icrc.org/eng/resources/documents/feature/montreux-document-feature-170908.htm

⁷⁵ Cf. § 44 of the *Report of the Working Group of Experts*, presented at the 10th session of the Human Rights Council A/HRC/10/14, dated 21 January 2009.

⁷⁶ *Idem*, §§ 45, 47 et 48.

The Working Group is of the opinion that “the commercial logic of the private military and security industry appears to be the impetus behind the (Montreux) document” and that “the industry lobby appears to have participated quite strongly in the Initiative’s process”.⁷⁷

Despite the codes of conduct that have been adopted, no-one contests the fact that PMSCs are responsible for human rights violations (extra-judicial, summary or arbitrary executions, disappearances, torture, arbitrary detention, forced displacement, human trafficking, confiscation or destruction of property, etc.) Equally, there is no question that they are responsible for looting natural resources because “thanks to exemptions, national laws no longer apply where the concessions are held in the mining areas, which have now become areas of lawlessness.”⁷⁸

⁷⁷ *Idem*, § 46.

⁷⁸ Philippe Leymarie, “En Afrique, une nouvelle génération de ‘chiens de guerre’”, *Le Monde diplomatique*, November 2004

VII. MEASURES TAKEN OR PROPOSED AT THE INTERNATIONAL, REGIONAL AND NATIONAL LEVEL

The principal organs of the United Nations (General Assembly, ECOSOC, the Security Council and the Commission on Human Rights, now the Human Rights Council) have repeatedly condemned the use of mercenaries⁷⁹ which, as mentioned above, have adverse effects not only on peace and security, but also on the right of peoples to self-determination and other human rights. In this chapter we will examine the measures taken or recommended at international, regional and national levels to combat mercenarism.

A) At the international level

The UN Charter prohibits all wars of conquest and promotes, among other things, friendly relations among States, based on the principle of equal rights of peoples and their right to self-determination (Article 1.2). Members of the United Nations should “refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” (Article 2.4) The Charter authorizes the use of force only in case of any threat to peace, breach of peace, or act of aggression (Chapter VII, Art. 39 to 51) and only when other measures, including mediation, have been exhausted (art. 40).

The UN General Assembly has adopted numerous declarations and resolutions which reaffirm these principles. It is worth mentioning in particular the Declaration of Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations which stipulates, among other things, the right of every state “to choose its political, economic, social and cultural systems without interference in any form by another State.”⁸⁰

The two International Covenants on Human Rights, which were adopted in 1966, consecrate, in their first joint article, the right of peoples to self-determination as a human right. They also consecrate the right of peoples to “freely dispose of their natural wealth and resources.”(Article 1.2)

By virtue of their commitments under these instruments, States are required to take steps to eliminate mercenary activity (both by individuals and PMSCs), which would violate the UN Charter and respect for human rights.

1. The International Court of Justice

The International Court of Justice (ICJ) is the principal judicial organ of the United Nations. All member states of the United Nations are automatically party to its Statute (art. 93.1 of the Charter), but the ICJ has no compulsory jurisdiction; that is to say it is not competent to judge a state that does not recognise its authority (art. 36 and 37). The ICJ has two main functions: ruling on contentious issues and offering advisory opinions. Only States can be parties in contentious cases.

Regarding the use of mercenaries, the ICJ condemned the United States for undermining the sovereignty of **Nicaragua**. Indeed, in its ruling of 27 June 1986 on “the case concerning the Military and Paramilitary Activities in and against Nicaragua” (*Nicaragua v. United States of America*), the Court

⁷⁹ See, *inter alia*, General Assembly Resolutions: 1514 (XV) 14 December 1960, 2395 (XXXIII) 29 November 1968, 2465 (XXXIII) 20 December 1968, 2548 (XXIV) 11 December 1969, 2708 (XXV) 14 December 1979, 40/74, 11 December 1985, 41/102, 4 December 1986, 53/135, 9 December 1998 & 61/151, 14 February 2007; Security Council Resolutions : 239 (1967), 10 July 1967, 405 (1977) 14 April 1977, 419 (1977) 24 November 1977, 496 (1981) 15 December 1981 and 507 (1982) 28 May 1982; Commission on Human Rights Resolutions: 1986/26, 10 March 1986, 1987/16, 9 March 1987, 1991/7, 22 February 1991, 1993/48, 9 March 1993, 2001/3, 6 April 2001, 1995/5, 17 February 1995, 1999/3, 23 April 1999, 2001/3, 6 April 2001, 2003/2, 14 April 2003 and 2005/2, 7 April 2005; for Human Rights Council resolutions: 10/11, 26 March 2009 and 15/12, 30 September 2010.

⁸⁰ Cf. *Resolution 2625 (XXV)* of the General Assembly, adopted 24 October 1970.

upheld, among other things, that “the United States of America, by training, arming, equipping, financing and supplying the contra forces or otherwise encouraging, supporting and aiding military and paramilitary activities in and against Nicaragua, has acted, against the Republic of Nicaragua, in breach of its obligation under customary international law not to intervene in the affairs of another State.”⁸¹

Although the ICJ’s condemnation is commendable, the fact that direct armed conflict between States is almost a thing of the past, makes referral to the ICJ for mercenary activities potentially “unworkable”.

2. The International Criminal Court

The Rome Statute of the International Criminal Court (ICC) came into force on 1st July 2002. The ICC can prosecute those responsible for war crimes, crimes against humanity and genocide (art. 5-8). Although these are imprescriptible crimes, the ICC does not have retroactive jurisdiction and has no jurisdiction with respect to crimes committed before 1 July 2002 (art. 11.1). Nor does the Court have jurisdiction over States for crimes that were committed before the State became a Party to the Statute. (art. 11.2).⁸²

During the negotiations surrounding the adoption of the Rome Statute in 1998, the possibility of giving the ICC jurisdiction to deal with mercenary activities was examined before being dismissed.⁸³

However, even if the current Rome Statute does not expressly mention the activities of mercenaries, the people or PMSCs involved should be prosecuted like anyone else who commits crimes mentioned in the Statute. The fact of being a mercenary should be considered an aggravating circumstance by the ICC.

It should also be noted that at present only 114 states have ratified the Statute of the Court. It is therefore not universally applicable. In addition, the United States, who constitute the largest employer of PMSCs, have circumvented the jurisdiction of the ICC by using bilateral agreements whereby United States nationals and PMSC employees working for their country are immune from prosecution for war crimes, crimes against humanity and genocide (eg Colombia, see chapter VI.B).

3. International Humanitarian Law

The first appearance of a specific and binding legal measure on mercenarism at international level occurs in international humanitarian law. Article 47 of Protocol I to the Geneva Conventions of 1949 (Additional Protocol) denies to mercenaries the status of combatant or prisoner of war in armed conflict (Art. 47.1). The Protocol defines a mercenary as follows: “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.” (Art.47.2)

⁸¹ See ICJ, *Military And Paramilitary Activities In And Against Nicaragua (Nicaragua v. United States Of America)*, Judgement of 27 June 1986, § 292.3, 292.5 and 6 in particular: www.icj-cij.org/docket/files/70/6503.pdf

⁸² Cf. www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome_Statute_English.pdf

⁸³ For example, Article 23 (5) et (6) of the Draft Statute For The International Criminal Court: 23 (5) : “The Court shall have jurisdiction over legal persons, with the exception of States, when crimes committed were committed on behalf of such legal persons or by their agencies or representatives. 23 (6): The criminal responsibility of legal persons shall not exclude the criminal responsibility of natural persons who are perpetrators or accomplices in the same crimes.” United Nations, 1998, Annex point 1, A/CONF.183/2/Add.1: www.un.org/law/n9810105.pdf

The main problem with this definition is that it is very restricted and has no operational relevance in the contemporary world. Indeed, “the Protocol referred to 'mercenary' but not to 'mercenarism', which was a broader concept that included the responsibilities of the States and organizations concerned in mercenary acts.”⁸⁴

In addition, to be defined as a mercenary, all the conditions listed in article 47.2 must be fulfilled.⁸⁵ This makes the definition hard to apply and it is quite easy for sponsors/ employers to circumvent the terms of the article.⁸⁶

That said, States which use the services of mercenaries and/or PMSCs are responsible for all acts committed by them and have therefore an obligation to respect and to ensure respect for international humanitarian law, as the following statement from the UN experts confirms: “If a State, a rebel group or a multinational company recruited military personnel through a private security company and if these persons participated in combat, then they had to respect international humanitarian law. Under international humanitarian law, persons were criminally responsible for the violations they committed personally or that they ordered committed. Besides, the fact that a subordinate committed a violation of international humanitarian law did not absolve his superiors from penal or disciplinary responsibility if the latter knew or had information which should have enabled them to conclude that the subordinate was committing a crime.” (Protocol I, art. 86)⁸⁷

On the other hand, it must be stressed that international humanitarian law does not provide for criminal responsibility for legal persons.⁸⁸ This is recognized by the ICRC: “The status of the companies themselves is not regulated by international humanitarian law.”⁸⁹

We also need to remember that PMSCs are not only used in armed conflict, which limits the application of international humanitarian law in this case. Humanitarian law cannot quite simply cover all the activities of 'mercenarism' carried out by PMSCs. Hence the need for specific regulation of mercenary activities at the international level.

4. The International Convention against the Recruitment, Use, Financing and Training of Mercenaries

The International Convention against the Recruitment, Use, Financing and Training of Mercenaries was adopted on 4th December 1989 by the UN General Assembly, in its resolution 44/34 (see Annex 1). It came into force on 20th October 2001.

The Convention makes provision for three types of offence: i) Recruitment, Use, Financing and Training of Mercenaries (art. 2), ii) any offences committed by the mercenary himself when he participates directly in hostilities or commits a concerted act of violence (art. 3.1) iii) attempting to commit an offence or being an accomplice (Art. 4). Moreover, States Parties “shall not recruit, use, finance or train mercenaries and shall prohibit such activities” (Art. 5).

⁸⁴ Cf. § 19 *Note by the United Nations High Commissioner for Human Rights on the first meeting of experts on the traditional and new forms of mercenary activities as a means of violating human rights and impeding the exercise of the right of peoples to self-determination*, presented at the 57th session of the Commission on Human Rights, E/CN.4/2001/18, dated 14 February 2001.

⁸⁵ Cf. *The Impact of Mercenary Activities on the Right of Peoples to Self-Determination*, UN High Commissioner for Human Rights, Fact Sheet n°28, October 2002, p. 18.

⁸⁶ Cf. *Note by the United Nations High Commissioner for Human Rights on the first meeting of experts...*, 57th session of the Commission on Human Rights, mentioned before, § 24.

⁸⁷ *Idem*, § 28.

⁸⁸ *Ibid.*

⁸⁹ Cf. ICRC, “Privatization of War: The outsourcing of military tasks”, dated 23 May 2006: www.cicr.org/eng/resources/documents/misc/privatisation-war-230506.htm

This Convention is the principal and currently the only legally binding instrument at the international level, but it suffers from two drawbacks: 1) it provides no mechanism for monitoring; 2) the fact that the Convention has so far only been signed and/ or ratified by 31 States⁹⁰ limits its scope (none of the major powers, neither the United States nor any of the States that make frequent use of mercenaries, have ratified the agreement).

Besides, in the interval between the adoption of the Convention and its coming into force (12 years!), with the creation of PMSCs, the definition of “mercenary” has been overtaken and is no longer relevant.

5. The Special Rapporteur on Mercenaries

On the recommendation of the General Assembly and the Economic and Social Council (ECOSOC), the former Commission on Human Rights (now Human Rights Council) established in 1987 a mandate for a Special Rapporteur to investigate the question of the use of mercenaries as a means of impeding the exercise of the right of peoples to self-determination.⁹¹ This mandate was renewed regularly until 2005 and was extended to cover 'new forms' of mercenaries⁹² The first holder of this mandate, the Peruvian Enrique Bernales Ballesteros, held the post until 2003, and made a study of mercenary activities in dozens of countries, and undertook more detailed investigations in some of them.⁹³ Faced with the new forms of mercenary activities, following the creation of PMSCs, he tried, with the help of a Working Group, to develop a new definition of 'mercenary' in order to bring the International Convention against the Recruitment, Use, Financing and Training of Mercenaries up to date.⁹⁴ However, the proposed definition has failed to obtain consensus.. In 2005, the Commission on Human Rights ended its mandate, replacing it by a Working Group of Experts (see below).

6. Working Group of Experts on Mercenaries

In 2005, the Commission on Human Rights replaced the mandate of the Special Rapporteur cited above with the Working Group of Experts). Composed of five experts, chosen in accordance with the geographical distribution of the UN⁹⁵, the mandate of this working group is among other things: “(a) To elaborate and present concrete proposals on possible complementary and new standards aimed at filling existing gaps, as well as general guidelines or basic principles encouraging the further protection of human rights, in particular the right of peoples to self-determination, while facing current and emergent threats posed by mercenaries or mercenary-related activities (...) (e) To monitor and study the effects on the enjoyment of human rights, particularly the right of peoples to self-determination, of the activities of private companies offering military assistance, consultancy and security services on the international market, and to prepare a draft of international basic principles that encourage respect for human rights by those companies in their activities.”⁹⁶

This mandate has been renewed twice by the current Human Rights Council. The Working Group of Experts has conducted missions in several countries (Afghanistan, USA, Honduras and the United

⁹⁰ They are: Germany, Angola, Saudi Arabia, Azerbaijan, Barbados, Belarus, Belgium, Cameroon, Congo, Costa Rica, Cyprus, Croatia, Cuba, Georgia, Guinea, Honduras, Italy, Libya, Liberia, Maldives, Mali, Morocco, Mauritania, Moldova, Montenegro, New Zealand, Nigeria, Uzbekistan, Peru, Poland, Qatar, Syria, Democratic Republic of the Congo, Romania, Senegal, Serbia, Seychelles, Surinam, Togo, Turkmenistan, Ukraine, Uruguay (See Annual Report of the Working Group, presented at the 10th session of the Human Rights Council, A/HRC/10/14, 21 January 2009.

⁹¹ Cf. *Resolution 1987/16* of the Commission on Human Rights, adopted 9 March 1987.

⁹² Cf. *inter alia*, *Resolution 2001/3* of the Commission on Human Rights, adopted 6 April 2001.

⁹³ Cf. South Africa, Angola, Cuba, El Salvador, United States of America, Nicaragua, Panama, United Kingdom and the former Yugoslavia. The mission reports are available at: www2.ohchr.org/english/issues/mercenaries/visits.htm

⁹⁴ Cf. *inter alia*, § 22 of the *Annual Report of the Special Rapporteur on Mercenaries*, 59th session of the Commission on Human Rights, E/CN.4/2003/16, dated 29 November 2002.

⁹⁵ The member states of the United Nations are divided up into five geographic groups: Asia, Africa, Eastern Europe, the West (besides Western Europe, this includes the United States, Canada, Australia, New Zealand, Israel and Turkey) and Latin America and the Caribbean.

⁹⁶ Cf. *Resolution 2005/2* of the Commission on Human Rights, adopted 7 April 2005.

Kingdom for example).⁹⁷ In September 2010 the Group presented a *draft convention on private military and security companies (PMSCs)* at the 15th session of the Human Rights Council.

The Working Group of Experts explained the need for the adoption of a new international legal instrument to establish standards for the regulation, supervision and control of PMSC activities, using the following arguments:⁹⁸

- i. the serious human rights violations committed by PMSC personnel;
- ii. the lack of transparency and of effective accountability of PMSCs;
- iii. the unregulated activities of PMSCs in the countries in which they operate;
- iv. the lack of clarity between the responsibility of the States - whether they are States of origin, Contracting States or Home States - and the PMSCs ;
- v. the fact that the definition of a mercenary as contained in Additional Protocol I to the Geneva Conventions and in the International Convention against the Recruitment, Use, Financing and Training of Mercenaries does not apply in general to PMSC staff;
- vi. the services provided by PMSCs do not lend themselves to self-regulation.

The Working Group makes it clear that the purpose of this legally binding agreement is not the “out-right banning of PMSCs but to establish minimum international standards for States parties to regulate the activities of PMSCs and their personnel.”⁹⁹ However, it does recommend “prohibiting the outsourcing of inherently State functions to PMSCs in accordance with the principle of the State monopoly on the legitimate use of force.”¹⁰⁰

Composed of six chapters and 49 articles, the draft Convention is the result of wide consultation, carried out by the working group in every continent.¹⁰¹ The draft Convention also provides for the establishment of a Committee to regulate, control and supervise the activities of PMSCs (see Annex 3). This draft Convention is to be reviewed by an open-ended intergovernmental working group, created for the purpose by the Human Rights Council for a period of two years.¹⁰² Given that certain countries, particularly in the West, are opposed to the Convention, the task seems fairly daunting.¹⁰³

B) At the regional level

The only specifically binding regional instrument in existence is the *Convention on the Elimination of Mercenaries in Africa* (see Annex 2), adopted in 1977 by the Organisation of African Unity (which became the African Union in 1999). This Convention came into force in 1985, and applies only to those African States which have ratified it.

The strength of this Convention lies in the fact that it expressly prohibits mercenaries and mercenarism (Article 6c) and that it defines it as a crime against peace and security in Africa (section 1.3), whether it is committed by an individual, group, association, state or representative of a State (Art. 1.2). It criminalises any support for the activities of mercenaries (art. 2).

The Convention also provides a set of obligations for States parties to take measures to eliminate the activities of mercenaries by enacting legislation to punish the crime of mercenarism, with the severest

⁹⁷ See: www2.ohchr.org/english/issues/mercenaries/wgvisits.htm

⁹⁸ Cf. §§ 32 to 38 of the *Report of the Working Group of Experts*, presented at the 15th session of the Human Rights Council, A/HRC/15/25, dated 5 July 2010.

⁹⁹ *Idem* § 39.

¹⁰⁰ *Ibid*, our emphasis.

¹⁰¹ See the following reports: A/HRC/7/7/Add.5, A/HRC/10/14/Add.3 and A/HRC/15/25/Add. 4 to 6. All the reports of the Working Group are available on the website of the UN High Commissioner of Human Rights: www2.ohchr.org/english/issues/mercenaries/index.htm.

¹⁰² Cf. *Resolution 15/26* of the Human Rights Council, adopted 1 October 2010.

¹⁰³ The following countries voted against this resolution at the Human Rights Council: Belgium, South Korea, Spain, United States of America, France, Hungary, Japan, Moldova, Poland, United Kingdom, Slovakia and Ukraine.

penalty, (including the death penalty, art. 7), to exchange information on mercenary activities, by undertaking to prosecute or extradite any person committing an offence under the Convention, and by offering to other States every possible assistance in respect of investigations and proceedings taken against the crime of mercenarism, etc. (Clauses 6 to 10). The Convention further provides for (an Inter-State complaint procedure whereby one State can bring a complaint against another State before any competent tribunal or body of the Organisation of African Unity or any competent international tribunal. (Art. 5).

The two main objections to the Convention are the following: i) it focuses almost exclusively on the issue of extraterritorial deployment of mercenaries and remains silent on internal deployment; ii) no African state has actually integrated the provisions of the Convention into its legal system.¹⁰⁴

According to the UN experts the OAU Convention “does not deal properly with” the issue of PMSCs.¹⁰⁵ African states are initiated a process to revise the Convention in order to put this right.¹⁰⁶

C) At national level

In many countries the activities of mercenaries and/ or PMSCs are not penalised. In others, mercenarism is permitted but it is not monitored effectively and there remains a grey area, as outlined by the Expert Working Group, between the responsibilities of the State and those of the PMSCs. In fact, the problem has reached the point where regardless of the political will of States, it is now virtually impossible to monitor the activities in this area and in any case there is no international register available.¹⁰⁷ For example, there are reportedly some 180, 000 PMSC employees, from over 100 countries, employed by 630 different companies, working for the USA in Iraq!¹⁰⁸ It should be noted that the United States has privatised so many military and intelligence functions that the Defence Secretary Robert Gates ignores the exact number of PMSC personnel working for the Pentagon.¹⁰⁹ Hence the need for legally binding regulations, both nationally and internationally, and for effective cooperation between States.

It is noteworthy in this regard that **South Africa** shows the political will to regulate the activities of PMSCs - its legislation is presented as exemplary by observers. South Africa certainly wishes to move beyond its apartheid past, which was marred by numerous mercenary activities, and to prevent its police force and soldiers from being enticed away by PMSCs.¹¹⁰ The Foreign Military Assistance Act 15

¹⁰⁴ Cf. §§ 44 and 45 of the *Note by the United Nations High Commissioner for Human Rights on the first meeting of experts on the traditional and new forms of mercenary activities as a means of violating human rights and impeding the exercise of the right of peoples to self-determination*, presented at the 57th session of the Commission on Human Rights, E/CN.4/2001/18, dated 14 February 2001.

¹⁰⁵ Cf. § 29 of the *Report by the Special Rapporteur on mercenaries*, presented at the 61st session of the Commission on Human Rights, E/CN.4/2005/23, dated 18 January 2005.

¹⁰⁶ Cf. § 40 of the *Report of the Working Group of Experts*, presented at the 15th session of the Commission on Human Rights, A/HRC/15/25/Add.5, dated 2 June 2010.

¹⁰⁷ Cf. § 52 of the *Annual Report of the Working Group of Experts*, presented at the 10th session of the Human Rights Council, A/HRC/10/14, dated 21 January 2009.

¹⁰⁸ Cf. Christian Science Monitor of 18 July 2007, quoted in the *Annual Report of the Working Group of Experts*, presented at the 7th session of the Human Rights Council, A/HRC/7/7, dated 9 July 2008.

¹⁰⁹ See the article by Rupert Cornwell entitled “Does America need so many spooks?” published in *The Independent* on 22 July 2010.

¹¹⁰ “South Africa holds the world record in terms of the ratio of private police to state police: 250,000 private guards against 95,000 police officers in uniform. Several domestic security companies, such as Para, Target, Combat Force, Peace Force, Springbok, also employ former members of South African and Rhodesian special forces. Some of their employees were involved in attacks against activists of the African National Congress and in mercenary expeditions in Angola and the Seychelles.” (Cf. Marc-Antoine de Montclos, *Violences urbaines en Afrique du Sud et au Nigeria*, L'Harmattan, Paris, 1997, quoted in the article by Philippe Leymarie, mentioned before). Note that the number of South Africans engaged in Iraq is set to rise to 10,000 (See Written statement by Human Rights Advocates (HRA), presented at the 7th session of the Human Rights Council, A/HRC/7/NGO/11, 21 February 2008.

(Act on the Regulation of Foreign Military Assistance), adopted in 1998, aimed at countering such a development. The scope of the Act covers natural and legal persons, that is to say, individuals as well as private military companies, who offer military services abroad from within the territory of South Africa.¹¹¹ However, this law could not possibly have foreseen the way in which South Africans have been employed in Iraq.¹¹² Hence the adoption of Act 42 in 2005 to prohibit and regulate mercenary activities in areas of armed conflict.¹¹³ This law prohibits a whole range of mercenary-related activities (consultancy, financial or logistical support, personnel, or management, control and supervision of such activities). Furthermore, in line with international law, international humanitarian law and accepted norms relating to human rights, this law submits any individual (including permanent residents) or company providing assistance or security services during armed conflict to strict regulations and obliges them to obtain in advance authorisation from the appropriate state authorities.

Another interesting example is the model law adopted, at Russia's initiative, in November 2005 by the Parliamentary Assembly of the **Commonwealth of Independent States**. This law broadens the definition of mercenaries to take into account non-material incentives. It also applies to nationals of countries committed by foreign agents to act as mercenaries in their own country. Member states of this organisation are encouraged to adopt legislation on mercenaries along the lines of this model law.¹¹⁴

As for the **United States**, the Military Extraterritorial Jurisdiction Act (MEJA) of 2000 allows charges to be brought against private security companies for violations of human rights committed in the exercise of services provided to the Department of Defence or in support of Defence missions. With the MEJA Expansion and Enforcement Act of 2007, the law was extended to cover mercenary companies working for any federal agency whatsoever, including the U.S. Congress, the State Department or the CIA.¹¹⁵ Nevertheless, the majority of violations, perpetrated by mercenaries hired by the North American Defence Department, go unpunished.¹¹⁶ In addition, the regulatory framework for the activities of these companies in the U.S. is the ITAR (International Traffic in Arms Regulations, part of the Arms Export Control Act), which regulates the issuing of licenses and permits for private security services abroad, but provides for no independent monitoring powers or means of control once the permit has been issued.¹¹⁷

It should be noted that the Expert Working Group, following their recent mission to the USA, recommended to the United States authorities, among others, to :

- i) expand the reach of United States criminal jurisdiction over contractors abroad, either by amending the Military Extraterritorial Jurisdiction Act or by enacting new legislation specific to private contractors of the Government of the United States abroad;

¹¹¹ Cf. §§ 52 and 53 of the *Note by the United Nations High Commissioner for Human Rights on the first meeting of experts on the traditional and new forms of mercenary activities as a means of violating human rights and impeding the exercise of the right of peoples to self-determination*, presented at the 57th session of the Commission on Human Rights, E/CN.4/2001/18, dated 14 February 2001.

¹¹² Cf. § 29 of Report E/CN.4/2005/23.

¹¹³ See *Prohibition of Mercenary Activities and Prohibition and Regulation of Certain Activities in Areas of Armed Conflict Bill*: www.info.gov.za/view/DownloadFileAction?id=66096

¹¹⁴ Cf § 40 of the Annual Report of the Working Group, presented at the 4th session of the Human Rights Council, A/HRC/4/42, dated 7 February 2007.

¹¹⁵ Written statement submitted by Human Rights Advocates (HRA), to the Working Group, 21 February 2008, A/HRC/7/NGO/11.

¹¹⁶ Cf. "Private Security Contractors at War. Ending the Culture of Impunity", in *Human Rights First report 2008*: www.humanrightsfirst.org

¹¹⁷ Deborah Avant, *The market for force. The consequences of privatizing security*, Cambridge University Press, New York, 2005

- ii) renounce the inclusion of immunity provisions in bilateral agreements for United States contractors working abroad;
- iii) establish a specific system of federal licensing of PMSCs and especially of their contracts for operations abroad, as well as a centralized register of all contracts to private military and security companies.¹¹⁸

¹¹⁸ See § 99 of the *Report by the Working Group of Experts on the Mission to the United States of America*, presented at the 15th session of the Human Rights Council, A/HRC/15/25/Add.3, dated 15 June 2010.

VIII. CONCLUSION

As we have seen, the activities of mercenaries pose many problems and, lead to serious human rights violations with the perpetrators of these violations being rarely prosecuted.

Apart from the serious violations of human rights and the untold suffering inflicted on the peoples, mercenary activities also undermines the functioning of democracy.

Furthermore, the contemporary form of mercenarism represented by PMSCs threatens the power of the state and erodes the traditional concept of state sovereignty and its monopoly on the use of force. Most states have already 'abdicated' their power in the economic arena, leaving the field open to market forces. Handing over responsibility for security to the private sector would be extremely dangerous and lead to an end to the rule of law.

It is for this reason that the UN Special Rapporteur on mercenaries says: "The State may privatize many things and many services that lie within its competence, but not that which constitutes its very *raison d'être*. If it hands over such authority to a private company, and a foreign private company at that, it is agreeing to a limitation of State sovereignty, with the further drawback that the substantive legal rights of its inhabitants may be impaired and basic human rights principles and norms of humanitarian law may be violated."¹¹⁹

States, in accordance with their obligations under international law in general, international humanitarian and human rights law in particular, are required to protect all persons, to prevent and, where appropriate, punish all human rights violations. The adoption of the draft Convention on PMSCs, proposed by the Working Group of Experts would allow States to "recover" an area that is vital to their sovereignty.¹²⁰

¹¹⁹ Cf. § 74 of the *Annual Report by the Special Rapporteur on mercenaries*, presented at the 54th session of the Commission on Human Rights, E/CN.4/1998/31, dated 27 January 1998.

¹²⁰ See Cetim's Booklet entitled: *The right of peoples to self determination and to permanent sovereignty over their natural resources seen from a human rights perspective*, 2010: www.cetim.ch/en/publications_autodetermination.php

IX. ANNEXES

- 1) International Convention against the Recruitment, Use, Financing and Training of Mercenaries
- 2) Convention for the Elimination of Mercenaries in Africa
- 3) Draft Convention on Private Military and Security Companies (PMSC)

Acknowledgements

This report received support from the state (canton) of Geneva, the Municipality of Meyrin, Loterie romande, Ritimo, Bread For All (Pain pour le Prochain) and Emmaüs International. It is part of the CETIM's Human Rights Program, itself supported by (November 2010) the Swiss Agency for Development and Cooperation (DDC), the cities of Geneva and Lausanne and the municipalities of Lancy, Plan-les-Ouates and Onex and Caritas Switzerland.

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