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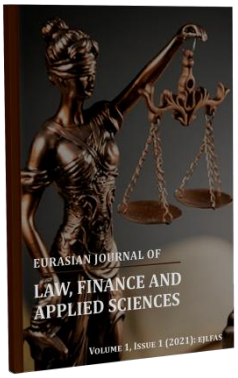

INTERNATIONAL LEGAL BASIS FOR PROSECUTION OF MERCENARISM IN ARMED CONFLICTS ABROAD

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ABSTRACT

Mercenarism has long been considered a destabilizing factor in armed conflicts, undermining sovereignty and fueling violence. Despite its global relevance, prosecuting mercenaries remains a complex challenge due to varying legal definitions, enforcement gaps, and political considerations. This article explores the international legal framework governing mercenarism, its enforcement mechanisms, and the obstacles to prosecution. Particular focus is placed on the United Nations (UN) conventions, regional agreements, and customary international law, alongside recommendations for enhancing accountability.

Introduction. Mercenaries, often defined as individuals hired to fight in conflicts for private gain, pose significant challenges to international peace and security. While the phenomenon is not new, its relevance has increased with the privatization of military services and the proliferation of non-state armed groups. The phenomenon of mercenarism, defined as the use of private individuals to engage in armed conflicts for financial gain, dates back to antiquity. However, its resurgence in contemporary armed conflicts, facilitated by globalization and the privatization of security, has brought the issue to the forefront of international law. The international legal framework governing mercenarism is rooted in treaties, customary law, and state practices. However, the enforcement of these provisions remains inconsistent. Mercenaries, often operating outside the control of state or international authorities, pose a unique challenge to the principles of sovereignty, non-intervention, and the rule of law in armed conflicts. Mercenarism's decline resulted from the institutionalization of a new international norm of state control over nonstate violence in the international system. The norm reflected a new set of state practices developed by leading states in the context of the French Revolutionary War. In the course of the nineteenth century, these practices were universalized in the state system, setting a new standard for competent statesmanship.[1] This article examines the international legal frameworks governing mercenarism, the challenges in prosecuting mercenaries, and the evolving role of states and

[1] State Practices, International Norms, and the Decline of Mercenarism. Janice E. Thomson. *International Studies Quarterly*, Volume 34, Issue 1, March 1990, Pages 23–47

international organizations in addressing this issue. Special attention is given to international conventions, customary international law, and the jurisprudence of international criminal tribunals. Even in the current global crisis, political instability prevails in several parts of the world, including Israel-Palestine, Russia-Ukraine, Syria and others, which further increases the relevance of the topic.

Defining Mercenarism: Legal and Operational Perspectives. The main purpose of international humanitarian law is to provide protection to persons in armed conflicts. In this respect, it is rare that it sidelines mercenaries. The provisions regarding mercenaries have a rather symbolic significance; they are the subject of particular attention and are accorded less protection than combatants. The first convention referring to mercenaries was the Hague Convention of 1907 respecting the rights and duties of neutral powers and persons in case of war on land.[2] It mainly deals with mercenary activity in terms of neutrality. It is prohibited to form corpses of combatants or open recruiting agencies on the territory of a neutral state to assist combatants in an armed conflict. It places a direct responsibility on neutral states to ensure that these acts do not take place on their territories. A person enlisted as a mercenary in favour of a state cannot claim neutrality, although he is still entitled to the protection afforded to the nationals of a belligerent state. This article reflects what the international doctrine thought about mercenaries. It was considered a lawful practice on the condition that the state was not involved. Mercenaries are not mentioned in the Geneva Conventions. Nevertheless, they could be brought under the scope of art. 4 Geneva Convention III. They are granted prisoner of war treatment if they form part of the armed forces, militias or other volunteer forces whose members are entitled to such treatment.[3] The term mercenary appears for the first time in a treaty in the First Additional Protocol. It only applies to international armed conflicts. As stated above, only 163 countries ratified this Protocol. However, the ICRC argues that art. 47 A.P. I reflects customary international law.[4] They were only in 1977 literally mentioned in a treaty due to the fact that they largely had the same rights as any other soldier. No specific provisions were needed. However, since 1977 and the appearance of the First Additional Protocol, the legal position of mercenary soldiers definitely changed. According to art. 47 A.P. I no mercenary shall have the status of prisoner of war. The provision also gives a definition:

"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

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[2] Hague Convention respecting the rights and duties of neutral powers and persons in case of war on land, 18 October 1907, *League of Nations Treaty Series*, vol. 54, p. 540. (Hereafter: Hague Convention on the rights and duties of neutral powers and persons in case of war on land).

[3] Art. 4, G.C. III; MICCOLI, M., "Mercenaries: unlawful soldiers", http://papers.ssrn.com/sol3/papers.cfm?abstract_id=279631 (consultation 15 March 2010).

[4] FALLAH, K., "Corporate actors: the legal status of mercenaries in armed conflict", *International Review of the Red Cross* 2006, 599-611.

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."[5]

Despite this definition, challenges arise due to its restrictive criteria, making it difficult to classify individuals as mercenaries in practice. Many private military and security contractors (PMSCs) operate in legal grey zones, further complicating enforcement efforts. Art. 47 was the result of a heated debate. Some authors say that many African and Eastern European states were in favour of a more severe text. This would have obliged the states to prohibit the recruitment and training of mercenaries.[6] However, other authors believe that the provision was inserted to calm down the African countries and was intentionally narrow in its scope of application. Since to be qualified as a mercenary, one has to meet all six conditions. It is virtually

impossible to find anyone who meets all these conditions. One of the most important conditions is the one that refers to the motivation. It is their motivation to take part in the hostilities that distinguishes mercenaries from other actors in armed conflicts. Art. 47 does not make a distinction between civil wars and international wars. It condemns mercenary activities in a general way. In that respect, it is a positive stipulation. Nonetheless, there is also a lot of criticism on the provision. In the first place, some people disapprove the definition of material compensation. The material compensation has to be in excess of that paid to combatants belonging to the armed forces of the state. It could be interpreted in such a way that its meaning would be lost. Any state can establish by itself the amount of compensation in excess of that paid to the other forces of the state. In that respect, it will depend on each state to qualify a combatant as a mercenary or a lawful combatant.

International Legal Frameworks

International Humanitarian Law, mainly comprising the 1949 Geneva Convention, the 1977 Additional Protocols and the Hague Conventions of 1899 and 1907, is still the most eff ective legal instrument in guaranteeing assistance and protection for the victims of armed confl ict. It also limits the use of certain methods of warfare. However, for International Law to be eff ective and applicable to current situations, it needs to adapt and evolve in the same way that the nature of armed confl icts changes.

1. United Nations (UN) Instruments

The International Convention against the Recruitment, Use, Financing, and Training of Mercenaries (1989) is the primary international treaty addressing mercenarism. It criminalizes the recruitment, use, financing, and training of mercenaries and obligates states

[5] Art. 47, Additional Protocol I.
[6] Art. 47, A.P. I; MICCOLI, M., "Mercenaries: unlawful soldiers". http://papers.ssrn.com/sol3/papers.cfm?abstract_id=279631 (consultation 15 March 2010).

to adopt domestic measures to prosecute offenders. However, its ratification remains limited, reducing its effectiveness.

In 1967, the UN Security Council adopted its first resolution in which it condemned 'any State which persists in permitting or tolerating the recruitment of mercenaries... with the objective to overthrow the governments of the United Nations'. It called upon governments 'to ensure that their territory as well as their nationals are not used for the planning of subversion, recruitment, training and transit of mercenaries'. Following a series of resolutions condemning the use of mercenaries, the UN General Assembly, on 14 December 1979, decided on a resolution, sponsored by 26 member states, to place an item for 'drafting an international convention against the recruitment, use, financing and training of mercenaries' on the agenda of its thirty-fourth session in 1980.[7] It invited all member states to communicate to the Secretary General of the UN their views and comments on the need to elaborate urgently such a convention. It also called upon all states to ensure by both administrative and legislative means that the territories under their control would not be used for the planning of subversion and recruitment, assembly, financing, and using of mercenaries for the overthrow of the government of any state.[8]

The UN General Assembly has also passed resolutions condemning mercenarism, emphasizing its destabilizing impact on states and its violation of self-determination principles. These resolutions underscore the political will to address the issue but lack binding force.

2. Regional Instruments

Regional frameworks have played a complementary role. The Organization of African Unity (OAU) Convention for the Elimination of Mercenarism in Africa (1977) explicitly criminalizes mercenary activities and reflects the continent's historical experiences with mercenaries during decolonization and post-independence conflicts.

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

[7] UN Doc A/35/366/Add.1, p8 para. 4
[8] Allaoua Layeb, 'The need for an international convention against mercenaries and mercenarism', The African Journal of International and Comparative Law, October 1989, p472-473

illegitimate actors, whilst allowing the legitimate private sector to continue their positive work in support of peace and stability, unhindered.[9]

3. Customary International Law

Although customary international law recognizes the prohibition of mercenarism, its application remains ambiguous. State practice and opinio juris (the belief that an action is obligatory under international law) vary significantly, leading to inconsistencies in enforcement.

Henckaerts and Doswald-Beck compiled and identifi ed the norms of international humanitarian law that can today be considered customary law. Thanks to their extensive work clarifying this area, we can now consult the rules of the Geneva Convention that are customary law. The authors organised these customary laws of international humanitarian legislation into a series of rules. Number 147 states:

"A state is responsible for violations of humanitarian international law which can be attributed

to it, including:

(a) Violations committed by its organs, including its armed forces;

(b) Violations committed by persons or bodies capacitated by the state to exercise government authority;

(c) Violations committed by persons or groups acting under the instructions of the state, or under its direction or control; and

(d) Violations committed by private persons or groups which it acknowledges and adopts as its own conduct.[10]

This rule is recognised as a norm of customary law applicable to violations committed both in international and domestic armed conflicts. Customary law is generally applicable, irrespective of whether the states have submitted to the rule through an international treaty.

However, the Articles on State Responsibility for Internationally Wrongful Acts[11] require that it should involve the conduct of a state organ. The Articles on State Responsibility establish a number of general principles to determine conducts that can be attributed to the state in the light of international law. It contains specifi c rules on the attribution of wrongful acts, always bearing in mind the exercise of public function. Proving the link between military security companies and the state would not be easy.

Challenges in Prosecuting Mercenarism

1. Ambiguities in Legal Definitions

The restrictive definitions of mercenaries under AP I and the 1989 UN Convention exclude many actors engaged in similar activities, such as PMSCs. This legal loophole enables individuals and corporations to evade accountability.

2. Jurisdictional Challenges

[9] WORKING TOWARDS EFFECTIVE LEGISLATIVE AND REGULATORY SOLUTIONS FOR THE PRIVATE SECURITY INDUSTRY IN AFRICA. J J Messner

[10] 1 Henckaerts, J.M. and Doswald-Beck, L., "Customary International Humanitarian Law", p.530.

[11] Dumberry, P. , "New State Responsibility for Internationally Wrongful Acts by an Insurrectional Movement", in European Journal of International Law, vol.17, no.3, pp.605-621.

Prosecuting mercenaries often involves transnational dimensions, requiring cooperation between states. Jurisdictional conflicts and the absence of universal jurisdiction over mercenarism hinder effective enforcement.

3. Political and Diplomatic Constraints

Mercenaries are frequently employed by powerful states or non-state actors, complicating efforts to prosecute them. Geopolitical considerations often influence the willingness of states to cooperate in legal proceedings.

The Role of International Organizations and States

1. International Criminal Tribunals

While international criminal tribunals, such as the International Criminal Court (ICC), primarily focus on war crimes, crimes against humanity, and genocide, they could play a complementary role in addressing mercenarism if linked to these crimes. However, the ICC lacks explicit jurisdiction over mercenarism as a standalone offense.

2. Domestic Prosecution

States bear the primary responsibility for prosecuting mercenaries under their domestic laws. Some states, such as South Africa and Switzerland, have enacted specific legislation criminalizing mercenarism. However, enforcement remains inconsistent.

3. Regulation of PMSCs

The Montreux Document (2008) and the International Code of Conduct for Private Security Service Providers (ICoC) represent voluntary initiatives aimed at regulating PMSCs. While not legally binding, they provide guidelines for states and corporations to ensure accountability and respect for human rights.

Recommendations for Strengthening the Legal Framework

1. **Harmonization of Definitions**: Expanding and harmonizing the legal definitions of mercenarism to include contemporary forms of private military and security activities is crucial.
2. **Enhanced International Cooperation**: Strengthening mechanisms for mutual legal assistance and extradition in cases involving mercenaries.
3. **Integration with International Criminal Law**: Expanding the jurisdiction of international criminal tribunals to address mercenarism linked to war crimes and crimes against humanity.
4. **Increased Ratification of International Conventions**: Encouraging states to ratify the 1989 UN Convention and the OAU Convention to enhance their global applicability.

Conclusion. Mercenary warfare remains a significant concern in the context of modern armed conflict. While international law has attempted to limit and criminalize the use of mercenaries, their role in contemporary conflicts continues to present legal, ethical, and humanitarian challenges. The lack of accountability for mercenaries, combined with their tendency to exploit conflicts for profit, makes them a destabilizing force in the international system.

Efforts to address the crime of mercenary warfare will require stronger enforcement of international treaties, greater accountability for private military companies, and a concerted effort by states and international organizations to prevent the recruitment and use of

mercenaries in armed conflict. Until such measures are fully implemented, the threat posed by mercenaries to global peace and security will remain a serious concern.

Mercenarism in armed conflicts abroad represents a persistent challenge to international law and global security. While existing legal frameworks provide a foundation for prosecution, significant gaps and enforcement challenges remain. Strengthening international cooperation, aligning legal standards with contemporary realities, and addressing the root causes of mercenarism are essential to ensuring accountability and upholding the rule of law in armed conflicts.

While the international legal framework provides a foundation for addressing mercenarism, significant gaps remain in enforcement and accountability. Bridging these gaps requires coordinated efforts at the international, regional, and national levels. By strengthening legal definitions, enforcement mechanisms, and cooperation among states, the international community can better address the challenges posed by mercenarism in armed conflicts.

Future research should focus on the evolving nature of mercenarism and the role of non-state actors, particularly PMSCs, in shaping the legal and operational landscape. Only through concerted efforts can the international community address the complexities of mercenarism and its impact on global peace and stability.

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