

Towards the revision of the 1977 OAU/AU Convention on the Elimination of Mercenarism in Africa

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The revision of the 1977 Organisation of African Unity's Convention on the Elimination of Mercenarism in Africa (Mercenary Convention) is now long overdue. The existence of the Mercenary Convention has over the years failed to eliminate mercenarism in Africa, among others as a result of the manner in which it defines a 'mercenary'. The problem is exacerbated by the rapid growth of the private security sector in the form of the private military/security company (PMSC), which to a large extent arguably represents a new form of 'mercenary' outfit that is technically not covered by the Mercenary Convention. Because the Mercenary Convention was adopted during a different epoch in African history there is now a need to take stock of its successes and failures and determine how it can best be revised to address the new security challenges in Africa. In this contribution the need for the revision of the Mercenary Convention is discussed. Given the difficulties and challenges presented by the Mercenary Convention, the contribution advocates the drafting of two conventions, one focusing on the regulation of PMSCs and the other focusing on the elimination of mercenarism in Africa.

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Introduction

In May 2004 the African Union convened a meeting of experts to review Organisation of African Unity/African Union conventions and protocols, including the 1977 OAU Convention on the Elimination of Mercenarism in Africa (Mercenary Convention). The recommendations of the meeting were approved by the executive council of the AU in June 2004. The meeting mandated the chairperson of the AU commission to undertake preliminary studies to determine the best way to implement the recommendations, and authorised him to convene meetings of experts to examine the recommendations and to develop the necessary legal instruments. To date nothing concrete has happened, at least in the public domain, regarding the revision of the Mercenary Convention. Nevertheless, the fact that the AU realised the need to review the Mercenary Convention is most welcome as it is aimed at addressing contemporary African challenges.

In this contribution the need for the revision of the Mercenary Convention is discussed against the background of the challenges presented by the definition of a ‘mercenary’ as set out in article 1. First the requirements that have to be met for a person to be defined as a ‘mercenary’ in terms of the Mercenary Convention are explored. Second, the question of whether a natural or artificial person could be defined as a ‘mercenary’ is discussed. Third, the way forward in view of the challenges presented by the present is explored, as is the question of private military/security companies (PMSCs) whose emergence has given rise to debates and policy challenges regarding their control and supervision. This is followed by a conclusion on the matter.

The Mercenary Convention in essence

That the Mercenary Convention is outdated is beyond question. According to article 1 of the Mercenary Convention, a mercenary is any person who:

- Is specially recruited locally or abroad in order to fight in an armed conflict
- Does in fact take a direct part in the hostilities
- Is motivated to take part in the hostilities essentially by the desire for private gain and in fact is promised by or on behalf of a party to the conflict material compensation
- Is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict
- Is not a member of the armed forces of a party to the conflict

- Is not sent by a state other than a party to the conflict on official mission as a member of the armed forces of the said state

This definition is not without flaws. For instance, the fact that the conditions are cumulative makes it difficult to apply and it offers little help in addressing PMSCs. In the following sections each of the requirements is analysed.

Requirement 1: A person specially recruited locally or abroad to fight in an armed conflict

The Mercenary Convention labels a person as a mercenary if and only if he fights in an armed conflict. The person must in addition be specially recruited locally or abroad.

An immediate problem arises from the fact that the Mercenary Convention does not define an armed conflict. Furthermore, the Mercenary Convention does not make a distinction between an international and non-international armed conflict, while this is one of the distinctions made under international humanitarian law. The reason why such a distinction is important is because the definition of a mercenary given under international humanitarian law is provided in Additional Protocol I to the Geneva Conventions of 12 August 1949, relating to the protection of victims of international armed conflicts, of June 1977, and this is an instrument that deals with 'international armed conflicts' as opposed to non-international armed conflicts. The presupposition is therefore that mercenaries are only capable of featuring in international armed conflicts since they are governed by an instrument focusing on international armed conflicts.

According to the International Committee of the Red Cross (ICRC 2002:4), 'international armed conflicts' refer to fighting between the armed forces of at least two states as well as wars of national liberation, while a non-international armed conflict is defined as fighting on the territory of a state between the regular armed forces and identifiable armed group(s), or between armed groups fighting one another. In order to be considered a non-international armed conflict, the ICRC states that the fighting must reach a certain level of intensity and extend over a certain period of time.

It is doubtful that the drafters of the Mercenary Convention intended mercenaries featuring only in armed conflicts, whether defined as international or otherwise, to be covered by the convention. Mercenaries operating where no armed conflict, in the technically defined sense, is taking place – for example, mercenaries recruited to overthrow a state which is not currently engaged in an armed conflict – are as a result arbitrarily absolved from being labelled mercenaries under the Mercenary Convention.

Requirement 2: A person must in fact take a direct part in the hostilities

This requirement consists of two conditions, namely *take a direct part* and *hostilities*, both of which present problems.

The first problem is that the Mercenary Convention unfortunately does not define what ‘taking a direct part’ means. The absence prompts one again to seek answers in international humanitarian law. While the basic documents of international humanitarian law do not provide answers, the Commentary on Additional Protocol I to the Geneva Conventions does. It defines direct participation as ‘acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of enemy forces’ (Pilloud & Pictet 1987:619). One problem with this meaning is the use of the word ‘war’, which the Mercenary Convention avoids, instead referring to ‘armed conflict’. It must be noted that African wars are not necessarily wars in the true sense of the word and ‘the nature of the actors in Africa’s wars rarely conforms to the conventional conception of organized, hierarchical and disciplined professional armies who fight in identifiable military uniform’ (Jackson 2006:19). This is clearly a challenge, for it is only if the word ‘war’ is taken to also mean armed conflict that this definition of direct participation could be invoked in distilling the meaning of a mercenary in the Mercenary Convention.

The Commentary adds that a distinction should be made between direct participation and participation in the war effort (1945). It cites as an example a worker in a munitions factory who is certainly assisting the war effort and building the capacity of the armed forces to defeat the enemy. For the purposes of international humanitarian law, however, such a worker is not considered to be a direct participant in hostilities. In line with this principle, for a person to be defined as a mercenary he or she must be physically present in the theatre of armed conflict and must in essence cause (or be likely to cause) actual harm to the personnel and equipment of the adversary. However, this must occur within the context of ‘hostilities’ and not during peacetime and therefore persons acting outside such a context cannot be considered to be mercenaries, either.

Direct participation must also be informed by the preamble to the Mercenary Convention, which relates direct participation to the objective of undermining the independence, sovereignty, territorial integrity and harmonious development of member states of the AU. It must furthermore pose a threat to the legitimate exercise of the right of African people under colonial and racist domination to their independence and freedom (parr. 2 and 3 of the preamble to the Mercenary Convention).

No definition of *hostilities* is provided in the Mercenary Convention. Neither is international humanitarian law helpful in this regard, although it is a term that

appears in numerous articles of its basic documents.¹ The introduction of the word hostilities in the second requirement seems to indicate that it is interchangeable with armed conflict, as used in the first requirement. On the assumption that the word hostility could also mean aggression, the AU Non-Aggression and Common Defence Pact² may shed some light on the matter. In terms of article 1(c) of the Pact, aggression means the:

... use, intentionally and knowingly, of armed force or any other hostile act by a State, a group of States, an organization of States or non-State actor(s) or by any foreign or external entity, against the sovereignty, political independence, territorial integrity and human security of the population of a State Party to this Pact which is incompatible with the Charter of the United Nations or the Constitutive Act of the African Union.

The Pact (art 1(n)) refers to the Mercenary Convention's definition (art 1(c)(vii)) of a mercenary. According to the Pact an act of aggression, regardless of a declaration of war by a state, group of states, organisation of states, non-state actor(s) or any foreign entity includes among others the sending by, or on behalf of a member state or the provision of any support, to mercenaries. A mercenary, therefore, must intentionally and knowingly use armed force or perform any other hostile act against the sovereignty, political independence, territorial integrity and human security of the population of a state that is party to the Pact. Aggression is also a crime within the jurisdiction of the International Criminal Court (ICC) (art 5(1)(d) of the Rome Statute of the ICC). The Hague Regulations (annexed to the Hague Convention IV respecting the laws and customs of war on land (1907)) also provide an extensive list of what constitutes hostilities in section II, entitled Hostilities.

According to Verri (1992:57), hostilities may be defined as follows:

Acts of violence by a belligerent against an enemy in order to put an end to his resistance and impose obedience. Positive international law does not define hostilities but often uses the word in, for example, the phrases: 'Opening of hostilities, conduct of hostilities, acts of hostility, persons taking or not taking part in hostilities, effects of hostilities, end of hostilities.'

Once again, the hostilities in which a person must take direct part must be understood in context, and the preamble (parr. 2 & 3) of the Mercenary Convention is pertinent in this regard. The hostilities must be those which first, undermine the independence, sovereignty, territorial integrity and harmonious development of African states (that is, member states of the AU), and second, pose threats to the legitimate exercise of the

right of African people under colonial and racist domination to their independence and freedom.

Requirement 3: A person must be 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

Having laid down the requirements of being specially recruited in order to fight in an armed conflict and in fact taking direct part in the hostilities, the third requirement goes on to deal with the motives for engaging in such an enterprise, namely the desire for private gain in the form of material compensation. The Mercenary Convention does not specify the forms of material compensation, which means that any form, be it in cash or in kind, would be included. The second part of the requirement is that the material compensation must be promised by or on behalf of a party to the conflict.

This requirement is not without shortcomings. First, should such a 'desire' be present during the special recruitment exercise or during the direct participation? The Mercenary Convention does not state when a person should entertain such a desire in order to fall within the ambit of the provision. Second, what if such a desire is absent but suddenly emerges during the direct participation? Consider the case of a person who is not necessarily 'specially recruited' but is coerced to fight in an armed conflict (as in the case of child soldiers), initially without any desire for private gain whatsoever. What if, in the middle of the operation, such a desire emerges? Could such a person be said to be a mercenary? Third, is it even possible to prove such motivation? A motivation in this context is a form of an intention. Under criminal law intention can take many forms, a discussion of which is beyond the scope of this paper. Suffice it to say that such an intention might be very difficult to prove.

Assuming such a 'desire' is present when the recruitment exercise is undertaken and suddenly ceases to exist in the middle of the hostilities, could this person be said to be a mercenary? Put differently, must such a desire be present throughout the direct participation in the hostilities or will it suffice if it is present at any point in time, to render the person a mercenary?

The second part of the provision is that the promise (for material compensation) should be made by or on behalf of a party to the conflict. If the party making such a promise is not a party or does not promise on behalf of a party to the conflict, then the person so recruited is not a mercenary. In terms of the Mercenary Convention parties who are not taking part in the conflict or acting on behalf of such parties may recruit persons, who then will not fulfil the requirements for a mercenary, and accordingly cannot be defined as a mercenary in terms of the Mercenary Convention.

Requirement 4: A person must neither be a national of a party to the conflict nor a resident of territory controlled by a party to the conflict

While the recruitment may take place locally or abroad, the recruited person must neither be a national nor a resident of a controlled territory. The words ‘national of a party’ suggests that such a party is a state because a person can only be a national of a state and nothing else. The problem with this requirement is the fact that each state determines under its own laws who qualifies as nationals. The Mercenary Convention does not give a definition of a national in this context. Of course, there are certain recognised grounds for the conferment of nationality which are followed by most states, generally birth (*jus soli*), descent (*jus sanguinis*) and naturalisation following upon a period of residence (Dugard 2005:283).

Second, the person must also not be a resident of the territory controlled by a party to the conflict. If the person who is not a national in terms of the law of the state taking part in the conflict takes up residency in a territory controlled by a party to the armed conflict, the mercenary tag in terms of the Mercenary Convention automatically falls away. The residency issue is further complicated by the term ‘control’. It is not clear why a party to the conflict should necessarily control the territory in which the person must not be a resident. In the event that a party to the armed conflict is not in control of the territory in which the person is resident, and that person is recruited, he or she cannot be treated as a mercenary in terms of the Mercenary Convention.

Requirement 5: A person must not be a member of the armed forces of a party to the conflict

This requirement means that as soon as a person who is not a national of a party to the armed conflict nor a resident of the territory controlled by a party to the conflict becomes ‘a member of the armed forces of a party to the conflict’, they would not qualify as a mercenary, for they would no longer fulfil this requirement. Thus, a person alleged to be a mercenary would only have to prove membership of armed forces of a party to the conflict for the mercenary tag not to be applicable.

The armed forces could be either those of a state or rebel group, and membership, too, may take various forms depending on the procedures, because the Mercenary Convention does not define ‘armed forces of a party to the conflict’. However, Additional Protocol I to the Geneva Convention (art 43(1)) states that the

... armed forces of a party to a conflict consists of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall

be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict.

In terms of this article of Additional Protocol I it is only members of the armed forces of a party to the conflict, with the exception of medical personnel and chaplains (see art 33 of the Geneva Convention (III)), that are combatants and have a right to participate directly in hostilities. Therefore only persons who are not part of the armed forces of a party to the conflict as defined in and elaborated on in Additional Protocol I can be alleged to be mercenaries.

Requirement 6: A person must not be sent by a state other than a party to the conflict on official mission as a member of the armed forces of the said state

This last requirement suggests that only a party to the conflict may send a person on official mission as a member of the armed forces of the said state. By official mission the requirement means a mission authorised by the relevant state. It would appear that the ‘party to the conflict’ in this requirement means a state, so while a state may make use of such a person, a non-state actor apparently may not. Thus, if a non-state actor uses a person in such a capacity, it would imply that that person is a mercenary. In support of this point, Singer has also argued that the Mercenary Convention seeks to allow African governments to continue to hire non-nationals, as long as they are used to defend the governments from ‘dissident groups within their own borders’, while disallowing their use against any other rebel group that the OAU supported, such as the African National Congress (Singer 2003:529).

From this requirement it is clear that if African states recruit a person who satisfies requirements 1 to 5, discussed above, such a person cannot be said to be a mercenary if requirement 6 is not met. This requirement introduces double standards in the sense that while it disallows the use of mercenaries against African states, they are allowed to use them within the confines of an ‘official mission’. With the emergence of PMSCs it could be argued that while their use by African governments against elements which seek to undermine their independence, sovereignty, territorial integrity and harmonious development is allowed, their use by those elements is also not prohibited outright.

**The mercenary:
The natural person or the artificial person?**

Article 1(1) of the of the Mercenary Convention refers to ‘any person’ who is capable of being recruited, who can fight, who desires private gain, who is not a national or resident, and who is not a member of the armed forces. From this definition a mercenary is clearly a natural person and is defined as such by article 1(1) in terms of his or her status as a natural person.

The assertion is supported by article 3, which states that mercenaries cannot 'enjoy the status of combatants' and are not 'entitled to the prisoner of war status'. Again, any juridical persons are excluded. But the Mercenary Convention does not stop there, for article 1(2) and article 1(3) do include juridical persons.

Article 1(2) states that the crime of mercenarism is committed by the individual, group or association, representative of a state and the state itself, who, with the aim of opposing by armed violence a process of self-determination, stability or territorial integrity of another state, undertakes certain acts. In the absence of such an aim there is no crime of mercenarism. However, the absence of a definition a 'process of self-determination' is unfortunate, because whether it refers to external self-determination, relating to the right to secede and form a new state, or to internal self-determination, relating to the right to choose one's own political status, to freely pursue a particular economic, social and cultural policy and to choose and participate in the government of a state, is open to interpretation (Gumedze 2007:14). What is clear, however, is that in terms of this article, an act of mercenarism can be committed by a state – thus by a juridical person. The proscribed acts listed under article 1(2) of the Mercenary Convention are first, sheltering, organising, financing, assisting, equipping, training, promoting, supporting, or in any manner employing bands of mercenaries; second enlisting, enrolling or trying to enrol in the said bands; and third allowing the sheltering, organising, financing, assisting, equipping, training, promoting, supporting, or in any manner employing bands of mercenaries, in any territory under its jurisdiction or in any place under its control or affords facilities for transit, transport or other operations of the above-mentioned forces.

There is a further recognition of a mercenary as a juridical person who commits a crime of mercenarism in terms of the definition in article 1(3) of the Mercenary Convention. Arguably through the latter, PMSCs who fulfil the conditions laid down under article 1(1) of the Mercenary Convention may be deemed to be mercenaries as their juridical nature is recognised under article 1(3). This may be ascribed to the fact that the drafters of the Mercenary Convention did not at the time envisage the emergence of PMSCs, which have now become major players in the field of security. As was noted elsewhere, only PMSCs with the sole aim of 'opposing by armed violence a process of self-determination, stability or the territorial integrity of another state' would be deemed to be mercenaries (Gumedze 2007:13).

The crime of mercenarism is considered to be a crime against peace and security in Africa. It is a crime that violates the human (or peoples') right to peace and security. The Mercenary Convention is the only instrument in Africa which gives expression to this view. It is however not clear why the definition of a mercenary is confined to a natural person as provided for under article 1(1), and its commission extends from the

individual and groups to state representatives and states themselves under article 1(2) and to natural and juridical persons under article 1(3) of the Mercenary Convention. The crime of mercenarism is considered to be neither a ‘war crime’ nor a grave crime in terms of the Rome Statute of the ICC (art 8), although it threatens not only the peace and security of Africa but also the well-being of the world.

Article 6(a) of the Mercenary Convention sheds some light on whether a mercenary is a natural or artificial person. The wording of the provision, namely that a state is obliged to ‘prevent its nationals or foreigners on its territory from engaging in any acts mentioned in article 1 of this Convention’, suggests that a mercenary is a natural person as opposed to an artificial one. Both ‘nationals and foreigners’ are in fact natural persons. Article 7 of the Convention requires each state party to ensure that the crime of mercenarism is ‘punishable by severest penalties under its laws, including capital punishment’ which reinforces the interpretation of natural persons. However, the wording of the provisions of the Mercenary Convention as a whole point to the contrary, and implies that both natural and artificial persons are capable of being mercenaries. What is very clear is that the matter needs to be resolved.

The way forward

In view of the confusion around PMSCs and mercenaries, some commentators have suggested their own definitions for mercenaries. One of these is the following suggestion for ‘an accountability-based definition’ by Scoville (2006:564–567):

A mercenary is any person who, in any situation,

- Is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at, or having the reasonable effect of
 - Overthrowing a government or otherwise undermining the constitutional order of a state;
 - Undermining the territorial integrity of a state; or
 - Causing or aiding and abetting any acts otherwise criminal under international law
- Has not been sent by a state on official duty
- Is not a member of the armed forces of the state on whose territory the acts are undertaken
- With regard to the said concerted acts of violence, is not otherwise legally accountable to his or her own government by means of a contract or licence whose parties are the person and that government

Obviously, this accountability-based definition is not legal and therefore not binding. The intention with the reference to this definition is not to suggest that this should be the final revised version of the definition of a mercenary, but it and other suggestions should certainly be weighed and taken into consideration. (What is likely is that there will never be a universally acceptable definition.) The important aspect of this definition is the fact that it proscribes the special recruitment of any person for the purpose of participating in a concerted act of violence that is aimed at, or has the reasonable effect of a specific number of aims or objectives.

With respect to the objective of overthrowing a government or otherwise undermining the constitutional order of a state, the Constitutive Act of the AU frowns upon governments which come to power through unconstitutional means, and they are not allowed to participate in the activities of the AU in terms of article 30. Therefore the use of mercenaries to assist in this enterprise is clearly undesirable under international law. With respect to the aim of undermining the territorial integrity of a state, one of the AU's objectives is to defend the sovereignty, territorial integrity and independence of its member states (art. 3(b) of the Constitutive Act). Persons who undermine this objective by engaging in mercenary activities are therefore undesirable. With respect to the aim of causing or aiding and abetting acts considered to be criminal under international law, the definition recognises the role played by mercenaries in the commission of international law crimes and ensures that such conduct is proscribed. International criminal law has become increasingly important in the present-day world and serious crimes of concern to the international community as a whole, such as genocide, crimes against humanity and war crimes, are all listed and defined in the Rome Statute (see arts 5–8).

Other requirements which Scoville takes into consideration in his definition are that the person should not have been sent by a state on official duty, that such persons may not be members of the armed forces of the state on whose territory the acts are undertaken and that such persons are not legally accountable to their own governments by means of a contract or licence whose parties are the person and that government. Again the aspect that states should not be allowed to make use of mercenaries for official duties is regulated. The definition ensures that in perpetrating the acts of violence, only the actions of persons legally accountable to their own governments are sanctioned by states.

Conclusion

In order to control and regulate the generally unregulated industry of PMSCs, and to effectively prohibit mercenarism in Africa, it is suggested that it would be prudent to draft two conventions, one which focuses on the regulation of PMSCs in Africa and the other on the elimination of mercenarism in Africa. This would address the confusion that results from grouping PMSCs and mercenaries together. What would be imprudent

would be to regulate PMSCs and prohibit mercenaries in one instrument. Both such conventions would have to address the need for workable legal definitions of both PMSCs and mercenaries. This will bridge the gap between the Mercenary Convention and the present-day reality. It will not be possible to achieve this without the input of African civil society and of course the PMSCs themselves. The challenges presented by the definition of a mercenary in the Mercenary Convention speak to the need for a complete overhaul of its now outdated provisions.

Notes

- 1 See for instance common article 3 (to the Geneva Conventions); article 17 of the Geneva Convention I, articles 67, 118 and 119 of Geneva Convention III; articles 44, 49, 130, 133, 134 and 135 of Geneva Convention IV; articles 33, 34, 45, 47, 59 and 60 of Additional Protocol I; articles 1–3 of the Hague Convention (III); articles 22–41 of the Regulations annexed to the Hague Convention (IV); and the title of the Hague Convention (VI).
- 2 Adopted at the 4th ordinary session of the Assembly, held in Abuja, Nigeria, on 31 January 2005.

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