INTERNATIONAL CONVENTION AGAINST THE RECRUITMENT, USE, FINANCING AND TRAINING OF MERCENARIES

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By resolution 44/34 of 4 December 1989, the United Nations General Assembly adopted and opened for signature and ratification, or for accession, the International Convention against the Recruitment, Use, Financing and Training of Mercenaries (hereinafter "Mercenaries Convention"), which was annexed to the resolution. Pursuant to its article 19, paragraph 1, the Convention entered into force on 20 October 2001, the thirtieth day following the date of the deposit of the twenty-second instrument of ratification or accession with the United Nations Secretary-General.

Historical Background

The use of mercenaries in warfare goes back to ancient times. Over the centuries, a great many States and cities have employed professional soldiers from other lands to provide for their defence or expand their empires. Mercenaries were used extensively, for example, by the kingdoms of the Warring States period of China 475–221 BCE. They were used, with varying degrees of success, by Carthage in its wars against Rome from 264 to 146 BCE and by innumerable kings and princes around the globe throughout the Middle Ages. The demand that King John banish his mercenary forces from England forms part of the first version of the Magna Carta in 1215 – illustrating that possession by the sovereign of a force owing no allegiance to the country, or its people, has long been regarded as a threat to the rights of subjects.

It was during the brutal Thirty Years War (1618-1648) that the use of mercenaries reached one of its most notorious excesses. Huge mercenary bands laid waste to much of Europe with little regard for the suffering of the common peoples who were killed, mutilated and despoiled at the whim of marauding "soldiers of fortune". These wars also exemplified a major objection to mercenary service – soldiers who fight only for pay have no interest in bringing war to an end. As Niccolò Machiavelli pointed out, they were greatly dedicated to their own preservation and also had an unsettling propensity to turn against their former master when funds ran out.

Mercenaries produced, however, many practical advantages. They came ready-trained and could be deployed almost immediately. They were often highly skilled in the art and science of war. Their services could usually be dispensed with at the end of the conflict. A State could also distance itself from their brutality in a way that was not possible with a national army. Throughout history, mercenaries were found to be particularly useful for putting down rebellions since they had no common feeling for citizens. They were, therefore, often the tools of tyrants who used them to repress popular attempts to gain political freedom. The colonial powers from the dawn of the modern era through to the middle of the twentieth century made extensive use of mercenaries, often recruiting from one indigenous group to fight against another. Until recently, however, international law had no position on their legality per se and they were treated, for most purposes, simply as combatants.

The Move towards Prohibition

The activities of mercenaries in post-colonial Africa generated particular animosity to this form of military service amongst emerging States. Mercenarism was inextricably linked in public opinion to colonialism, racism and denial of self-determination. Although they were, on occasion, capable of fighting "cleanly", mercenaries were also involved in numerous atrocities, for which accountability was often lacking due to their ambiguous status. This distaste for mercenary service led to the drafting of the Organisation of African Unity Convention for the Elimination of Mercenarism in Africa, which was opened for signature in Libreville on 3 July 1977.

That same year, mercenaries were denied combatant status by article 47 of Protocol I Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (hereinafter "Geneva Additional Protocol I"). This position has since been described as a rule of customary international law. While captured mercenaries are not entitled as of right to prisoner of war status, the capturing power may, nevertheless, afford them equivalent status. They must also be treated humanely and may not be convicted or sentenced without previous trial. The major impact of the provision is disqualification from combatant immunity. While a lawful combatant who complies with international humanitarian law bears no criminal responsibility for killing or injuring enemy combatants or damaging military objectives, that is not the case for mercenaries. A capturing force could, for example, put a mercenary on trial for murder for killing one of its soldiers. Furthermore, mercenary service itself might constitute a crime under the domestic law of the capturing State. The best-known post-World War II example of such a trial occurred on 28 June 1976 when an Angolan court sentenced three Britons and an American to death and nine other mercenaries to prison terms ranging from 16 to 30 years.

Mercenary service is not, however, listed as a "grave breach" under Geneva Additional Protocol I. Although some States had by that stage already criminalised mercenary activity, there was no international law obligation to do so. This situation remained unsatisfactory to a number of States, particular those from the African continent.

The Creation of the Mercenaries Convention

On 5 December 1979, Nigeria, acting on behalf of other Member States of the United Nations, sent a letter to the United Nations Secretary-General requesting that an item entitled "Drafting of an international convention against activities of mercenaries" be added to the agenda of the General Assembly's thirty-fourth session. The General Assembly adopted resolution 34/140 of 14 December 1979, by which it decided to consider the drafting of an international convention to "outlaw mercenarism in all its manifestations". At its thirty-fifth session, in 1980, on the recommendation of its Sixth Committee, the General Assembly established an *Ad Hoc* Committee on the Drafting of an International Convention against the Recruitment, Use, Financing and Training of Mercenaries composed of thirty-five Member States. On 17 February 1989, the drafting group produced the draft articles of the Mercenaries Convention.

The International Convention against the Recruitment, Use, Financing and Training of Mercenaries was adopted and opened for signature and ratification by General Assembly resolution 44/34 of 4 December 1989. It entered into force, in accordance with article 19, on 20 October 2001.

Ratification and Acceptance

The Mercenaries Convention has, at present, been ratified by 36 States. There are a further nine signatories which have yet to ratify.

The Mercenaries Convention has, therefore, met with only moderate acceptance internationally. After more than three decades, less than one in five Members of the United Nations are parties, and recent accessions to the treaty are only slowly increasing. No permanent Member of the Security Council is a party, and relatively few major military powers have ratified. This may be due in part to the widespread, but contestable, belief that the definition of mercenary in article 1 is too complex or limited. It may also be thought that the use of mercenaries is now a relatively minor or historical problem.

General Assembly resolution 54/151 of 17 December 1999 stressed the need for a better and more precise legal definition of mercenaries that would make for more efficient prevention and punishment of mercenary activities. Governments were requested to make proposals towards a clearer legal definition and the Office of the United Nations High Commissioner for Human Rights was asked to convene expert meetings to study and update the international legislation in force and to propose recommendations. To date, however, no better definition than that set out in the Mercenaries Convention has been agreed upon.

The Mercenaries Convention does not ban, per se, the employment of foreigners individually or in special units of national armed forces, such as the French Foreign Legion, or Britain's Brigade of Gurkhas. It also has no direct impact on the activities of so-called "private military and security companies" (hereinafter "PMSC") which have been extensively used by major military powers in recent armed conflicts, occupations and other war-like operations. These private commercial concerns supply logistical and administrative support to the armed forces and carry out certain security tasks – sometimes with poor human right results. It is asserted by those who use them, however, that they do not take a direct part in hostilities – a prerequisite of mercenary status. The dividing line between the activities of PMSC and mercenarism in practice may not always be so clear cut.

Although described as "offences of grave concern to all States" in the Mercenaries Convention's preamble, mercenary activities were not enumerated among the "most serious crimes of concern to the international community as a whole" in the Rome Statute of the International Criminal Court. Nevertheless, the recruitment, training and use of mercenaries is widely regarded as a destabilising element in regional politics, a likely impediment to the rapid and peaceful resolution of conflict and a challenge to the demand for accountability in respect of human rights breaches and war crimes. The Mercenaries Convention, despite its modest adherence rate, sets out a norm which is now seldom refuted. It therefore adds, in a concrete way, to the international stigmatization of this form of military service.

A Brief Summary of the Mercenaries Convention

The Mercenaries Convention records in its preamble the conviction that its adoption will contribute to the eradication of these nefarious activities and thereby to the observance of the purposes and principles enshrined in the Charter of the United Nations. The most important features of the Mercenaries Convention are as follows.

Article 1 sets out the critical definition of a mercenary, who may be of either of two types. The first is any person who:

(a) Is specially recruited locally or abroad in order to fight in an armed conflict;

(b) Is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar rank and functions in the armed forces of that party;

(c) Is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict;

(d) Is not a member of the armed forces of a party to the conflict; and

(e) Has not been sent by a State which is not a party to the conflict on official duty as a member of its armed forces.

Article 1. 2. extends that definition to include a person who:

(a) Is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at:

(i) Overthrowing a Government or otherwise undermining the constitutional order of a State; or

(ii) Undermining the territorial integrity of a State;

(b) Is motivated to take part therein essentially by the desire for significant private gain and is prompted by the promise or payment of material compensation;

(c) Is neither a national nor a resident of the State against which such an act is directed;

(d) Has not been sent by a State on official duty; and

(e) Is not a member of the armed forces of the State on whose territory the act is undertaken.

Although sometimes criticised as too complex to be workable, the definition is no more complicated than is the case with many other international crimes. The specific intent of the mercenary must be private gain over and above that which an ordinary soldier would receive. While this may be difficult to prove in some cases, it coincides with the general conception of a mercenary. Those who join a fight which is not their own to seek adventure or motivated by ideology may be troublesome in their own way, but are not mercenaries in either common parlance or law.

Articles 2, 3 and 4 establish individual criminal responsibility for certain conduct involving mercenary activity (called here "Convention offences"). These are:

- Recruiting, using, financing or training mercenaries (article 2);
- Participating directly in hostilities or in a concerted act of violence as a mercenary (article 3);
- Attempting to commit a Convention offence, or being an accomplice to such an offence (article 4).

Article 5, on the other hand, deals with the responsibility of States, and provides that they must not recruit, use, finance or train mercenaries, and furthermore must prohibit such activities. This comprehensive duty is further particularised by specifically prohibiting mercenary conduct for the purpose of "opposing the legitimate exercise of the inalienable right of peoples to self-determination". All lawful and appropriate measures must be taken to prevent recruitment, use, financing or training of mercenaries for that purpose. Convention offences must be punishable by appropriate penalties which take into account their grave nature.

Article 6 requires Parties to co-operate in the prevention of Convention offences. They must:

- take all practicable measures to prevent preparations for such activities in their territories;
- prohibit the illegal activities of persons, groups and organizations that encourage, instigate, organize or engage in the perpetration of these offences; and
- co-ordinate administrative and other measures to prevent the commission of offences.

Article 7 requires Parties to co-operate in the Mercenaries Convention's implementation.

Article 8 provides that where a Party has reason to believe that a Convention offence has been, is being or will be committed, it must in accordance with its national law, promptly communicate the relevant information, directly or through the United Nations Secretary-General, to the affected States Parties.

Article 9 requires Parties to establish jurisdiction over Convention offences committed:

- in their territory or on board a ship or aircraft registered to them;

- by their nationals (and, where deemed appropriate, stateless persons having habitual residence in their territory).

Parties must also establish jurisdiction over offences where the alleged offender is present in their territory and is not extradited to a State with jurisdiction over that person. The Mercenaries Convention does not exclude criminal jurisdiction exercised in accordance with national law.

Article 10 requires that, where warranted and lawful, a Party must take into custody, or ensure the presence of, any alleged offender present in its territory to enable criminal or extradition proceedings to be instituted. An immediate preliminary inquiry must be made into the facts. Relevant Parties must be notified of the action without delay, must be advised of the findings of any preliminary inquiry, and whether the Party intends to exercise jurisdiction over the alleged offender. The States that must be notified include those:

- where the offence was committed;
- against which the offence has been directed or attempted;
- of which the person against whom the offence has been directed or attempted is a national;
- of which the alleged offender is a national or, if stateless, has habitual residence.

The alleged offender is entitled to communicate with, and be visited by, a representative of his or her State of nationality or, if stateless, habitual residence. A Party having a claim to jurisdiction may invite the International Committee of the Red Cross to communicate with and visit the alleged offender.

Article 11 guarantees fair treatment and "all the rights and guarantees provided for in the law of the State in question" to any person subject to proceedings. Applicable norms of international law, however, are not stipulated but "should be taken into account".

Article 12 requires Parties to either extradite or prosecute alleged offenders found in their territory, regardless of whether the offence was committed there or not. Both the *aut dedere aut judicare* principle, and the requirement to establish extra-territorial jurisdiction, are common features of treaties establishing international criminal responsibility. Prosecuting authorities must make decisions in the same manner as for any other offence of a grave nature under national law.

Under article 13, Parties must afford one another the greatest measure of assistance in connection with criminal proceedings for Convention offences, including the supply of all necessary evidence at their disposal. The law of the State whose assistance is requested must apply in all cases.

Article 14 requires the State where the alleged offender is prosecuted, in accordance with its laws, to communicate the final outcome of the proceedings to the United Nations Secretary-General, who will transmit the information to the other States concerned.

Article 15 deals with extradition and starts from the premise that Convention offences must be deemed as extraditable offences in existing extradition treaties between Parties and must be included as extraditable offences in every extradition treaty subsequently concluded between Parties. The Mercenaries Convention itself can also be regarded as the legal basis for extradition, but extradition remains subject to the other conditions provided by the law of the requested State.

Article 16 provides that the Mercenaries Convention must be applied without prejudice to the rules relating to the international responsibility of States, and the law of armed conflict and international humanitarian law, including the provisions relating to the status of combatant or of

prisoners of war. This is a particular reference to Geneva Additional Protocol I, article 47, discussed further above.

Article 17 deals with disputes between Parties.

Article 20 provides that Parties may denounce the Mercenaries Convention by written notification to the United Nations Secretary-General, and that denunciation takes effect one year after the date on which the notification is received. So far, no State has denounced the Mercenaries Convention.

This Introductory Note was written in November 2020.

Related Materials

A. Legal Instruments

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), Geneva, 8 June 1977, United Nations, *Treaty Series*, vol. 1125, p. 3.

Organisation of African Unity Convention for the Elimination of Mercenarism in Africa, 3 July 1977, United Nations, *Treaty Series*, vol 1490, p. 96.

B. Documents

Note by the Secretary-General of 30 August 2000 (Report on the question of the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, submitted by the Special Rapporteur of the Commission on Human Rights) (A/55/334).

The Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict, Montreux, 17 September 2008.

C. Doctrine

F. J., Hampson, "Mercenaries: Diagnosis Before Proscription", *Netherlands Yearbook of International Law*, vol. 22, no. 3, 1991, p.27.

C. Kinsey, "International Law and the Control of Mercenaries and Private Military Companies", *Le droit international et le contrôle des mercenaires et des compagnies militaires privées*, 2008.

M.-F. Major, "Mercenaries and International Law", *Georgia Journal of International and Comparative Law*, vol. 1992, p. 103.

A. F. Musah and J.K. Fayemi (ed.), *Mercenaries: An African Security Dilemma*, London, Pluto Press, 2000, p. 269-271.

J. Williamson, "Status and obligations of mercenaries and private military/security companies under international humanitarian law", Institute for Security Studies, 2008.