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The Crime of Mercenarism

A Challenge for the Judges of the New African Court

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1. INTRODUCTION

In 2014 the African Union adopted a Protocol whereby, when it enters into force will: (a) merge into one single judicial assembly the African Court on Human and Peoples' Rights and the Court of Justice of the African Union; (b) vest the new Court with international criminal jurisdiction competent to hear all cases relating to the crimes specified in the Statute of the Court, elaborated by the African Union (AU) which are contained in the 2014 Protocol, mercenarism being one of them. To this end, Article 28 H of the Statute provides a definition of the crime of Mercenarism.

For over sixty years mercenaries have been utilized particularly against the struggle of the peoples of Africa for self-determination.[1] They have intervened in the internal affairs of the new African nations after decolonization and in plundering the natural resources of the continent.

The Organization of the African Unity (OAU), the United Nations and the international community at large have attempted to legally control, both under International Criminal Law (ICL) and International Humanitarian Law (IHL) the activities of mercenaries in order to solve problems that have impacted the African continent both in the struggle of their peoples for self-determination and in the reaping of their natural resources.

An analysis of the new definition of mercenarism contained in Article 28H of the 2014 African Union Protocol raises a number of questions as to the adequacy of its provisions in dealing with the phenomenon and the links between old forms and new forms of mercenarism, namely: the foreign mercenaries of the 1960s and 1970s, (the dogs of war), and the new

[1] The beneficiaries of the right to self-determination are peoples not States. See UN Doc. A/70/330, 19 August 2015, para. 39.

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commercial enterprises, (the private military and security companies and their soldiers for hire), that have mushroomed, particularly in Africa.

Due attention to this issue also fails because of the lack of national and regional measures in Africa, aimed at controlling both categories of performers of mercenaries that is those individuals implicated in mercenary activities and those of commercial private military and security companies carrying mercenary-like activities.

It raises some doubts as to whether by including *mutatis mutandi* the prerequisites of the definition of a mercenary, contained in Article 47 of Additional Protocol I to the Geneva Conventions (IHL) and Articles 1 and 2 of the International Convention on the Recruitment, Use, Financing and Training of Mercenaries (ICL), into the new definition of mercenarism, Article 28 H of the 2014 African Union Protocol will be operative enough to succeed in prosecuting individuals involved in mercenary activities.

A. *Mercenary Activities in Africa: The Return of Mercenaries in the Twentieth Century*

The modern state system and ideals of national patriotism, which developed in Europe in the nineteenth century contributed to stigmatizing and marginalizing individuals fighting for money rather than for loyalty to their countries. It is for this reason that mercenaries and their activities had practically disappeared[2] in Western European countries.

In Africa, however, commercial trading companies from European colonial countries with their own private military forces continued to seize the natural resources of the continent.[3] In the second half of the Twentieth century, the struggle of the African colonies for their independence, brought the private armies back again: they were actively involved in plundering the resources of the African continent and in fighting against the liberation movements for self-determination. Measures aimed at controlling and regulating their activities have been at the origin of the development of international and African regional treaties.[4]

[2] K. Suter, 'Mercenaries in Warfare', Global Directions, www.Global-Directions.com.

[3] A. Musah, J. Fayemi, *Mercenaries: An African Security Dilemma* [London: Pluto Press, 2000] at 17.

[4] The 1907 Hague Convention Respecting War on Land already contained prohibitions prohibiting mercenary recruitment on national territory, J.L. Taulbee, 'Myths, Mercenaries and Contemporary International Law', Vol. 15, No. 2 *California Western International Law Journal* 1985.

The actions carried out at the beginning by foreign mercenaries, often called soldiers of fortune or dogs of war, recruited to defend geopolitical interests of colonial powers as well as that of mining companies have soon turned into activities conducted by private military and security companies closely linked with the interests of the mining sector.[5] The traditional utilization of mercenaries has undergone a metamorphosis: old forms and new forms are presently intermingled.[6]

The decolonization period of 1960 opposed Western European countries to peoples subjected to alien domination and exploitation in the Third World, particularly in Africa. Mercenaries were recruited by colonial powers to crush liberation movements fighting for their independence,[7] first in the former Belgian Congo followed by interventions in a large number of other African countries.[8] The right of peoples to self-determination became an important issue at the United Nations.

Mercenary activities are specifically mentioned in instruments dealing with questions such as the development of Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the United Nations Charter[9] and the Definition of Aggression. United Nations has considered the use of mercenaries 'as a means of violating human rights and impeding the exercise of the right of peoples to self-determination'.[10]

[5] In the 1990s the post-apartheid period saw the establishment of private military and security companies by former military officers and soldiers. See UN Doc. A/HRC/18/32, Para. 10.

[6] PMSCs are nothing new in history. They are the reincarnation of the 'condotierri' (land mercenarism) and 'corsairs' (Private Men O-War, sea mercenarism) of the Renaissance who had combined the two skills of mercenaries: military and commercial know how. At the Renaissance, the State employed the condotierri by signing a contract (condotta) in the presence of a notary to form a corporation. The contract stipulated the amount (prestanza) that allowed the condottiere to buy the weapons and equipment and to hire the men (freelance). The contract (condotta) fixed also the nature of the activity and the number of soldiers (freelances) as well as the duration. See, P. Clapeau, 'Les Mercenaires', Collection Histoire, Ed. Ouest France, 2006. For the similarities between corsairs and to-day's contractors of PMSCs see, J. Gómez del Prado, 'Private Security Companies: The mercenaries or corsairs of the XXIst century?' Alai-amlatina, International website, 2006.

[7] United Nations, General Assembly resolution 1514 (XV), of 14 December 1960.

[8] Such as: Angola, Benin, The Comoros, Congo-Brazzaville, Côte d'Ivoire, Equatorial Guinea, Former Congo Belgian, Guinea, Kenya, Liberia, Mozambique, Nigeria, Rwanda and the Region of the Great Lakes, Senegal, Sierra Leone, Somalia and Zaire.

[9] United Nations, General Assembly resolution 2625 (XXV) of 12 November 1970.

[10] United Nations, General Assembly resolution 3314 (XXIX) of 14 December 1974. Also, International Court of Justice, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment.C.J. Reports 2005*, p. 168. The right of peoples to self-determination is contained as Article 1, in the International Covenant on Economic, Social and Cultural Rights and in the International Covenant on Civil and Political Rights.

In accordance with the Declaration on Principles: '*Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State*'.

Article 3 (g) of United Nations GA resolution 3314 (XXIX) states that '*The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein*' can be considered as an act of aggression. This same text has been incorporated in the Amendments to the Rome Statute of the International Criminal Court, adopted in Kampala, 11 June 2010.[11]

The use of mercenaries by States to intervene in other countries' affairs violates the ability of many Western European and Third World countries, who are UN Member States, to control private violence at the international level.[12] This question is at the origin of the provisions contained in IHL and International and African Criminal Law treaties aimed at controlling mercenarism.[13]

The international community continues to be divided on the issue of mercenarism, but particularly regarding the accountability and regulation of private military and security companies (PMSC) contracted by States to operate in zones of conflict or other countries' affairs.[14] Such companies recruit highly trained military personnel; who often resign or take leave of absence to fulfil a given contract.[15]

[11] Article 8 bis, Crime of Aggression, United Nations, Ref. C.N. 651.2010 TREATIES – 8 Depository Notification.

[12] C. Kinsey, 'International Law and the Control of Mercenaries and Private Military Companies', Cultures & Conflicts [En ligne], English documents, mis en ligne le 26 juin 2008, consulté le 12 décembre 2015. URL: http://conflits.revues.org/11502.

[13] The recruitment, use, financing and training of mercenaries which had been retained by the International Law Commission in its Draft code of crimes against the peace and the security of mankind in 1991 did not appear in the final draft of the Commission. This crime was not included either in the Rome Statute of the International Criminal Court of 1998.

[14] The strongest opposition is from the United Kingdom and the United States of America from where come most of the private military and security companies (some sixty per cent according to some estimates) and other Western Group countries who favor the International Code of Conduct for Private Military and Security Companies instead of a binding UN treaty. This opposition is particularly manifested at the debates of the United Nations Open-ended intergovernmental working group to consider the possibility of elaborating an international regulatory framework on the regulation, monitoring and oversight of the activities of private military and security companies. See UN Doc. A/HRC/WG.10/3/2.

[15] This has been the case for British, Canadian, Peruvian, Chilean and militaries of many other countries armed forces. See for instance, K. Fallah, 'Corporate actors: the legal status of mercenaries in armed forces', Vol. 80, No. 863 *International Review of the Red Cross* (September 2006), para. 600; UN Doc. A/HRC/7/7/Add.4, paras. 23–4.

The Nigerian Civil War, which took place from 1967 to 1970 as consequence of the secession of Biafra from Nigeria, had a strong international involvement due to the oil resources, as had been before in the former Belgian Congo in 1960 for other mineral resources in the province of Katanga.

It is against this background that the Luanda Trial to judge foreign mercenaries recruited by the National Liberation Front of Angola (FNLA) to fight against the Popular Movement for the Liberation of Angola (MPLA) took place June–July 1976. The People's Revolutionary Court of Angola pronounced four death sentences and condemned nine of those convicted to prison. The main charges against these foreigners were those of crime against peace and of being mercenaries.

Their indictment for being mercenaries relied on Angolan law based essentially on a number of United Nations resolutions on the matter of implementing the UN Declaration on the Granting of Independence to Colonial Countries and Peoples[16] as well as UN GA res. 3103(XXVIII) on Basic Principles of the legal status of the combatants struggling against colonial and alien domination and racists régimes.[17] These Principles state that the use of mercenaries 'is a criminal act and the mercenaries should be accordingly be punished as criminals.'[18]

In Africa, the Organization of African Unity has taken a number of actions and adopted such instruments as the 1972 OAU Convention for the Elimination of Mercenaries in Africa,[19] which incorporated provisions of the United Nations resolutions mentioned above, and the 1977 OAU Convention for the Elimination of Mercenarism in Africa.[20] The 1977 OAU Convention entered into force on 22 April 1985; with thirty-one States so far having ratified it. The 1977 Convention is based on a draft elaborated by the International Commission of Inquiry on Mercenaries that followed the Luanda Trial in 1976.

[16] UN GA. Resolutions 2548(XXIV); 2395(XXIII); 2465(XXIII)

[17] UN GA. Resolution 3103(XXVIII).

[18] G. H. Lockwood, 'Report on the Trial of Mercenaries: Luanda, Angola June, 1976', Vol. 7, No 3 *Manitoba Law Journal* (1977), pp. 183–202. The author formed part of an international commission of inquiry composed by 51 personalities from 37 different countries from the different regions of the world. By setting up such independent commission the Angolan government drew the attention of the international community to make an objective assessment of the trial on mercenaries. In 1976 in Luanda, the first measures were taken for the adoption of a draft convention, elaborated by the International Commission of Inquiry on Mercenaries, which was sent to the Angolan Government, the Organization of the African Union and the United Nations.

[19] OAU Doc. CM/433/Rev. L, Annex 1(1972), University of Minnesota, Human Rights Library.

[20] OAU Doc. CM/817 (XXIX) Annex II Rev.1, Organization of African Unity, African Union, www.au.int.

At the international level, during 1960 and 1970, Nigeria has been the main mover against mercenarism both in IHL and in ICL.

At the International Committee of the Red Cross Plenipotentiary Conference for the Adoption of Article 47 of Protocol I Additional to the Geneva Conventions of 1949, which took place from 1974 to 1977, Nigeria proposed for discussion that a person participating in an armed conflict to be considered or defined as a mercenary.[21]

At the United Nations, Nigeria officially requested that the matter of mercenaries be discussed at the General Assembly. In 1989, based on a document elaborated by an Ad Hoc Committee, the UN General Assembly adopted the International Convention against the Recruitment, Use, Financing and Training of Mercenaries.

In Africa there have been over 330 armed conflicts for the period covering 1989–2014. The quasi totality of such armed conflicts with some rare exceptions, such as the conflict between Ethiopia and Eritrea, have been intrastate conflicts. One disturbing factor, reported by the Uppsala Conflict Data Program,[22] is the involvement of external actors in such conflicts.

This is not a new phenomenon. However, as we have witnessed in the past in different parts of the world, the proportion of foreign actors in intrastate armed conflicts, as proxies, freelancers, contractors, PMSCs, mercenaries, soldiers for hire, foreign fighters or any others is increasing. In 2014 the proportion of such actors was the highest since World War II.[23]

Considering the prevalent involvement of foreign military actors in the African continent the importance, therefore, of a good definition of mercenarism that would embrace all the different categories, or at least the most important ones, of foreign actors' involvement in internal armed conflicts.

In 2014, the Assembly of Heads of State and Government of the AU adopted the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights.

This important regional instrument broadens the jurisdiction of the new African Court of Justice and Human Rights (ACJHR) to 14 crimes under international law, including the crime of mercenarism and other transnational

[21] States at the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts reluctantly agreed to introduce the theme of mercenaries, K. Fallah, 'Corporate actors: the legal status of mercenaries in armed conflict', www.icrc.org/eng/assets/files/other/irrc_863_fallah.pdf

[22] T. Pettersson, & P. Wallensteen, 'Armed Conflicts, 19462014', Vol. 52(4) *Journal of Peace Research* (2015), 536–50.

[23] Ibid., T. Pettersson, & P. Wallensteen.

crimes often connected with mercenary activities such as terrorism, human trafficking, piracy, war crimes and illicit exploitation of natural resources.

The provisions contained in Article 28H of the 2014 African Union Protocol, proposing to the African Union Court a new text for its interpretation of the crime of mercenarism and application of the sanctions for the offences incurred, is a new attempt at the African regional level to deal with this phenomenon.[24]

Article 47 of Additional Protocol I to the Geneva Conventions of 1949 and Article 1 and 2 of the 1989 International Convention against the Recruitment, Use, Financing and Training of Mercenaries are the main sources of the new Article 28 H.

B. *Article 28 H of the 2014 African Union Protocol*[25]

1. Similarities and Differences with Article 47 of Additional Protocol I and Article 1 and 2 of the 1989 International Convention against the Recruitment, Use, Financing and Training of Mercenaries

Article 28 H is structured along the lines of Articles 1 and 2 of the 1989 International Convention against the Recruitment, Use, Financing and

[24] Contrary to the International Criminal Court, the African Union Court will be empowered to consider cases of mercenarism and of illicit exploitation of natural resources.

[25] African Union, Daft Protocol on Amendments to the Protocol on the Statute of The African Court of Justice and Human Rights, STC/Legal/Min/7(I) Rev. 1 Page 25;

Article 28H Mercenarism

1. For the purposes of this Statute:
   a) A mercenary is any person who:
      i. Is specially recruited locally or abroad in order to fight in an armed conflict;
      ii. 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;
      iii. Is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict;
      iv. Is not a member of the armed forces of a party to the conflict; and
      v. 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.
   b) A mercenary is also any person who, in any other situation:
      i. Is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at:
         1. Overthrowing a legitimate Government otherwise undermining the constitutional order of a State;
         2. Assisting a government to maintain power;
         3. Assisting a group of persons to obtain power; or
         4. Undermining the territorial integrity of a State;

Training of Mercenaries[26] incorporating with some minor changes the provisions therein.

The 1989 International Convention, ratified by 33 out of 189 United Nations Member States,[27] has with minor changes, incorporated in its text the provisions of Article 47 of Additional Protocol I of 1977 to the Geneva Conventions. These provisions are also contained in Article 3 of the 1977 OAU Convention against Mercenarism, ratified by 31 out of 54 Member States[28] of the African Union.

According to Art. 47 of Additional Protocol I to the Geneva Conventions, which has been ratified by 174 States,[29] during an international armed conflict mercenaries, as non-State armed groups, are obliged to respect applicable international humanitarian rules. In an international armed conflict, mercenaries do not enjoy the right to combatant or prisoner-of-war status.

It should be recalled that IHL does not forbid war: it tries to regulate the conduct of the parties in armed conflicts and to protect and assist all victims of armed conflicts.

Now, to protect the right of peoples to self-determination enshrined in its Charter, the United Nations has adopted instruments to fight against mercenary activities and the crime of mercenarism. These actions have been developed within the context of *Jus ad bellum* or the prerequisites, established

ii. Is motivated to take part therein essentially by the desire for private gain and is prompted by the promise or payment of material compensation;
iii. Is neither a national nor a resident of the State against which such an act is directed;
iv. Has not been sent by a State on official duty; and
v. Is not a member of the armed forces of the State on whose territory the act is undertaken.

2. 2. Any person who recruits, uses, finances or trains mercenaries, as defined in paragraph (1) (a) or (b) above commits an offence.
3. A mercenary, as defined in paragraph (1) (a) or (b) above, who participates directly in hostilities or in a concerted act of violence, as the case may be, commits an offence.

[26] Adopted by the UN General Assembly, Res. 44/34, 4 December 1989, Articles 1 and 2.

[27] Arzerbaïjan, Barbados, Belarus, Belgium, Cameroon, Costa Rica, Croatia, Cuba, Cyprus, Georgia, Guinea, Honduras, Italy, Liberia, Libya, Maldives, Mali, Mauritania, New Zealand, Peru, Qatar, Republic of Moldova, Saudi Arabia, Senegal, Seychelles, Suriname, Syrian Arab Republic, Togo, Turkmenistan, Ukraine, Uruguay, Uzbekistan, Venezuela. United Nations, Treaty Series, Vol. 2163, p. 75.

[28] Algeria, Benin, Burkina Faso, Cameroon, Chad, The Comoros, Congo, Democratic Rp. of Congo Egypt, Equatorial Guinea, Ethiopia, Gabon, Gambia, Ghana, Guinea, Libya, Lesotho, Liberia, Madagascar, Mali, Nigeria, Niger, Rwanda, Senegal, Seychelles, Sudan, Tanzania, Togo, Tunisia, Zambia, Zimbabwe.
www.africa-union.org

[29] ICRC, www.icrc.org/ihl.nsf/INTRO/470.

in the United Nations Charter, under which States may resort to the use of armed force.

Article 47 stipulates six prior conditions for a person to be accused of being a mercenary. The six prerequisites of Article 47, developed within the context of *Jus in bello*, have also been incorporated, mutatis mutandi, in Article 28 H 1.a).

Under Article 28 H, the six cumulative conditions stipulated in Article 47 of Additional Protocol I[30] necessary in order for an individual to be accused of being a mercenary apply in two types of situations:

- when a person fights in an armed conflict.
- in any other situation, stipulated in Article 28 H 1.b) which comprises activities, purposes, acts, and offences in which a person may participate.

Contrary to the 1989 International Convention, Article 28 H has integrated all the six requirements contained in Article 47 of Additional Protocol I of 1977 to the Geneva Conventions[31] which relate to taking a direct part in hostilities[32] with the following change: The sixth condition in the provisions

[30] United Nations, *Treaty Series*, Vol. 1125, No. 17512; Article 47:

1. A mercenary shall not have the right to be a combatant or a prisoner of war.
2. 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.

[31] According to Article of 47 Additional Protocol I of 1977 to the Geneva Conventions mercenaries do not enjoy the status of prisoners of war because of the shameful character of mercenary activity: mercenaries are solely motivated by private gain. However, they are entitled to a fair trial, (Customary Law). The United States, however, has stated that it does not consider the provisions of Article 47 of Additional Protocol I to be customary. Cited in ICRC Customary IHL – Rule 108 Mercenaries, www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter33_rule108

[32] The US Air Force Commander's Handbook asserts that the United States has regarded mercenaries as combatants entitled to prisoner-of-war status upon capture. This shows that a State is free to grant such status. The Handbook also states that 'the US government has always vigorously protested against any attempt by other nations to punish American citizens as mercenaries'. This statement does not undermine the current rule to the extent that these protests were made with respect to persons who did not fulfill the stringent conditions of the definition of mercenaries contained in Article 47 of Additional Protocol I, which was adopted by consensus. Cited in ICRC IHL – Rule 108 Mercenaries.

of Article 47 namely: b) *does, in fact, take a direct part in the hostilities*, has been included in the wording of paragraph 3 of Article 28H which reads as follows:

> 3. A *mercenary, as defined in paragraph (1) (a) or (b) above, who participates directly in hostilities or in a concerted act of violence, as the case may be, commits an offence.* This provision applies in both types of situation: in direct participation in hostilities and in concerted acts of violence.

The specification relating to direct participation is not contained in Article 1 of the 1989 International Convention.

Article 28 H of the AU 2014 Protocol incorporates the provisions included in Article 1. paras.1 and 2. of the 1989 International Convention with the following changes:

> The last part of the sentence in Article para. 1 (b) of the 1989 International Convention which reads '*substantially in excess of that promised or paid to combatants of similar ranks and functions of that party*', has not been retained;
>
> The term '*significant*' before '*private gain*', included in Article 1 para. 2. (b) of the 1989 International Convention also has not been retained. Article 28 H para1. b) ii. reads: '*Is motivated to take part therein essentially by the desire for private gain and is prompted by the promise or payment of material compensation*'.
>
> Article 2 of the 1989 International Convention has been incorporated as paragraph 2 of Article 28 H with minor editorial changes. It reads as follows:
>
> 2. *Any person who recruits, uses, finances or trains mercenaries, as defined in paragraph (1) (a) or (b) above, commits an offence.*
>
> 2. *More specifically similarities and differences with Article 1 and 2 of the 1989 International Convention against the Recruitment, Use, Financing and Training of Mercenaries with regard to Situations*

In non-international armed conflicts non-State armed groups may be prosecuted under domestic law for taking part in hostilities.

Article 28 H para. 3 of the 2014 AU Protocol stipulates: '*A mercenary, as defined in paragraph (1) (a) or (b) above, who participates directly in hostilities or in a concerted act of violence, as the case may be, commits an offence*'.

This provision applies to both types of situations envisaged in Article 28 H: direct participation in hostilities, which is particularly dealt with in the provisions of Article 47 of Additional Protocol I in situations of an international armed conflict, and concerted acts of violence, more specifically in the

provisions of the 1989 International Convention[33] indicated in Article 28 H 1. b) such as:

1. *Overthrowing a legitimate Government or otherwise undermining the constitutional order of a State; 2. Assisting a government to maintain power 3. Assisting a group of persons to obtain power; or 4. Undermining the territorial integrity of a State;*

In addition of fulfilling the condition of *participating directly in hostilities* the person must fulfil the following five prerequisites stipulated in Article 28 H 1. a) namely:

i. *Is specially recruited locally or abroad in order to fight in an armed conflict;*

This provision has exactly the same wording as that of the 1989 International Convention.

ii. *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;*

As mentioned before, the last sentence of the 1989 International Convention, namely 'substantially in excess of that promised or paid to combatants of similar rank and functions in the armed forces of that party' has not been retained in Article 28 H.

iii. *Is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict:*
iv. *Is not a member of the armed forces of a party to the conflict; and*
v. *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.*

[33] UN General Assembly, Res. 44/34, 4 December 1989, Article 1 para. 2:

A mercenary is also any person who, in any other situation:

(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.

These provisions are exactly the same, word by word, as those of the 1989 International Convention.

Concerning the other four situations contained in Article 28 H para. 1. b) the requirements to be fulfilled contained in this sub-paragraph b) are:

i. *Is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at:*
   1. *Overthrowing a legitimate Government or otherwise undermining the constitutional order of a State;*

These provisions have the same wording as that of the 1989 International Convention

2. *Assisting a government to maintain power;*
3. *Assisting a group of persons to obtain power;*

The above-mentioned two aims for the African context are innovative. They are creative provisions that were not contained in previous international criminal instruments. They consider situations such as those of Angola and Sierra Leone and more recently that of Zaire in the 1990s during the conflict for power opposing Mobutu[34] and Kabila[35]. The offence 'assisting a group of persons to obtain power' may be interpreted in conjunction with under Article 28 E of the AU Protocol which stipulates that an intervention by mercenaries to replace a democratically elected government is a Crime of Unconstitutional Change of Government.

> *or 4. Undermining the territorial integrity of a State; ii. Is motivated to take part therein essentially by the desire for private gain and is prompted by the promise or payment of material compensation; iii. Is neither a national nor a resident of the State against which such an act is directed; iv. Has not been sent by a State on official duty; and v. Is not a member of the armed forces of the State on whose territory the act is undertaken.*

All five provisions above mirror exactly those of the 1989 International Convention with the exception of the word 'significant' before 'private gain' which has not been retained in Article 28 H para. 1. b) (ii).

[34] For example: in 1997 Mobutu hired the so-called 'White Legion' in order to keep power against Kabila. See K. O'Brien, 'Private Military Companies and African Security' [A. Musah, J. Fayemi (ed.)], *Mercenaries: An African Security Dilemma* [London: Pluto Press, 2000] at 55–9.

[35] Mercenaries and private security companies were particularly involved in both sides. See K. O'Brien, 'Private Military Companies and African Security' [A. Musah, J. Fayemi (ed.)], *Mercenaries: An African Security Dilemma* [London: Pluto Press, 2000] at 55–9.

2. GENERAL COMMENTARY

Paragraph 1. (a) of Article 28 H has integrated, like other international and regional instruments on mercenarism, the six elements stipulated in Article 47 of Additional Protocol I concerning a situation of armed conflict. One may raise the question as to whether these prerequisites are essential or are obstacles to condemn individuals for mercenary activities.

The fact that Article 47 was adopted in 1977 by consensus, one year after an Angolan Court had pronounced four death sentences and condemned nine foreign mercenaries to prison may be an indication that the stringent measures, adopted at the Plenipotentiary Conference in Geneva, might have been a relief for many governments utilizing this form of indirect implication in armed conflicts.

The need to control the activities of mercenaries in Africa was developed not under the scope of *Jus in bello* of IHL but within the aegis of the United Nations under *Jus ad bellum*. Mercenarism, therefore, should be dealt with under such scope and should not be a matter of the status that may be accorded to the individual under *Jus in bello*[36] which is the exception and not the rule in the non-international armed conflicts: the new forms of armed conflicts taking place in the twenty-first century, particularly in Africa.

Under IHL, non-State armed groups, including mercenaries and other actors such as foreign fighters or contractors of PMSC do not enjoy combatant immunity: they may be prosecuted under domestic law for mere participation in hostilities.

The six elements contained in the definition of mercenaries are to be applied at the same time in a cumulative manner, not only in a situation of international armed conflict, but in any other of the following four situations, envisaged in Article 28 H, under *Jus ad bellum*: 'overthrowing a legitimate Government or otherwise undermining the constitutional order of a State; assisting a government to maintain power; assisting a group of persons to obtain power; or undermining the territorial integrity of a State'.

The elaboration of Article 28 H afforded a great opportunity to abandon the conditions of fulfilling the definition of mercenary that were introduced in Article 47 of Additional Protocol I and which have since then been retaken by in other international conventions regarding mercenaries.

These prerequisites are extremely difficult to prove. Each of the requirements necessary to arrive at the definition, if they were to be applied

[36] F. Hampson, 'Mercenaries: Diagnosis Before Proscription', Vol. 22, No. 3 (1991) *Netherlands Yearbook of International Law*, 3–38.

individually, would be very difficult to prove in a court. To apply the six of them cumulatively is an impossible task.

To add to this difficulty, it should be noted that the lacunae in ICL are not rectified in domestic legislations.[37]

For the African region, a major exception to the point made above in regard to the inadequacy of domestic legislation, is the South African Regulation of Foreign Military Assistance Act of 1998 which prohibits the activities mentioned in Article 28H.[38] It should be noted that South Africa is neither a party to the 1977 OAU Convention nor to the 1989 International Convention.[39]

In other States such as The Comoros, in spite of being a party to the 1977 OAU Convention, mercenarism is not specifically prohibited under domestic law.[40] The Comoros is a country that has suffered greatly from mercenary activities. Mercenaries have committed grave human rights violations on its people including on their right to self-determination.

No specific legislation, either, addressing the activities of mercenaries and / or PMSCs has been adopted in the following African countries: Botswana, Burkina Faso, Cameroon, Côte d'Ivoire, Ghana, Democratic Republic of the Congo, The Gambia, Kenya, Lesotho, Mali, Mauritius, Morocco, Namibia, Nigeria, Senegal, Sierra Leone, Swaziland, Tunisia, Uganda and Zimbabwe.[41]

Angola is the only country, where a Luanda Court, in 1976, charged the defendants with the crime of being mercenaries. At the time no international definition had been adopted and the Angolan domestic law was based on United Nations resolutions. In other cases, such as in South Africa, the defendants were charged with mercenary activities; in Equatorial Guinea for crimes against the Head of State and against the form of government; and in Zimbabwe for arms smuggling.[42]

For a charge of mercenarism to be effective, the recruitment of the individual must have been specifically to fight in an armed conflict and 'in a concerted act of violence'. Such specificity, however, is usually not indicated in the clauses of a contract for this purpose, as members of the UN Working

[37] UN Doc. E/CN.4/2004/15, para. 38.

[38] To understand the developments of its internal legislation concerning mercenaries and private military companies one must refer to the implication of the former governments of the apartheid period in the internal affairs of the countries of the region. See UN Doc. A/HRC/18/32/Add.3.

[39] UN Doc. A/HRC/27/50/Add.1.

[40] UN Doc. A/HRC/27/50/Add.1.

[41] UN Doc. A/HRC/24/45, paras. 22–5, and UN Doc. A/HRC/27/50 Survey Francophone Africa, Scope of the legislation. paras. 15–44.

[42] UN Doc., A/HRC/18/32/Add.2, paras. 23–7 and UN Doc., A/HRC/18/32/Add.3, paras. 17–23 and 34–6.

Group on the use of mercenaries were able to observe during their fact-finding missions to several countries including Chile, Ecuador, Fiji, Honduras and Peru.

Furthermore, the individual must be motivated by private gain *to take part in the hostilities (armed conflict)*, or in other situations (*overthrowing a legitimate Government or otherwise undermining the constitutional order of a State*; *assisting a government to maintain power*; *assisting a group of persons to obtain power*; *Undermining the territorial integrity of a State)*.

The motivation is another prerequisite difficult to prove. For many of the mercenaries such as Bob Denard, if private gain was important, there were also a number of other reasons as well, such as serving their own government.

Many of the individuals recruited by PMSCs for security tasks in the Iraqi and Afghan armed conflicts and who could have fallen under definition of mercenary, were there for a combination of personal egoistic and altruistic motivations, reasons, sentiments or desires, which operated simultaneously.

One of the main reasons for accepting the job these individuals mentioned first, before even referring to the high remuneration they received, was the risk of danger and to be able to feel the adrenaline when involved in a dangerous situation.[43] For others, such as former Peruvian or Chileans military personnel the main reason was to be able to provide a better living standard to their families: education for their children or to be able to pay the hospital bills for their parents.[44]

It is interesting to note that contrary to Article 28 H of the 2014 AU Protocol, Article 1 of the draft produced by the International Commission on Inquiry on Mercenaries, in Luanda, Angola, June 1976, defines simply what is the crime of mercenarism; by whom it may be committed (individual, group, association, representatives of state, the and the State itself); the purpose (opposing self-determination); the means (armed violence) and the activities performed (organize, finance, supply, etc.). It does not try to elaborate a definition of the type of person. There are advantages of departing first from the crime in the definition and not from the person, as does Article 28 H.

The draft proposed then to concentrate on the actor, who commits the crime (the possible offenders: individual, group, association, representative of

[43] Guerriers à Louer, Temps Present, Program of the Swiss TV, 2005.

[44] Interviews of members of the UN Working Group on the use of mercenaries with former militaries, who had been recruited by private companies to provide security in conflict zones in Afghanistan or Iraq, during their respective missions to Peru and Chile. Also, see the reports of the UN Working Group. UN Doc. A/HRC/7/7/Add.2 and A/HRC/7/7/Add.4.

a state, the State itself); the acts that may be committed (organize, finance, etc.); the aim (opposing self-determination); the means employed (military armed violence) and finally the foreign character of the offenders and the personal motivation or reason (personal gain).[45]

For what should be more important in the definition of the crime should be the act committed rather than the motivation. The motivation or reasons, whether emotional, financial or ideological, are less important than the fact that the offence has been perpetrated.

Another of the requirements in the definition is that such private gain has to be material compensation and must have been promised specifically by or on behalf of a party to the conflict: and not by someone else, which is not often the case.

In the contracting, there is often a labyrinth of diffused responsibility. Many contracts for mercenary activities are outsourced by a 'given government' or by a 'given mining company' or by a 'given private security company'. The group or company contracted, be mercenaries or a commercial private military and security company, may in their turn sub-contract the job to another company, some times in the same country but often in Third World countries because they are cheaper.

Mercenaries, contractors of PMSC's as well as foreign fighters are non-State armed individuals with military skills intervening in armed conflicts in countries that usually but not always are not their own.

Currently, an individual cannot be considered as a mercenary if he is a national of a party to the conflict or a resident of a territory controlled by a party to the conflict. However, this element of the definition does not take into consideration the phenomenon of nationals from the diaspora acting against their own country, a matter that has already been raised by the UN Special Rapporteur on the use of mercenaries.[46]

Also, employees of PMSC from USA or any of the other countries involved in the Iraq or Afghan conflicts, engaged either individually or by PMSCs, and

[45] Draft Convention on the Prevention and Suppression of Mercenarism (Draft produced by the International Commission of Inquiry on Mercenaries, in Luanda, Angola, June 1976), Vol. 22:3 616 *Virginia Journal of International Law*.

[46] E. Bernales Ballesteros, UN Doc. E/CN.4/2002/20, paragraph 88. This paragraph states that: 'For 40 years the Cuban authorities had been the victims of acts of aggression and terrorist acts committed by its nationals based on foreign territory or acting in return for pay from foreign organizations based abroad'. The Special Rapporteur had also noted that during his missions to the successor countries to the former Yugoslavia it had sufficed to obtain the nationality of any other country of the region in the conflict to cease to be considered as a mercenary.

who had committed human rights violations, could not been considered as mercenaries since they were nationals of a party to the conflict.[47]

Another prerequisite for the definition is that the individual is not a member of the armed forces of a party to the conflict. However, most mercenaries have been former or active members of the armed forces of their respective countries and have been working directly or indirectly for States geopolitically or economically interested in a given conflict although not officially involved. Recently a large number of militaries active in the armed forces of their respective countries, or reservists, take a leave of absence or vacation to work for PMSCs contracted in armed conflicts.

The new Article 28 H makes explicit reference to the individual's direct participation in two types of situations: in an armed conflict or in a concerted act of violence.

The references in the contracts that are usually signed by individuals engaged for this type of operations avoid mentioning direct participation. They refer to 'hazardous environment', 'a high-risk environment, including (. . .) risks and hazards of war', etc. The individual is usually contracted as an independent contractor to provide security but not as a mercenary or individual to fight.[48]

Under *Jus in bello* the statute of mercenaries may be considered irrelevant, if they do not take part in combat, since they continue to be considered as civilians, even if they are carrying weapons.

The Geneva Conventions and their Additional Protocols of 1977 do not provide a definition of 'direct participation in the hostilities'. However, the commentary on Additional Protocol I indicates that 'direct participation means acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces.'

This commentary raises a number of questions as to the activities that can be entrusted to mercenaries or to employees of PMSCs in situations of armed conflict[49] such as security, logistics, training and intelligence gathering. Logistical activities such as food or laundry services, plumbing, etc. may not fall under direct participation in the hostilities.

[47] It is interesting to note that foreign fighters (another non-State armed group) mobilizations from the diaspora may include nationals of a party to the conflict. See, UN Doc. A/70/330, paragraph 87.

[48] UN Doc. A/HRC/7/7/Add.2, paras. 27–8.

[49] J. Gómez del Prado, 'A United Nations Instrument to Regulate and Monitor Private Military and Security Companies', Vol. I, No. 1 *Notre Dame Journal of International, Comparative and Human Rights Law* (Spring 2011), at 10.

Under IHL employees delivering these services to the armed forces in an armed conflict, if captured, would fall under the category of prisoners-of-war, provided the forces they are accompanying have authorized them[50] in their tasks. However, the transportation of weapons and other military commodities, intelligence, strategic planning, or procurement of arms, performed by PMSCs may be considered as participation. In the US Naval Handbook, gathering intelligence is classified as direct participation in hostilities.

The second type of situations relating to concerted acts of violence, such as: overthrowing a legitimate Government or otherwise undermining the constitutional order of a State; assisting a government to maintain power; assisting a group of persons to obtain power; or undermining the territorial integrity of a State, as in the case of a situation of an international armed conflict, can be applied to both individuals as well as to employees of PMSC who, in the past, have been involved in African countries.

The African history is rich in both examples. Bob Denard[51] is undoubtedly the most well-known mercenary intervening in Africa as far as foreign individuals or bands are concerned. He carried out activities in zones of French geopolitical interests such as the former Belgian Congo (in support of the separatist State of Katanga in 1960–3), Gabon, Benin, and The Comoros, where he established his own private military company and organized a coup d'Etat. In 1995, a French court in Paris sentenced him for his involvement in The Comoros attempted coup d'Etat.[52]

Other well-known mercenaries such as Jacques Schramme and Mike Hoare had also conducted mercenary activities in the former Belgian Congo.

François Richard Rouget, a former French soldier with South African nationality, who had collaborated with Bob Denard in The Comoros, was the first mercenary prosecuted under the South African Regulation of Foreign Military Assistance Act. Rouget was found guilty of recruiting former members of the South African Defence Forces to carry out military activities in Côte d'Ivoire[53] and sentenced to a fine of R100 000. In 2011, Rouget was hired by

[50] L. Cameron, 'Private Military Companies: Their Status under International Humanitarian Law and Its Impact on Their Regulation', Vol. 88, No. 863 *International Review of the Red Cross* (September 2006), at 593.

[51] S. Weinberg, '*Last of the Pirates: In Search of Bob Denard*', (London: Pantheon, 1994).

[52] Le Monde, 21 June 2006, 'Bob Denard est condamné à cinq ans de prison avec sursis'. It is interesting to note that in the course of Denard's trial a former head of the foreign intelligence service admitted that Bob Denard had used parallel structures and undertaken a number of undercover operations in situations when the special services had not been able to do so.

[53] UN Doc. A/HRC/18/32/Add.3, para. 34.

Bancroft Global Development, a PMSC indirectly financed by the US State Department, to train troops in Somalia fighting against Al Quaeda.[54]

In the 1990s, military operations in the internal affairs of African States which had been carried out at the beginning of the decolonization period by foreign mercenaries began to be conducted by legally established private companies which provided, among other things, highly skilled military operations, advice and training. This coincided with the dismantling process of the apartheid apparatus in South Africa.

One of the pioneers of the global privatized military industry and the most emblematic of them in establishing a new operational model[55] was the company Executive Outcomes (EO). It was integrated by militaries of the elite South African Defence Forces of the apartheid period with strong links to mining and oil corporations operating in Africa.[56]

In the early 1990s EO was contracted by the Angolan government to fight the National Union for the Total Independence of Angola (UNITA) insurgents and recapture the oil facilities, which had been seized by them. The Angolan Government also gave the company a contract to train its armed forces. Previously, in the 1980s, militaries of the South African Defence Forces had intervened in support of UNITA against the same Angolan government.

In 1995, the Government of Sierra Leone hired EO to fight the Revolutionary United Front (RUF), clear the rebels from the capital region as well as train the country's armed forces. In addition, EO also operated in other African countries such as Uganda, Kenya and Congo. EO's interventions in the internal affairs of African countries may have pushed the South African Government, concerned with the possible impact of the activities of these companies on its foreign policy, to adopt the Regulation of Foreign Military Assistance Act in 1988.[57]

Despite the fact that the South Africa Regulation of Foreign Military Assistance Act of 1988 contains the strongest provisions on mercenarism, it has had little impact on PMSCs. South Africa does not control the export of services by South African PMSCs. A large number of companies have relocated abroad and many nationals continue to be recruited to work in zones of armed conflict.

[54] New York Times 'U.S. Relies on Contractors in Somalia Conflict', 10 August 2011.
[55] UN Doc. E/CN.4/1997/24, paras. 95–9.
[56] P.W. Singer, '*Corporate Warriors: The Rise of the Privatized Military Industry*', (Cornell University Press: Itacha, 2003), at 101.
[57] UN Doc. A/HRC/18/32/Add.3, paras. 10–13.

In 2004, an attempted coup d'Etat in Equatorial Guinea involving many South Africans, most of them former employees or executives of PMSCs, was organized from South Africa. This, together with the fact that a large number of South African PMSC had been contracted in Iraq, prompted the authorities in 2005 to adopt new legislation to replace the Regulation of Foreign Military Assistance Act.[58]

The 2004 attempted coup in Equatorial Guinea is a clear illustration of the blurring between categories and situations as well as a good example of the close ties between mercenaries and certain PMSCs. The organizer, Simon Mann, a former British Officer, as well as Nick du Toit and other persons involved had previously worked for EO in operations conducted in Angola and Sierra Leone. Two other persons were part owners of Meteoric Tactical Systems, a company providing security to the Swiss Embassy in Iraq.[59]

A. *Limitations of Article 28 H of the 2014 African Union Protocol with Regard to the Definition of Mercenarism in Article 1 of the 1977 OAU Convention*

Article 1. DEFINITION of the 1977 OAU Convention contains in its paragraph 2 a number of elements defining the crime of mercenarism that, regretfully, have not been included in Article 28 H of the 2014 African Protocol.

These refer to natural or juridical persons which: may be an 'individual', 'group', 'association', 'representative of a State' or 'a State itself'.

The following activities covered by the crime of mercenarism included in sub-para. (a) of the 1977 OAU Convention Article 1 have not been retained either in Article 28 H. These are: 'shelter' (. . .), 'organize', (. . .) 'assist', (. . .) 'equip', (. . .) 'promote, support or in any manner employ bands of mercenaries', or activities such as: 'enlists, enrolls or tries to enroll in the same bands' which are much wider than the term 'recruits' embodied in Article 28 H.

Similarly, in Article 28 H the provision contained in the 1977 OAU Convention that 'Any person, natural or juridical who commits the crime of mercenarism (. . .) commits an offence considered as crime against peace and security in Africa (. . .)' has not been retained.

[58] UN Doc. A/HRC/18/32/Add.3, paras. 39–41.

[59] R.Y. Pelton, '*Licensed to Kill*', [Crown Publishers, New York: 2006]; UN Doc. A/HRC/18/32/Add.2, paras. 18–20; A. Roberts, '*The Wonga Coup*', [Public Affairs, New York: 2006].

If the reference to juridical persons such as groups, associations had been included in the new definition of mercenarism of the 2014 AU Protocol it would have made it possible to implicate corporate responsibility and legally pursue not only individual mercenaries or employees of PMSCs but the companies themselves for mercenary activities.

B. *Positive Aspects and Loopholes in Article 28 H of the 2014 African Union Protocol in Relation to Problems Arising from Activities Conducted by Private Military and Security Companies*

The introduction by the African Union Protocol of the crime of mercenarism at the international/regional level of Africa is a very positive move indeed. Particularly because in 1991, the United Nations abandoned the recommendation by the International Law Commission to maintain it in the code of crimes against the peace and the security of mankind. This crime was not included either in the Rome Statute of the International Criminal Court of 1998 and, therefore, is not among the international crimes to be judged by the International Criminal Court.

It may be also noted that, once the 2014 Protocol is in force, the fact that Article 28 H of the AU 2014 Protocol integrates, with some changes, the provisions contained in Article 1.1 and 2. of the 1989 International Convention may facilitate its application, not only in the 31 African States who are presently parties to the 1977 OAU Convention for the elimination of mercenarism in Africa but also in 25 additional States parties to the 1989 International Convention.[60] In this connection, the African Court will be in a position to interpret and apply a large array of regional and international instruments.

The new definition of merceranism in Article 28 H can be considered as a good effort to consolidate in one regional criminal instrument the regional norms already contained in the 1977 OUA Convention.[61] It is, however, more

[60] These States Parties are: 1 African State (Mauritania); 4 Western European States (Belgium, Cyprus, Italy and New Zealand); 8 Latin American States (Barbados, Costa Rica, Cuba, Honduras, Peru, Suriname, Uruguay and Venezuela); 5 Eastern European States (Belarus, Croatia, Georgia, Moldova and Ukraine) and 6 Asian States (Azerbaijan, Maldives, Qatar, Saudi Arabia, Turkmenistan and Uzbekistan).

[61] According to Kamari Clarke the new Article 28 H has not amended the 1977 OAU Convention. The 1977 instrument being irrelevant, the new African Court should not apply the expanded definition of mercenarism contained in the 1977 OAU Convention. The 1977 OAU Convention could be relevant to the new African Court as a third subsidiary source to interpret the 2014 AU Protocol. Views expressed in an exchange of correspondence with the author on this issue.

consistent with the definition of the 1989 International Convention on mercenaries which retains almost word by word those of IHL, Article 47 of Additional Protocol I.

There are, however, as mentioned above some major drawbacks. One of them springs from the integration of the definition of the 1989 International Convention.

Within this context, it may be noted that the IHL provisions of Article 47 that could have been pertinent for situations of international armed conflicts in the second half of Twentieth century, confronting regular armies, are not for the intrastate armed conflicts of the twenty-first century.

Article 28 H integrates in its provisions how the African Court, from a regional perspective, may consider activities committed by mercenaries. It does not spell out sufficiently clearly, however, the accountability and control of those activities carried out by a major actor: PMSCs.

Article 28 H has not incorporated the qualifications of the compensation, contained in the 1989 International Convention, which to 'substantially in excess of that promised or paid to combatants of similar rank and function in the armed forces of the party' or 'significant'. This can be considered positive, for their inclusion would have made even more difficult to prove the motivation of a person concerning mercenarism.

However, in order for an individual to be accused of the crime of mercenarism Article 28 H, has kept the references to 'direct participation', included in the 1977 OAU Convention, regarding the involvement of an individual in 'hostilities' of an armed conflict or in a 'concerted act of violence'. The 1989 International Convention did not foresee such prerequisites.

Also, to be regretted is the fact that the definition of Article 28 H has not kept provisions contained in Article 1 of the 1977 OAU Convention relating to natural or juridical persons; and a number of additional activities such as sheltering, organizing, assisting, equipping, promoting, or employing band of mercenaries and can be considered a major drawback. These elements have been excluded from that definition as well as the reference in the Convention that the offence of mercenarism can also be considered as a crime against peace and security in Africa.

Mercenarism is a complex phenomenon encompassing not only direct participation in the acts stipulated in the international treaties dealing with the problem but in many other dimensions such as involvement in illicit exploitation of natural resources, illicit trafficking and activities of PMSC. The reports of the UN Special Rapporteur on the use of mercenaries have often mentioned the link between mercenarism and terrorism, trafficking in

migrants and women, trafficking in weapons and taking forcible control of valuable natural resources.[62]

With regard to terrorism and illicit trafficking it appears that the 'Islamic State (ISIS)' has been recruiting 'foreign fighters'[63] (a term that recalls the foreign mercenaries of the 1960s) from many Western countries.[64] ISIS largely finances itself from the terrorist activities of this non-State armed groups that are the foreign fighters, such as the illicit trafficking in weapons and natural resources (oil); in the trafficking of refugees and migrants, and in the kidnapping of rich Syrians whose families pay their ransom.[65]

In this connection, it should be underlined that when the African Court of Justice and Human Rights enters into force, its Judges will be in a position to establish the links between offences defined in its Statute, such as the crimes of terrorism, piracy, trafficking in persons, illicit exploitation of natural resources or aggression with the crime of mercenarism, as an aggravating circumstance, if the first crime has been committed by individuals that fulfil all the conditions contained in Article 28 H. This is also a very positive aspect.

In a number of intrastate conflicts in Africa, such as Angola, Sierra Leone, Liberia and Zaire/Democratic Republic of Congo the illicit exploitation of natural resources by armed groups and mercenaries has been a major factor.[66]

The Judges of the Court, however, might not be able to establish such a link if a PMSC has committed the crime.

The United Nations Special Rapporteur on the use of mercenaries attempted without success to cover all such complex activities, including PMSCs involvement, into a revised definition of mercenaries contained in the 1989 International Convention proposing that that instrument be amended.

His recommendations have not been followed by any of the States parties to the Convention, given the lack of enthusiasm of the international community for that treaty which continues to have a low rate of ratification.

The UN Working Group on the use of mercenaries, which took over the mandate of the Special Rapporteur in 2005, did not follow this path. Indeed, it considered that it was fruitless to concentrate its efforts at trying to arrive at a

[62] See, for example, UN Doc. E/CN.4/2001/19, para. 74.

[63] As mercenaries, foreign fighters are non-State armed groups that intervene in armed conflicts and can be linked in a number of illegal activities. For the similarities and differences between mercenaries and foreign fighters, see UN Doc. A/70/330, paras. 9–19.

[64] The terrorist organization Boko Haram in Africa acts similarly.

[65] L. Napoleoni, 'Asi se financia el terror yihadista', Article of El País, 16 November 2015.

[66] Amnesty International Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court, 2016, page 16.

definition of mercenarism, which presents many loopholes exploited by the Western States from where these companies operate.

Instead, it considered that given the large-scale involvement of PMSC, particularly in the Afghan and Iraq armed conflicts, their activities ought to be regulated and monitored at the international, regional and national level by an international legal binding instrument.

Such instrument ought to indicate what activities individuals, employees and PMSC may carry out and what activities are to be proscribed by the State as the only authority holding the monopoly of the use of force.[67]

While continuing to promote the ratification of the 1989 International Convention, the Working Group concentrated mainly on the activities carried out by PMSCs. It has drafted a new proposed instrument, separate from those that regulate the activities of mercenaries. This draft instrument aims at controlling the use of force internationally by the private sector.[68]

The problem of defining mercenarism is tied up with political problems associated with the unwillingness of States to prohibit the use of mercenaries. Western States, which have resisted attempts to label PMSCs as mercenaries, are not willing either to accept that PMSCs be regulated and monitored by a binding international instrument.[69]

Instead, they have promoted parallel international initiatives with the Swiss Government, the International Committee of the Red Cross[70] and the Geneva Centre for the Democratic Control of Armed Forces (DCAF) aimed

[67] S. Shameen, 'The State as the holder of the right to use force', Paper presented at the Regional Latin American and Caribbean consultation on the effects of PMSCs', UN Doc. A/HRC/7/Add.5, 2007. Also, H. Wulf, 'The Privatization of Violence: A Challenge to State Building and the Monopoly of Force', 18, no. 1 *Brown Journal of World Affairs* (2011), at 137–49.

[68] The draft instrument is being considered by a UN intergovernmental working group with the mandate to consider the possibility of elaborating an international regulatory framework, including, inter alia, the option of elaborating a legally binding instrument on the regulation, monitoring and oversight of the activities of private military and security companies, including their accountability, taking into consideration the principles, main elements and draft text as proposed by the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination. See the last report available of the Intergovernmental working group UN Doc. A/HRC/WG.10/3/2, 2 September 2014.

[69] These commercial corporations have made all attempts to dissociate any connotation of the term 'mercenary' from their activities. At a given point, they named themselves Private Military Companies, then Private Security Companies and finally they have kept the name of Private Security Providers, a more neutral term which allows them to propose their services to international humanitarian organizations.

[70] The Montreux Document, Département federal des affaires étrangères de la Confédération Suisse. International Committee of the Red Cross, www.icrc.org.

at developing a not binding International Code of Conduct that is acceptable to PMSCs.[71]

As already mentioned above, no specific legislation regarding PMSCs has been adopted in any of the African countries surveyed by UN Working Group on the use of mercenaries.[72]

One exception is Angola following the Luanda Trial that condemned nine mercenaries to prison sentences and three executions for fighting in the National Liberation Front of Angola (FNLA) against the Popular Movement for the Liberation of Angola (MPLA) and also put in motion measures for adopting African regional instruments regarding mercenaries. The other is South Africa, which has convicted six of the eight individuals who have been charged with the crime of mercenarism.[73]

So far no African State has mentioned either specific legislation prohibiting mercenary activities or specific convictions in their replies to the United Nations' request through the UN Working Group on the use of mercenaries for its database following the proposal made by the UN Human Rights Council on this matter.[74]

3. CONCLUDING OBSERVATIONS

Article 28 H contained in the 2014 AU Protocol will empower the Judges of the African Court to deal with cases related to violations of regional and international law for offences of mercenarism. This new article has incorporated with minor changes the prerequisites contained in the 1989 International Convention.

This new definition of mercenarism, however, which contains the same preconditions as those embodied in previous international and regional instruments, will be difficult to apply.

Assisting a government to maintain power and assisting a group of persons to obtain power are two innovative provisions that have taken into consideration situations not foreseen in any other former international or regional instruments dealing with mercenary activities. A more explicit provision regarding conflicts of violence for expropriation of natural resources could have also been included in the new definition.

[71] Such initiatives have finalized in the establishment of an International Code of Conduct Association for Private Security Providers' Association, based at Geneva, see www.icoca.ch/en/icoc-association.

[72] UN Doc., A/HRC/27/50 paras. 67–75.

[73] UN Doc., A/HRC/18/32/Add.3, para. 34.

[74] UN Doc., A/HRC/24/45 paras. 13 and 22–5.

The foreign character of the performer (mercenary, freelance, proxy, foreign fighter) is of particular importance in most cases, with the exception of those in which individuals of the same diaspora may commit mercenary activities. Taking into account the changing patterns of international security in internal and international conflicts and the close links between mercenary activities and those of certain private military and security companies, as the case of Equatorial Guinea has demonstrated, the revision of Article 28 H afforded a great opportunity to include clauses encompassing PMSCs at the regional level as the UN Working Group on the use of mercenaries has encouraged.

There has been a blurring between activities traditionally carried out by mercenaries and those of PMSC's in zones of armed, low intensity conflicts or other situations as numerous examples show in Africa.[75] One of the most recent examples has been reported by the UN Monitoring Group on Somalia and Eritrea regarding the PMSC Saracen that provided military training and equipment to the Puntland Maritime Police Force in violation of the UN Security Council arms embargo.[76] However, Article 28 H continues to deal exclusively with the old concept of mercenaries adopted in international treaties – IHL and ICL.

The activities giving rise to the crime of mercenarism such as organize, finance, supply, equip, train, promote, support, enlist, enrol, etc. ought also to be spelled out in Article 28 H.

The definition could have included all possible actors that may commit the crime of mercenarism: individual, group, association, company or representative of state that have already been identified in other international/regional instruments.

The process of revision of all existing OUA conventions, which has taken place for the adoption of the 2014 AU Protocol, provided an opportunity to abandon the requirements in the definition of a mercenary contained in Article 47 of Additional Protocol I, replicated also in the 1989 International Convention and the 1977 OAU Convention. The prerequisite of motivation as well as the need of a definition accumulating six indispensable requirements could have been abandoned.

Our present globalized world encourages the privatization of violence and the privatization of wars. These trends pose difficult dilemmas to African governments still in a period of building the control of the monopoly of force

[75] Such as: Angola, Sierra Leone, and Equatorial Guinea to mention a few.
[76] UN Doc. A/HRC/24/45/Add.2, paras. 28–36.

by State institutions.[77] The corporate actors that are the PMSCs and their industry continue to be self-regulated in Africa as elsewhere in the world.

As has been pointed out, PMSCs 'will continue to find recruits from national and international force pools. This is due to the fact that, firstly, they pay considerably more than a national soldier is paid and, secondly, because they offer the kind of life that many professional soldiers desire, not the dreariness of routine duties and constant training for an operation that may never come'.[78]

A framework of *Jus ad bellum*, under Article 28 H of the 2014 Protocol, could have offered and encouraged governments to adopt provisions aimed at establishing the accountability of the PMSC as well as at regulating them to indicate the activities that such companies may carry out and those that they cannot. Such initiative is important for African States where PMSCs have already been a threat in the past, continue to be in the present and might also be in the future since governments may be unable to control PMSCs in a given situation.

In this context, the AU could have followed the conclusions adopted at the UN Regional Meeting for Africa held at Addis Ababa on regulation and monitoring of PMSCs.[79] At that consultation government representatives participating at the Meeting had arrived at a consensus regarding the existing legal gap at the international level vis-à-vis the activities of PMSCs and had expressed a high level of support for the ongoing efforts towards the elaboration of an international instrument for the accountability and regulation of PMSCs.

Western States, particularly the United States of America and the United Kingdom, where the majority of these companies come from, as well as other States such as the Russian Federation or China, which may have moved towards a 'governing at a distance' model[80] by which a number of public functions in the security area have been privatized while always retaining

[77] H. Wulf, 'The Privatization of Violence: A Challenge to State Building and the Monopoly of Force', 18, no. 1 *Brown Journal of World Affairs* (2011), at 137–49. The author suggests three-level monopoly of force to counter the assault on the Westphalian nation-state system because of world globalization.

[78] K. O'Brien, 'Private Military Companies and African Security' (A. Musah, J. Fayemi (ed.)), *Mercenaries: An African Security Dilemma* (London: Pluto Press, 2000) at 71.

[79] UN Regional consultation for Africa on the activities of mercenaries and private military and security companies: regulation and monitoring, 3–4 March 2010, UN Doc. A/HRC/15/25/Add.5.

[80] M. Caparini, 'Applying a Security Governance Perspective to the Privatization of Security', in (A. Bryde & M. Caparini (eds.)), *Private Actors and Security Governance* (Muenster: Lit: 2007).

necessary control, will inevitably be able to rely on a strong national army with a capacity superior to control such companies. In contrast, African States continue to have weak state structures[81] in matters of military defence forces and, therefore, need a robust regional and national framework to protect and comply with international law. Unfortunately, this has not been totally provided by the developments in national, and regional law to date.

The Judges of the new African Court will be confronted with two major challenges regarding the crime of mercenarism. Firstly, to apply the definition of mercenarism with its six prerequisites to non-State armed groups or individuals, such as foreign fighters, proxies, freelance, contractors, and PMSCs, to mention just a few. Secondly, to establish the possible links between mercenarism and other crimes contained in the Statute such as, terrorism, piracy, trafficking in persons, illicit exploitation of natural resources or aggression.

[81] Singer, supra note 56, page 9.