

The Applicability of the Concept of Mercenary on Military and Security International Companies under the Rules of International Law

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Abstract

The subject of mercenaries and military and security companies is one of the topics that have seen much attention on the international level, such as what occurred in the mercenary groups and these companies a clear evolution. As the observer of the international scene , finds that there is a growing evident in the role of power and non-official, including security companies, military, international, and especially in areas involving military conflicts and political instability, where he has played a prominent role and the president in a lot of international disputes in openly and under the legal cover internal issue for the protection of its activities and gives it legal immunity and international legitimize feature away from the control of UN supervision , including the Security Council as the primary Organ responsible for supporting international peace and security. And the spread of the security and military international companies led to political and legal differences, and the international community was split between supporters and opponents of the activities and existence of these companies, since the opponents sees that the members of these international companies and their activities are acts of mercenaries, and the activities constitute a clear violation of many of the principles of international law in Article (2) of the Charter of the United Nations, which necessitating the intervention of the international community to prevent the activities of these companies, the fact that members of these companies are involved in military conflicts according to personal interests and material regardless of ethical considerations, and therefore these companies are the only form of new and evolving a mercenary. While the supporters sees that the activity of these companies are not considered as mercenaries in the legal sense contained in the first Additional Protocol and other international conventions . As These companies operate under self legal system that makes it committed to the international legal rules, including international humanitarian law, as the existence of these companies comes as a respond to international variables as a result of the large number of international and internal conflict, Which force the need to study this phenomenon and its legality under the rules of international law.

Key Words: Mercenaries, Security and military Companies, International Humanitarian Law.

1. Introduction

The international law stated to the states in its official form represented by the international community to the right to assist the State in which is exposed to the aggression and the national liberation movements under colonization, as the states would have the right of to allow its citizens to fight side by side with the military forces and the armies of the State subjected to aggression and with members of the national liberation movements, and also have to provide them with weapons and that it did so in the case of legitimate of individual or collective defense according to Article 51 of the Charter of the United Nations and the status of international collective security under the terms of legal controls and an exception of Article 2/4 of the Charter of the United Nations.¹ However, the observer of the international scene and the international system, finds that there is a growing evident in war and non-official powers, including security, military, and international companies, and especially in areas involving military conflicts and political instability, without the oversight and supervision of the UN, including security the Council as the main device responsible for the support of international peace and security, It's that what occurred in the mercenary groups of evolution, especially after the end of the Cold War.

¹ Mohammed K Al Mousa ,The use of Power in Law International Contemporary , Wael House for Publishing, Amman , 2004, pp. 76-77.

As the security and international military companies have become more affective in the role and increased activity in modern warfare and play a role in states that do not have political stability or in areas affected by military conflicts, as the military companies became more structured and complex and possess military capabilities of not less than regular conventional armies, where this development spread that these companies have the capability to use high technique weapons and do the works which were in the past one of the functions of the regular armies, which the right to follow it was limited to state citizens and supervised by the State to protect its sovereignty. And these companies spread in the areas of international

Conflicts and have played a prominent and main role in lots of international conflicts openly and under the internal legal cover issued to protect its activities and give it the legal immunity and its international legality away from the control of the international community and the supervision of the UN. and the spread of the of private security and military international companies phenomenon led to the division of the international community between supporters and opponents of the activity of these companies and their presence in the conflict areas, since the opponents sees that the members of these international companies and their activities are of such acts of mercenaries, where its presence in conflict zones and its participation in military operations away from the control of the UN and its supervision and its concerned apparatus with supporting international peace and security clear violation of the rules and principles of international law, especially the international precedents revealed that the activities of these companies may involve violations of the law and violations of human rights and the right of peoples to self-determination and the principles of international law². In addition, these military and security companies like mercenaries, as represented by these companies in common with the activities of mercenaries known to the international community through history, the fact that members of these companies are involved in military conflicts according to personal interests and material regardless of ethical considerations, and therefore the These companies are only new and evolving form of mercenaries, ³whilst opinion makers favor the activity of these companies are not considered as mercenaries in the legal sense contained in the first extra Protocol, as they operate under the legal system self makes it committed to the rules of international legal, including international humanitarian law, the existence of these companies comes as a respond of international variables as a result of the large number of international and internal conflicts, these companies also help in saving a lot of time and money to the lack of a regular army States which have permanent physical workload.⁴

The effects of the role of the security companies and military force engaged in military operations in Iraq after the occupation, British and U.S. International attention and widespread, especially on the impact of the reports, which confirmed leaving a lot of individuals to the armies of the regular and joined in the work for the military and security companies and the resignation and the influx of large numbers of armed forces personnel (British)⁵, in return for large sums of money far in excess of the wages of ordinary soldiers in armed forces and armies. The rising concern by the activity of the mercenaries was based on the obstruction of the right of peoples and states in the post-colonial in its self-determination, and this vision was reflected in the approach adopted by the United Nations in many of its resolutions, on what the mercenary activity involves of a clear violation of human rights and a threat to international peace and security ⁶also revealed many of the events witnessed by the Iraqi arena and some African countries for faulty legal vacuum is not unprecedented in the possibility accountable to these companies accountable in the absence of international legal rules governing the activity of these companies and impose restrictions and clear, especially if the intervention for and participation of these companies in conflict zones, based on an agreement with the host country or the population in Lacey where, as happened in the Libyan conflict or Occupying State, as happened in the Iraqi experience, as can the activities of these companies operating in areas of armed conflict can result in serious consequences and actions involving irregularities coverage, Suffice it to point out in this regard to what happened in Iraq, Angola, Comoros, Kenya⁷, which dictates that we need to study the phenomenon of these companies and their legality under the rules of international law.

² Anna Leander The Market for Force and Public Security: The Destabilizing Consequences of Private Military Companies, *Journal of Peace Research* Vol.42, Issue.5, 2005, p. 609.

³ See, UN Econ & .Soc. Council [ECOSOC], UN Doc. E/CN.4/2004/15 (Dec. 24, 2003)

⁴ L. Heil", *African Private Security Companies And The Alien Act: Could Multinational Oil And Mining Companies Be Reliable* "Northwestern Journal of international Law and Busniss.Vol.22, (3)2002, pp .296-297.

⁵ See" *Private Military Companies: Options For Regulations* "Green paper 2002).

⁶ See about mercenaries "December 2004,UN Doc. E/CN.4/2005/23"; UN GAOR, 49th sess., Annex, UN Doc.A/49/362 (1994);UN Doc A/RES/59/178 (3 March 2005);UN Doc A/60/263 (2005).

⁷ Mustafa Ahmad Abulkhair, *Future Wars: International Private military and Security Companies*, Cairo, ed. 1, 2008, pp. 259-260.

The emergence of mercenaries and international efforts to fight it in the UN and African unity**The emergence and evolution of mercenaries**

There is no doubt that the work of mercenaries (Mercenary) Contrary to many of the legal established in the public international law and inconsistent with the right of peoples to self-determination and freedom of the state to choose its economic and social development, so the mercenaries work and using it and training them, and financing them is considered contrary to both legal and moral sides, considering each one doing so criminally responsible.⁸

The mercenaries are simply members that have no loyalty toward anyone, seeking for wealth and adventure anywhere, especially in civil wars and conflict zones in the world, in the pursuit of personal gain. such people do not acquire the fighting qualities and does not enjoy the privileges enjoyed by the prisoner in the case of arrest and shall be tried as war criminals" mercenaries "as their actions a crime against the peace and security of humanity ⁹because they do not owe loyalty to the examples and principles that govern the international community. The phenomenon of mercenaries is not new, it has emerged in ancient times as they were not regular armies were formed, and thus has been the use of mercenaries in wars since ancient times, since about three thousand years found some of the right hire soldiers from abroad, and at that time voices defamation This method not ethical. On the other hand, it was the same time when the method defenders appeared, considering trading mercenaries a fanciful side boasts by mercenary¹⁰.

The ancient peoples have used of the Middle mercenaries, as used by the Greeks, Carthaginians, Romans, and in the fifteenth century originated in Europe, the so-called Free the difference where it was made up of members from Italy, Germany and Switzerland, these teams were announced the sale of its services to the princes and nobles¹¹. The middle ages also was characterized by the use of mercenaries on a wider scale, where the nobles in medieval keen on privileges that made them responsible for army conscripts market to pain, so as to feed the troops and keep property on their social and economic privileges. In the eighteenth century the practices to hire foreigners and allowing individuals to join the armies were ordinary things, where the army was at that time a multinational force, for example, serving English and Irish and Scottish soldiers in the French and Prussian and Austrian, Russian, German armies, ironically, in that time Switzerland was the only country that did not recruit mercenaries in the army, even though it was the largest source of mercenary soldiers in the eighteenth century¹².

The emergence of movements of liberation and independence played an important and strong role in the emergence of mercenary groups and the evolution of its activities, as the colonial powers hired them to suppress the national resistance movements in the colonies, which was struggling for independence, and the intervention of mercenaries in disputes were often aimed at eliminating the principle of decolonization which involved constitutes a violation of the right of peoples to self-determination and a violation of the principle of the prohibition of force in international relations ¹³Where there was an objection to mercenary activity in the second half of the twentieth century, based on a concern about maintaining the right of states after the colonization of self-determination. This approach was reflected in the language adopted by the United Nations in its view of perpetual use of mercenaries" as a means of violating human rights and impeding the exercise of the right of peoples to self-determination. Though, the nineteenth century has witnessed, the get away from the large numbers of the mercenaries, The Crimean War was the last time of formation of an army of foreigners¹⁴.

⁸ Committee Law International System Considered Mercenaries Crime Against Peace And security Humanity, If Formed Its actions Assault On national Sovereignty , Or The Its actions Aaúguena Before Investigation Movements Freedom National Its objectives ,view Report Committee Law International: UN.A/40/10. 1985. P16.

⁹ Become a principle of non-obsolescence of international crimes of the established principles of international law, where Article (4) of the Convention to prevent genocide and punishable by the year 1948, it also adopted by resolution of General Assembly in its No. (3291) 1968 Convention on the "non- applicability of the rules of limitation on war crimes and crimes against humanity," as stated in Article 29 of the Statute of the International Criminal Court.

¹⁰ Wilfred Borcat, mercenaries in Africa, Translation: Joseph Abdullah, Arab Institution for Studies and Publishing, i 1, 1984, 2008, pp. 227-245.

¹¹ Mohammed Shawki Ruslan, the Rights and Duties in the Customs of Mercenaries, Journal of the National Guard, 1979, p 28. 58 - IBID, op cit, p 5.

¹² Alaa Abdel Hafiz, Mercenaries, the Phenomenon of Evolution, Journal of the National Guard, KSA, 1997, pp. 31-32.

¹³ Abdul Ghani Mahmoud, International Humanitarian Law: a comparative study of Islamic law , Renaissance House, Cairo, 1991, pp. 71.

¹⁴ It should be noted however that Britain hired at the time (16500) German, Italian and Swiss to participate in this war, see Alaa Abdel Hafiz , op cit, p 23-33.

In the past century, States were working that its army consists from its citizens only, in order to maintain the purity of feeling in the national commitment to military orders, and because the results of the war does to them alone, in addition that states prevented its citizens from joining the armies of foreign countries¹⁵. In spite of that, the mercenaries did not weaken their participation in armed conflicts, and there are several form of mercenaries in the twentieth century, and from these images the join of members of organizations of foreigners into the army in the framework of an agreement between the State and the organization or contracting with international private military companies, or that the State hire foreigners directly for use in a particular dispute¹⁶.

In a detailed scope they participated after the fifth decade of the twentieth century in many armed conflicts, especially in Africa, as mercenaries fought in the (Kinshasa) in the period between 196-1964 along with the separated forces, as mercenaries fought during the Nigerian civil war to by the troops in the period from 1967 to 1970, as well as in the civil war of Angola in 1976, also in Comoros in 1978, where the mercenary managed to invade and overthrow its government, wars numerous in several spots of the world and the mercenaries were its fuel, as expressed them some that they do not aim to achieve a very sublime but they sell their combat services or defense to other countries or to rulers who need them¹⁷.

The emergence of liberation movements in African countries was accompanied by the prevalence of international military companies to participate in internal and international conflicts, where the reasons diverts in the use of clients of private military and security companies, where foreign governments resorted to suppress the rebel movements and the opposition and the national liberation movements in Africa, also rebel movements and opposition resorted to it to meet legitimate governments, and used by the occupation authorities in Iraq after 2003, it was also used by some political systems as in Libya in 2011 on the impact of the strikes of the Interior, which led to a boom and the spread of this kind of private military and private security companies that trades in security needed by all creatures on the planet¹⁸.

In this way, mercenaries became more sophisticated and professional, and this has become a profitable business, and the phenomenon of mercenaries was developed qualitatively and has a new form, where it spilled in the establishment of a military companies (private sector) for foreign mercenaries deployed in the countries of the world⁶⁶¹⁹ And the phenomenon of mercenaries became real industry and moneymaking, and the mercenaries organizations increased recently, under the pretext of helping weak states experiencing instability or maintain security in areas that suffer from military tendencies, and the preparation and rehabilitation of a regular army which is capable to maintain internal and external security of the country, with providing the necessary supplies according to the claim of mercenary organizations and beyond huge amount of money which paid to ordinary soldiers.

And so, the Mercenaries became more sophisticated and professional, and this has become a profitable business, and extended it to establish a military companies (private sector) for foreign mercenaries deployed in the countries of the world²⁰ Where the world has witnessed in three recent decades an obvious growth in the number of private military and security companies and the quality of business provided by these companies., and the mercenaries were called special military contractors who often exercising the most necessary tasks performed by regular armies in military operations, prompting some to describe this phenomenon to what called "privatization creeping to acts of war". and the use of these companies from familiar business became in many areas of military conflicts became a result of several factors, including reducing the number of armed forces after the Cold War ended, and the possibility to intervene in any dispute away from internal and international public opinion without supervision or accountability.

¹⁵ Sohail Fatlawi, *Prisoners Of War In The System Of International Law*, Qadsia Printing House, Baghdad 1983, pp. 70-71.

¹⁶ Jose L. Gomoz , *The Role of Private Military and Security Companies in Modern Warfare*, *The Brown journal of world Affairs*, August 2012 ,available at: <http://www.globalresearch.ca/the-role-of-private-military-and-security-companies-in-modern-warfare/32307>

¹⁷ Abdul Ghani Mahmoud , op cit, p 72.

¹⁸ Elke Krahmman , *From 'Mercenaries' to 'Private Security Contractors': The (Re)Construction of Armed Security Providers in International Legal Discourses*, *Journal of International Studies* vol.40,issue 2,2012 ,pp. 347-351.

¹⁹ Majdi Mohammed Issa, *Mercenaries: The Armies Of Private Sector Demand*, *Journal of the National Guard*, 1997, p 24.

²⁰ Rolf Uessler, *Servants of War: Private Military Corporations and the Profit of Conflict*, trans. Jefferson Chase (Brooklyn, New York: S, 2008) 146.

²¹ which made many of jurists and politicians to question about the possibility of their control and judge them and accuse them for their violations of the law issued by them in the absence of international legal rules governing them, especially after some facts has revealed the involvement of some private military companies operating in Iraq scandals that were committed at Abu Ghuraib prison, and committing grave breaches of human rights²².

These problems are caused by the use of mercenaries, which emerged on the surface were huge, complex and especially in light of the violations committed by some military and security companies in the areas of international and domestic tendencies, and the absence of international legislation governing the activity of these companies, and for what the phenomenon of mercenaries represents of big danger to the international security, Which can lead to more conflicts and wars and converting the fight into a commodity and source of the material gain, which push the international community, represented by the UN to address this phenomenon on the international level.

Fighting the mercenary in the Organization of the United Nations and the African Unity Organization

Although the phenomenon of mercenaries and was old and danger, but the UN addressed this phenomenon only after the events in the Republic of Congo in Africa, where it was first time to discuss the mercenaries in front of the UN in 1961, and that was during the battles witnessed by the Republic of Congo, which claimed the lives of large numbers of civilians, where there were large numbers of mercenaries fighting with separatists in this war, which pushed the Security Council to take its resolution No. (161), which called to take the necessary procedures for the immediate evacuation of Congo to each military device or paramilitary Belgian or foreign, as well as politicians advisers who are not linked directly to the UN, and on 24 October II in 1961, the Security Council issued resolution No. (163) to use all necessary forces for the implementation of this decision, after the UN forces in Congo directed to expel the mercenaries²³, And this was the first experience of the process carried out by the UN to face the mercenary's activity, which paved the way for the Security Council to deal with the phenomenon of mercenaries and the issuing several international resolutions.

In this regard, the UN Security Council adopted four important resolutions condemning the use of mercenaries at the international level, namely: Resolution No. 239 in 1967 - Resolution No. 404 of 1977 - Resolution No. 405 of 1977-Resolution No. 419 of 1977²⁴, in Resolution No. 239 dated July 10, 1967 described the attack of mercenaries on the Congo-Kinshasa to be a foreign intervention, then the Security Council was more strict toward mercenaries in its resolution No. 405 for the year 1977, when it described the attack of mercenaries on the state as an act of aggression and called on all States to take all measures necessary under their domestic law to prevent the recruitment or use of their lands or the lands controlled by it to train or transfer any mercenary-related activity²⁵ and a sharp debate was raised about the legal value of these decisions on the basis that they were outside the framework of Chapter VII, which does not carry a mandatory character but is close to recommendation, but sooner the vision it became clear, especially after the advisory opinion of the International Court of Justice in the case of Namibia in June 1971, under which such mandatory character was adopted to this range of decisions on the basis of the theory of " terms of implied reference " of international organizations when the interpretation of the Charter of the United Nations, where the Court concluded that" the Security Council when adopted these decisions it was an acting to exercise its primary responsibility which is maintaining security and peace, and it took its decisions in accordance with the purposes of the Charter and the principles enshrined in Article 25 which stipulates that the states that comply with those decisions, even including members of the

²¹ Michael Cottier, Element Of Contracting And Regulation Private Security And Military Companies, International Review of Red Cross, Vol. 88, No. 863, September 2006, p174.

²² See "report of the expert meeting on private military contractors, CUDI, Geneva, 29-30 August 2005.see also. Deven D.B, The Threat of military companies, The Brown journal of world Affairs, 2011.

²³ See Resolution 161 (1961) adopted by the Security Council at its 933th meeting, on the 21 / February 1961, and Res. (163), adopted by the Security Council at its 949th meeting, on 6/ June (1961), and see Res (170), adopted by t he Security Council at its 984th meeting, on the 30 November (1961)

²⁴ See Resolutions: [S/RES/239\(1967\)](#), [S/RES/404\(1977\)](#) concerning the Democratic Republic of the Congo" and Res. [S/RES/404 \(1977\)](#), [S/RES/405 \(1977\)](#), [S/RES/419\(1977\)](#), Benin.

²⁵ See , [S/RES/405 \(1977\)](#) Adopted by the Security Council on the 21 / April 1977. ⁷³- Wilfred Borcat, mercenaries in Africa, op cit, p 220.

Security Council countries that voted against it and the Member States of the United Nations that are not members of the Security Council²⁶. The Council issued Also Resolution No. 1467 on its meeting held on 03.28.2003, a resolution where it adopted the attached statement on the light of weapons and small arms, and the activities of mercenaries, and the dangers that threaten the international peace and security in West Africa. And the decision was consisted of four paragraphs and six items, which warned African countries from supporting the mercenaries in the West African region, and to take all measures to fight them. The Council expressed its grave concern from the activities of mercenaries, and requested to aware the countries from their danger, and demanded that the regional countries and the non-regional countries need to cooperate, to put an end to the phenomenon of trading in small arms and mercenary activities.²⁷

There after he convictions and the criminalization of the United Nations to mercenary groups continued in several occasions, in 1968 the General Assembly proclaimed the United Nations that the way in the use of mercenaries to face the movements of national liberation and independence are punished as a criminal act, mercenaries themselves are outlaws, in addition, it demanded the Governments to implement legislation considering the recruiting, financing and training in its territory a punishable offense and forbids its citizens to volunteer to work in the ranks of mercenaries²⁸ And in 1976, during the diplomatic convention the Niger delegation submitted a suggestion on the definition of mercenaries and demanded the inclusion of some of the legal texts on mercenary activity, and in spite of the differences and the apparent disparity between the positions of countries around the definition of mercenaries, some participating countries managed to reach a compromise formula adding the text of Article (47) within the first additional protocol.

Given the seriousness of mercenaries and violating the principles of international law, the General Assembly established a special committee to prepare an international convention on mercenaries, where the work of the Commission finished by adopting the General Assembly in its resolution 44/34 of the 1989 convention, prepared by the Commission, namely the International Convention against the recruitment or use or configure and training Mercenaries, and the International Law Commission considered the mercenary system a crime against peace and human security, as the form of an attack on the sovereignty of the State, or that it was an obstacle to the achievement of national liberation movements of its goals.²⁹ Also the General Assembly issued several resolutions, such as resolution No. 49/150 issued on 12.23.1994, and resolution 50/138 On 01/12/1995, in addition to resolution 52/112 issued by the session No. (70) 12.12.1997, which includes

(7) Paragraphs, the General Assembly stressed the seriousness of the phenomenon of mercenaries, and its violation of the United Nations Charter and the principles, objectives and rules of international law. And called all States, to take the necessary steps, and exercise the utmost vigilance, and to take all Legislative measures to fight the mercenaries, and insisted on the need for cooperation to do so, but some States that finance and sponsors the «Mercenary» corporations was and is still hampering all initiatives on this regard. In this context, a group of experts, under the auspices of the United Nations, seeking for the preparation of a code of good conduct for this sector of private security in addition to work on a new legal definition of the word" mercenaries "taking into account the new facts on the ground regarding private international military and security corporations , where (Shaista Shameem) the special reporter of the Commission on Human Rights of the United Nations And a group of experts held meetings since 2001 about using three of the mercenaries in European headquarters of The United Nations in Geneva to discuss the issue but these meetings did not result in a specific definition which deals with all legal aspects of the business of these companies.

At the regional level, and given what the African countries suffered as a result of the use of mercenaries in the wars, whether civil or international, the Organization of African Unity proceeded to develop mechanisms to combat the phenomenon of mercenaries In 1967, the Assembly of Heads of State condemned all Government of African mercenaries in all its forms and in the fourth ordinary session, where if called all the countries of the world to enact and enforce legislation considering the recruitment and training of mercenaries in their territory a punishable offenses, and to deter its citizens from volunteering as mercenaries³⁰ in June 1971.

²⁶ ICJ, Advisory Opinion of 5 August, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970).

²⁷ See (Res/1467/2003) adopted by Security Council at its (4720) meeting

²⁸ Majdi Mohammed Issa, op cit, p 26.

²⁹ See UN Document, A/40/10, 1985 p.16. 78- Mustafa Ahmad Abulkhair , op cit , p, 264.

³⁰ Majdi Mohammed Issa, op cit, p 37.

And at the meeting of Heads of State and Government in Addis Ababa, and after the threats of the Portuguese army, which includes foreign mercenaries in its ranks and its various activities in the Dark Continent, there was an adoption of the declaration of making mercenaries outside the law, where this declaration condemned all activities and work carried out by mercenaries, as it also revealed their real activities in Africa³¹. Given the horrors witnessed by the African continent as a result of the activities of the mercenaries, a committee of legal experts by the African Union prepared a treaty approved by the African Summit held in Libreville in 1977, and it was named the African Convention to outlaw mercenaries, and Article (6) of this agreement stipulated a number of duties that the States should adhere to³². However, all these international and regional conventions did not address the issue of private security and military companies, and the increasing role of these companies in the areas of conflicts pushed the United States to search for ways to regulate these activities which are similar, in some cases, to the work of mercenaries, where the absence of international supervision led in fact to the existence of margins which allowed private military and security companies in the market to form mercenary forces.³³

In spite of the international and regional efforts to eliminate the phenomenon of mercenaries, the international community has not addressed the phenomenon of private international military and security corporations, and the absence of international legislative regulating the activity of these companies led to the spread and open use of it in a lot of internal, regional and international conflicts, providing a practical alternative and legal cover for these companies, despite the lack of legitimacy to carry out the activities done by the mercenaries without the possibility of questioning or the supervision of international legal control, especially in areas suffering from political instability or established under foreign occupation

What are the mercenaries in international jurisprudence and regional and International Conventions?

What are the mercenaries in the jurisprudence of international law?

There is no doubt that the activities of mercenaries are contrary to many of the established principles of public international law, such as the principle of Non-interference in internal affairs and the principle of independence, and the principle of territorial integrity, and the principle of non-use of force, and the principle of living in security and peace. As well as mercenaries would block right of the determination of peoples, they also impede freedom of States to choose its own economic and political status, so the mercenaries is considered a disliked act morally and legally³⁴ the mercenary represents those groups of people who find the recruitment of themselves as a profession of material gain and sell their lives to those who

pay them a price more without interest to the causes of war or principles, and human factors, those individuals from professionals fighting a request for the benefit of the material and more money does not matter whether the war or the party they are fighting on its side is legitimate or not. And considering the dangerous role played by the mercenaries the international community baptized to respond to the phenomenon of mercenaries on the regional and international level, but the emergence of security and private military companies in the conflict zones in the pursuit of material gain and participation in a lot of internal conflicts and international, has made many illegal argument in the absence of international legislation to these companies and the existence of common denominators between these companies and the traditional activity of mercenary³⁵.

And the states jurisprudence has already discussed the concept of mercenaries, where some believe that the mercenaries, are people involved in the armed conflict in a desire to obtain personal benefits of material gain much more than ordinary soldiers are paid in similar functions, in order to overthrow the government or handicap the political or economic life or to achieve illegitimate goals,³⁶ which mean that the objective of participating in military conflicts is to achieve financial gain.

³¹ Wilfred Borcat, mercenaries in Africa, op cit, pp. 212-222.

³² Ghassan Aljoundi, Mercenary and International law, Egyptian Journal of in International law, Vol. 41, 1985, p 257.

³³ Katherine Fallah, Corporate actors: the Legal Status of Mercenaries in Armed Conflict, International Review of Red Cross, Vol.88, No.863, September. 2006, p, 160.

³⁴ Ahmed Abu Al-Wafa International Humanitarian Law, Council Supreme Culture, Cairo, 2006, pp. 65-66.

³⁵ Hin-Yan Liu, Leashing the Corporate Dogs of War: The Legal Implications of the Modern Private Military Company, oxford journal, Conflict Security Law vol.15,issue 1 ,2010 ,pp. 149-150.

³⁶ Ebrahim, Adam, Going to war with Army you can Afford: The United States, International Law, and the Private Military Industry, Boston university, international law journal. (181)2010, p.208.

Some argue that it is difficult to develop a definition of mercenaries that addresses all aspects of the activities of these people, but the mercenaries can be defined in general, as a person volunteered for a financial reward, and enters into an agreement to fight for Armed Forces of a foreign state or any entity that aims to exercise power over country or people or part of it³⁷. While the other side believes that the mercenaries are "professional soldiers fighting under the banner of any State or any group ready to buy their services with money."³⁸ However, it is difficult to define mercenaries by excessive compensation and motivation, because there are people involved in military conflicts on the ground floor of a foreign country according to the convictions and intellectual or political or religious reasons, making them out on the concept of mercenaries⁸⁸. Thus, linking motivation and material gain behind participation in military operations is making the applicability of the concept of mercenaries on individuals is difficult, especially that proving the motive requires a real proof, so the definition of mercenaries on the basis of the reasons that led them to participate in the military operations and actions makes the definition of Mercenaries involves legal impractical complications.

In another definition of mercenaries some find that the most important element that drives the mercenaries to participate in military operations is the material compensation which is beyond what could be paid to an ordinary soldier who belongs to a regular army, where mercenaries on the basis of this opinion is known as "groups doing certain act in instead of personal goal or financial compensation that exceeds the value of similar act from foreign party or foreign intelligence device"³⁹.

While some believe that the participation in military operations for financial gain is not enough itself to be considered as a person of the mercenaries, but we must taking into account the natural relationship that govern mercenary's party he works for. As in a detailed definition of mercenaries it includes the nature of the relationship between the mercenary with the recruiter State for their own benefit and the purpose of fighting in its ranks, it is said that the mercenary is "a foreign person from the parties of the conflict, and who is recruited voluntarily without being hired of his own state in order to participate in hostilities actions directly for the benefit of one of the parties of the conflict, in spite of the absence of a connection to the concerned party used or all parties, no (nationality) connection nor endemic or stay in the territory of any of them nor belonging to the armed forces of the party who was recruited, but stints fighting specifically for the performance of combat missions instead what he does of material gain, and for that the material element with the voluntary nature of private and external of the vowed that connects the mercenary armed parties of the conflict are considered exclusively the most important characteristics of the definition of mercenary"⁴⁰. Therefore the criterion of nationality distinguishes between mercenaries and opposition politicians who are engaged in military operations against the authority or the state in where they live in.

Based on the foregoing, we believe that the mercenary is a person who is being recruited to fight in armed conflicts and to participate in direct hostilities, without being a member of the armed forces of any party of the conflict or an officially delegates by a State that is not part of the conflict as a member of its armed or a citizen in a province controlled by one of the parties to the conflict, in a desire to gain material beyond what regular fighters are paid in similar positions. From these definitions, we find that there is a common between the jurisprudence views on the definition of mercenaries in that it does not depart from the fact that the main objective of these groups is the search for wealth, which take these groups to recruit themselves a profession of material gain, they sell their lives to the highest bidder, regardless of legitimate war or its illegal goals, or for reasons of war or humanitarian principles and factors, without being citizens of the State where they are practicing their military operations. And it seems that the international jurisprudence based its definition of mercenaries to two main criteria: achieving material gain which is paid by a person from a foreign party, secondly: participation in military operations⁴¹.

³⁷ H.C Burmester, *The Recruitment and Use of Mercenaries in Armed Conflicts*, *The American Journal of International Law*, Vol. 72, No. 1 (Jan., 1978), p. 37.

³⁸ Mohammed Shawki Ruslan, *Op cit*, pp 28-30. 88 - H.C Burmester, *op cit*, p p. 37-38.

³⁹ Ebrahim, Adam, *op cite* (181)2010, pp, 206- 207.

⁴⁰ Nizar Anbuki, *International Humanitarian Law*, Weal Publishing House ,Amman, 2010 , Pp. 274-275

⁴¹ Lindsey Cameron, *Private military companies: their status under international humanitarian law and its impact on their regulation*, ICRC, Volume 88 Number 863 September , 2006, p577.

Based on this view, some has found that private military and international security corporations represents the face of modern mercenaries known by the international community through the ages considering people working in it as pursuant of material gain and not by ideological or national loyalty which makes the concept of mercenaries applicable to them according to the principles of contemporary international law⁴²; international military companies are only commercial entities that provide special military and security services and participate in military operations in pursuit of material gain without taking into account the legality of war and its causes as it also does not go through the supervision of the Security Council as the main device responsible for the support for international peace and security, Thus, security and international military companies and its personnel workers in the conflict zones are applied on them the definition of mercenaries in terms of jurisprudence, so they're involved in military operations in pursuit of the material gain and personal regardless of the nature of the conflict on one hand, and on the other hand they are paid huge amounts which are beyond what is paid by individuals working groups in similar military positions, and they often do not belong to any party of the conflict, so these international companies do not differ from the traditional mercenary in the terms of substance and goals and motivations. Therefore, the absence of international legal texts established in the activities of these companies and its members do not confers acts of these companies and their employee's recipe legitimacy, but reveals clearly the limits of the legal texts governing this type of activity. Therefore, the traditional definition of mercenaries is not commensurate with international variations and developments witnessed by the international community in recent years, which dictates that we need to reconsider the international legal texts for mercenary and its activities.

Mercenaries under Geneva Conventions and two Additional Protocols of 1977

Although the phenomenon of mercenaries is old and spread long time ago, and legal transformation of the law of war to Armed conflicts law, which attempted to reconcile between military necessity and the principle of humane treatment in order to protect involved and non-involved individuals in the armed conflict, but Hague law⁴³ and the law of Geneva did not include any legal definition that defines mercenaries until the date of the adoption of the Additional Protocols of 1977, despite the condemnation of this breed of fighters strongly and criminalization of its actions by some of the Interior laws, for example, the State Security Court of Sudan in 1972 condemned the mercenary" Shatbaner "in imprisonment for a period of twenty years as a result of his involvement with the rebels in southern Sudan, without giving a definition of mercenaries.⁴⁴ There is no doubt that the purpose of the exclusion of mercenaries to enjoy of international legal protection for prisoners and be treated as war criminals⁴⁵ is tightening on them and not let them escape and trial them to reduce this phenomenon of the perpetrators of war crimes with impunity .

As for the meaning of the categories of mercenaries in the first Additional Protocol , it is rewarded to the its definition to Nigeria, which has suffered from the activities of the mercenaries on its territory during the civil war that took place between 1967 - 1970, where the delegate at the conference of international humanitarian held in the period between 1974 - 1977 to present a proposal to the Third Committee of the Conference expressed an item to the draft protocol that prohibits the mercenary from enjoying of the captive position or the fighter and explained the elements of the definition of mercenaries, where the Nigerian delegation proposed the following:⁴⁶

First: do not give place fighter and prisoner of war to any mercenary participate in armed conflicts referred to in the Conventions and the Additional Protocol, Second: A mercenary is a person who is not an individual in the armed forces of a Party of the conflict, recruiting specially abroad, stimulated mainly to fight or to participate in an armed conflict material or reward or never gains another person. However, this initiative Nigerian met with sharp controversy between the countries of the Third

World and the Non- Aligned and other Western countries during the third session and the controversy was based on two points⁴⁷:

⁴² Faisal Shatnawi, Human Rights And International Humanitarian Law, Hamid Publishing House, Amman, 1997, p 214

⁴³ See Articles (4, 5, and 17) "Hague Convention of 18 October 1907 (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land".

⁴⁴ Ghassan Aljundi, op cites 248.

⁴⁵ Resolution GeneralAssembly No. (3103) issued December 12/ 1973 Confirmed Where Principle of The inherent right Of the peoples In Struggle, And Mercenaries Must Treatment as Criminals.

⁴⁶ Report to Committee (3) on the working group submitted by the Rapporteur, (CDDH/111/236), pp.190-201.

⁴⁷ See Official Record of the Diplomatic conference on the Reaffirmation and Development of international humanitarian Law applicable in Armed Conflict, Berne, 1978, Vol .6, p.488.

1- The third world countries sees that the foreigner who join the ranks of the armed forces of one of the warring States is a mercenary, while Western countries reject this proposal if the State which joined by the foreigner by being a soldier involved in the armed forces.

2-The Non-Aligned Movement countries saw that foreign experts and technicians who are in the army of one of the warring countries are mercenaries, while Western countries see the contrary, it is during the fourth session when the sharpness of the controversy was reduced and the third action committee submitted the document CDDH/11 / GT/105 in different terms, where they reached a compromise formula unanimously, to take into account the proposals, as approved by the participating delegations so this document become the Article 47 of the First Additional Protocol.

In spite of the efforts that have been made in order to criminalize the activities of mercenaries, and put a specific definition for him, but that the text of Article (47) The formula generally does not meet the purpose for which situation for him this definition, so that the article did not address to determine the legal effects on the person in the case was considered mercenaries and only after consideration of the category of combatants and depriving him of rights enjoyed by the prisoner of war, where the first paragraph of Article (47) that the mercenaries " are not entitled to enjoy combatant status or prisoner of war " ⁴⁸ and thus deprived of all rights guaranteed to prisoners of war under the rules of international humanitarian law, which means punished in accordance with the domestic criminal law of the country which is caught in the grip, but they must take into account the basic conditions and guarantees recognized. ⁴⁹ In return for the state's right to prosecute and the rhythm of legal punishment on State should respect the conduct to ensure fair legal main known trial guarantees such as neutrality, independence and impartiality, and ensure the provision of necessary conditions humane treatment⁵⁰. The second paragraph of Article (47) has been identified as a mercenary⁵¹:

A - Being specially recruited locally or abroad, to fight in an armed conflict.

B - Actually and directly participate in hostilities acts.

C - Mainly stimulated to participate in hostilities acts, in a desire to achieve personal gain, and make him actually by the party of the conflict or on behalf of a promise to compensate the material exceeds what has promised to the fighters-ranking with similar functions in the armed forces of that party or what is paid to them.

D – Is not a national party of the conflict and not a citizen in the province controlled by one of the parties of the conflict?

E - Is not a member of the armed forces of a Party of the conflict?

F – Is not a delegate on an official mission by the State which is not a party of the conflict as a member of the armed forces?

As the mercenary in accordance with the definition contained in Article 47 of Additional Protocol I is a person who recruited to participate actively in hostilities to calculate the state is not considered one of its nationals not endemic and that in order to obtain material benefits far exceed what is paid to regular soldier in the state army, which hired him. And so the lack of six conditions contained in the former legal text means that the person remains enjoying legal protection of international obligations under the Conventions Geneva and Additional Protocols, the doubt explains the interest of the protected person so that he is considered a civilian for the pending commanded by the competent court of the country, on its grip⁵².

And despite the fact that this text was a turning point in the fight against mercenary activity, but he did not provide much in the definition of mercenaries, causing him to replace criticism by many legal. Because some believe that the motives that led to stipulate this text during the Diplomatic Conference out of legal substance content, and came to meet the requirements of a purely political without taking into account the legal dimension, making the text of the article (47) devoid of legal dimension of the substantive right, even though it was applied to people involved in the same dispute, which made the scope of application of this provision practice very tight⁵³.

⁴⁸ See Article (4), Third Geneva Convention For the year 1949, War Prisoners groups.

⁴⁹ Jean-Marie Henckaerts and Louise Doswald-Beck, op cit, p, 343.

⁵⁰ See for example Article (3) Common Conventions of Geneva For the year 1948 and Article (75) First Additional protocol.

⁵¹ article (47/2) of the First Additional Protocol

⁵² See article (5/2) Third Geneva convention for the year 1949.

⁵³ Katherine Fallah, op cit, 166.

Thus the existence of a legal and clear vacuum led to the definition of a mercenary, and especially that the requirements contained in the second paragraph of Article (47) that are required to categorize the person as a mercenary to meet all the conditions specified in the text of the article mentioned, which makes proving the case mercenary practically impossible for the classification of a person under the category of mercenaries. In addition, it is assumed to classify a person as a mercenary to not be a member of the armed forces of one of the most amusing dispute, and therefore it is not a mercenary person who is engaged in hostilities acts if⁵⁴:

1- Their state was neutral and has sent them to fight alongside the enemy, then its work is a violation of the rules of neutrality and takes the international responsibility for this, and those individuals are not considered mercenaries.

2- Those individuals were of an ally state and have been sent by the state to fight alongside the enemy then they are not considered mercenaries as long as they were sent by their state and this state is internationally responsible to violate the rules of the alliance.

3- Expressed its support for the enemy even if it did not involve in the fighting effectively but indirectly sent to fight or volunteered on their own then they are not considered to be mercenaries.

As for the second condition contained in the second paragraph, which require that the person actually participate directly in hostilities acts, we believe that international humanitarian law does not give a clear concept of the meaning of participation in hostilities, and did not include a clear international explanation of the concept of participation, for this the concept of direct participation in hostilities must be explained in accordance with the ordinary meaning and based on the theme of international humanitarian law and its purpose⁵⁵. As when the international humanitarian law refers to the hostilities, this concept can be linked to international armed conflicts and non-international, and does not include cases of internal riots or violence acts. The concept of direct participation in hostilities confined to the armed conflict, and consists of two main components, the first: hostilities; and are intended to (collective asylum) to one of the parties of the conflict and to ways and means of injuring the enemy, and the second: participation in the hostilities; which means individual contribution to a person in this hostilities⁵⁶. And as for the individual direct or indirect participation, it is determined according to the quality and degree of this contribution in the armed conflict. Therefore, some believe that participation in hostilities is an individual behavior that is a part of hostilities, regardless of whether the participating sporadically or as part of a permanent job carried out by a person for the benefit of regular troops or armed groups belonging to one of the parties to the conflict, and therefore the concept of participation in military operations not return to the status of the person or his or affiliation with one of the parties to the conflict, but based on the nature of its contribution to the specific hostile acts constitute the total for each business carried out by the participants in this operations the hostilities of an armed conflict⁵⁷. Therefore, security or international military companies cannot be considered mercenaries in areas of armed conflict to mere presence in areas of armed conflict or to provide some services, but these companies must participate in the hostile operations to the interests of one of the parties to the conflict, as we must take into account the nature of the actions that are part of the hostilities and the degree of contribution of these companies to the hostilities in the conflict.

As for the third term of the second paragraph of the text of Article 47 of the first Protocol, which require in the mercenary must be mainly stimulated to participate in hostilities, and have the desire to achieve personal gain, and make him actually by the party of the conflict or on behalf of a promise of a material compensate that exceed what is promised by a Fighters -ranking who is in a similar position in the forces of the armed of the party or what paid to them. Some has felt that the motivations to take part in hostilities is the most important element in the definition of a mercenary and distinguish it from the rest of the people participating in the armed conflict, and this is what was expressed by some of the countries participating in the international Conference of the text of Article (47).⁵⁸

⁵⁴ Suhail Fatlawi, a Mediator In Public International Law, the Arab Thought House, First Edition, Lebanon, 2003, p 379.

⁵⁵ see Article (31/1) Conventions Vienna, Law of Treaties 1969.

⁵⁶ Nils Mislser, Direct Participation In Hostilities Under International Humanitarian Law, ICRC, 2009, p.43.

⁵⁷ IBID, pp.42-44.

⁵⁸ Report to the Committee (3) on the working group submitted by the Rapporteur, (CDDH/111/SR.57) , Pp.196-201.

However, we support the view of others that the definition of mercenaries on the basis of motive can be objective and non-viable and involves many legal problematic when interpreting the text of Article (47)⁵⁹ and in particular to prove the motive it requires a real proof to prove your intent to do the mental element of the crime of mercenary for the person who is engaged in hostilities. There is no doubt that the link between the "motivation "as a special ," compensation to participate in hostilities "as a condition objective eased the requirement for motivation, however, the dilemmas related legal interpretation of the motive behind the participation in hostilities operations, compensation keep a list and unclear. This is what the Committee has concluded (United Kingdom's Diplock committee) in its report issued in 1976, it is possible to define the mercenaries only by reference to what they are doing, and not by reference to the reasons that motivated them to participate in hostilities operations⁶⁰. Therefore, we believe that the condition of the motive material to participate in hostilities as a basis for the definition of mercenaries and linking motivation compensation in excess constitutes a legal problem when applying this text to similar members participating in an armed conflict and one without taking into account their work and the degree of their participation in hostilities. Especially if the text (47) of the First Additional Protocol has been applied to the people belonging to an illegal international organizations for ideological or political or intellectual reasons without taking into account the nature of their acts and the degree of their participation in hostilities. Based on the foregoing, we find that in spite of the progress made by the First Additional Protocol with respect to the rules of international humanitarian law in general, but that the text of Article (47) who did not develop a clear definition of the concept of mercenary did not criminalize the act of mercenaries, as it did not specify the consequences of in the case of individuals classified as a mercenary.⁶¹

What mercenaries in the draft convention Luanda:

The African continent, most regions in the world - and remains - the scene of mercenary activities, as more areas suffering from the phenomenon of mercenaries given the prevalence of civil wars and insurgencies and ethnic and religious conflicts, prompting many courts enters on the criminalization of mercenaries and condemned strongly. Has already condemned the Revolutionary Court in Luanda / Angola in 1976, the British (Costas Giorgio) and (Andrew McKenzie) and U.S. (Daniel Gerhat) for the exercise of mercenary activity and the impact of their participation in the civil war that erupted with Angola's independence from Portugal, where he was on death row⁶². And is the Convention on the Luanda first agreement dealing with the criminalization of mercenary activities at the regional level, in 1976 the International Committee of achieving on mercenaries projects on the criminalization of mercenary activity in the city of Luanda, Angola, which is known to the draft of Luanda convention.

The Convention Luanda first agreement on the subject of mercenaries on a regional level, but it did not provide anything new about the definition of Mercenaries where it form General Terms and did not specify the elements of the crime of mercenary where the agreement was taken in the broad sense of the crime of mercenary. It's also merely enumerates acts under which the mercenary are guilty of an offense. In addition, it appears that an agreement to Luanda did not focus on the amount of compensation when ingested acts of mercenaries; any that the standard that had been assigned to him is the existence of compensation or any bonus material as a condition for classifying a person as mercenaries, either contrast or compensation is not excessive physical excessive. Delegation known as Article the first (1) of this Convention mercenary crime that would be committed by individuals, groups or associations or representatives of the countries of the same countries and the person concerned is guilty of the crime of mercenary, if committed in order to resist the process of the right of self-determination by armed violence, any of the following acts:⁶³

⁵⁹ Katherine Fallah, *opcit*, p, 165.

⁶⁰ Report of the Committee of Privy Counselors appointed to inquire into the recruitment of mercenaries (the' Diplock Report, ('HMSO, August 1976.

⁶¹ Frits Kaishoven and Leisbeth Zegveld, *Constraints on the Waging of War: An Introduction To International Humanitarian Law*, ICRC publication, 2011, p18-19.

⁶² In 1976, the Court of Luanda judgment on American (Gerhart Daniel) death; announcing himself as a mercenary soldier in an American newspaper. As judge (John Derek Parker) sentenced death by firing squad for announcing himself as the leader of the mercenaries in the north of Angola, was also sentenced to nine other men to prison for years ranging between 16 and 30.

⁶³ Article (1) of Luanda convention.

A - Regulation, funding, supplying, or recruitment, training or promotion, or support, or use, in any way, for military forces composed of individuals. Or with individuals who are not citizens of the country in which they practicing those actions, with the aim of personal gain, and to get salary or any other type of material reward.

B - Registration, or recruitment, or attempt to recruit in the force mentioned.

C - Allowing the implementation of such acts or activities in any territory under its jurisdiction or in any other place is under the control of, or the granting of facilities for the passage of the above-mentioned forces, or transfer or any other processes to those forces.

Through review of the text of the previous article, we note that the definition of mercenaries in this convention did not give the dimension of the required legal and correct to the concept of the mercenary and the constituent elements of this crime, but merely criminalize the act and the multiplicity of business to prepare such mercenary, which led to the lack of broad concept of mercenaries. In addition, although the public has been characterized by a project of this Convention, but I formed the nucleus the built by the Organization of African Unity Convention, It seems that this agreement has focused on the criminalization of acts that are of such mercenaries without for taking into account the amount of compensation or bonus material, making him the definition of mercenaries and a very broad and fundamentally different, what is guaranteed by Article 47 of the Additional Protocol.

What are the mercenaries in the framework of the African Unity Convention?

The Organization of African Unity, the first regional organizations initiated to address the phenomenon of mercenaries on the regional level, in view of the horrors witnessed by the African continent in order to self-determination, where accompanied by the emergence of liberation movements in African countries, the spread of the phenomenon of mercenaries and international companies military to participate in internal conflicts and international, where the diversity of the use of mercenaries and private military and security companies, has resorted to foreign governments and states of colonialism to suppress the rebel movements and the opposition and the national liberation movements in Africa in order to self- determination, also resorted t it also rebel movements and opposition to meet the legitimate governments, as killer mercenaries in (Kinshasa) In the period between 1962 - 1964, along with the forces (Tshombe)., As mercenaries fought during the Nigerian civil war to by separatism the troops in the period from 1967 to 1970, As well as in the civil war known to Angola in 1976. And in the Comoros in 1978, where mercenaries were able to invade and topple its government, Also the Sudanese government suffered in that period of mercenary activities, where the Sudan state security court first court issued a ruling includes criminalizing the mercenary at the level of domestic courts. Has condemned, for example the State Security Court of Sudan in 1972 mercenary" Shatbaner "imprisonment for twenty years as a result of his involvement" as mercenaries" in hostilities with the rebels in southern Sudan against the legitimate government on the grounds that the business carried out by one of such mercenary acts that constitute a criminal offense, without giving a definition of mercenaries⁶⁴.

These factors provided the fertile ground for the spread of the phenomenon of mercenaries in the African continent, therefore the Organization of African Unity in Libreville in 1977, adopted the Convention on the Elimination of mercenary in Africa, where prepared by a committee of legal experts with me year by the African Union Treaty was approved by the African Summit held in the city of Libreville - Gabon on July 3, 1977 , Named after the African Convention on the prohibition of mercenaries and entered into force on April 22, 1985⁶⁵. And the Convention refers to the concerns of Member States on the use of mercenaries in the armed conflicts in order to confrontation, armed force to the process of national liberation from the hegemony of colonialism and neo-colonialism. It seems that the convention of the Organization of African Unity in the definition of mercenaries under Article (1/1) has adopted the same approach as stated Article (47) of the first additional protocol to eliminate the term in paragraph (c), as it linked the" motivation "as a goal to participate in military hostilities, the desire to achieve personal gain as a special" and the compensation of to participate in hostilities , "but it is sufficed mercenaries to do crime that offers one of the parties to the conflict or on behalf of the promise of mercenaries "to obtain financial compensation ".

⁶⁴ Ghassan, Aljoundi, op cit, P 248.

⁶⁵ Sabelo Gumedze, The Use of Mercenaries in Libya A Serious Indictment Against the African Union, Institute of security studies,2011. P27.

We believe that the approach taken by the Convention of African Unity in the definition of a mercenary does not commensurate with the nature of the criminal acts carried out by these individuals, that the nature of the criminalization of mercenary activity should be based on the nature of their acts which itself represents illegal acts that represents criminal conduct whether the motivation was excessive compensation or not, and not on the basis of the reasons that push them to do these acts, and that the existence of compensation for people who the condition of fighters and prisoners do not apply on them is only an extra proof of condemnation. The second paragraph of the first article of this Convention has defined mercenary crime that would be committed by individuals, groups or associations or representatives of the countries of the first countries themselves. And does not accurately identify the elements of the crime and the legal person concerned is guilty of a mercenary offense, if committed in order to resist the right of self-determination process by armed violence, any of the following acts:⁶⁶

A - Regulation, funding, supplying, or recruitment, training or promotion, or support, or use, in any way, for military forces composed of individuals. Or with individuals who are not citizens of the country in which they practicing those actions, with the aim of personal gain, and to get salary or any other type of material reward.

B - Registration, or recruitment, or attempt to recruit in the force mentioned.

C - Allowing the implementation of such acts or activities in any territory under its jurisdiction or in any other place is under the control of, or the granting of facilities for the passage of the above-mentioned forces, or transfer or any other processes to those forces.

In addition, the Convention of African Unity Organization expanded the acts, which is itself criminal acts, where it did not participate in military attacks only, but considered the contribution in any action that would assist mercenary gangs directly or indirectly, under the second paragraph of Article I of the Convention, a person commits a criminal offense if just engaged or attempted to engage in any group or any form of mercenaries, the mercenaries also bears criminally responsibility for any specific criminal acts committed during the performance of their duties, and apply a crime mercenary also the forms and wide, and is familiar to participate. Also Article II of this Convention considered leadership mercenaries or to give it considered an aggravating circumstance for purposes of applying the sanctions.

On the other hand indicate Article (3) that the mercenaries do not enjoy the legal status of a fighter not Right for them prisoner of war status. It seems that the convention of the unity had sought to expand the scope of criminal liability for acts which constitute an act of mercenary, through the criminalization of all parties who have contributed in any act of mercenary. And see that the scope of reliability is not just about people who provided financial support, but also extends to people who have contributed to provide moral support; any that criminal reliability not include only the person who actually physical mercenary crime, but also extends to all parties who contributed to the moral act such as incitement or coverage.⁶⁷ In addition, the Convention of the Organization of African Unity has approved the principle of individual responsibility and the responsibility of state and representatives from business, which is by mercenaries under Article IV-fifth of them, as it has committed the States Parties to track down and punish people who are alleged to have committed any of the acts that are considered under this Convention such as mercenaries or extradited to a State which has on its territory the crime⁶⁸. Also Article 7 demanded each State Party to ensure the punishment of the crime of mercenary maximum penalties under its laws, including the death penalty⁶⁹.

Based on the foregoing, we find that the contemporary international law did not provide a clear definition and specific corporate security and private military international, and that the classification of a person as mercenaries in accordance with the provisions of Article (47) of Additional Protocol I requires the application of all the six conditions set out in the legal text in, we find that Article (1/1) of the Convention of Africa Unity Organization has expanded the scope of criminalization and relaxed the requirement of financial compensation.

⁶⁶ See Article (1) of Luanda Convention.

⁶⁷ Hortensia D.T Gutierrez Posse. The Relationship Between International Humanitarian Law And The International Criminal Tribunals, International Review of the Red Cross, Vol.88, No.861, March, 2006.p, 9

⁶⁸ Sabelo Gumedze , Elimination of mercenarism in Africa A NEED FOR A NEW ONTINENTAL APPROACH. ISS MONOGRAPH SERIES , No 147, JULY 2008, p17.RISM IN AFRICA

⁶⁹ Sharif Altm, Encyclopedia of International Humanitarian Law, ICRC publication , Cairo 2004, P 260.

However, we believe that the military companies and international Alopacia involved in international conflicts and hostilities to differ in substance from the mercenaries traditional defined by the international community, if it contributes to the armed conflict in the pursuit of profit physical, it is also involved in hostilities, and often do not belong to any party to the conflict, how the members of these companies often do not belong to the regular army as that members of these companies often they belong to different nationalities, and are not with official mission, though participating in these processes are the approval of the state they belong to this company .

The mercenaries in the UN Convention

The increasing and danger of role the phenomenon of mercenaries and spread in areas of conflict, pushed the United United to search for an effective means of combating these activities at the international level. Indeed, the adoption of the principle deprive mercenary of prescription combatant or prisoner of war in accordance with international humanitarian law, remained beset by some of the gaps, as the mercenaries do not meet the requirements of conventional to be met by fighters or in the armed forces of the organization and the leadership responsible for her subordinates on the basis of the rules of international humanitarian law in its definition of combatants. Thus, this exception is limited to mercenaries in the forms of independent Army, and can therefore state that uses mercenaries that use the ranks of its armed forces to deny mercenary recipe for mercenaries who it recruited within the armed forces in this manner.⁷⁰

In addition, we note that the provisions relating to mercenaries were basically symbolic, in the sense that the mercenaries are the subject of special attention, has been granted a degree of protection is less than the protection afforded For fighters, but there are difficulties related to traditional definitions of the term mercenary and therefore a lot of legal confusions relating to mercenaries remained untreated. And the international humanitarian law instruments do not provide a significant contribution in clarifying the legal implications of the mercenary mode.

In 1980, General Assembly stipulated Resolution No. (35/48), where the competent Committee established the drafting of an international convention against mercenaries, and the draft convention developing was finalized and presented to the General Assembly on 12.04.1989 in the plenary (72), was approved « International Convention against the recruitment and use of mercenaries, financing and training » Resolution No. 44/43 on the same previous date.⁷¹

Based on the previous resolutions of the General Assembly, the Third Committee charged acts with yielded in preparing a draft of this Agreement to reach in 1989 to the International Convention against the recruitment, use, financing and training of mercenaries, which entered into force on October 20/2001⁷². In addition, We find that the United Nations Convention has expanded its acts, which is itself criminal acts, where she not only jointly direct military attacks only, but considered to contribute to any action that would assist mercenary gangs directly or indirectly, under this Convention a person commits a criminal offense to just engage or attempt to engage in any group you any form of mercenaries, have also had ml mercenaries.

This exception alone makes the definition of the United Nations Convention to develop a mercenary broader than the definition contained in the First Additional Protocol.⁷³ However, the second part of the definition is, however, a broader as it pointed out that in any other case beyond armed conflicts such as mercenaries following categories:

A - Recruited locally or abroad to participate in a concerted act of acts of violence intended to overthrow governments or otherwise act to undermine the constitutional order or territorial integrity of a State.

B - His primary motive is to participate in it is the desire for personal gain and has already promised to pay the bonus material or pay him the bonus.

C – Is not a citizen of the State which conducts against such a neither act nor its residents.

D – Is not delegated by the state on an official mission.

E – Is not a member of the armed forces of the State of which the act was conducted out on its territory?

⁷⁰ Nizar Anbuga, op cit , pp. 277-278.

⁷¹ Generating this Committee under the Decision of the General Assembly No. (53/48) of On 4/ December 1980.

⁷² See official Document of UN Session (44/43) Resolution of General Assembly (A/Res/44/34).

⁷³ Jean-Marie Henckaerts and Louise Doswald-Beck, P, 359.

In addition, we believe that the United Nations Convention has made positive progress when it adopted the participation rounds, because that participation in hostilities is individual behavior that are part of hostilities, regardless of whether the participating sporadically or as part of a permanent job carried out by a person for the benefit of regular troops or armed groups belonging to one of the parties to the conflict, and therefore the concept of participation in military operations do not return to the status of the person or his or affiliation with one of the parties to the conflict, but based on the nature of its contribution to the hostile acts specific constitute the total for each business carried out by the participants in these operations in the hostilities of an armed conflict⁷⁴.

Conclusions and Recommendations

Based on the foregoing, we find that the contemporary international law did not provide any definition of corporate security and military international, however, that the classification of a person as mercenaries in accordance with the provisions of Article (47) of Additional Protocol I requires the application of all the six conditions set out in the legal text, as that article (1/1) of the Convention The of African Unity Organization has expanded the scope of criminalization and cushioned from the compensation requirement which makes the text of Article smell. Under this Convention a person commits a criminal offense to just engage or attempt to engage in any group you any form of mercenaries, have also had ml mercenaries.

Addition, we believe that the United Nations Convention has made positive progress when it adopted a share on rounds, since that participation in hostilities is individual behavior that are part of hostilities regardless of whether the participating intermittent or as part of a permanent job carried out by a person for the benefit of regular troops or armed groups belonging to one of the parties to the conflict, and therefore the concept of participation in military operations is not due to status of the person or his or affiliation with one of the parties to the conflict, but based on the nature of its contribution to the specific hostile acts constitute the total for each business carried out by the individuals participants in these hostilities operations of an armed conflict.

Therefore, we believe that the military companies and international participating in international conflicts and hostilities, either directly to differ in substance from the mercenaries traditional defined by the international community, if it contributes to the armed conflict in the pursuit of profit, it is also involved in operations hostilities, and often do not belong to any party to the conflict, how the members of these companies often do not belong to the regular army; since that members of these companies often they belong to different nationalities, are not on official mission, though they participated in these processes with the consent of the State in which belong to this company. Furthermore, these companies are not subject to the control of the Security Council and are linked to the main device responsible for the support of international peace and security.

References

- Abdul Ghani Mahmoud, *International Humanitarian Law: a comparative study of Islamic law*, Renaissance House, Cairo, 1991.
- Ahmed Abu Al -Wafa, *International Humanitarian Law*, Council Supreme Culture, Cairo, 2006.
- Alaa Abdel Hafiz, *Mercenaries , the Phenomenon Of Evolution*, Journal of the National Guard, KSA, 1997.
- Anna Leander *the Market for Force and Public Security: The Destabilizing Consequences of Private Military Companies*, Journal of Peace Research Vol.42, Issue.5, 2005.
- Burmester. H.C, *the Recruitment and Use of Mercenaries in Armed Conflicts*, the American Journal of International Law, Vol. 72, No. 1 (Jan., 1978).
- Elke Krahmman, *From ‘Mercenaries’ to ‘Private Security Contractors’: The (Re)Construction of Armed Security Providers in International Legal Discourses*, Journal of International Studies vol.40, issue 2, 2012.
- Faisal Shatnawi, *Human Rights And International Humanitarian Law*, Hamid Publishing House, Amman, 1997.
- Frits Kaishoven and Leisbeth Zegveld, *Constraints on the Waging of War: An Introduction to International Humanitarian Law*, ICRC publication, 2011.
- Ghassan Aljoundi, *Mercenary and International law*, Egyptian Journal of in International law, Vol. 41,1985.
- Haytham Manna, *Attempts evaluation, the Damascus Center for Theoretical Studies and Civil Rights* 8/6/2004, an article published on the web pages: <http://hem.bredband.net/cdpps/s298.html>.

⁷⁴ Nils Misler, op cit, pp.42-44.

- Hin-Yan Liu, Leashing the Corporate Dogs of War: The Legal Implications of the Modern Private Military Company, oxford journal, Conflict Security Law vol.15, issue 1, 2010.
- Hortensia D.T Gutierrez Posse. The Relationship between International Humanitarian Law and the International Criminal Tribunals, International Review of the Red Cross, Vol.88, No.861, March, 2006.
- Jean-Marie Henckaerts and Louise Doswald-Beck, Customary International Humanitarian Law, Publication of International Red Cross, 2006.
- Jose L. Gomoz , The Role of Private Military and Security Companies in Modern Warfare, The Brown journal of world Affairs, August 2012 . Katherine Fallah, Corporate actors: the Legal Status of Mercenaries in Armed Conflict, International Review of Red Cross, Vol.88, No.863, September. 2006.
- L. Heil", African Private Security Companies And The Alien Act: Could Multinational Oil And Mining Companies Be Reliable"? North western Journal of international Law and Busniss.Vol.22, (3)2002.
- Lindsey Cameron, Private military companies: their status under international humanitarian law and its impact on their regulation, ICRC, Volume 88 Number 863 September, 2006.
- Majdi Mohammed Issa, Mercenaries: The Armies Of Private Sector Demand, Journal of the National Guard, 1997.
- Michael Cottier, Element of Contracting And Regulation Private Security And Military Companies, International Review of Red Cross, Vol. 88, No. 863, September 2006.
- Mohammed K Al Mousa, The use of Power in Law International Contemporary, Wael House for Publishing, Amman, 2004.
- Mohammed Shawki Ruslan, the Rights and Duties in the Customs of Mercenaries, Journal of the National Guard, 1979.
- Mustafa Ahmad Abulkhair, Future Wars: International Private military and Security Companies, Cairo, ed. 1, 2008.
- Nils Mislser, Direct Participation in Hostilities under International Humanitarian Law, ICRC, 2009.
- Nizar Anbuki, International Humanitarian Law, Weal Publishing House, Amman, 2010.
- Wilfred Borcat, mercenaries in Africa, Translation: Joseph Abdullah, Arab Institution for Studies and Publishing, 1984.
- Rolf Uessler, Servants of War: Private Military Corporations and the Profit of Conflict, trans. Jefferson Chase (Brooklyn, New York: S, 2008).
- Sabelo Gumedze, Elimination of mercenarism in Africa a NEED FOR a NEW ONTINENTAL APPROACH. ISS MONOGRAPH SERIES, No 147, JULY 2008.
- Sharif Altm, Encyclopedia of International Humanitarian Law, ICRC Publication, Cairo 2004.
- Sohail Fatlawi, Prisoners of War in the System of International Law, Qadsia Printing House, Baghdad 1983.
- Suhail Fatlawi, a Mediator in Public International Law, the Arab Thought House, First Edition, Lebanon, 2003.

International Documents

- Convention to prevent genocide and punishable 1948 , adopted by resolution of General Assembly No. (3291).
- Hague Convention of 18 October 1907 (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land.
- Convention on the " non- applicability of the rules of limitation on war crimes and crimes against humanity. Statute of the International Criminal Court.
- Third Geneva Convention (1949),a two Additional Protocols of 1977 International Convention against the recruitment and use of mercenaries, financing and training 1989.Luanda convention.
- African Convention on the prohibition of mercenaries
- Report to the Committee (3) on the working group submitted by the Rapporteur, (CDDH/111/SR.57).
- Report of the Committee of Privy Counselors appointed to inquire into the recruitment of mercenaries (the' Diplock Report ,(HMSO, August 1976. Report Committee of International Law: UN.A/40/10. 1985. P16.
- Report of the expert meeting on private military contractors, CUDIH, Geneva, 29-30 August 2005.
- Report Committee of International Law : UN.A/40/10. 1985.
- Report to Committee (3) on the working group submitted by the Rapporteur, (CDDH/111/236).
- Official Record of the Diplomatic conference on the Reaffirmation and Development of international humanitarian Law applicable in Armed Conflict, Berne, 1978.
- Military Companies: Options For Regulations) "Green paper 2002).

Report to the Committee (3) on the working group submitted by the Rapporteur, (CDDH/111/SR.57).
Report of the Committee of Privy Counselors appointed to inquire into the recruitment of mercenaries (the Diplock Report), HMSO, August 1976.
ICJ, Advisory Opinion of 5 August, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970).
Official Record of the Diplomatic conference on the Reaffirmation and Development of international humanitarian Law applicable in Armed Conflict, Berne, 1978, Vol .6.law No. (17) Issued Paul Bremer", the decision No.(17)dated 06/27/2004 (Section 2 / Paragraph 1).
UN Econ & .Soc. Council [ECOSOC], UN Doc. E/CN.4/2004/15 (Dec. 24, 2003)
UN Document, A/40/10, 1985.
UN document: "December 2004, UN Doc. E/CN.4/2005/23"; UN GAOR, 49th sess., Annex, UN Doc. A/49/362 (1994); UN Doc A/RES/59/178 (3 March 2005);UN Doc A/60/263 (2005).

International Resolutions

International Resolutions General Assembly No. (3103) issued December 12/ 1973 Confirmed Where Principle of Theinherent right of the peoples In Struggle, And Mercenaries Must Treatment as Criminals.
Resolution of the General Assembly No. (53/48) of On 4 / December 1980. Document of UN Session (44/43) Resolution of General Assembly (A/Res/44/34).
Resolution 161 (1961) adopted by the Security Council at its 933th meeting, on the 21 / February 1961, and Res. (163), adopted by the Security Council at its 949th meeting, on 6/ June (1961), and see Res (170), adopted by the Security Council at its 984th meeting, on the 30 November (1961),
Resolutions: S/RES/239(1967), S/RES/404(1977) concerning the Democratic Republic of the Congo" and Res. S/RES/404 (1977), S/RES/405 (1977), S/RES/419(1977) Benin. S/RES/405 (1977) Adopted by the Security Council on the 21 / April 1977. (Res/1467/2003) adopted by Security Council at its (4720) meeting.