

# EXPANDING THE MERCENARY CONCEPT AS A WAY TO SOLVE LEGAL GAPS AND AVOID OVERLAPPING JURISDICTION

Márcio Luis da Silva Carneiro<sup>1</sup>

## ABSTRACT

This paper aims to respond to requests for contribution from the Office of the United Nations High Commissioner for Human Rights (OHCHR), assisting in combating the practice of mercenaries by establishing broader scope or expansion of the concept contained in article 47 of protocol I, additional to the Geneva Convention of 1949, adopted on 10 June 1977 by the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable to Armed Conflicts, as a way of solving or reducing legal gaps and avoiding overlapping jurisdiction. The *de facto* definition of mercenary is very narrow and it is here concluded, therefore, that its wider scope will save Convention efforts in establishing the necessary minimum international standards, solving a good part of the two issues here presented: solving legal gaps and avoiding overlapping jurisdiction.

**Keywords:** Mercenaries. Geneva Convention. Gaps. Jurisdiction.

## Introduction

It is well known that the performance of mercenaries differs from that of private military companies (PMC) that work in conflict situations and have their own statute determined by International Humanitarian Law (IHL). PMCs are obliged to comply with IHL provisions but are not criminal input due to gaps in referred Convention.

As the purpose of this work is not to navigate through the history of the subject, but to bring practical ways of solving legal gaps and avoiding overlapping jurisdiction arising from

---

<sup>1</sup>Master's degree student in Maritime Studies at the Escola de Guerra Naval (EGN). Post-Graduate in Military Law and Public Law, both from Universidade Cândido Mendes - Centro do Rio de Janeiro (UCAM). Bachelor in Law. Approved in the XIV Exam of the Brazilian Bar Association. Military of the Armed Forces. Member of the research group in International Law at the Federal University of Rio de Janeiro (UFRJ). Email: flaamarcio@hotmail.com.

the current version of the Geneva Convention, we will divide this paper into two parts. The first will bring some considerations about the concepts listed in the Convention, which, despite of being strictly synthetic, will serve, at this stage, as a basis for pointing out the gaps and to show the benefits of expanding the idea of mercenary, that will certainly avoid wasting time and work of international and even national legislators in establishing their regulatory norms for mercenary practice. The second will try to make the best possible contribution by outlining suggestions for improving the concepts, expanding the range of mercenary concept in its most legal way possible, based in the author's research as a Lawyer for some years.

In this way, the UN working groups will be able to advance on the subject in a safe way and without the need of stopping or going back in their work, concerned with the conceptual restrictions imposed by the Geneva Protocol I, resulting in a greater efficiency of those who will eventually create international laws based on the new Geneva Convention version.

### **1. Analysis of the concept of mercenary established by article 47 of Protocol I, in addition to the 1977 Geneva Convention and some considerations**

The criteria established by the Geneva Convention as a concept of mercenaries are very restricted, in addition of being cumulative, which makes its analysis very difficult for any jurist or lawyer, not to mention the researchers who make up the various groups around the world involved in such discussion, given the multidisciplinary nature of the topic.

To begin this analysis and knowing that the topic of maritime safety is vague and imperfect in its current legislation, it is necessary to quote Julian Corbett:

“ The more vague the problem to be solved, the more resolute we must be in the search for starting points from which we can begin to chart a course, always keeping an eye open for the accidents that will devastate us, and always being alive at its deflecting influences”<sup>2</sup>.

When studying the above strategist, it is clear that there is a need for defining better the starting point of mercenary concept should not be vague. So there is an urgent need to expand and perfect such concept inserted in Article 47 of Protocol I of the Geneva Convention.

---

<sup>2</sup> Corbett, Julian. 1911. **Some Principles of Maritime Strategy**, p. 9.

It is fundamental to conceptualize the term “mercenary”, and it is noticeable that this term is currently obsolete. Also, given *de facto* the definition of Private Military Enterprises such companies are not reached, as they should truly be, by the outdated text of the Convention. Indeed, current nomenclature of mercenary is inappropriate when used in relation to Private Military Companies (PMC), as Magalhães well said <sup>3</sup>. However, it is observed that the PMCs can already be known as a new facet of mercenary actions, which already alerts us to the urgency of expanding of such concept.

This conception can be based on one of the most complete definitions on the subject, coming from Goddard, who says that the mercenary is:

“...an individual of an organization financed to act in a foreign entity within a scope of military service, including the conduct of operations of a military character, without regard to ideals, legal or moral commitments, and national and international”.<sup>4</sup>

The need and importance of creating mechanisms to solve issues such as these stem not only from the contemporary situation with the increase of mercenary cases during the COVID-19 pandemic, but above all from an old issue as observed by Machiavelli:

“The mercenaries and helpers are harmful and dangerous; and if a prince bases his power on mercenary weapons, he will never be solid nor will he enjoy security, because the soldiers are not fond of him, they are ambitious, undisciplined and unfaithful, cheerful among friends, vile before the enemy; and they do not fear God or show loyalty to others <sup>5</sup>.”

It seems clear to us that Machiavelli, in a speech so distant in time, but also so close, was already slowly trying to introduce an expansion of the concept of mercenary, which is proven throughout this article.

The concern is noble and walks over time reaching the present day and brings with it the perennial difficulty that these activities are not covered by the Geneva Convention or even by the International Convention against the Recruitment, Use, Financing and Training of Mercenaries. These conventions contain a number of functions intrinsically linked to the State, such as those of the armed forces and security. Such conventions currently present, in their text,

---

<sup>3</sup>MAGALHÃES, A. **Private Military Companies and Conflict Resolution in the UN Framework**. Nation and Defense N° 111 – 3rd series, p.155-174, 2005, p. 159.

<sup>4</sup> Goddard, S. **The Private Military Company: A Legitimate International Entity Within Modern Conflict**. Faculty of US Army Command and General Staff College, 2001, p. 8.

<sup>5</sup> MACHIAVELLI, N. **The Prince (II Prince)**. 1 ed. São Paulo: Circulo do Livro, 198, p. 87.

functions linked to the State and such should not be outsourced to PMCs. PMCs acting on armed conflicts as mercenaries should be included in the Convention to be upgraded as Entity, so that they may be deemed or judged as criminals.

Going straight to the point, as a constructive criticism and as a way of pointing out the existing difficulties in characterizing or conceptualizing what a mercenary should be, it is necessary to rewrite the norm, as suggested below, even if from the point of view of methodology there is no such need, but didactically it is proven to be crucial.

Paragraph a) of item 2 of article 47 of protocol I refers to a mercenary as any person who: “has been specially recruited, locally or abroad, in order to fight in an armed conflict”. The expression “specially recruited” in addition to being very restricted does not make it clear what the international legislator wanted to achieve.

The term “person” restricts the scope even further, considering that, in order to achieve the supposedly proposed objectives, there should at least be an expression with greater scope because, as is known, there are not only these actors, but also Private Military Companies (PMC), as Schreier and Caparini well assert:

Traditionally, mercenaries were defined as foreigners hired to take a direct part in armed conflicts. The main motivations are always said to be monetary gain rather than loyalty to a state. That's why they are called soldiers of fortune. (...) Sometimes they are veterans of past wars or insurgency who are looking for any new conflict to continue what they did before: fighting <sup>6</sup>.

Observing the understanding of these authors and others, in line with Machiavelli, it is verified that they deal with the subject always including their opinions and understandings, showing the desire to contribute in some way to the expansion and even change of the mercenary concept, in order to combat these people/entities acting as mercenaries. This is the way to go.

In relation to subparagraph b) the convention states that: “any person who, in fact, takes a direct part in hostilities”. The issue here even involves the form of hiring these mercenaries, usually *ad hoc*, with a concern to obtain quick profits. On the other hand, the various concepts of PMC revolve around of being “permanent and clearly hierarchical complexes” (BORNE, 2008, p.60), in addition to seeking long-term profits (ROBERTS, 2007, p.2).

What if a mercenary, in a factual situation, is forced to take part in a hostility masking the direct character of his participation? It is also a question that is not answered by the norm in use in that convention.

---

<sup>6</sup>SCHERIER, F; CAPARINI, M. **Privatizing Security: Law, Practice and Governance of Private Military and Security Companies**. Geneva: DCAF Occasional Paper – N°6, 2005, p. 16.

Well, moving forward in the analysis of the other items, we observe in subparagraph c) where a mercenary is every person:

“who takes part in hostilities motivated essentially by the desire to obtain personal gain, and in fact has been effectively promised, by or on behalf of a Party to the conflict, of material remuneration considerably in excess of that promised or paid to combatants of the same point and similar functions in the Armed Forces of that Party;”

Several issues can be punctuated from the reading above, such as, for example, the lack of clarity as to what would be a “desire for personal gain” or even the absence of necessary requirements to prove what this “promise” (of paying) would be. Another observation would be the fact of knowing who these “combatants from the same point” (physical place) would be and what these functions would be.

All these considerations make us question how, for example, an authority of any country will be able to discern if such acts are mercenary acts according to the Convention. As is seen, the term mercenary is restricted, as person is mentioned, but at the same time it is broad, because it includes PMCs, so that there is no doubt about the urgency of a paradigm shift, an upgrade on the Convention text.

Subparagraph d) contradicts a little with subparagraph a) and also it seems a bit confusing when it states: “who is neither a national of a Party to the conflict nor a resident of a territory controlled by a Party to the conflict;”. Observe that subparagraph a) does not require that the person is or is not a national or resident of a Party to the conflict, that is, how will the mercenary know in advance if the country in which he resides will become a party to a conflict in the future? Yet we see another unanswered question, which also goes against the main objective of science, that is to answer real-world problems.

When subparagraph e) specifies that: “is not a member of the Armed Forces of a Party to the conflict”, it excludes a large number of people, but leaves aside the case, as in Brazil, soldiers from the paid and unpaid reserve. They continue to be members of the Armed Forces.

Finally, paragraph f) leaves not only a gap, but also another confusion, when it says: “that has not been sent on an official mission as a member of its Armed Forces by a State that is not a Party to the conflict”. Now, if you cannot be a member of the Armed Forces, there is no need to keep the text “to be on an official mission.”

From all the above, without exhausting the possibilities, but as a small contribution, it appears that all these lines are cumulative and not exclusive in the definition of mercenary when we see the additive conjunction “and” in the penultimate line.

## **2. Some small suggestions for changes/exclusions/inclusions in article 47**

In this part, it is important to clarify the fact that this author feels honored to be able to contribute to humanity, especially through such an important body as the United Nations (UN). The intention was never to exhaust the topic, despite the short time given by the professor to develop this paper, and the request of it being short and direct. This didn't allow the author to produce a profound text.

Following, are small suggestions for changes or expansions regarding the article in question.

In item 2, the expression “entity” could easily be included, in order to reach the PMCs, greatly expanding the scope of the international standard, given what has already been briefly explained about these companies.

In subparagraph a) it would be proposed to remove the expression “specially recruited” and include the expression “recruited or contracted”

In relation to paragraph b) a withdrawal would also be proposed, but now of the expression “direct”.

By going through point c) we propose to change the expression “motivated essentially by the desire to obtain a personal gain, and in fact the promise has been effectively made, by” to “obtaining gains from”.

We understand the exclusion of subparagraph d) as we understand that regardless of the conflicting party, mercenary activity has at its core several crimes and abuses, many of which are equated with war crimes, so that a person can use this subparagraph to commit atrocities and not be framed in the concept.

Under the same argument as the previous paragraph, we propose the exclusion, in paragraph e) of the expression “a Party in conflict”.

In the last paragraph, the exclusion of the term “its” and the expression “by a State that is not a Party to the conflict” is still necessary under the same reasoning.

Therefore, we decided not to attach the proposed amendment to save time, as one of the objectives of this article, making ease the analysis of that brilliant Organ. Here's the proposal:

## ARTICLE 47

### Mercenaries

1. Mercenaries shall not be entitled to the status of combatant or prisoner of war.
2. A mercenary means any person or entity:
  - a) who has been recruited or contracted, locally or abroad, in order to fight in an armed conflict;
  - b) which, in fact, takes part in hostilities;
  - c) who takes part in hostilities by obtaining, from or on behalf of a Party to the conflict, material consideration considerably in excess of that promised or paid to combatants of the same rank and similar functions in the Armed Forces of that Party;
  - d) who is not a member of the Armed Forces; and
  - e) who has not been sent on an official mission as a member of the Armed Forces.

### **Final considerations**

After analyzing and discussing possible results, we also understand the possibility of not using the conjunction “and” at the end, but we leave it open to the understanding of the bodies analyzing the topic.

The issue resolved by this work, in addition to saving time and avoiding rework for analysts is, above all, to facilitate the details of an international standardization, serving as a basis for national standards, so that the expansion of the concept established by the convention is the “cherry” of the cake, which is not so simple, as it will require a new expression of will from the States parties involved.

However, it would be elegant and willing to start from the beginning and effectively combat the attitudes of mercenaries and PMCs, which are growing more and more as a natural way of acting.

## References

BEIRAO, André Panno. Safety at sea”: what safety. **Reflections on the Law of the Sea Convention. Brasília: FUNAG**, p. 127-166, 2014.

BORNE, T. **MILITARY PRIVATE ENTERPRISES: Lack of State Control or Efficient Management of Friction?**. Porto Alegre: Federal University of Rio Grande do Sul, 2008.

BRAZIL. **Decree No. 849, of June 25, 1993**. Enacts Protocols I and II of 1977 in addition to the Geneva Conventions of 1949, adopted on 10 June 1977 by the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable to Armed Conflicts.

CORBETT, Julian S. **Principles of maritime strategy**. Courier Corporation, 1911.

GODDARD, S. **The Private Military Company: A Legitimate International Entity Within Modern Conflict**. Faculty of US Army Command and General Staff College, 2001.

MAGALHÃES, A. **Private Military Companies and Conflict Resolution in the UN Framework**. Nation and Defense N° 111 – 3rd series, p.155-174, 2005.

MACHIAVELLI, N. **The Prince (II Prince)** . 1 ed. São Paulo: Circulo do Livro, 198, p. 87.

MENEZES, Wagner (Ed.). **Law of the sea: challenges and prospects**. CEDMAR-USP, Center for Studies in Law of the Sea, 2015.

SCHERIER, F; CAPARINI, M. **Privatizing Security: Law, Practice and Governance of Private Military and Security Companies**. Geneva: DCAF Occasional Paper – N°6, 2005, p. 16.

GUERRA, Sidney. **Direito internacional público**. Freitas Bastos Editora, 2004.

ZANELLA, Tiago V. **Law of the Sea**. Juruá, 2015.