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LEGALITY OF USE OF MERCENARIES IN NIGERIA'S COUNTER-TERRORISM PROTOCOL*

Abstract

Nigeria's monopoly of use of force within its territory is increasingly challenged by terrorists, bandits, separatists and criminal gangs. Nigeria's security services appear unable to eliminate these challenges. A suggestion that mercenaries should be recruited to aid the counter-terrorism efforts has been challenged, primarily on the legality of use of mercenaries and Private Military Companies (PMCs). The use and status of mercenaries raise vital issues in international law.[1] The objective of this paper is to examine the legality of use of mercenaries in international law generally, and particularly, in Nigeria's counter-terrorism protocol. The methodology adopted is essentially doctrinal. The paper relied on primary and secondary sources. These include journal publications and articles, conference papers, books, caselaw, resolutions, treaties, declarations and other archive materials, both electronic and print. The paper having clarified the concept of a mercenary and the relationship between the traditional mercenary and the modern PMC, gave historical examples of use of mercenaries by nations. After examining the status of mercenaries and PMCs in international law, and analysing the legality of use of mercenaries and PMCs in international law, the paper found that use of mercenaries in Nigeria's counter-terrorism protocol is lawful. The paper then recommended that notwithstanding the provisions of the various mercenary conventions, Nigeria would not be in breach of international by integrating mercenaries into its counter-terrorism security architecture

Keywords: Mercenaries, Private Military Companies, Private Security Companies, Terrorism

1. Introduction

Terrorism's writ is etched boldly on Nigeria's landscape. Most of Nigeria's northeast, and substantial parts of Nigeria's northwest and northcentral are under terrorists' remit. Initially, Nigeria's federal government classified the mindless nihilism of the terrorists' depredations as herder/farmer clashes. The herders here possessed military-grade weapons and no cattle, and the farmers included churches, shopping malls and other civilian targets. Subsequently, Nigeria's government re-classified these purveyors of indiscriminate violence as bandits. Paradoxically, these so-called bandits were interested in anything but banditry. Within their areas of operation, they bombed both soft and hard targets. Police stations and military formations were not spared. By the time substantial parts of the country had been detached from the empirical sovereignty of the Nigerian state, the government

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[1] *Ex parte Quirin*, 317 US 1 (1942) concerns an attempt in 1942 by German Americans to sabotage various US targets. Following the declaration of war between US and Germany, eight German Americans received training on sabotage in Germany, and were smuggled into US. They were arrested before accomplishing their mission, tried by military commission, found guilty and sentenced to death. On *habeas corpus* before the Supreme Court the Court held in part that they were *'unlawful combatants'* and subject to trial and punishment by military tribunals. Richard Baxter 'So-called 'Unprivileged Belligerency: Spies, Guerrillas and Saboteurs', (1951) 28 *British Yearbook of International Law*, [324-345], suggests that the reference to '*unlawful combatants*' by US Supreme Court in *Ex parte Quirin et al* (later used by US government for persons held in Guantánamo Bay after the conflict in Afghanistan) was based on the Court's fundamental misunderstanding of the law of armed conflict. He pointed out that certain categories of persons - spies, saboteurs, and guerrillas - were not given PoW status (for various reasons) although states used such persons in armed conflict and did not consider this unlawful under international law. It was inaccurate to label such persons '*unlawful*' combatants. He preferred the term '*unprivileged*' – i.e., without privilege of PoW status. See Louise Doswald-Beck, 'Private Military Companies Under International Humanitarian Law', in *From Mercenaries to Market: The Rise and Regulation of Private Military Companies,* Simon Chesterman (ed.), Chia Lehnardt (ed.) [115-138]

conceded it was dealing with battle-hardened, well-armed terrorist organisations.[2] Nigeria's security forces have been unable to degrade the terrorist networks or their activity. The State has proved incapable of maintaining monopoly of force, violence, authority and power over its territory. Prompted by the government's helplessness in the face of the problem, it has been suggested that mercenaries be employed and deployed to the frontlines of Nigeria's conflict with terrorists.[3] Reactions to this suggestion vary, spanning both support and opposition. This paper interrogates the legality of deployment of mercenaries or PMCs as part of the counter-terrorism strategy. Nigeria's relationship with mercenaries dates to the Nigerian civil war. Both Nigeria and Biafra relied on mercenaries. Contextually, use of mercenaries may be rationalised as nothing more than asking for the assistance of friends, when, in this instance, Nigeria lacks capacity to deal with her security challenges. Babagana Zulum, Borno state Governor, at various times, but more specifically on March 3, 2022, at the North-East Governors Forum, strongly pressed for recruitment of mercenaries in the war against terrorists.[4] A member of the ruling All Progressives Congress (APC) lent support to the call to recruit mercenaries in the on-going war against terrorists; he justified recruitment of mercenaries to help combat terrorism on the basis that the practice is sanctioned by other countries in the world, including the US.[5]

Deployment of private purveyors of military power to exercise regalia functions of statehood has not found an appeal as widespread as its necessity. This is because, delegating traditional state military functions to private citizens creates political and legal problems that are not easily resolved. Contextually, operation of mercenaries finds greater expression in non-international armed conflicts (NIACs), understood classically as civil wars. Most of the literature on mercenary phenomenon proceed from this background of use of mercenaries by either or both parties in a contestation of the State's sovereignty. The current Nigerian situation falls outside the classical analysis of legality of mercenary deployment. The intended object of mercenary recruitment by the Nigeria state, is to complement state security forces and combat the nihilistic depredations of terrorists and ethnic cleansers operating under the Boko Haram and ISWAP brands. The purpose of this paper is to establish that, in Nigeria's current operations against terrorists, ethnic cleansers, nihilists, extremists and fanatics, use of mercenaries by the Nigerian government is not a violation of international law. This paper is written in seven parts. Part 2 is a conceptual clarification of persons that may properly be designated as mercenaries. Part 3 establishes that in international law, use of mercenaries is traditional state practise, and provides historical outlines of States' resort to mercenary power. Part 4 will examine the legal status of both the traditional mercenaries and PMCs. Part 5 will argue that though use of the traditional mercenary in international conflicts is prohibited, use of PMCs though open to objection, is a legal penumbra. Part 6 will question use of mercenaries in Nigeria's domestic security challenges. Part 7 concludes this paper.

[2] Terrorist groups operating in Nigeria include - Boko Haram or JASDJ an Islamist terrorist group operating in Nigeria, Cameroon, Chad and Niger. The group seeks to establish a Sharia State in Nigeria and West Africa, destabilise the Nigerian government and remove western influence from the country. The group was formerly linked to Al Qaeda in the Islamic Maghreb (AQIM) <https://www.gov.uk/foreign-travel-advice/nigeria/terrorism#content> Accessed August 22, 2022

[3] Bolaji Ogundele_, 'Northwest states may hire mercenaries to fight terrorists -El-Rufai' The Nation, April 2, 2022, <https://thenationonlineng.net/news/> Accessed July 27 2022; Francis Sardauna, 'NNPP Calls on Buhari to Hire Mercenaries to Combat Insecurity' ThisDay, July 27, 2022 available at <https://www.thisdaylive.com/> Accessed October 19, 2022

[4] Danjuma Musa, 'The needless "opposition" to hiring of mercenaries by North-west governors' April 15, 2022, <https://www.blueprint.ng/category/opinion/> Accessed July 27, 2022

[5] Insecurity: Recruit mercenaries, we're tired of FG's condolence messages –Kokori, 16th April 2022l, <https://www.sunnewsonline.com/insecurity-recruit-mercenaries-were-tired-of-fgs-condolence-messages-kokori/> Accessed July 27, 2022

2. Conceptual Clarification of who is a Mercenary

From the view of international law, mercenaries are neither combatants nor civilians, but are hired soldiers, without significant connection to the conflict, who sell their military skills solely for monetary compensation or other material gain.[6] Article 47(2), Protocol 1 Additional to the Geneva Conventions 1949 states that: a mercenary is any person who: (a) is specially recruited locally or abroad in order to fight in an armed conflict; (b) does, in fact, take a direct part in the hostilities; (c) is motivated to take part in the hostilities essentially by the desire for private gain, and in fact, is promised, by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party; (d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict; (e) is not a member of the armed forces of a Party to the conflict; and (f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces. Thus, the term 'mercenary' as a legal term is well-defined. Being specifically employed for combat, directly partaking in hostilities for enhanced remuneration, and alienage are the crucial elements.[7] In this regard, art. 47 criteria is cumulative, and a conjunctive reading of (a)-(f) is required to define a mercenary.[8] The OAU Convention for the Elimination of Mercenarism in Africa 1977[9] defines mercenaries in similar terms as Art. 47(2), and states in Art. 1(1) A mercenary is any person who:- a) is specially recruited locally or abroad in order to fight in an armed conflict; b) does in fact take a direct part in the hostilities; c) is motivated to take part in the hostilities essentially by the desire for private gain and in fact is promised by or on behalf of a party to the conflict material compensation; d) is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict; e) is not a member of the armed forces of a party to the conflict; and, f) is not sent by a state other than a party to the conflict on official mission as a member of the armed forces of the said state. The OAU Convention however enlarges the definition by creating the crime of mercenarism. Article 1(2) of the Convention declares that:- [t]he crime of mercenarism is committed by the individual, group or association, representative of a State or the State itself who with the aim of opposing by armed violence a process of self-determination, stability or the territorial integrity of another State, practises any of the following acts: a) shelters, organises, finances, assists, equips, trains, promotes, supports or in any manner employs bands of mercenaries; b) enlists, enrols or tries to enrol in the said bands; c) allows the activities mentioned in paragraph (a) to be carried out in any territory under its jurisdiction or in any place under its control or affords facilities for transit, transport or other operations of the above mentioned forces. Although the OAU Convention does not represent much of an improvement over Article 47, however, by creating the crime of mercenarism and ascribing definitional elements to it, it introduces the innovation of attributing mercenary status based on what the individual is hired to do as opposed to the hitherto prevailing practice of assigning the status based on who the individual is. In any event, all the prevailing definitions of who a mercenary was,

[6] PR Kalidhass, 'Determining the Status of Private Military Companies under International Law: A Quest to Solve Accountability Issues in Armed Conflicts' (2014) 6(2) *Amsterdam Law Forum*, [4-19] 6

[7] Won Kidane, 'The Status of Private Military Contractors under International Humanitarian Law', (2010) 38 *Denver Journal of Int'l Law & Policy* [361-419] 396

[8] Chaloka Beyani and Damian Lilly, 'Regulating Private Military Companies: Options for the UK Government,' (August, 2001) *International Alert*, 18; see Edward Kwakwa, 'The Current Status of Mercenaries in the Law of Armed Conflict', (1990) 14 *Hastings Int'l & Comparative Law Review* [67-92] 73 [A hired soldier can avoid being labelled a mercenary by enlisting in the armed forces of the party on whose behalf he is fighting. A state or entity engaging the services of mercenaries will avoid characterization of the enlistees as mercenaries by declaring that they are members of its armed forces.]

[9] <37287-treaty-0009_-_oau_convention_for_the_elimination_of_mercenarism_in_africa_e>

were taut, and in practical effect, excluded all possible combatants.[10] In 1989**,** the UN General Assembly adopted a mercenaries convention, that excluded the active involvement prerequisite of Article 47.[11] The UN Convention against Recruitment, Use, Financing and Training of Mercenaries 1989[12] defines mercenaries in similar terms as in Article 47(2). Thus, Article 1(1) states that - a mercenary is any person who: (a) is specially recruited locally or abroad in order to fight in an armed conflict; (b) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar rank and functions in the armed forces of that party; (c) is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict; (d) is not a member of the armed forces of a party to the conflict; and, (e) has not been sent by a State which is not a party to the conflict on official duty as a member of its armed forces. However, Article 1(2) of the UN Convention expands the definition by providing that: [A] mercenary is also any person who, in any other situation: (a) is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at: i. overthrowing a government or otherwise undermining the constitutional order of a State; or ii. undermining the territorial integrity of a State; (b) is motivated to take part therein essentially by the desire for significant private gain and is prompted by the promise or payment of material compensation; (c) is neither a national nor a resident of the State against which such an act is directed; (d) has not been sent by a State on official duty; and, (e) is not a member of the armed forces of the State on whose territory the act is undertaken. In enlarging the definition of a mercenary, the UN Convention includes individuals hired to subvert the territorial integrity of a State, or stage a *coup d'état* against the Government of a state. Furthermore, in contrast to Article 47, 'direct participation in hostilities' is unnecessary under the UN convention to ascribe mercenary status to a person. Thus, from the perspective of the UN Convention, the controlling factor in determining the status of a person as a mercenary is the purpose for which the person was recruited, and not if he eventually committed the act. This entails, that once the individual had been recruited as a mercenary, he would come under the sanction of the law, even if he did not eventually see action as a mercenary.[13] Both traditional and convention definitions of who is a mercenary reinforce the archetype of the mercenary as an alien combatant partaking in combat, and driven solely by reward. Perception of mercenaries was thus adverse because of the view that they profit from wars, irrespective of the sufferings war exact on peoples and communities.[14]

In the contemporary period, the epicentre of mercenary activity was Africa during the decolonisation and immediate post-decolonisation period of the 1960s and 1970s. The end of the Cold War and rise of a global hegemon altered the dynamics of global conflicts. It also altered supply

[10] Edward Kwakwa, (n 8) 90-91 [The narrow definition may be explained by the fact that mercenaries are denied combatant and PoW status. Due to the legal consequences of labelling a person a mercenary, it is understandable that the drafters attempted to be restrictive in their definition]

[11] Won Kidane, (n 7) 388-9

[12] G.A. Res. 44/34, U.N. GAOR 6th Comm., 44th Sess., 72d plen. mtg., Annex, Agenda Item 144, UN Doc. A/44/766 (1989). Cuba's reservation was that article 1, paragraph 1, was pointless and irrelevant in the definition of mercenary. Cuba was of the view that material compensation alone, whatever the amount, was sufficient for an activity to be considered mercenary. Cuba considered that in order for a natural or legal person to be defined as a mercenary under the Convention, it was not necessary for all the criteria in articles 1 and 2 to be met. <https://treaties.un.org/doc/Treaties/1989/12/19891204%2008-4%20AM/Ch_XVIII_6p.pdf> Accessed 27 July 2022

[13] PR Kalidhass, (n 6) 6

[14] Chaloka Beyani and Damian Lilly, (n 8) 15

of non-state military power. Thus, though, non-state suppliers of military power are still deployed in current conflicts, the character of these purveyors of informal violence changed in the 1990's from the old style mercenary to the contemporary equivalent known as private military companies. Possibly, the only distinction that could be made between these companies and their mercenary counterparts is that while old style mercenary activity is comprehensively regulated by international law, activities of these modern equivalents still remain an area of legal penumbra. Other than that, these companies, with an operational methodology premised only on profiting from war and conflict situations are equivalent to the old-style mercenaries.[15] PMCs may be broadly defined as: - [b]usiness organizations that trade in professional services intricately linked to warfare. They are corporate bodies that specialize in the provision of military skills, including combat operations, strategic planning, intelligence, risk assessment, operational support, training and technical skills.[16] They are incorporated legal personalities that provide military and security services. Often, they employ mercenaries. The services they provide vary, but include combat and operational support; military advice and training; arms procurement; logistical support and security services.[17] Power vacuums often exist in areas of low-intensity armed conflict where armies are not fully deployed or in post-conflict locations with high insecurity; in armed conflicts where, international society fails or refuses to intervene; and in troubled areas lacking the presence of State power. The necessity of PMCs in these situations is indicated by their ability to fill the existing power vacuums, often at lower human, financial and public relations costs than would otherwise be incurred by state agents in performing the same functions.[18] As businesses whose motivation is profit, they are invariably not discriminatory about who their clients are. Thus, their clients include autocratic rulers, humanitarian agencies and democratic governments.[19] As stated earlier, the definition of a mercenary in Article 47 is, with minor additions, adopted by both the OAU Convention and UN Mercenaries Convention. As these Conventions did not foresee the evolution of mercenary activity using a joint stock company, the major activities of PMCs were not prohibited by the Conventions. Moreover, the eager and helpful use of PMCs by many states, including the home countries of most of the PMCs, creates a self-interest against their regulation.[20] Consequently, no effort is spared to differentiate the old-style mercenary from the modern equivalent of PMCs and in the process, rebrand and prove that PMCs do not engage in mercenary activities.[21] Nevertheless, distinguishing mercenaries from PMCs succeeds only in creating a distinction without a difference. Both are private purveyors of military skills for hire. Both are driven by a profit motive, irrespective of the corporate structure of the one and the informal personalized structure of the other. Both offer the same range of soft and lethal power, spanning training, reconnaissance, arms procurement, infrastructural and personnel protection, arms procurements, logistics and re-supply, combat operations and combat support, etc.

[15] Chaloka Beyani and Damian Lilly, (n 8) 10

[16] PW Singer, *Corporate Warriors: The Rise of the Privatized Military Industry* (2003) 8; see also Won Kidane, (n 7) 391

[17] Chaloka Beyani and Damian Lilly, (n 8) 15-16 [As corporate bodies, PMCs are required to operate in registered business and management structures. Most claim they provide military services under structured chain of command with disciplinary procedures. Ex-soldiers usually constitute the Boards of Directors. The personnel structure of the companies is usually opaque. Often, they do not have a fixed set of employees and draw on networks of ex-servicemen on the international market.]

[18] Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of people to self-determination, Human Rights Council, 9th January 2008, A/HRC/7/7, 9-10

[19] Won Kidane, (n 7) 364

[20] Petereyns Manuel, *The Legal Status of Mercenaries in Armed Conflict* (Master of Law Thesis of the Faculty of Law, Ghent University, 2016) 34; see Christopher Kinsey, 'International Law and the Control of Mercenaries and Private Military Companies', <http://journals.openedition.org/conflits/11502> Accessed 27 July 2022,13 [The problem of definition is clearly related to the political problems associated with the reluctance of states to exclude the use of mercenaries.]

[21] See Steven R Kochheiser, 'Silent Partners: Private Forces, Mercenaries, and International Humanitarian Law in the 21st Century', (2012) 2 *University of Miami National Security & Armed Conflict Law Review* [86-109] 90

The ability of the PMCs to concurrently service multiple clients or simultaneously run different operations, or interface with industry is basically an advantage derived from their economies of scale. It does not deodorize them or make them any different from the old type mercenaries. Beyond doubt, old fashioned mercenary activity and PMCs are united and renowned by the fact they both subvert the unitary typology of statehood by constituting themselves into non-state suppliers of military power. It must be conceded that the business model of the traditional mercenary is personalised unlike that of the PMC who hides behind a corporate identity. Furthermore, while the operational methodology of the traditional mercenary is restricted to his core business of shoot and kill, PMCs sometimes add babysitting and housekeeping to their slash and burn, shoot and kill operations. That however, is where the distinction ends. Both categories of operatives are specially recruited to supply private military power in armed conflicts, and are induced to accept employment basically because of the compensation offered. Furthermore, invariably, neither of these categories of operatives are members of the armed forces of a party to the conflict; nor are they sent to the conflict by a State on official duty as a member of its armed forces.

3. Historical Outline of Use of Mercenaries and PMCs Amongst Nations

Records of use of mercenaries in warfare stretch into antiquity. In the defence of their homeland or empire-building, over the centuries, many States and cities retained professional soldiers from other lands to supply armed force. The kingdoms of the Warring States period of China (475–221 BC) used mercenaries extensively. They were also used, by Carthage in its wars against Rome from 264 to 146 BC.[22] Records indicate that the Roman Empire made extensive use mercenaries, often using Germanic tribes against other Germanic tribes at the borders of the empire.[23] Recruitment and use of mercenaries has been recorded in European history from the 12th and 13th centuries. The mercenaries were either used as the sole combatants of an army or to assist the hirer's own army in war.[24] Byzantium used Spanish frontiersmen early in the 14th century; and Swiss, Italian, and German mercenaries were retained by princes and dukes to fight their wars in the 15th century.[25] The province of Swabia, during the reign of Maximilian I, the Holy Roman Emperor, (1493-1519) created mercenary armies which they rented out to fight for the Holy Roman Empire.[26] Fighting for gain was a visible aspect of 17th century English and Scottish Continental armies, and of the Swiss Papal guards.[27] In the Igbo territory of what eventually became Eastern Nigeria, the Aro Confederacy (1690-1902) had a primary goal of conducting slave raids throughout the region. It also had the related goal of enforcing worship of the Ibini Ukpabi idol of the Aro tribe, the power of which's priesthood was by superstition and fraud used in procuring non-Aro locals for sale as slaves. It relied on military power supplied by mercenaries from Ezza, Ohafia, Edda, Abam, Abiriba, Afikpo, Ekoi, Bahumono, Amasiri etc.[28] Use of mercenaries attained some of its most reprehensible extremes

[22] Kevin Riordan, 'International Convention Against the Recruitment, Use, Financing and Training of Mercenaries', <https://legal.un.org/avl/> Accessed 8 September, 2022, 1

[23] 18 *Encyclopaedia Britannica* 507 (1965)

[24] Leszek Sosnowski, 'The Position of Mercenaries under International Law', (1979) 19 (3) *Indian Journal of Int'l Law* 382; see also Marie-France Major, 'Mercenaries and International Law', [1992] 22 *Georgia Journal of Int'l & Comparative Law* [103-150] 105

[25] See Edward Kwakwa, (n 8) 75

[26] *US v Charles Burney*, 6 C.M.A. 776, 785, 21 C.M.R. 98, 107 (1956)

[27] *See* George Schwarzenberger, 'Terrorists, Hijackers, Guerrileros and Mercenaries', (1971) 24 *Current Legal Problems*, 279-80; Abdulgawi A Yusuf, 'Mercenaries in the Law of Armed Conflicts', in *'The New Humanitarian Law of Armed Conflict's* 113 (Antonio Cassese ed., 1979); CM Peter, 'Mercenaries and International Humanitarian Law', (1984) 24 *Indian Journal of Int'l Law* 373, 375-78; see also Marie-France Major, (n 24) 104

[28] see generally, E Isiche, *A History of the Ibo People* (1976) 81; Edward Harland Duckworth, (ed.) *Nigeria Magazine*, (FMI, 1982) 140-147; Adiele Eberechukwu Afigbo, *The Abolition of the Slave Trade in Southeastern Nigeria, 1885–1950* (Rochester, 2006)

during the Thirty Years War (1618-1648). Here, mercenary bands, fighting only for money, with no interest in the conflict coming to an end, with scant concern for the distress of the common peoples, laid much of Europe to waste.[29] Actually, preceding the Peace of Westphalia in 1648, any person with sufficient wealth and means, could raise an army.[30] The Congo, in modem times, was a remarkable case of mercenary use, commencing with the Katanga Province secession by Moise Tshombe. The central government on suppressing the secession, also employed mercenaries to assist in subduing the Simba revolt. Yet again, the central government, in 1966, employed mercenaries to suppress another uprising in Katanga. Thereafter, two groups of mercenaries in 1967, conducted several unsuccessful operations against the central government in an attempt to restore Moise Tshombe to power.[31] In other parts of Africa, both the Federal Government of Nigeria and the secessionists in Biafra employed mercenaries, and in Angola both the National Union for the Total Independence of Angola (UNITA) and the National Front for the Liberation of Angola (FNLA) employed mercenary assistance.[32]

PMCs originate from the private sector, and provide armed security services as private business activity for profit. They are one of the newest armed non-state parties operating in conflict situations.[33] Starting from, and since 1975, Vinnell Corp. (a firm of soldiers for hire) has been retained by Saudi Arabia for training the Saudi National Guard, running military academies, and writing Saudi military doctrine. At times Vinnell has engaged in combat support roles alongside Saudi Arabian forces.[34] In 1991, the government of Sierra Leone, was overwhelmed by violent rebellion by a group called Revolutionary United Front (RUF), In 1995, the RUF commenced a push towards Freetown. As the RUF closed in on the city, private soldiers employed by Executive Outcomes, a South African based PMC, took on the RUF rebels. They deployed mechanized infantry units, repulsed the RUF drive on Freetown, and degraded the once powerful rebel forces.[35] The MPLA government in Angola also hired Executive Outcomes from 1994 to 1996 to help end its war with UNITA. Papua New Guinea's government signed contracts with Sandline International in late 1997 in attempt to end its 8-year conflict with separatist rebels on the island of Bougainville.[36] In

[29] Kevin Riordan, (n 22) 1

[30] Martin van Creveld, *The Rise and Decline of the State* (CUP, 1999) 158

[31] James L Taulbee, 'Myths, Mercenaries and Contemporary International Law', [1985] 15(2) *California Western International Law Journal*, [339-363] 341; A Mockler, *The Mercenaries* (1969) [The Congo mercenaries were utilized both to support secession and also by the central government to subdue a challenge by an extremist faction. They were also later used in an attempt to overthrow the central government itself. Many of the same mercenaries were involved in all three operations.]

[32] Marcum, 'Lessons of Angola', (1976) 54 *Foreign Affairs* 407; W Burchetr & D Roebuck, *The Whores of War: Mercenaries Today* (1977)

[33] Lindsey Cameron, 'Private Military Companies: Their Status under International Humanitarian Law and its Impact on their Regulation', (2006) 88 (963) *International Review of the Red Cross*, 573; see also PR Kalidhass, (n 6) 4 [The terms 'civilian-contractors' and 'mercenaries' are often used as synonyms to PMCs, but these terms indicate three different though overlapping concepts. PMCs are private corporate entities whose employees are available for being contracted for hostilities or security services. Civilian-contractor as a generic term refers individuals, from either PMCs or other private sources, engaged in hostilities or providing logistical support in armed conflicts for profit. Mercenaries engage in hostilities for private gain without being part of the armed forces of a party to the conflict.]

[34] Chalmers Johnson, *The Sorrows of Empire: Militarism, Secrecy, and the End of the Republic* (2004) 135

[35] Won Kidane, (n 7) 401-2

[36] Damian Lilly, 'The Privatisation of Security and Peacebuilding: A Framework for Action,' (September 2000) *International Alert*; see also PW Singer, 'War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law', [2004] 42 *Columbia Journal of Transnational Law,* [521-550] 532-533 [In Sandline's contract signed with Papua New Guinea in 1997, Sandline's personnel were deputized by the government as '*special constables*,' notwithstanding that they were non-citizens; this was a stratagem to ensure that Sandline's personnel escaped international law categorisation as mercenaries.]

May 1998, a border conflict between Eritrea and Ethiopia, developed into conventional armed hostilities between the two countries. Ethiopia acquired Sukhoi 27 fighters, and Eritrea acquired MiG 29 interceptors. On both sides, these aircraft were flown by pilots from Russia, Ukraine or Latvia and both sides used Russian technicians for their maintenance. These Russian, Ukrainian, or Latvian pilots, mechanics, or advisers were private military contractors, and not officials formally representing their respective governments.[37] During its war with Serbia, military operations for Croatia were planned and commanded by a US company, MPRI.[38] Yet again, Bosnia Herzegovina's government hired MPRI in 1995 for a Train and Equip programme.[39] The fact that as at 1997, nine years after UN General Assembly adopted a mercenaries convention, thirty-four countries were interested in hiring Executive Outcomes[40] is eloquent testament of the relationship of members of the international community with the mercenary trade, despite the contrary voluble sermonising.

Despite the necessity of services offered by them, and notwithstanding their widespread use, the reality that mercenaries were actuated solely by pecuniary desires, as opposed to altruistic purposes, created a moral problem in their use. This was in addition to the problem created by the fact that the sovereign that employed them invariably had little or no operational control or authority over them.[41] The first version of the Magna Carta in 1215 demanded that King John banish his mercenary forces from England. This demand depicted the reality that the people regarded it as a threat to their rights as subjects for the sovereign to possess a force that owed no loyalty to the country or its people. Conversely, whatever misgivings attended the use of mercenaries, practical benefits also attended the use. Mercenaries provided ready-to-deploy military skills which were unavailable in the general population. Furthermore, unlike standing armies that needed to be maintained even during peacetime, retainer of mercenary armies invariably did not outlast the conflict for which they were recruited.[42] Within this context, it must be borne in mind that as a matter of fact, the phenomenon of the state as the sole legal authority with a monopoly on armed force, is a relatively recent occurrence in human history.[43] Consequently, until lately, their legality was not prohibited in international law, and they were treated, for most purposes, as combatants,[44] and usually, were treated as prisoners of war when captured.[45] From the 18th century, nationalism in Europe triggered creation of citizen armies. This lessened use of mercenaries as a fighting force. Despite the decline of use of mercenaries in Europe, outside of Europe, mercenaries still found ready use, particularly in colonial conflicts.[46] They remained respected professionals, and if captured, were accorded the status of PoWs.[47] Thus, until the mercenaries' controversies during the decolonisation of Africa, the international

[37] Won Kidane, (n 7) 399-400

[38] Louise Doswald-Beck, (n 1) 7-8

[39] Damian Lilly, (n 36)

[40] Foreign and Commonwealth Office, 'Private Military Companies: Options for Regulation', (2002) 107

[41] Sarah Percy, *Mercenaries: The History of a Norm in International Relations* (2007) 1; Steven R. Kochheiser, (n 21) 91

[42] Kevin Riordan, (n 22) 1 [Mercenaries were aliens, and had no relationship with the state they were recruited to serve. Dictators and autocrats found them useful in suppressing revolts.]

[43] *See* Martin van Creveld, (n 30) 158-61

[44] Kevin Riordan, (n 22) 1

[45] Edward Kwakwa, (n 8) 85 [During the American Revolution, the Hessian mercenaries who fought against American colonists and were captured were treated as prisoners of war. Foreign volunteers fighting for the Boers were similarly treated as prisoners of war when captured.]

[46] James L. Taulbee, (n 31) 339, 343 [The French Foreign Legion was a state-created standing mercenary army whose sole function was enforcement of colonial dominion.] see also Marie-France Major, (n 24) 106

[47] Marie-France Major, (n 24) 141

community accepted the legitimacy of mercenaries.[48] Incorporation of Africa into the states' system in the 20th century led to large scale mercenary operations in the continent. Mercenaries were deployed by either ex-colonial powers, often against national liberation movements; or by newly decolonized countries against secessionist and dissident groups; or by both major superpowers during the cold war, in proxy wars. In these regards, the Katanga secession, Nigeria-Biafra war, Zimbabwe wars, and Angolan civil war stand out for the extensive and sustained use of mercenaries by one or both sides to the conflict. Perception by ex-colonialists that use of mercenaries was acceptable as a discrete manner of enforcing foreign policy ensured their continued use, despite their clear subversion and undermining of the sovereignty and stability of the newly independent ex-colonies. However, mercenary despoliations and interventions ceased being someone else's problem in June 1976, when the government of the newly independent Republic of Angola tried thirteen mercenaries and found them guilty. Five were executed, and nine, imprisoned.[49] Subsequently, in the light of the subversion of post-colonial Africa by mercenary activity, the international community weighed in with a response. Even with these efforts and their eventual proscription in international law, mercenaries either in their traditional form, or operating under corporate form participated in many recent conflicts, such as in Afghanistan, Angola, Armenia, Bosnia-Herzegovina, Chechnya, Columbia, Congo-Brazzaville, the Democratic Republic of the Congo (DR Congo), Eritrea, Ethiopia, Georgia, Kashmir, Kosovo, Liberia, Papua New Guinea, and Sierra Leone.[50]

4. Status of Mercenaries and PMCs in International Law

A long history of customary use of mercenaries ensured that the international community had no wish to contest the traditional description of a mercenary until the latter half of the 20th century. In a largely political movement against the West, Nigeria led other African nations to create a new definition of 'mercenary' under international law.[51] In the aftermath of a civil war in which it took about 30 months of difficult campaigning to subdue a largely outgunned, outnumbered and starved Biafra army, it was expedient for Nigeria to attribute its poor military showing to the succour rendered by mercenaries to the Biafra army. At this point it was convenient to forget that mercenaries fought on both sides of the conflict, with the Nigerian side actively assisted by their USSR, Arab,

[48] Leonard Gaultier et al., *The Mercenary Issue at the UN Commission on Human Rights: The Need for a New Approach* (2001) 16; Michael Scheimer, 'Separating Private Military Companies from Illegal Mercenaries in International Law: Proposing an International Convention for Legitimate Military and Security Support that Reflects Customary International Law', (2009) 24(3) *American University International Law Review* [609-646] 614

[49] *See* Robert E Cesner & Brant, 'Law of the Mercenary: An International Dilemma', (1977) 6(3) *Capital University Law Review,* [339-370] 341; See Edward Kwakwa, (n 8) 78, [The Angolan trial's outcome was severe and unprecedented. It was the first time mercenaries were held to account for their activity before a legal tribunal.]

[50] Chaloka Beyani and Damian Lilly, (n 8) 11 [Since 1968, the UN General Assembly, the Security Council, the Economic and Social Council, and Commission on Human Rights, have repeatedly condemned use of mercenaries as an internationally unlawful act that undermines the exercise of the right of peoples to self-determination and enjoyment of human rights. In 1987, a UN Special Rapporteur on the use of mercenaries was established whose role is to document instances where mercenaries have been involved or implicated in human rights abuses and bring these instances to the attention of UN General Assembly and the Commission on Human Rights. In 1989, the UN General Assembly adopted and opened for signature and ratification the International Convention against the Recruitment, Use, Financing and Training of Mercenaries.]

[51] David Shearer, 'Private Armies and Military Intervention' (1998) 16 *Adelphi Paper, International Institute for Strategic Studies* 316 (discussing the Nigerian representatives' insistence at the Diplomatic Conference on Humanitarian Law in Geneva in the 1970s for a new definition of mercenary)

Nigerien and Chadian friends. In 1977, in an event of crucial import to the position of international law on mercenaries, the society of states promulgated two protocols to the four 1949 Geneva Conventions[52] relating to the protection of victims of international armed conflicts.[53] In this regard, three categories of persons recognised as subjects of IHL by the Four Geneva Conventions and the Additional Protocols as well as the Hague Conventions in order to confer rights or to impose responsibilities in relation to armed conflicts are combatants, mercenaries and civilians. PMCs and their personnel are not accepted as a distinct class.[54] While a clear proscription of mercenary activity is not contained in Article 47, clearly, a mercenary, under the laws of armed conflict remains isolated and exposed. Upon capture, he is not entitled to be treated as a PoW or combatant. He may access only the most rudimentary of human rights such as the right to life, etc.[55] The OAU Convention, having adopted Article 47 definition, goes further to create and define the crime of mercenarism by reference to what a mercenary is hired to do rather than what he eventually does. In this regard, the OAU Convention may be considered an improvement on the Geneva Conventions. On the other hand, just like the Geneva Conventions, it fails to regulate PMCs. Again, as a regional framework, its application is limited to Africa. Moreover, since most of the parties to the OAU Convention utilised or still utilise mercenary services, the OAU Convention does not speak with strong moral force. While it prohibits activities by persons or organisations who use mercenaries against other member States of the OAU or liberation movements in Africa,[56] by deliberating omitting a similar preclusion from governments using mercenaries against their own people to suppress popular and unpopular revolts, the OAU Convention reserves to governments, the right to use mercenaries. The UN Mecernaries Convention has entered into force.[57] Unlike Additional Protocol-I, 'direct participation in hostilities' is not needed in this UN Convention as condition precedent to determine the status of a person as mercenary. Status as mercenary is determined, not actual commission of the act but the purpose for which a person is recruited. However, the UN Convention failed to clarify the status of PMCs. Its ratification has been patchy. Most of the countries that ratified the Convention suffer the moral burden of having lately used mercenary services. The general belief is that under the practices of most nations as regulated by international law, complete prohibition of mercenary activity does not exist. This is more so when existing laws fail to properly and adequately regulate

[52] Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362,75 U.N.T.S. 31; Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention]; Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No, 3365, 75 U.N.T.S. 287

[53] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol *I), opened for signature* Dec. 12, 1977, U.N. Doc. A/32/144, Annexes I, 11 (1977), *reprinted in* 16 I.L.M. 1391 (1977) [hereinafter Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), *opened for signature* Dec. 12, 1977, U.N. Doc. A/32/144, Annexes 1, 11 (1977), *reprinted in* 16 I.L.M. 1442 (1977). See Edward Kwakwa, (n 8) 67-68

[54] PR Kalidhass, (n 6) 6

[55] Chaloka Beyani and Damian Lilly, (n 8) 4; [Article 47 does not criminalise mercenary activities.]

[56] Art. 6(c) of OAU Convention

[57] Kevin Riordan, (n 22) 1 [By resolution 44/34 of 4 December 1989, the International Convention against the Recruitment, Use, Financing and Training of Mercenaries was adopted by UNGA and opened for signature and ratification, or for accession. On 20 October 2001, in accordance with its article 19(1) the 30th day following date of deposit of the 22nd instrument of ratification or accession, the Convention entered into force. The Mercenaries Convention met with moderate international acceptance. After more than three decades, less than one in five UN members are parties. No permanent member of the Security Council is a party, and relatively few major military powers have ratified. This may be due in part to the widespread, but contestable, belief that the definition of mercenary in article 1 is too complex or limited. It may also be that use of mercenaries is now a relatively minor or historical problem.]

private military actors in their different manifestations.[58] In any event, most of the definitions of who is a mercenary are imprecise. This, coupled with non-existent structure for interdicting mercenary activity renders curtailment of mercenary/PMC operations difficult. While for example, the definitions tie recruitment as a mercenary to a specific conflict, in practice, most PMC employees are recruited on long term contracts and are not tied to any specific conflict. This enables their employer to rotate them to different locations, as the need arises.[59]

5. Legality of Use of Mercenaries and PMCs in International Law

Customary international law does not prohibit use of mercenaries. Flowing from this reality, current conventions emphasise proscription of activities subversive of the sovereignty or territorial integrity of states, or suppression of national liberation movements, or national self-determination.[60] Thus, the protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Article 47(1) does not prohibit recruitment and use of mercenaries. It rather provides that a mercenary shall not have the right of a combatant or PoW.[61] Also, recruitment and use of mercenaries is not completely prohibited by the OAU Convention. In order to outlaw European mercenaries retained by the minority governments of Rhodesia and South Africa, Article 1 prohibits governments or other groups from employing mercenaries to defend themselves from actions by liberation movements recognised by OAU. Thus, a government may recruit mercenaries to protect itself from dissident groups within its own borders. A case in point was the recruitment of Cubans to fight with MPLA during the Angolan civil war. In effect, African governments adopted the self-serving expedient of reserving to themselves, a right to use mercenaries to supress dissent in their countries.[62] The definition expanded with the UN Mercenaries Convention,[63] which used the 1977 definition but specified that to constitute a mercenary, a person must have been recruited to participate in a concerted act of violence for overthrowing a government or undermining the constitutional order or territorial integrity of a State. This Convention, operating from the background of post-colonial mercenary interventions in Africa, was clear about the operations it sought to restrain.[64] Although the UN Mercenary Convention broadened the definition of mercenary by eradicating the prerequisite of taking direct part in hostilities,[65] it does not utterly prohibit service of foreigners individually or in special units of national armed forces, such as the French Foreign Legion, or Britain's Brigade of Gurkhas. It completely overlooks PMCs.[66] In lieu of a total ban on mercenarism, the Convention proscribes undertakings for destabilise the government and territorial integrity of states.[67]

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[58] PW Singer, (n 36) 531

[59] Ibid. 532 [An example is Executive Outcomes, which moved from fighting in Angola to Sierra Leone and then to Democratic Republic of the Congo. Despite fighting for pay in other nations' wars, personnel of Executive Outcomes would not meet the standard.]

[60] Christopher Kinsey, (n 20) 9

[61] 1125 U.N.T.S. 3

[62] Christopher Kinsey, (n 20) 4

[63] International Convention against the Recruitment, Use, Financing and Training of Mercenaries, G.A. Resolution 44/34, U.N. GAOR, 44th Sess., Supp. No. 43, U.N. Doc. A/RES/44/34 (Dec. 4, 1989) (entered into force Oct. 20, 2001)

[64] Todd S. Milliard, 'Overcoming Post-Colonial Myopia: A Call to Recognize and Regulate Private Military Companies', (2003) 176 *Military Law Review*, 33-34 [Arguing that the drafters designed these narrow definitions to cover only those forces acting against the interests of postcolonial African states.] see Michael Scheimer, (n 48) 616-7; see also Chaloka Beyani and Damian Lilly, (n 8) 24

[65] Won Kidane, (n 7) 412

[66] Kevin Riordan, (n 22) 3

[67] Chaloka Beyani and Damian Lilly, (n 8) 24

As a widespread historical practice, rulers utilised private forces to supress opposition and sustain even unpopular regimes in power. Governments justified mercenary use on the basis that their states lacked proficient security agencies; and besides, made-to-order mercenary units were cheaper than a standing army.[68] Ironically, for the past five decades, the international community sought prohibition of self-employed mercenaries from particular conflicts. The lead was taken by African governments who though they have borne the brunt of the operations of these mercenaries, yet are a ready clientele for these mercenaries. Since most governments, especially, African governments do not perceive practical benefits of excluding themselves from an available source of specialised military skill, current international law is deliberately made weak so as to have circumscribed efficacy. Consequently, in order to permit them recruit any kind of military power they require in order to remain in office, African states, in defining mercenarism, deliberately constructed an imprecise definition that is susceptible to dispute.[69] Clearly, these mercenary conventions do not proscribe recourse to private military power; contrariwise, international law permits recourse to private military muscle if its use serves the purposes of states, parties to the treaty. Thus, from the various mercenary treaties, private warriors are classified and prohibited as mercenaries only when it accords with the self-interest and political agenda of states to categorise them as such.[70] In the final analysis, recruitment of mercenaries, both in their traditional and PMC forms is recognised and accepted as legitimate by state parties. This legitimacy is enhanced by the lawfulness of the operations the mercenaries are hired to perform. The hiring is unlawful only if the mission violates international law, for example, when it is a subversion of the government of a member state of the international community, or it is a violation of the territorial integrity of such a state, or when it is to suppress a lawful claim for self-determination.[71]

6. Legality of Use of Mercenaries and PMCs in Nigeria's Counter-Terrorism Measures

Under the Geneva Conventions, an international armed conflict (IAC) is defined as 'all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them,' and also as 'all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.'[72] On the other hand, a non-international armed conflict (NIAC) is an 'armed conflict not of an international character occurring in the territory of one of the High Contracting Parties.'[73] In other words, a NIAC is the opposite of an IAC, and is basically any other armed conflict other than an IAC. It is clear that despite prohibition of the use of mercenary force in IACs, exculpating circumstances exist. Thus, in a typical scenario of international relations, if a stronger nation invades a weaker one, and the weaker nation retains mercenary units to complement its national army in the defence of its government and protection of its territorial integrity, the use of private military power in this circumstance is in accordance with the principles and objectives of the UN, and is justified. The question now is if such license in use of mercenary power extends to internal disturbances and conflicts that lack an international character. As a background to the answer to this question, it must be emphasised that the concept of territorial sovereignty as a basic principle is

[68] Alexandra Yu, Skuratova & Elena E. Korolkova, 'Private Military and Security Companies in International Law', (2020) 4 *Moscow Journal of International Law* [81–94] 88

[69] Christopher Kinsey, (n 20) 13-14

[70] Ibid. 2

[71] Juan Carlos Zarate, 'The Emergence of a New Dog of War: Private International Security Companies, International Law, and the New World Disorder', (1998) 34 *Stanford Journal of International Law*, 125 argues that the status of a private warrior as a mercenary is determined by the mission he is recruited to perform, so that the legitimacy of a private warrior is not compromised provided his mission is not a violation of international law, and his employer is legitimate.

[72] Common Article 2 of Geneva Conventions of 1949

[73] Common Article 3 to the Geneva Conventions of 1949

recognized by international law.[74] It indicates the authority of a state over its own territory, and implies that under contemporary international law, states are prohibited from exercise of sovereign powers in the territory of another state without the latter state's consent.[75] Thus, in international law a fundamental principle is that every nation's sovereignty is limited by its territorial boundaries, so that it may not act within the territory of another sovereign without its consent.[76] As a corollary to the principle prohibiting states from non-consensual exercise of sovereign powers in the territory of another state, every state is entitled, within its borders, to exercise jurisdiction, and take and implement decisions in respect of its internal and external affairs without interference by other states.[77] In answer to the question posed earlier, an underlying basis for political science, international relations and international law is the predicate that within its territory, the state possess monopoly over violence.[78] Accordingly, laws at both international and municipal levels entrench this principle that states hold the monopoly on armed violence, and may act through agents such as private suppliers of military power.[79] For that reason, international law permits domestic law to protect mercenaries in so far as they are retained by the established government; international law, on the other hand, will consider them as outlaws and bandits if they fight on behalf of the rebels.[80] In any event, as a general rule, international humanitarian law does not apply to 'banditry, unorganized and short-lived insurrections, or terrorist activities,'[81] so that even at both a theoretical and practical level, if the law could be given an extreme interpretation of precluding states from using mercenaries in both IACs and NAIC, that preclusion does not apply if the mission of the mercenaries is to degrade and annihilate local banditry, kidnapping, ethnic cleansers, genocidaires or terrorists.

Article 2(4) of UN Charter requires all members to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the UN. Thus, any use of inter-state force

[74] *See*, e.g., UN Charter, art. 2(4) [All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.] *See also* Constitutive Act of African Union adopted by the 36th Ordinary Session of the Assembly of Heads of State and Government, on 11 July, 2000, at Lome, Togo [The Union shall function in accordance with the following principles: (a) sovereign equality and interdependence among Member States of the Union; (f) prohibition of the use of force or threat to use force among Member States of the Union; (g) non-interference by any Member State in the internal affairs of another; (i) peaceful co-existence of Member States and their right to live in peace and security; (m) respect for democratic principles, human rights, the rule of law and good governance]

[75] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA)* (Merits, Judgment) [1984] ICJ Rep. 14 paras. 212; *Case of the SS 'Lotus' (France v Turkey)* [1927] PCIJ Rep Series A No 10, 18-19

[76] In the *Schooner Exchange v. McFaddon* 11 US (7 Cranch) 116 (1812) at 136 Chief Justice John Marshall stated the principle thus '*The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction'*.

[77] NA Maryan Green, *International Law* (3d Ed. 1987) 191

[78] *See* Janice E. Thomson, *Mercenaries, Pirates, and Sovereigns: State-Building and Extraterritorial Violence in Early Modern Europe* (1994) 147

[79] Ibid. 82-83; see Juan Carlos Zarate, (n 71) 134; [States retain legal authority for use of violence, and PMCs are legitimate actors if authorized by a state.] PW Singer, (n 16) 90, 95 [Executive Outcomes operated in Sierra Leone at the request of the government in 1995, providing ground troops supported by artillery and air units that successfully defeated a rebel army invasion. ……The Vinnell firm personnel fought alongside Saudi National Guard troops in combat during the first Gulf War.] Steven R Kochheiser, (n 21) 92, 93

[80] Antonio Cassese, Mercenaries: Lawful Combatants or War Criminals? (1980) 40 (1) *Zeitschriftfür ausländisches öffentliches Recht und Völkerrecht* [1–30] 6

[81] *ICTY, Prosecutor v Boskoski & Tarculovski*, Case No. IT-04-82-T, Judgement (Trial Chamber) 10 July 2008 §175-176; Petereyns Manuel, (n 20) 62

by member states for whatever reason is banned, unless explicitly allowed by the Charter.[82] Principle 1 of the Declaration of the Principles of International Law Applicable to Friendly Relations Between States 1970, stated that – '(e)very State has the duty to refrain from organising or encouraging the organisation of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State.'[83] In view of the fact that African countries have no reticence about employing mercenaries as part of their security architecture, it becomes clear that the opprobrium the international community has for mercenaries is not for mercenaries as such; but for those of the trade who find employment in subverting national governments, violating the territorial integrity of states, and fighting against internationally recognised national liberation movements.[84] In fact, the OAU mercenary convention in its Article 1 branded mercenaries by mentioning the purpose of their recruitment, particularly if they were hired to execute *coup d'états* or oppose OAU-recognized liberation movements.[85] Thus, the UN and OAU did not pass a blanket censure on mercenaries. Their denunciation was reserved for those mercenaries whose mission was a violation of the purposes of the UN, i.e., mercenaries employed to violate the territorial integrity of sovereigns, or oppose national self-determination. Consequently, the prohibition did not encompass mercenaries recruited by sovereigns to form part of their security infrastructure.[86] From the perspective of international law regarding deployment of force within the territory of a sovereign, use of mercenaries by external actors or internal rebels to subvert a state's sovereignty, overthrow its government, or violate its territorial integrity represents the basis for detestation of mercenary activity. However, a recalibration of the basis for use of commercialized military power as represented by mercenaries leads to an acceptance of the occurrence. In this regard, use of mercenaries by a local sovereign within his territory to assist the local armed forces cope with terrorist and insurgency depredations does not have any deleterious effect on international law. It is the argument of this paper that protection of territorial sovereignty is the primary purpose of international law; and suppression of intrastate terrorism is as salutary as the first. Customarily, the odium attached to traditional mercenary activity was justified because it was an activity singularly purposed for deployment of illegal force for undermining of state sovereignty. Consequently, censure and prohibition of traditional mercenary activity finds justification within the perspective of recruitment of mercenaries for interstate conflict and subversion of the sovereignty of one of the feuding parties. However, in the Nigerian situation, use of mercenaries is to assist States' security agencies in the discharge of their duties of protecting the territorial integrity of the state. Contextually, the only difference between the use of such private military assistance and deployment of UN troops is that while the first are funded directly by the affected state, the latter are funded collectively by members of the UN, and while the first may be used in local or localised conflicts, the latter though occasionally used in non-internationalised conflicts, are mostly used in internationalised conflicts. In this

[82] Yoram Dinstein, *War, Aggression and Self-Defense*, (2005) 87-88; in the *Nicaragua v USA case* (n 75), the ICJ held that any act of sending armed bands across the frontier of another state constituted a breach of the prohibition on the threat or use of force against the political independence and territorial integrity of a state. A State will breach the international law principle of non-intervention against another nation '*by organizing or encouraging the organization of irregular forces…for incursion into the territory of another State'*.

[83] G.A. Res. 2625 (XXV), 24 October 1970.

[84] Antonio Cassese, (n 80) 11

[85] PW Singer, (n 36) 528-529; see James L Taulbee, (n 31) 347 [The OAU Convention does not explicitly forbid use of mercenaries. Under art. I, a government, may not use mercenaries to defend itself from the activities of a liberation movement recognized b**y** the OAU. However, a government may engage mercenaries to defend itself from liberation movements which fall outside the defined category. This anomaly was not an oversight, but the result of careful drafting which came from African governments' desire to give support to '*national liberation movements*' without creating conditions which might encourage dissident groups within their own borders]

[86] Antonio Cassese, (n 80) 24

situation, lawfulness of the purpose of the deployment which is in accordance with the principles and purposes of the UN, sanctifies resort to private military skills. Use of mercenaries and PMCs in Nigeria's conflict with banditry, kidnappers, ethnic cleansers, genocidaires and terrorists, does not involve violation of the territorial integrity of any sovereign state. In this regard, there is no violation of international law if the territorial integrity of another state is not violated.

7. Conclusion and Recommendations

The idea that a state should exercise monopoly of violence within its territory is not a mere theoretical construct; it underlies the entire social contract. For a state to fail in this regard, is to fail in the most salutary attribute of statehood. Section 14(2)(b) of Nigeria's 1999 Constitution is clear that security and welfare of the people is the primary purpose of government. This connotes that monopoly of violence is both a function of statehood and an attribute of statehood. From the earliest days of civilisation, rulers and kings lawfully had recourse to private soldiers to supply skilled military services. Up till the present, outsourcing of the state's monopoly of power to private soldiers on behalf of the state is lawful.[87] Consequently, in exercise of police or military powers appurtenant to a state, it is permissible for it, either using its own forces, or that of friendly states or sundry persons, either for free or for hire, to degrade, annihilate and eradicate any challenge to its monopoly of violence within its territory. In other words, for purposes of discharging its sovereign responsibilities to establish peace in its territory, a territorial sovereign is authorised to utilise both private and public forces. This paper has argued that use of mercenaries and PMCs by the Nigerian government in its counter-terrorism conflict does not violate international law. International law prohibition of use of mercenaries is a legal term of art that finds expression within specific circumstances. Use of mercenaries and PMCs by the legitimate government of a state to oppose criminal activity within its territory does not fall within the delimited circumstances. It is accordingly recommended that the Nigerian government, in accordance with its sovereign prerogative, should go ahead and recruit mercenaries and private military companies in such numbers as is necessary to assist it perform its sovereign duty of degrading and obliterating the terrorists' networks and organisation that are competing with the sovereign government for monopoly of use of violence within Nigeria's territorial space.

[87] See J. Cockayne, 'Make or Buy? Principal-Agent Theory and the Regulation of Private Military Companies', in S. Chesterman & C. Lehnardt (eds.), F*rom Mercenaries to Market: The Rise and Regulation of Private Military Companies*, (2009); See Janice E. Thomson, (n 78) 31-32, 82-83; Petereyns Manuel, (n 20) 56