MERCENARIES IN INTERNATIONAL LAW

by

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ABSTRACT

The recruitment, training and use of mercenaries in armed conflicts, although not a new phenomenon, has become in recent years an issue of great importance to the Third World countries. Traditional international law contains no clear limitations on the employment of mercenaries. The only prohibition involves a duty of each State to prevent the organization on its territory of a hostile military expedition for action against any other State. The growing employment of "soldiers of fortune" in the developing countries has led to a change in the attitude of the international community towards the lawfulness of the use of individuals as mercenaries.

This study analyses the meaning of the term "mercenary", the grounds upon which the use of mercenaries in armed conflicts is viewed as impermissible or permissible and whether or not new international norms regulating their recruitment, training and use have emerged.

RÉSUME

Le recrutement, la formation et le recours à des mercenaires lors des conflits armés n'est pas un phénomène récent, mais est devenu une question de grande importance pour les pays du Tieres-Monde, au cours des dernières années.

Le droit international traditionnel (classique) ne contient aucune limitation quant à l'embauche (l'emploi) de mercenaires. La seule interdiction apparaît dans le devoir qui a chaque État d'empêcher sur son territoire l'organisation d'expéditions militaires hostiles à l'égard de n'importe quel autre État. Le recours croissant aux "soldats de fortune" dans les pays en voie de développement a provoqué un changement d'attitude de la communauté internationale à l'égard de la légalité de l'utilisation d'individus comme mercenaires.

Cette étude a pour but d'analyser la signification du terme "mercenaire", et les motifs pour lesquels l'utilisation de mercenaires lors de conflits armés est considérée comme interdite ou permise, puis de déterminer si de nouvelles normes internationales règlementant leur recrutement, formation et utilisation ont été dégagées.

INTRODUCTION

The use of mercenaries is not new in the world. It has in fact existed for centuries. However, in the United Nations the problem of mercenaries was first discussed in 1960 during the Congo (now Zaire) crisis. No treaty or convention regulating the use of mercenaries has resulted from those debates. But a number of resolutions have been passed by the United Nations General Assembly condemning their activities and calling for an end to their recruitment and employment. The Organization of African Unity (hereinafter referred to as the OAU) adopted a draft convention on mercenaries in 1972. But its impact has yet to be seen since it is not yet in force and as the examination of this convention will show, it leaves many questions unanswered.

Jurists on their part, have paid scant attention to the problem of mercenaries, although a lot of information on their activities has been provided by journalists and historians. Most textbooks and treatises on international law do not refer specifically to the question of mercenaries. Valuable references to the subject are found, for the most part, in articles. Continued absence of a comprehensive rule of international law regulating the use of mercenaries, the lack of scholarly research on the matter leaves the following questions without an authoritative

answer:

1. Who is a mercenary in international law?
2. Is there need for the international community to regulate the use of mercenaries?
3. Does international law already regulate the recruitment, training and use of mercenaries?

These questions deserve to be asked and searchingly examined. It is fairly obvious that the growing use of mercenaries is an important problem facing the international community. The actions of mercenaries in Congo/Zaire, Benin, Angola, Comoro Islands and Seychelles (to mention only a few places) have generated widespread debate on the subject of mercenaries. Secondly, the trial and subsequent execution of white mercenaries and the imprisonment of ten others in Angola in 1976 equally produced responses of a high magnitude. Finally, Africa where the problems of mercenaries have been most felt and many third world countries whose constitutional institutions are still unstable continue to face problems of internal strife that resort to mercenaries is a reality. Therefore, there is an urgent need to clarify the legal position. It is in this context of current international dialogue that this study is undertaken.

In Chapter I, problems relating to the definition of the word "mercenary" will be examined.

In Chapter II, the use of mercenaries through history shall be briefly traced. Emphasis will be put on

their role in armed conflicts, factors which led to their use and how they were recruited.

Chapter III will examine the basis upon which the claims that the use of mercenaries is prohibited. Two major justifications have been identified and examined; namely that their use is a threat to the peace, and a threat to the right of self-determination.

Chapter IV shall focus on the claims that the use of mercenaries is still lawful. One of the questions is whether foreign individuals can intervene in another State to protect human rights without being called mercenaries.

In Chapter V, the international responsibility of a State whose nationals take part in armed conflicts as mercenaries shall be examined.

Finally, in Chapter VI, the extent to which mercenaries can be said to be criminals under international law shall be discussed.

CHAPTER I

PROBLEMS RELATING TO DEFINITION

In any discussion of the "soldiers of fortune" the first difficulty one encounters relates to the definition of mercenary. One possible reason for the difficulty seems to be that there are a few authoritative interpretations of the term. The United Nations, for example, does not define the term mercenary in its resolutions.[1] In the words of Professor Georg Schwarzenberger[2] the term mercenary has no legal definition. In this study, the term mercenary carries two meanings: a popular meaning and a legal one. The former is descriptive and the latter is normative. The popular meaning of the term mercenary is examined first.

Section 1: Popular Meaning of the Term "Mercenary"

In its popular sense, the term mercenary is used in at least two ways which overlap and they could be summarized in one but because each represents a certain trend of thought they merit separate consideration. As Judge-Advocate Daffala of Sudan, in the course of a court-martial stated: "the meaning of the word seems to have taken different forms through different ages."[3]

The simplest and perhaps the most common non-legal definition of the term mercenary is offered by Robert

Hughes, a British parliamentarian. He defines the terms as follows:

> Mercenaries are nothing more than hired killers who murder to order and for no other purpose than commercial gain.[4]

Two essential elements can be noted in the above definition: one, a person to be regarded as a mercenary must be hired to kill, and two, the purpose of killing must be for commercial gain. The definition thus excludes persons who are hired to kill for purposes other than commercial. If the purpose for killing is patriotic, for example, then the person who kills would not be called a mercenary. The above definition is closer to one aspect of the armed forces as understood in pre-Roman antiquity. Edward Kossy, for example, states that, "there existed or co-existed two different conceptions of armed forces; one was rooted in the belief that every able-bodied man has an inborn obligation to defend the community he belongs to, the other was based on a full-time organization of more specialized armed forces (as, for instance, cavalry) being the duty and privilege of a socially elevated warrior caste, or of paid mercenary professionals."[5] It is the latter category of armed forces that is consistent with definition offered by Robert Hughes. If every citizen, as among the Romans, took his turn in serving in the army, such service would naturally be gratuitous.[6] At this point in time it seems that the nationality of the hired soldier was not a necessary element of the definition.

A more elegant non-legal definition of the mercenary is provided by the Oxford English Dictionary. It defines the term as follows:

> Working merely for monetary or other reward; actuated by self-interest. Now only of soldiers serving in a foreign army.[7]

Like the first definition the emphasis here is on those who are armed. A desire for personal profit on the part of the soldier continues to be a relevant distinguishing feature. But unlike in the first definition, the purpose for fighting is not restricted to pecuniary gain. It can be for other reward. And other reward could probably include gains which are not commercial. The major improvement over the first definition, however, is that under the second definition the soldier serves in a foreign country. This definition is consistent with the character of armies of Europe before the end of the eighteenth century. Until the French Revolution, wars were fought by professional soldiers who were employed by the State and in many cases were not of the nation for whose cause they fought. Forces were usually levied and disbanded ad hoc. But the French Revolution and the system of conscription transformed the whole spirit of war.[8] Decrees were passed providing that, "all Frenchmen shall be in a permanent readiness for service of the armies." And ordering the imprisonment of all foreigners with which the French Republic is at war.[9] Mercenaries' lack of discipline and its accompanying social problems seem to have been one of the

factors behind the feeling for a native French infantry.[10] Following the French example, the rest of Europe reorganized their armies on a national basis.[11] While the national character of the European armies has changed since the French Revolution, the meaning of the term mercenary as understood then has survived. However, this does not mean that all foreign soldiers are called mercenaries.

Niccolo Machiavelli,[12] for example, distinguishes between foreign persons hired by a sovereign who is involved in an armed conflict and foreign soldiers who are sent by one sovereign to fight for another sovereign. He limits the term mercenary to the former, calling the latter "auxiliaries". According to Machiavelli mercenaries were "free lancers" similar to the "free companies" of the Middle Ages, professional warriors recruited on an ad hoc basis and held together by leaders of strong personality. With regard to auxiliaries he wrote: "When one asks a powerful neighbour to come to aid and defend one with his forces, they are termed "auxiliaries."[13] The practical difficulties of making a distinction between mercenaries and auxiliaries are pointed out by J.M. Gilbert:

> However clear their difference in theory, it is not always possible to distinguish between mercenaries and auxiliaries. Both were foreign, both were professionals; both served under alien officers and both were impelled, to a greater or lesser degree by hope of material reward - for even auxiliaries, though drawing no pay from the ruler in whose cause they fought, could hope, like mercenaries, for pensions, booty, ransoms, and similar extraneous emoluments.[14]

The basis for the distinction between mercenaries and auxiliaries, according to Machiavelli, is not the motives of those who fought but which sovereign paid them. The motives of foreign soldiers, however, is still a basis for distinguishing those who fight for personal gain and those who fight with commitment and without pay. While the former are called mercenaries, the latter are referred to as volunteers. Colin Legum, a well-known journalist and writer, for example, writing in the Observer defined volunteers as:

> Volunteers on the other hand - whether of the Left or the Right - are primarily motivated by ideals, and are willing to sacrifice themselves for causes without thought of compensation. Those who joined either side in the Spanish Civil War, or who fought in Israel, accepted the ordinary conditions of pay and service of those they went to help.[15]

The definition of the Oxford English Dictionary was adopted by a court-martial in the Sudan. In this case Colonel Rolf Steiner, a former Nazi youth movement member and storm-trooper, crossed the border of the southern part of the Sudan, joined the Anya-nya rebel army and aided them in waging war against the Government.[16] While on his way to Uganda, he was arrested by Ugandan authorities and was handed over to the Sudan where he stood trial for various offences including that of being a mercenary. After examining a number of definitions and after quoting Antony Mockler[17] that no hard and fast definition of a mercenary can be formulated the Judge-Advocte concluded:

However, the meaning popular in current language of the word seems to be akin to its definition in Oxford Dictionary, a soldier fighting in a foreign country for money.[18]

Section 2: "Mercenary" in Treaty Law

A. Under Protocol 1 Additional to the Geneva Conventions of 12 August, 1949[19]

The most comprehensive definition of the term mercenary is provided in the Protocol I Additional to the Geneva Conventions of 12 August, 1949 and relating to the Protection of Victims in International Armed Conflicts. Article 47 of the Protocol reads as follows:

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 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, for 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) 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.

The analysis which follows immediately also applies to the definition in a draft convention before the

United Nations Ad Hoc Committee on the Drafting of an International Convention Against the Recruitment, Use and Financing of Mercenaries[20] and which forms a basis for the drafting of a final convention.[21] This approach is adopted because both definitions are identical. This similarity is not accidental. Nigeria has been responsible for introducing both drafts. Nigeria introduced the original proposal at the 1976 Session of the Conference on International Humanitarian Law.[22] At the 1977 Session of the said Conference, Nigeria was able by informal negotiations to gain widespread agreement to a definition.[23] The draft convention before the Ad Hoc Committee was presented by the Nigerian delegation during the Thirty-Fifth Session of the General Assembly of the United Nations.[24]

Turning to the definition of mercenary in Protocol 1, it may be argued that if such a definition is incorporated in municipal legislations seeking to prohibit the training, recruitment, and use of mercenaries, then, it would be of limited application. First, persons who recruit others to fight as mercenaries and furnish arms seem to be excluded from the definition. This is a significant omission. Recruiters of private soldiers for foreign missions have in the past played a very important role in the success of mercenary activities. It may be recalled that during the Angolan trial of mercenaries, the court

received a telegram from Bufkin, the chief recruiter in the United States, which was read aloud to the audience. In it Bufkin stated: "I am at present recruiting for Rhodesia."[25]

Equally remarkable is the work of Hank Wharton, the German-American airline operator in the Biafran War. He did not fight at all, but he contracted to run guns to Biafra. He operated three large airlines. The journey started in Lisbon through Bissau, formerly Portuguese Guinea and Sao Tome. John De St. Jorre described Wharton's role:

> Wharton's shoe-string operation was, for many critical months, the Biafran 'pipeline' on which the country's very existence depended. Arms, emissaries, money, journalists and later, medical and relief supplies, shuttled back and forth weaving a tenuous but remarkably sturdy life-line between Biafra and Europe.[26]

Those instances may serve to illustrate the point that a definition of mercenary in a statute seeking to prohibit the use of mercenaries, to be effective, must include the recruiters and suppliers of arms. Recommending the punishment of those persons who sponsor others for hostile military expeditions, Roy Emerson Curtis wrote:

> The State would find prevention impossible if it attempted to punish only those who were to engage in the actual fighting. Those who provide or prepare the means of an expedition are in fact the real offenders at municipal law, whether they are acting as principals or accomplices. For they commit the abuse of the territory and resources which the State is under obligation to prevent. Where contributions of

> money, arms, or other provisions have been made, the hostile purpose is very apparent. These are things which will be a material aid to the expedition and will add to its chances of success.[27]

On the issue of gain by emphasizing the point that material gain should be in excess of that paid to combatants of similar ranks and functions in the armed forces of a party to the conflict, the definition under Protocol 1 excludes persons who fight because of beliefs, religion or race. On the significance of this latter point Burmester, in his article states:

> In many cases, monetary reward will not be the sole, or even primary motivation which will lead foreigners to participate in a conflict. Often foreign volunteers will take part in an armed conflict for political or ideological reasons.[28]

And as Lord McNair concludes "in almost every war will be found fighting foreign volunteers attracted by the desire of employment or love of adventure or sympathy with the cause of one of the belligerents."[29]

Even for domestic law a definition which relies almost exclusively on the motivation of the participant as a basis for determining the legitimacy of conduct has been found to be unsatisfactory. The Report of the Committee of Privy Counsellors appointed to inquire in the recruitment of mercenaries is the United Kingdom, for example, stated:

> Any definition of mercenaries which requires positive proof of motivation would either be unworkable or so haphazard in its application as between

comparable individuals as to be unacceptable. Mercenaries, we think, can only be defined by reference to what they do and not by reference to why they do it.[30]

B. Under the OAU Draft Convention of 1972[31]

Article 1 of the OAU Draft Convention provides as follows:

> Under the present Convention a mercenary is classified as anyone who, not a national of the State against which his actions are directed, is employed, enrolls or links himself willingly, to a person, group or organization whose aim is:
>
> (a) to overthrow by force of arms or by any other means the government of that member State of the Organization of African Unity;
>
> (b) to undermine the independence, territorial integrity or normal working of the institutions of the said State;
>
> (c) to block by any means the activities of any liberation movement recognized by the Organization of African Unity.

Article 2

> Anyone who recruits or takes part in the recruitment of a mercenary, or in the training or in financing his activities or who gives him protection, commits a crime in the meaning of paragraph 1 of this Article.

Under the OAU Draft Convention it is an offence to be a mercenary and a person is a mercenary if he fulfills the conditions set out in the Convention. While Article 1 of the draft Convention states that a person to qualify as a mercenary should not be a national of the State against

which his actions are directed, it does not specify the capacity in which that person fights. Is it not relevant that such a person should fight in a private capacity? The literal reading of that article seems to imply that if a person has been sent by a State to engage in hostilities he may be treated as a mercenary by the State against which his actions are directed. Take, for example, the recent fighting between Ethiopia and Somalia.[32] Under Article 1 of the OAU draft Convention, Somali soldiers could be treated by Ethiopia as mercenaries and not as prisoners of war and vice versa. It is unlikely that the African Heads of State meant that to be the case. The more plausible interpretation of the intention of the African Heads of State is that in a situation where there is a conflict between two or more States a person to qualify as a mercenary should not be a national of a party to the conflict and should fight in a private capacity. Would there be a difference where two States are at war and one of them invites a friendly State to help her in the execution of the war? Under Article 1 of the OAU Draft Convention, the soldiers of a third State could be treated as mercenaries and not as prisoners of war. Cuban soldiers sent by the Government of Cuba to fight for Ethiopia against Somalia, could, for example, be treated as mercenaries on capture by Somalia. Traditionally, soldiers sent by a State to participate in a conflict have been excluded from being called mercenaries.[33] On the assumption that the above

construction was not intended by the drafters of the OAU Draft Convention there is need, then, for an amendment of Article 1 to include a provision that a person to be a mercenary should not have been sent by a State.

C. Under the Draft Convention on the Prevention and Suppression of Mercenarism, 1976[34]

Finally attention is focused on the provision of the "Luanda Convention". This draft Convention is the work of the International Commission of Enquiry on Mercenaries. The Commission comprising of 51 lawyers from thirty-seven countries was invited by the Government of Angola to attend the proceedings of the trial of the mercenaries captured during the Civil War, draft an international convention on the suppression of mercenaries, prepare a general declaration on the subject and report on the fairness of the trial. The majority of the members of the Commission who drafted the convention were lawyers with experience in international law. But as Professor Leslie Green[35] rightly points out, the Commission had no official international basis and consequently, its pronouncements are not authoritative. Nevertheless, they are still useful for purposes of examining the question of definition of the term mercenary. Article 1 of the draft Convention provides:

> The crime of mercenarism is committed by the individual group or association, representatives of State and the State itself which with the aim of opposing

by armed violence a process of self-determination, practices any of the following acts:

(a) organizes, finances, supplies, equips, trains, promotes, supports or employs in any way military forces consisting of or including persons who are not nationals of the country where they are going to act, for personal gain through the payment of a salary or any other kind of material recompense;

(b) enlists, enrols, or tries to enrol in the said forces;

(c) allows the activities mentioned in paragraph (a) to be carried 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.

Both the OAU and the Luanda draft Conventions propose to create a crime of mercenarism.[36] The definition of the Luanda draft Convention however, is rather restrictive in that if it were in force protection would be extended to a process of self-determination only. This provision could be broadened to include the protection of other major purposes of the Charter of the United Nations.

Section 3: Conclusion

It follows from the foregoing considerations that the notion "mercenary" may be defined in different ways. This is true whether the term is defined in the popular sense or in the legal sense. It is however, submitted that the popular meaning of the term mercenary is not the concern of international law. The person qualifies to be

called a mercenary, by what he does and the motives which drive him to doing it. In that case a rule of international law is not necessarily violated. The mere fact that a person participates in a war in a private capacity or uses forces should not automatically make him an object of international law. The reason is that international law has not outlawed the use of force per se.[37] It has only limited the conditions under which force can lawfully be used. The prohibition of the use of force is found in Article 2(4) of the Charter of the United Nations. It provides that, "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 manner inconsistent with the purposes of the United Nations". If the use of force by a party to a conflict is lawful, i.e. if that party has been the subject of an armed attack, then, third parties may lawfully assist in the collective defence. This right of collective defence is recognized under both customary international law and the United Nations Charter. Article 51 of the United Nations Charter, for example, expressly reserves the right of individual and collective self-defence if there is an armed attack. It is on the basis of the above prescriptions that some writers have justified the military assistance of the United States to the former Republic of Vietnam. Professor John Norton Moore writes:

> Assessed against this fundamental structure, defensive assistance of the Republic of Vietnam is lawful under the most widely accepted principles of customary international law and the United Nations Charter.[38]

Under the popular meaning of the term mercenary, a soldier is a mercenary if he participates in a foreign venture and it is immaterial whether the side on which he fights is using force lawfully or unlawfully. What matters is that the soldier should be motivated by personal gain. On the other hand, the international community seems not be concerned with a mercenary by whatever name called. It is concerned with a foreign soldier who participates in an unlawful venture and in a private capacity. This meaning is born out by the provision of the OAU Draft Convention of 1972. Although the United Nations has not defined the word "mercenary" in its resolutions condemning the recruitment, training and use of mercenaries, the focus of the condemnation has been on private foreign soldiers whose use of force is a threat to the peace,[39] a threat to the right of self-determination,[40] and an interference with friendly relations between States.[41] Used in this sense, the term mercenary is intended to carry normative overtones, as to the legitimacy of the conduct of foreign soldiers. It does provide an answer to the question of whether the use of foreign soldiers in a given case should be permissible or impermissible. The OAU Draft Convention, 1972 and the

United Nations Resolutions in the matter of mercenaries have in this respect relied on the notion of the just war. The just war doctrine provides that recourse to war is permissible where the cause therefor is just.[42] This mode of seeking to clarify the legal position of mercenaries is not entirely a creature of contemporary international law. Many classical writers were equally more concerned with the justness of the cause which foreign soldiers fought than with their motivational factors. Victoria, for example state:

> I also maintain that those who are prepared to go forth to every war, who have no care as to whether or not a war is just, but follow him who provides the more pay, and who are moreover, not subjects, commit a mortal sin, not only when they actually go to battle, but whenever they are thus willing.[43]

Grotius also pointed out that:

> Those alliances which are entered into, with the Design and Promise of Assistance in any war without regarding the Merit of Cause, are altogether unlawful; so there is no course of life more abominable and to be detested, than that of mercenary soldiers, who without ever considering the Justice of what they are undertaking, fight for the Pay; who By their Wages and Goodness of the Cause Compute.[44]

Certainly, the meaning of the just war doctrine has changed. A war was considered to be just when it was a punishment for a wrong.[45] And each State was competent to determine what was just and what was not. Today, resort to the use of force is permissible or just only if it is consistent with the purposes of the United Nations Charter.

In this study, therefore, a definition of mercenary that is recommended is a person who:

(a) recruits or is recruited to take part in an unlawful use of force;

(b) is not a national of a party to an armed conflict; and

(c) has not been sent by a State on official duty.

It is clear from the above recommendation that soldiers sent by a State are excluded. The reason for recommending the exclusion of soldiers who have been sent by a State on official duty from the definition of mercenary is not because such use of force is always permissible, rather, it is because whenever the State itself becomes a direct party to the carrying out of hostilities against other States, it is directly answerable to the offended State in particular and to the international community in general. The inquiry in this study is limited to the lawfulness of the use of force by individuals in their private capacity, across international boundaries. The direct participation of the government destroys the private nature of the use of force by individuals and it becomes a public undertaking.

FOOTNOTES

1. For example, in the following resolutions:

   U.N. G.A. Res. 2565, 23 U.N. GAOR Supp. (No. 18) at 5 U.N. Doc. A/7218, (Dec. 20, 1968);

   U.N. G.A. Res. 2548, 24 U.N. GAOR, Supp. (No. 30) at 5 U.N. Doc. A/7630, (Dec. 11, 1969).

   U.N. G.A. Res. 2708, 25 U.N. GAOR, Supp. (No. 28) at 7 U.N. Doc. A/8028, (Dec. 14, 1970).

   U.N. G.A. Res. 3103, 28 U.N. GAOR, Supp. (No. 30) at 1 U.N. Doc. A/9030 (Dec. 12, 1973).

2. G. Schwarzenberger, "Terrorists, Hijackers, Guerrilleros and Mercenaries," 24 Curr. Leg. Probs. (1971), 257.

3. In the Trial of F.E.R. Steiner - A Court-Martial, Sudan Law Journal and Reports (1971), 147, 171.

4. Quoted in S.E. Finer, "The Second Oldest Trade", 37 New Society (July 15, 1976), 129, 129.

5. E. Kossy, Living with Guerrilla (1976), 239.

6. See H.W. Halleck, International Law and Laws of War (1861), 383.

7. The Shorter Oxford English Dictionary (3rd ed., reprinted 1965), 1235.

8. See, Sir Graham Bower, "The Nations in Arms," 4 Transactions of the Grotius Society (1919), 71, 74.

9. Ibid.

10. See, M. Vale, War and Chivalry (1981), 155.

11. The reorganization did not lead to a complete elimination of the foreign soldier in those armies. The Gurkhas in the British Army and the French Foreign Legion have foreign soldiers.

12. M. Machiavelli, The Prince (trans. by G. Bull 1961), 77-90.

13. Ibid.

14. J.M. Gilbert, Tudor Mercenaries and Auxiliaries 1485-1547, (1980), 27. See also generally, R.W. Grund, "On Machiavelli and the Mercenaries," 6 J. Mod. Afr. Stud. (1968), 295-310.

15. C. Legum, "Why Britain Must Keep Mercenaries Out of Rhodesia," The Observer (Aug. 8, 1976), 8.

16. See in the Trial of F.E.R. Steiner, A Court-Martial, supra note 3; The Observer (Aug. 8, 1971), 4.

17. A. Mockler, The Mercenaries (1970), 10.

18. In the Trial of F.E. Steiner, A Court-Martial, supra note 3.

19. For the text of this Protocol, see (1977), 16 Int'l Leg. Mat. 1391.

20. International Convention Against the Activities of Mercenaries, in Drafting of An International Convention Against the Recruitment, Use, Financing and Training of Mercenaries, see U.N. Doc. A/366/Add.1 at 10 (Dec. 4, 1980). See Appendix 3, infra, Art. 1.

21. Many delegates to the Ad Hoc Committee mentioned that the draft convention submitted by Nigeria would provide a good basis for the work of the Committee. See Report of the Ad Hoc Committee on the Drafting of an International Convention Against the Recruitment, Use, Financing and Training of Mercenaries, U.N. GAOR, Supp. (No. 43) at 20, U.N. Doc. A/36/43 (March 17, 1981).

22. Doc. CDDH/III/GT/82 (May 13, 1976).

23. See H.C. Burmester, "The Recruitment and Use of Mercenaries in Armed Conflicts," 72 Am. J. Int'l L. (1978), 37, 39.

24. See U.N. Doc. A/35/366/Add.1 at 10 (Dec. 4, 1980).

25. Quoted in 6 Afr. Political Economy (1977), 73.

26. J. de St. Jorre, The Nigerian Civil War (1972), 322.

27. R.E. Curtis, "The Law of Hostile Military Expeditions as Applied by the United States, 2 Am. J. Int'l L. (1906), 1, 21.

28. H.C. Burmester, supra note 23, 53.

29. A.D. McNair, "Laws Relating to Civil War in Spain," 53 L.Q. Rev. (1937), 471, 496-97. On the question of motives, G. Schwarzenberger states, "to establish legal categories by reference to motives, such as the economic incentive, is risky; for the most members of the species of homo habilis (rather than sapiens), on most occasions appear to act from mixed motives, supra note 2, 281.

30. The Report of the Committee of Privy Counsellors Appointed to Inquire in the Recruitment of Mercenaries, Cmnd. 6569 (1976), para. 7.

31. OAU Doc. CM/433/Rev.L., Annex 1; see Appendix 1, infra.

32. See N.Y. Times, (Aug. 18, 1978), A1, Col. 2.

33. See J.M. Gilbert, supra note 14, 26.

34. Quoted in W. Burchett and D. Roebuck, The Whores of War: Mercenaries Today (1977), 237; see Appendix 2.

35. L.C. Green, "The Status of Mercenaries in International Law," 8 Isr. Y.B. on Human Rights (1978), 9, 55.

36. The use of the word "mercenarism" has been objected to by some States because the word is found neither in Spanish nor in English. See Summary Record of the 21st Meeting, U.N. Doc. A/C.6/35/SR.21, 3, 10 (1980) (Comments of Mr. Vinal and Mr. Anderson).

37. See W.M. Reisman, "Humanitarian Intervention to Protect the Ibos" in Humanitarian Intervention and the United Nations (ed. by R.B. Lillich, 1973), 167, 177.

38. J.M. Moore, Law and the Indo-China War (1972), 359.

39. See, for example, U.N. SC. Res. 199, 19 UNSCOR Supp. (Oct- Dec. 1964) at 328-29, U.N. Doc. S/6129, (Dec. 30, 1964); U.N. SC. Res. 289, 25 UNSCOR Supp. (Oct.- Dec. 1970), at 13, U.N. Doc. S/10030 (Dec. 8, 1970).

40. For example, U.N. G.A. Res. 2708, 26 U.N. GAOR, Supp. (No. 28) at 7 U.N. Doc. A/8028, (Dec. 14, 1970).

41. For example, U.N. G.A. Res. 2131, 20 U.N. GAOR, Supp. (No. 14) at 11-12, U.N. Doc. A/6014 (Dec. 21, 1965).

42. See generally, J. Dugard, "SWAPO: The Jus-ad Bellum and Jus-in Bello," 93 S. Afr. L.J. (1976), 144; D.E. Graham, "The 1974 Diplomatic Conference of the Law of War: A Victory for Political Causes and a Return to the Just War Concept of the Eleventh Century," 32 Wash. & Lee L. Rev. (1975), 25; F. Kalshoven, "Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts: The Diplomatic Conference, Geneva, 1974-1977," 8 Neth. Y.B. Int'l L. (1977), 107; A. Shaw, "Revival of the Just War Doctrine," Auckland U.L. Rev. (1977), 156.

43. F. Victoria, De Bello, Arts. 1 and 8. Quoted in J.B. Scott, Law, The State and the International Community (1939), 328.

44. 2 Grotius, De Jure Belli Ac Pacis, Bk. II (trans. Classics of International Law, 1925), 585-86.

45. F.X. De Lima, Intervention in International Law (1971), 7.

46. See R.E. Curtis, supra note 27, 34.

CHAPTER II

THE USE OF MERCENARIES THROUGH HISTORY

The use of mercenaries in armed conflicts is an old phenomenon. The mercenary soldier is to be found in almost every highly organized society.[1] A great deal has been written on the subject but in the context of this study it would be too ambitious a task to retrace the history of the use of mercenaries from ancient times to the present day. Therefore, only a brief survey is offered and not necessarily in a chronological order. Among the salient points to be emphasized are: who are these mercenaries; why was it necessary to engage them? and how were they recruited?

Section 1: The Role of Mercenaries in Armed Conflicts

Greek tradition named the Carians as the first mercenaries. The earliest mercenaries are those of the Saite Kings of Egypt, beginning with Psammtichus 1 (650 B.C.). His mercenaries are described by Herodutus as "Ionians and Carians", later "Greeks and Carians". The Carians and Asiatic Greeks between them monopolized dynasties in the seventh and sixth centuries B.C.[2]

Probably the most prolific period for Greek soldiers was that of the Successors' Wars (323-301 B.C.).

They went as far as Cyrene and Carthage, and as far east as the Bosporan Kingdom of the Black Sea. But Greek mercenaries were only a part of the mercenary population of the Hellenistic World. Barbarian fighters also were a source of soldiers for the great powers. Carthage, for example, recruited from the best fighters of Spain, Italy and Northern Africa.[3]

In Italy, during the thirteenth, fourteenth and fifteenth centuries, the army consisted of mercenary soldiers and mass levies. The mercenaries of the thirteenth century served as individuals while those of the fourteenth and fifteenth centuries were mercenary companies of the condottieri. The majority of these mercenaries came from Germany.[4]

In England, the employment of foreign soldiers by her rulers is as old as the nation itself.[5] Tacitus speaks of the Batari, the Tungri, and the Usipi, German auxiliaries who assisted Agricola in the conquest of Britain. The first Anglo-Saxons were invited to Britain as mercenaries and they were awarded grants of land "on condition that they protect the country". Mercenaries comprised "the elite corps" of the Saxon fyrd, the forerunners of the Tudor militia; while under the Normans, "the most significant military expense" was the outlay of hired soldiers. They played a substantial part in pre and post-conquest warfare.

As regards the Tudors' foreign soldiers figure prominently in the very foundation of their regime. Henry VII, while still Earl of Richmond and fugitive in France, received money, ships, artillery and auxiliaries of about two thousand from the government of Charles VIII.[6] Foreign soldiers figure prominently in the military annals of the remainder of the reign. Those mercenaries and auxiliaries recruited at the beginning of the reign were almost exclusively lands pikemen and heavy cavalry. Pikemen and men-at-arms were recruited mainly in Germany and Holland, while light-horsemen, acquired initially from the same territories, were increasingly sought among the bands of Italian and Spanish free-lancers and among the exiled Albanian and Greek Stradiots. Those soldiers equipped with firearms were Italians or Spaniards.[7]

During the Crimean War, Great Britain recruited mercenaries from Germany, Italy, Switzerland and the United States. However, their role was not very significant. Many of them were hit by cholera and hostilities were suspended on February 1, 1856 before they could be committed to battle.[8]

The employment of mercenaries by the Katanga secessionist in the Congo (Zaire)[9] from 1960 to 1963 and their subsequent use by Tshombe and Mobutu Governments against the Simbas from 1964 onwards marked the first occasion since the Spanish Civil War that a group of foreign volunteer force had been employed on a large scale.

According to Mockler[10] the history of the Congo/Zaire conflict falls conveniently into three periods: the Katanga Secession, from July, 1960 to January, 1963; the Simba War from July, 1964 to the end of 1965, and a period of plots against Mobutu, from early 1966 till November, 1967.

The Katanga mercenaries came from France, Belgium, Britain, Southern Rhodesia and South Africa. Most of them were ex-servicemen. They came from various walks of life and the motives for enlistment ranged from financial reasons, domestic trouble and lust for adventure to a desire to serve what they considered a good cause.

The first group of French mercenaries were under the command of Faulques, who had been an officer in the Legion. Other French officers and NCO's went to Katanga later. Among these was Bob Denard who had been an NCO in the French marines and later a policeman in Morocco and Algeria. He took over command of the mercenaries for the last battle against the United Nations.

The English-speaking mercenaries were under the command of Capitain Richard Browne, an Englishman. They included Alastair Wicks who had emigrated after the War to Rhodesia; Jeremiah Puren, an Africaner who was appointed titular Commander-in-Chief of the Katangese air force, Mike Hoare, born in Dublin, said to have fought in Burma after which he emigrated to South Africa, and Jean Schramme a Belgian ex-planter.

These mercenaries were behind Tshombe in his struggle against the United Nations.[11] The struggle ended when Tshombe was defeated in the early part of 1963. With the end of the attempted secession of Katanga the United Nations Force was withdrawn on June 30, 1964.[12]

Following the withdrawal of the United Nations Force, the situation in the Congo rapidly deteriorated. On July 9, 1964, Cyrille Adoula, who had resigned, was replaced by Moise Tshombe as Prime Minister to head a transitional government with the main task of preparing the forthcoming elections. Tshombe had just returned from exile. Shortly, thereafter, a revolt, known as the Simba revolt against the central government started in the province of Kwilu. It was led by a former minister, Pierre Mulele. The revolt received moral and material support from the Chinese. The Chinese action led the Americans to support the central government. They supplied planes including the large D130 transport planes and pilots.

The Simba revolt was initially successful in that the insurgent forces extended their control over vast regions in the eastern part of the country including Stanleyville, where they established a dissident government under Christopher Gbenye.

With increased military assistance from Belgium and the United States, Mr. Tshombe attempted to regain the lost territory. He also recruited mercenaries. He called Mike Hoare and Jerem Puren from South Africa and gave them

a commission to form a group of white mercenaries to be known as Five Commando. Schramme and the Katangese gendarmes, over 8,000 in all, crossed the border from Angola and re-entered Katanga. Hoare was the commander of the mercenaries in the field, Puren was the liaison and administrative officer, while Wicks was the second in command.[13]

By October, 1965 the mercenaries had recaptured the towns from the Simbas and the revolt collapsed. After the collapse of the Simba revolt, General Mobutu led a coup on November 25, 1965. Tshombe went into exile once again.

On June 30, 1967, Tshombe was kidnapped on a private flight to Majora and was flown to Algiers. On July 5, 1967, a cable from the President of the Democratic Republic of the Congo was transmitted to the Security Council stating that a group of mercenaries had been parachuted at the Kisangani airport. Mercenaries of Belgian, French and Spanish origin, jointly with former Katangese gendarmes, had started hostilities at Bukavu. On August 10, 1967, another communication from the Congolese Minister for Foreign Affairs was transmitted to the Security Council in which he informed the Council of the presence at Luanda of mercenaries and two planes. Requesting action by the Security Council, the Minister for Foreign Affairs and External Trade of the Democratic Republic of the Congo, on November 3, 1967, charged that on the evening of November 1, an armed band of mercenaries had invaded the Congolese

territory at Kisenge. Although all mercenaries had been ordered by his government to leave the country as from July 1967, he said in a letter to the President of the Security Council that the mercenaries under Major Schramme had rebelled and occupied Bukavu where fighting had again broken out on October 29.[14] On November 5, 1967, the forces of the central government retook Bukavu. One hundred and eleven mercenaries led by Schramme crossed over into Rwanda from Congo after their defeat at Bukavu. Pressure was applied by Western Countries on President Grigoire Kayibanda to release and repatriate the mercenaries rather than extraditing them to Congo to stand trial.[15]

Before the outbreak of Angolan War in 1976, mercenaries took part in two other wars: in the Yemen and Nigeria/Biafra conflicts. Their participation in the Yemen Civil War is examined first.

The Civil War in the Arab Republic of Yemen (North Yemen)[16] took place from 1962 to 1970 between the Republic Government in Sanaa and the royalist forces. The conflict began in September 1962 with the overthrow of the Imam by a group of republican officers. For a period of eight years the Imam tried to retake power with tribal forces organized with the help of Sauda Arabia and a group of mercenaries. The republican side was supported by Egyptian forces, at one time numbering more than 60,000 men. The conflict also witnessed the presence of a small number of United Nations observation mission between July 1963 and September 1964.

The first European mercenaries to help the Royalists arrived in Prince Mohammed Hussein's camps in November 1963. About half of the mercenaries were French and Belgian who were mostly weapon instructors, and the other half were British, working on communications and as medical assistants. These were seldom more than fifty mercenaries with the Royalists at any one time. The system used was one of rotation: a mercenary would serve for six months, and then be recalled and replaced by another. Among the British mercenaries was Major John Cooper, who had been a member of the Special Air Service, the regiment which fought behind enemy lines during the Second World War and against communist guerillas in Malaya from 1951 to 1959. After that he had been in the service of the Sultan of Muscat and Oman against the rebellious Imam of Oman. Another was Anthony Alexander Boyle, son of Marshal of the Royal Air Force Sir Dermont Boyle, who until October 1963 served as Aide-de-Camp to the British High Commissioner in Aden. Some of the French and Belgian mercenaries had fought for Moise Tshombe in Katanga province in 1966 and 1962. Their chief was a former French Colonel who had participated in the abortive 1961 O.A.S. Coup in Algiers. By the end of 1968, all mercenaries had left the Royalist camp. Their pay averaged $900 (£321) per month.[17] Drink, women, glory and loot were unobtainable.[18]

The Nigerian Civil War[19] broke out in July 1967 after the proclamation of independence of Eastern Nigeria

as the "Republic of Biafra" on 30 May of the same year. The war ended in January 1970 after Biafra was defeated.

Both the Federal Military Government and Biafran secessionists sought the help of mercenaries. In a letter to the Times of London, 'Mad Major' Mike Hoare,[20] disclosed that he had visited first the Biafran side and then the Federal side to consider offers which he claimed he received from both sides to help in their struggle.

In 1967, the Nigerian federal government employed South Africans, Rhodesians, Britons and Egyptians as pilots to bomb Biafran targets.[21] The Soviets would not fly the planes they had sold to Nigeria. In July 1967, John Peters 'Mad' Mike Hoare's successor in the Congo, arrived in Lagos and signed a contract to recruit pilots to fly converted DC-3s on bombing raids over Biafra. British, Rhodesian and South African pilots were hired at £1,000 a month paid into Swiss bank accounts. All living expenses in Nigeria were covered by the Federal Government.[22] Peters received a large commission for every man he hired but neither flew nor fought himself. There were usually never less than a dozen pilots, sometimes rising to twenty.

In Biafra, mercenaries were used in ground operations both in combat and as instructors. The first mercenary signed on by Ojukwu was Hank Wharton, the German-American airline operator contracted to run guns to Biafra. He operated three super-constellation aircraft. The crews consisted of mainly Americans and Germans and many had

flown in the Congo. Wharton charged the Biafrans £25,000 payable in advance and in cash, for the round trip. Another famous mercenary on the Biafran side was Alistair Wicks. He had emigrated to Rhodesia after the Second World War and had served under Hoare in the Congo. Wicks made a contract with Ojukwu to airlift arms and supplies using a small independent Rhodesian airline operated by another mercenary, Jack Mulloch. A few mercenaries also flew in a combat role for Biafra.

The use of mercenaries in ground operations by Biafra seems to have been undertaken upon the advice of Jacques Foccart, General de Gaulle's secret service chief and special adviser on African affairs.[23] Foccart had already been active in obtaining arms for Biafra through French arms dealers. Biafra's first batch of mercenaries was organised by Jacques Foccart's office and a former French foreign legion officer called Roger Faulques. Faulques had fought in the Second World War, Indo-China, Algeria, Katanga and the Yemen. In return for providing 100 men for a period of six months, the Biafrans paid him £100,000 through a Paris bank. However, only forty-nine mercenaries actually arrived in Biafra in late 1967. By early February 1968, all but four were out of Biafra.[24] The most important mercenaries of the four who stayed were Rolf Steiner and Williams who had fought in the Congo and become Tshombe's bodyguard after the latter's exile to Spain. These two were joined, in the summer of 1968, by a

handful of new mercenaries.

The 'Steiner group' specialised in training and leading the Biafrans in guerrilla style operations. They were paid £1,000 a month on the average.

The importance of the use of mercenaries in the Angolan Civil War lay in the involvement of the super-powers than the mercenaries themselves.

In April 1974, Portugal's armed forces overthrew the government of Marcello Caetano and the new government moved in the direction of independence for Angola, which had been a Portuguese colony for 500 years. In early 1975, the Portuguese announced the Alvor Accord under which the three liberation movements would participate with the Portuguese in a transitional government that would operate until the outright grant of independence on November 11, 1975.[25] Having been accorded political legitimacy by Portugal's new military regime, the three competing liberation movements fought for political and military power.

Each of Angola's three major liberation movements has a separate army, separate political structure, and separate sources of external support.[26]

The National Front for the Liberation of Angola (FNLA) is led by Holden Roberto and draws its popular support from the 600,000 to 700,000 strong Bakongo community of Northern Angola, which comprises about 13% of the population. The FNLA received direct material assistance

from the Chinese and financial assistance from the United States.[27]

The National Union for the Total Independence of Angola (UNITA) resulted from a split within the FNLA and is directed by Jonas Savimbi.[28] Its base is among the two million Ovimbundu of the Central Benguela plateau, who comprise 38% of the population of Angola.[29] UNITA did not receive significant outside help until early in 1976, when Savimbi cultivated support from the United States, Britain, Zambia and South Africa.

The Popular Movement for the Liberation of Angola (MPLA) was led by Dr. Agostino Neto, a Portuguese educated physician. The MPLA draws its primary support from the 1.3 million Mbundu people of the Central and Eastern Angola, who make up about 23% of the country's population.[30] The MPLA received massive arms support from the Soviet Union and large numbers of combat troops from Cuba.[31]

But the involvement of a large number of Cuban troops on the side of the MPLA in late 1975 seems to have been due to the intervention by the United States, South Africa and mercenaries. In early 1975, just as the Alvor Accord had been arrived at, the National Security Council's "40 Committee" authorized a covert American grant of $300,00 to the FNLA.[32] Again in July 1975, another covert program to beef up the FNLA and UNITA was approved and by the end of 1975 military hardware worth $30 million had been provided.[33]

In October 1975, UNITA and FNLA were joined by South African regular forces and mercenaries.[34] The majority of mercenaries came from Great Britain and the United States.

On November 25, 1981, the Republic of Seychelles was the subject of an armed attack by a group of mercenaries.[35] Michael Hoare, who had been involved in previous mercenary activities in Africa, made plans for an attempt to overthrow the Government of Seychelles with a force of mercenaries.[36] To accomplish his objective he recruited in South Africa over fifty individuals. The plan consisted of sending to Seychelles an advance group of mercenaries under the guise of tourists, with specific assignments allotted to them.[37] Eight men and one woman were chosen for that purpose, and they travelled to Seychelles on various dates during October and November 1981. The main body of the force arrived at Pointe Larne International Airport in Mahé, Seychelles on November 25, 1981, having flown from Switzerland. The mercenaries took control of the airport buildings and control tower. They later hijacked an Air India Boeing 707 with 65 passengers and 14 crew and ordered the crew to fly to Durban, South Africa.[38]

Section 2: Factors Determinig the Use of Mercenaries

In the preceding section the description was about where mercenaries have been employed and the role they

played. This section examines some of the reasons which led to their employment. A number of reasons explain the use of mercenaries in Italy in the thirteenth century. First, the economic expansion of cities like Florence, Genoa, Venice and Milan enabled the system to employ mercenaries. Second, factionalism within Italy made it difficult to recruit local persons. Third, the availability of large groups of under-employed foreign troops.[39]

Want of skilled combatants seems to be a common reason for the employment of mercenaries. During the reigns of Henry VII and of Henry VIII, the employment of mercenaries, for example, was due to the fact that they were better and they were indispensable. Henry VIII engaged in three wars with France during his thirty years reign of England. The English army lacked pikemen, it lacked gunners, and it was almost deficient in heavy horse. Consequently, Henry VIII enlisted foreigners by thousands. Those mercenaries and auxiliaries obtained at the beginning of the reign were almost exclusively pikemen and heavy cavalry. The employment of such specialists attends to the obvious deficiencies of Henry's own national forces.[40]

In the eighteenth century, European mercenaries were employed in India for the same reason of want of skill. The military system of India had stagnated. The "Moghul armies", were still essentially the same as they had been in the early sixteenth century. They were completely untrained, except in skill-at-arms, they were

without regular subdivisions, subordination of command, staff and were quite incapable of manoeuvre. From the middle of the eighteenth century onwards, the Indian rulers began to pay foreign officers to raise and train battalions and brigades of regular infantry on the European pattern.[41]

A number of factors account for Great Britain to recruit mercenaries for the Crimea. First, Prussia and Austria refused to join Great Britain and France in the war against Russia. Second, emigration and high wages made local recruitment very difficult.[42]

The reasons for the employment of mercenaries by Tshombe during the Katanga secession are fairly obvious. President Tshombe of the newly independent State of Katanga needed an army to ward off three threats. First, the northern half of Katanga was inhabited mainly by the Baluba tribe, whose leader, Jason Sendwe, was Tshombe's chief political opponent inside Katanga and head of the opposition political party, the Baluba Kata. The Balubas were not prepared to be dominated, and bands of their youths, armed mainly with sharpened bicycle chains, were already forming into gangs. The second threat came from the central government, which never accepted the independence of Katanga and which eventually was to 'invade' Katanga on several occasions with units of the Armée Nationale Congolaise (ANC). The third threat came from the United Nations forces, for from the very beginning the United Nations condemned the secession. Although Tshombe had a

large number of Belgian troops who were stationed at the enormous military base of Kamina, he turned to mercenaries.[43] The reason given for Tshombe's use of mercenaries was that he wanted to keep his independence.[44] For the implication of African governments employing mercenaries as Tshombe did, Professor Ali Mazrui makes the following point:

> From one point of view, the employment of mercenaries by an African government should be more consistent with the country's sovereignty than a request to another country, or even to the United Nations for a loan of troops.
>
> By buying foreign soldiers for his own use, Tshombe showed, in one sense, greater independence than Lumumba had done when he invited the United Nations to help him. After all, while Tshombe's mercenaries were presumably answerable to Tshombe who paid them, the troops to the United Nations were never accountable to Patrice Lumumba.[45]

The reasons for the employment of mercenaries by the Royalists during the Civil War in the Yemen seem to have been military and not necessarily indirect intervention by other States. The Royalists had plenty of money but lacked troops. Given these conditions, mercenaries went out to Yemen to teach the Royalists fighting methods, and advised the Royalist Commanders on the strategy and tactics.[46] On the point that other States did not sponsor mercenaries in the Yemen Civil War, A. Mockler concludes that, "although most of the mercenaries in the Yemen were

French, the French government had nothing to do with it."[47]

The involvement of mercenaries in the Nigerian Civil War was due to a combination of military necessity and foreign interests. Both sides in the civil war were reluctant to use them. First, senior officers in each army had fought against them in the Congo under the United Nations flag and knew their failings and limitations.[48] Secondly, both sides in the civil war did not want to annoy the OAU which had already condemned the use of mercenaries in Africa.[49] In 1967, the Nigerian federal government employed mercenaries as pilots to bomb Biafran targets.[50] Russian MIG fighters and Czech Delphins had been delivered to the Nigerian Federal Authorities but there were no qualified Nigerian pilots. Therefore, the Federal Authorities turned to mercenaries.

In employing mercenaries, the Biafrans were more desperate than the Federal Authorities. When Colonel Ojukwu was asked whether he should use mercenary troops to assist the war efforts he is said to have answered:

> I do not exclude the possibility. Lagos is using them. In our struggle for existence I would fail my people if I did not use every means at our disposal to defend ourselves.[51]

Besides military necessity, the use of mercenaries by Biafra was due to foreign interests. According to A. Mockler[52] the first group of fifty French mercenaries were part of an arms' deal arranged by private French interests

which insisted that Ojukwu had to accept those 'advisers' if he wanted to receive the arms. Private interests may also have been responsible for sponsoring fifteen mercenaries who arrived in the autumn of 1968. French and British business interests wanted to protect their investments in Biafra.[53]

The involvement of mercenaries in the Angolan Civil War is said to have been due to the United States' backing of FNLA and UNITA.[54] The CIA was reported to have recruited American and European mercenaries to fight in Angola against the MPLA.[55] In an article in the Christian Science Monitor of January 2, 1976, David Anable revealed, "the CIA is indirectly recruiting American ex-servicemen, training them, dispatching them to Southern Africa ... and providing them and indigenous forces with light and heavy weaponry."[56] Anable reported that at the time there were already 300 American mercenaries operating in Angola. Most of them were with the UNITA forces in the southern and central areas, while one unit was working with FNLA in the North.

The United States denied any government involvement in the recruitment of mercenaries. When asked about the reports, White House Press Secretary, Ron Messen, replied January 2, 1976, that no U.S. Government agency was recruiting or training American mercenaries in Angola. President Ford confirmed, "The United States is not training foreign mercenaries in Angola."[57]

In testimony on August 9, 1976, before the House International Relations Committee Special Sub-committee on Investigations, Assistant Secretary of State William E. Schaufele, Jr. denied the involvement of the United States Government and the CIA:

> Angolan authorities charged the defendants with being mercenaries and with being the agents of foreign interests and governments. The United States Government and the CIA [Central Intelligence Agency] were often mentioned but I wish to emphasize that no evidence of any sort, apart from undocumented and vague charges, was ever presented, that is unless you consider that the claim that the mercenaries were paid in "crips $100 bills" a charge apparently made much of, constitutes proof of involvement by the United States Government.[58]

The statement of William E. Schaufele, Jr. above is difficult to reconcile with evidence to the contrary which has been disclosed through a number of sources.[59] Legislation which was passed during the Ford administration to restrict covert operations including the use of mercenaries has been repealed under the Reagan administration.[60] This may pave the way for the CIA to employ mercenaries in many Third World Countries.

The complicity of the South African Government in the attempted overthrow of the Government of Seychelles by mercenaries in November 1981, cannot be ruled out. The United Nations Security Council Commission of Inquiry appointed to investigate the origin, background and financing of the attempted overthrow did not find any direct evidence of the South African involvement. The South

African Prime Minister stated that the South African Government had neither initiated, approved of nor known about the mercenary operation.

A number of factors, however, seem to disprove the innocence of the South African Government. The U.N. Security Council Commission of Inquiry concluded:

> Given the tight and effective control exercised by the Security Authorities in South Africa, and the nature of the preparations for the mercenary operation of November 25, 1981 in South Africa, particularly the procurement and test-firing of the weapons, the Commission finds it difficult to believe that the South African authorities did not at least have knowledge of the preparations in this matter.[61]

Some of the mercenaries were serving members in the South African Army.[62] When the mercenaries flew to South Africa, 39 were released and the five were charged not with hijacking which carried a mandatory minimum sentence of five years' jail but with kidnapping, a common law offence. The action of the South African authorities was interpreted as a cover-up operation. Those who were released were told not to talk about the coup attempt. Pressure from Western powers that leniency was a violation of the Hague Convention on Hijacking which could lead to severance of air links with South Africa brought about a change of mind on the part of the South African authorities.[63] They charged all the 45 mercenaries with hijacking contrary to South Africa's 1972 Civil Aviation Offences Act. In his testimony to the Court during his trial, Mike

The recruitment of mercenaries in Germany, Switzerland and the United States for the Crimean War could not be undertaken openly. In the German States, open recruitment by foreign powers had been prohibited by the law of 1853.[70] In Switzerland, the federal military code of 1851 prohibited the enlistment of mercenaries by foreign powers.[71] In the United States, the Government in announcing its neutrality, warned belligerent powers against recruiting on American soil.[72] In those countries the recruitment was done through agents.

For the Katanga mercenaries, Tshombe first requested for aid from the French Government. Colonel Tringuier, a well-known soldier in the French army, received a letter at Nice on Janaury 5, 1961, offering him full control of the Katangese gendarmerie. Tringuier recruited twenty French officers who participated in the fighting against the United Nations forces. The English-speaking mercenaries were recruited through Johannesburg, and Bulawayo centres. Recruits were lured by advertisements in South African newspapers. These newspapers called for ex-servicemen looking for an interesting and adventurous career but did not mention Katanga. The recruits were called for an interview at which they were told that they were to serve as policeman and given free tickets on scheduled Sabena or other flights from Johannesburg to Eville. Requirements for acceptance were previous military service and physical fitness. Contracts were for six

months, renewable for further periods. Conditions offered included pay ranging from £100-£180 a month, plus a danger allowance, family allowance, insurance and a free vacation after one year.[73]

During the Simba revolt, when Tshombe turned to mercenaries, he summoned Mike Hoare and Jeremiah Puren from South Africa and gave them a commission to form a group of white mercenaries.[74] The mercenaries were recruited openly in South Africa and Rhodesia and flown to Kamina where they were trained for two or more weeks before being committed to action.[75]

The recruitment of mercenaries for the Nigerian Civil War was undertaken by several persons. John Peters, a former sergeant and commander of the Fifth Commando after Mike Hoare, was reported to have recruited South African mercenaries for the Nigerian Federal Government.[76] They were recruited on a strictly commercial basis.[77]

Major Alistair Wicks, Hoare's deputy in the Congo, recruited officers in London to help the Biafrans. Wicks operated from his luxury flat in Bickenhall Mansions, off Baker Street, London W1, and from the Praai-Mar Hotel at Carcavellos in Lisbon. The recruitment of mercenaries for Biafra was also done through the agency of the Officers' Association (an organization devoted to promoting the interest of ex-British officers) at 28 Belgrave Square. The mercenaries were being offered £1400 a month. The rest of the Biafran mercenaries were recruited by Robert Denard,

a French soldier who had commanded the Sixth Commando in the Congo; Rolf Steiner and Roger Faulques.[78]

The Angolan mercenaries were recruited from many parts of the world through advertisements. The recruitment was carried out openly and publicly both in the United States and in Britain.

In the United States, Bufkin, the chief recruiter, even had T.V. programmes where he presented his recruits and called for recruitment of more people. There is a publication called Soldier of Fortune which contains nothing but articles about people who go abroad to fight, brave men, guns in hand, women with sub-machine guns.[79]

In Britain there was John Banks, an ex-paratrooper, who recruited openly and put advertisements in papers with telephone number that people could call. To undertake his job more effectively, Banks together with Leslie Asin, a gun runner and British Secret Service Agent, and Frank Perren, an ex-marine, founded an agency called 'Security Advisory Service' (SAS). The said agency was offering recruits a £300 advance a week to fight for UNITA and the FNLA. The SAS said that they were inundated with inquiries from men who wanted to sign up. Most of men were among the 1,400,000 unemployed and many came from the 8,000 soldiers demobilised under army cutbacks.[80] In the June 2, 1975 issue of the London Daily Express, a tiny advertisement at the bottom of one of the inside pages advertised:

> Ex-commandos, paratroopers, SAS troops wanted for interested work abroad Ring Camberley 3356.[81]

This was one of the many advertisements in the British Press which attracted about a hundred Britons to Angola as mercenaries. In a handwritten stated Kelvin Marchant said:

> After my sister Lesley Ann Ryan had seen an advertisement in the Sunday People towards the end of January 1976 which advertised for ex-soldiers in the British Army to work for a period of six months in Zaire at a salary of £300 per fortnight, decided to telephone the newspaper for more information on ways and means of contacting the person advertising, since this was not mentioned in the advertisement. The newspaper gave the telephone number. A male voice answered and asked if I was a soldier in the British Army and what my qualifications were. On the following Saturday - I think it was the 27 January - I received a telephone call from a man whose voice I identified as being the same as the first one that I had spoken to. He said to me (Mr. Marchant), I heard that you would like to work abroad. I replied "Yes" and he asked if I was prepared to leave the following Tuesday. I replied in the affirmative and he told me that the only necessary thing to take along with me was toilet articles.[82]

The recruiting was being financed with American money. The money was received in four ways: through couriers from Zaire, through a Leeds doctor, by bank transfers from Belgium, and from the Zaire Embassy in London.[83]

In the case of Seychelles, the recruitment of over fifty mercenaries by Hoare, took place in South Africa. A small number of those concerned had previous experience as mercenaries. For the most part they were persons who had

military experience in the South African and former Rhodesian forces. A number were reservists in the South African defence forces, to whom call-up papers had been issued.[84] The terms of the mercenaries' engagement were that each was given a down-payment of 1,000 Rands[85] and each would receive 9,000 Rands on successful completion of the plot.

FOOTNOTES

1. See G.T. Griffith, The Mercenaries of the Hellenistic World (1935), 1.

2. Ibid., 236.

3. Ibid., 251.

4. See M. Mallett, Mercenaries and their Masters: Warfare in Renaissance Italy (1974), 10-13.

5. J.M. Gilbert, Tudor Mercenaries and Auxiliaries 1485-1547 (1980).

6. Ibid., 244.

7. Ibid., 251.

8. See C. Bayley, Mercenaries for the Crimea (1977), 111.

9. For an examination of the Congo/Zaire Crisis, see generally: G. Abi-Saab, The United Nations Operations in the Congo, (1978); C. Hosky, The Organization of African Unity and the Congo Crisis, 1964-65 (1969); D.W. McNemar, "The Post Independence War in the Congo", in The International Law of Civil War (1971), 244-302; L. Miller, World Order and Local Disorder: The United Nations and Internal Conflicts (1967), 66-116; K. NKrumah, Challenge of the Congo (1967).

10. A. Mockler, The Mercenary (1970), 156.

11. Ibid., 165.

12. See Y.B. U.N. (1964), 94.

13. See A. Mockler, supra note 10, 165.

14. See Y.B. U.N. (1967), 123.

15. See The Observer, (Dec. 31, 1967), 1.

16. On the Civil War in North Yemen, see generally, E. O'Ballance, The War in the Yemen (1971); D.A. Schmidt, Yemen: The Unknown War (1968).

17. See E. O'Ballance, supra note 16, 217.

18. See A. Mockler, supra note 10, 256.

19. On the Civil War in Nigeria, see generally, S. Cronje, The World and Nigeria (1972); J. de St. Jorre, The

Nigerian Civil War (1972); E.I. Nwogugu, "The Nigerian Civil War: A Case Study in the Law of War," 14 Indian J. Int'l L. (1974), 13.

20. See, M. Hoare, "No Place for Mercenaries," The Times (London) (Dec. 1, 1967), 11e. This letter is also reprinted in 13 Afr. Rep., No. 2 (1968), 44-45.

21. See S. Cronje, supra note 19, 187.

22. See J. de St. Jorre, supra note 19, 315.

23. See S. Cronje, supra note 19, 201.

24. Ibid.

25. See J.A. Marcum, Lesson for Angola, 54 For. Aff. (1976), 407.

26. Ibid., 410.

27. Ibid.

28. International Institute for Strategic Studies, (1976) 27.

29. Ibid.

30. J.A. Marcum, supra note 25, 411.

31. Ibid., 413.

32. Ibid., 414.

33. Ibid., 416.

34. See C.K. Ebinger, "External Intervention in Internal War: The Politics and Diplomacy of the Angolan Civil War," 20 Orbis (1976), 669, 690.

35. For mercenary activities in Seychelles, see Report of the Security Council Commission of Inquiry Established Under Resolution 496 (1981), U.N. Doc. S/14905 (March 14, 1982) (hereinafter referred to as the Report of the Security Council Commission of Inquiry).

36. Ibid., 49.

37. Ibid., 14-19.

38. Ibid., 50.

39. See M. Mallett, supra note 4, 16-18.

40. J.M. Gilbert, supra note 5, 44.

41. See B. Shelford, European Mercenaries in Eighteenth Century India (1918), 2.

42. See C. Bayley, supra note 8, 35.

43. See A. Mockler, supra note 10, 157.

44. Ibid., 158.

45. A. Mazrui, Towards a Pax Africana (1969), 205-7.

46. See E. O'Ballance, supra note 16, 256.

47. A. Mockler, supra 10, 256.

48. See J. de St. Jorre, supra 19, 312.

49. Ibid., 323.

50. See S. Cronje, supra 19, 187.

51. Quoted in Mike Hoare, "No Place for Mercenaries," supra note 20. Ojukwu's reliance on mercenaries is consistent with George Modelski's theory that in a situation in which the overall political and social system has broken down completely, and conflict between domestic groups has reached a level of all out violence, with the weaker party perceiving its very survival to be at stake, appeal for outside aid is the only way no matter what the cost. "The International Relations of Internal War," in Internal Aspects of Civil Strife (ed. by J.M. Rosenau, 1964), 14, 20.

52. A. Mockler, supra note 10, 256.

53. See S. Cronje, supra note 19, 201.

54. See E. Harsh and T. Thomas, Angola: The Hidden History of Washington's War (1976), 97.

55. Ibid., 98.

56. Ibid.

57. Ibid., 100.

58. 71 Am. J. Int'l L. (1977), 140-41.

59. See generally, R. Lemarchand, "The C.I.A. in Africa: How Central? How Intelligent?" 14 J. Mod. Afr. Stud. (1976), p. 401; V. Marchetti & J. Marks, The C.I.A. and the Cult of Intelligence (1974); J. Stockwell, In Search of Enemies: A C.I.A. Story (1978).

60. See C.W. Little, "Covert Operations: A Needed Alternative," 33 Air U. Rev. (1982), 65, 69.

61. Report of the Security Council Commission of Inquiry, supra note 35, 52.

62. See The Observer, (Dec. 6, 1981), 8.

63. See The Observer, (March 14, 1981), 5.

64. See N.Y. Times, (May 4, 1982), A10, Col. 1; N.Y. Times (May 10, 1982), A2, Col. 1.

65. G.A. Griffith, supra note 1, 254-55.

66. Ibid., 256.

67. Ibid., 262.

68. See M. Mallett, supra note 4; A. Mockler, supra note 10, 44.

69. See J.M. Gilbert, supra note 5, 47-48.

70. See C. Bayley, supra note 8, 44-45.

71. Ibid., 71.

72. Ibid., 88.

73. See A. Mockler, supra note 10, 159-63.

74. Ibid., 173.

75. Ibid., 174.

76. See The Observer, (Dec. 10, 1967), 1.

77. See S. Cronje, supra note 19, 189.

78. See The Observer, (Dec. 10, 1967), 1.

79. See 6 Afr. Political Economy (1977), 71.

80. See The Observer, (Feb. 1, 1976), 1.

81. Quoted in W. Burchett & D. Roebuck, The Whores of War: Mercenaries Today (1977), 26.

82. Ibid.

83. See The Observer, (Feb. 1, 1976), 1.

84. See The Report of the Security Council Commission of Inquiry, supra note 35, 51.

85. The rand is the South African currency. The average rate of exchange of the rand during October 1981 was 1 rand = U.S. $1.0365 (IMF: International Financial Statistics, Dec. 1981).

CHAPTER III

CLAIM RELATING TO THE IMPERMISSIBLE USE OF MERCENARIES

Claims that the use of mercenaries is impermissible are demands to establish a public order system in which the use of force by foreign soldiers in their private capacity is outlawed. Before the Congo/Zaire Crisis, the employment of mercenaries was not challenged as being contrary to international law. Echoing the traditional view, American scholar H.W. Halleck, for example, wrote in International Law and Laws of War:

> The right of a State to permit its citizens to be employed in the military service of another State, is very questionable, but the right of this other to so employ them [with such permission], cannot be doubted. [1]

There are many reasons which help to explain the absence of demands to prohibit the use of mercenaries. For M. de Vattel, permitting persons of one State to serve in the armies of another State had an educational function. He wrote:

> The noble view of gaining instruction in the art of war, and thus acquiring a greater degree of ability for their country, has introduced the customs of serving as volunteers even in foreign armies; and the practice is undoubtedly justified by the sublimity of the motive. [2]

The reason given by Vattel as a justification for permitting private individuals to serve as mercenaries

appear to apply to his country only and was not of general application. The description in chapter two of this study tends to indicate that private individuals were largely employed as mercenaries for their presumed skill.

The attitude of the international community towards the lawfulness of the use of mercenaries seems to have changed. Their use is increasingly being viewed as impermissible. The rest of this chapter examines some of the grounds upon which demands that the use of mercenaries is impermissible are based.

Section 1: Mercenaries as a Threat to the Peace

It has been argued that the use of mercenaries is a threat to peace and, therefore, that it is either outlawed by international law or that it is at least a matter of international concern. If an activity constitutes a threat to international peace then it ceases to be a matter essentially within the domestic jurisdiction of a State.[3] Wilfred Jenks writes:

> The crumbling of public order in many of the new States has given a renewed importance especially in Africa to the problem which is currently described as that of mercenaries. The whole question assumes a new complexion in a world in which the threat or use of force is prohibited by Charter and the instability of settled governments in developing areas is one of the gravest threats to the peace.[4]

The employment of mercenaries in Zaire was characterized as a threat to peace by both the OAU and the United Nations. The OAU perceived the civil war in Zaire as an African problem requiring an African solution. Therefore, the employment of white mercenaries by Tshombe in 1964 was seen as intervention by non-African States. At the request of the Congolese Government, an extraordinary session of the OAU Council of Ministers was convened to "examine the Congolese problem, its repercussions on the neighbouring States and on the African scene at large." The Council of Ministers met in Addis Ababa from 5 to 10 September 1964, and passed a resolution. The resolution provided:

> Deeply concerned by the deteriorating situation in the Democratic Republic of the Congo resulting from foreign intervention as well as use of mercenaries principally recruited from the racist countries of South Africa and Southern Rhodesia;
>
> Considering that foreign intervention and the use of mercenaries has unfortunate effects on the neighbouring independent States as well as on the struggle for national liberation in Angola, Southern Rhodesia, Mozambique and other territories in the region which are still under colonial domination, and constitutes a serious threat to peace in the African Continent;
>
> Deeply conscious of the responsibilities and of the competence of the Organization of African Unity to find a peaceful solution to all problems and differences which affect peace and security in the African Continent.
>
> 1. Appeals to the Government of the Democratic Republic of the Congo to stop immediately the recruitment of

> mercenaries and to expel as soon as possible all mercenaries of whatever origin who are already in the Congo so as to facilitate an African solution.[5]

The resolution also set up an Ad Hoc Commission of ten States under the chairmanship of H.E. Jomo Kenyatta, then Prime Minister of Kenya to bring about normal relations between the Democratic Republic of the Congo and its neighbours.

When the Security Council met in December 1964, it reaffirmed the resolution of the OAU dated September 10, 1964 and called for the withdrawal of the mercenaries. Its resolutions provided as follows:

> The Security Council, taking into consideration the resolution of the Organization of African Unity dated 10 September, in particular paragraph 1 relating to mercenaries,
>
> (3) considers, in accordance with the Organization of African Unity's resolution dated 10 September, 1964, that mercenaries should as a matter of urgency be withdrawn from the Congo.[6]

The return of mercenaries to Congo in 1966 also caused tension between Congo and Rwanda. The mercenaries occupied Bukavu and other towns. The Central Government was able to defeat the mercenaries and retook Bukavu in the latter part of 1967. After their defeat, the mercenaries crossed over into Rwanda. It is the process of evacuating them from Rwanda that threatened relation between Congo and Rwanda. The OAU Ad Hoc Committee took on the task of evacuating the mercenaries from Rwanda. For the task, the Ad Hoc Committee established a Five-Nation Commission of

Inquiry: first, to identify the mercenaries detained in Rwanda as well as the States, organizations, or interested groups behind the mercenary activities; second, that a just and equitable amount of reparations should be paid to Congo by mercenaries themselves or by States or organizations to which they claimed to belong. Until such compensation was paid and written guarantees were given by the mercenaries or their governments to ensure that they would never return to Africa to resume their "subversive activities" the Rwandese Government was requested to detain them under the exclusive political authority and effective control of the OAU Ad Hoc Committee.[7]

Rwanda objected to some of the demands of the Commission and its line of questioning on the ground that they tended to infringe upon its domestic jurisdiction and to presume complicity between Rwanda and the detained mercenaries.

Given this situation, the Ad Hoc Committee met again and decided to request Rwanda to transfer the mercenaries immediately to Congo in order that they might undergo full investigation by the Commission of Inquiry and trial in Congolese Court.

Rwanda could not agree to such transfer on the ground that it was contrary to the OAU Assembly resolution which had called for measures to evacuate the mercenaries from Africa. The real reason behind Rwanda's refusal to the transfer of mercenaries to Congo seems to be pressure

applied by western nations on President Grigoire Kayibanda to release the mercenaries.[8]

In April 1968, the Chairman of the Ad Hoc Committee was able to persuade the Congolese Government to agree to an evacuation. At the same time, he assured that Government against the return of mercenaries to Africa by obtaining guarantees from the mercenaries themselves and their respective Governments.

The mercenaries were finally evacuated from Rwanda with the help of the International Committee of the Red Cross.

In 1970, the U.N. Security Council met to consider Guinea's charges of armed attack by Portugal against Guinea's capital using naval units, commando troops, and mercenaries. In its resolution the Security Council declared that such armed attacks against African States and, indeed, the presence of Portuguese colonialism in Africa constituted "a serious threat to the peace and security of independent African State."[9]

By a letter dated December 9, 1981, the Chargé d'Affaires of the Permanent Mission of Seychelles to the United Nations requested that a meeting of the Security Council be convened to consider an invasion of the Republic of Seychelles, on November 25, 1981, by mercenaries and the threat to international peace and security resulting from that situation.[10] The Security Council considered the question at its 2314th meeting held on 15 December, 1981.

At that meeting, the Security Council adopted unanimously Resolution 496 of 1981.[1] In the Resolution the Security Council condemned the mercenary aggression against the Republic of Seychelles and the subsequent hijacking, and decided to send a commission of inquiry in order to investigate the origin, background and financing of the November 25, 1981 mercenary aggression. After the investigation the Security Council Commission of Inquiry made the following conclusion:

> The Commission would wish to emphasize that, given the small size and limited resources of Seychelles, the aggression posed a grave threat to the sovereignty and independence of the country and seriously disrupted its daily life. This event underscores the vulnerability of small States, particularly those in geographical situations such as that of Seychelles, to aggression by mercenaries.[2]

The legal significance of the resolutions of the United Nations as they relate to mercenaries is examined in chapter six of this study. It may, however, be pointed out here that on the basis of the practice in the United Nations, Burmester concludes:

> The repeated calls of the Security Council for foreign States to cease assisting mercenaries and for the adoption of measures to prevent their departure and the continued appeals for the end of foreign intervention clearly lend weight to the view that a State has an obligation to control the recruitment of its nationals in situations where a threat to peace and security exists.[3]

It is rather clear from the above conclusion that an absolute prohibition of the use of mercenaries was not the objective of the international community. It is also clear that the international community did not view every use of mercenaries as a threat to the peace. What was condemned is the use of mercenaries under conditions in which they are a threat to the peace.

Section 2: A Threat to the Right of Self-Determination

One of the principal claims for prohibiting the use of mercenaries is that it is a threat to the right of of self-determination. The principle of self-determination is an important feature of contemporary international law. The concept is embodied in Article 1, paragraph 2, Articles 55, 56, 73, 74 and Chapters IX to XII of the Charter of the United Nations. According to Article 1(2) of the United Nations Charter, one of the purposes of this organization is to "develop friendly relations among States based on respect for the principle of equal rights and self-determination of peoples." These general provisions of the Charter by themselves were insufficient to transform the concept of self-determination into a binding principle.[1] However, as argued by several writers, the subsequent practice of States may have led to the establishment of the principle as a legal right.[2] In December 1960, the U.N. General Assembly adopted the Declaration on the Granting of

Independence to Colonial Countries and Peoples (with 89 votes in favour, none against and 9 abstentions: U.S.A., Great Britain, France, Belgium, Portugal, South Africa, Australia, Dominican Republic and Spain).[16] First, the Declaration reaffirms the principle of self-determination and the immediate right of all peoples to independence. Second, it declares that "subjection of peoples to alien subjugation, domination and exploitation" is contrary to the U.N. Charter and constitutes a denial of human rights. For the purpose of implementing the Declaration, in 1961, the U.N. General Assembly established a Special Committee of 17 members (increased to 24 in 1962).[17] On the basis of the Declaration independence was granted to many States.

Article 1 of both the International Covenant on Economic, Social and Cultural Rights[18] and the International Covenant on Civil and Political Rights[19] adopted by the General Assembly in 1966 provide in idential language:

> 1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
>
> 2. All people may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
>
> 3. The State Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the

> right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

Both Covenants, thus, recognise the right of self-determination and State Parties, including those having responsibility for the administration of Non-Self-Governing and Trust Territories undertake to promote the realization of that right.[20]

The latest important U.N. pronouncement on the principle of self-determination is the Declaration on Friendly Relations and Co-operation Among States adopted by Consensus, in 1970.[21] Under the Declaration the U.N. General Assembly prolaims, inter alia, the following principles:

> By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.
>
> Every State has the duty to promote, through joint and separate action, the realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle ...

It can be seen from the above paragraphs that the Declaration recognises that peoples have the right of self-determination and asserts that every State has the duty to respect this right.[22]

According to O. Umozurike "the principle of self-determination has now matured into a fundamental principle of positive international law."[23] In the same vein Professor Rosalyn Higgins concludes that the effect of a number of resolutions passed by the United Nations:

> [C]learly indicate that the great majority of States in the United Nations believe that a legal right of self-determination exists .... It therefore seems inescapable that self-determination has developed into an international right.[24]

On the other hand, several jurists have observed that the principle has not yet become a legal right.[25] Professor Gross contends that "subsequent practice as an element of interpretation does not support the proposition that the principle of self-determination is to be interpreted as a right."[26] In concluding that the principle of self-determination is not a legal right, Sir Gerald Fitzmaurice points out that many of the U.N. General Assembly resolutions on the matter and U.N. General Assembly Resolution 2625 (XXV) of October, 1970 in particular assume "the existence of the very circumstances that would be in issue if a concrete case arose."[27]

Considering the principle of self-determination as a legal right presents problems relating to its implementation. Many of the problems are due to the absence of generally accepted meaning of terms like "peoples" and "self-determination".[28] Broadly construed the terms "peoples" and "self-determination" could be applied to a wide range

of conflicts.[29] For example, the term "peoples" may apply to "majorities" as well as "minorities" within a State.[30] Self-determination is also said to comprise two elements: (a) the internal constitutional aspect involving the freedom of a people to choose their own government and institutions; and (b) the international aspect involving a right to either independence or some form of self-government.[31] However, few States hold that the principle of self-determination applies to "all peoples".[32] Within the United Nations, self-determination has been regarded as the right of peoples in overseas colonies to become independent or to achieve self-government.[33] This interpretation is now incorporated in Article 1 of Protocol 1 Additional to the Geneva Conventions of 1949, adopted in 1977.[34] The Article recognizes armed conflicts where "peoples are fighting against colonial or alien occupation and against racist regimes" as wars fought in the exercise of the right of self-determination as enshrined in the Charter of the United Nations and the Declaration on Friendly Relations and Co-operation Among States. The OAU's interpretation of the principle of self-determination is not different from that of the United Nations. When the OAU was founded, it accepted the principle of helping freedom fighters in their struggle against colonialism. On the basis of this principle, liberation movements involved in overthrowing colonial and minority regimes in Africa have been recognized by the OAU. Among the movements recognized were:

Frelimo for Mozambique, ZAPU and ZANU for Zimbabwe, the ANC for South Africa, PAIGC for Guinea Bissau, and SWAPO for Namibia.[35]

When it comes to recognizing liberation movements within independent States, the OAU and the United Nations have been very reluctant to acknowledge the right of self-determination. Since the inception of the OAU, no liberation movement seeking the right of self-determination from an independent African State has ever been recognized. For instance, in the Nigerian conflict, only five States[36] recognized the Biafran claim to independence and neither the OAU nor the United Nations spoke for the Biafran right of self-determination.[37] Other major instances where claims to the right of self-determination have been made and not recognized are Ethiopia and Sudan.[38] In February 1982, the Polisario guerrilla movement which is fighting Morocco for the control of the former Spanish colony of Western Sahara,[39] was admitted to the OAU at a meeting of Foreign Ministers held in Addis Ababa. Morocco and a number of other countries opposed the admission. The dispute led to the postponement of the holding of a summit meeting in Libya.[40]

The reason for refusing to accord recognition to the Polisario and other instances given above is not necessarily that the claim to the right of self-determination is not genuine in each case. The OAU response is the principle of "... respect for the sovereignty and territorial

integrity of each State and for its inalienable right to independent existence" embodied in Article 3, paragraph 3 of its Charter.

It is against this background of the narrow interpretation attached to the concept of self-determination by the OAU and the United Nations, that condemnation of the use of mercenaries against peoples in their exercise of the right of self-determination is examined.

Among the earliest condemnation of mercenaries who were engaged in hostilities against forces struggling for self-determination and national liberation was in response to military operations carried on in Portugal's colonial territories. In 1968, the U.N. General Assembly condemned Portugal for failing to grant independence to "territories under Portuguese domination". It called upon all States as a matter of urgency:

> to take all measures to prevent the recruitment or training in their territories of any persons as merce-naries for the colonial war being wages in the territories under Portuguese domination and for violation of the territorial integrity and sove-reignty of the independent African States.[41]

In 1969, by 78 to 5 votes with 16 abstentions, the U.N. General Assembly reaffirmed its Declaration on Independence for Colonial Countries and Peoples and stated that:

> The practice of using mercenaries against movement for national libera-tion and independence is punishable as a criminal act and that the merce-naries themselves are outlaws, and calls upon the Governments of all countries to enact legislation declaring the recruitment, financing and training of

> mercenaries in their territory to be a punishable offence and prohibiting their nationals from serving as mercenaries.[42]

In 1970, to mark the tenth anniversary of the adoption of the Declaration on Independence, the U.N. General Assembly, after deploring the fact that colonial powers particularly Portugal, South Africa and Southern Rhodesia were still colonial or racist rulers, noting with grave concern that many territories were still under "colonial domination and racist regimes", reiterates its declaration that:

> the practice of using mercenaries against national liberation movements in the colonial territories constitutes a criminal act and calls upon all States to take the necessary measures to prevent the recruitment, financing and training of mercenaries in their territories and to prohibit their nationals from serving as mercenaries.[43]

In its resolution on Basic Principles of the Legal Status of the Combatants Struggling Against Colonial and Alien Domination and Racist Regimes, the U.N. General Assembly condemned the use of mercenaries against "the national liberation movements struggling for their freedom and independence."[44] The Civil War in Angola in 1976 in which mercenaries were involved prompted the U.N. General Assembly to declare that the "practice of using mercenaries against movements for national liberation and independence constitutes a crime" and that the mercenaries are criminals.[45]

From the preceding discussion it may be concluded that the use of mercenaries to fight against national

liberation movements in colonial situations has been condemned by the international community. However, because of the narrow interpretation attached to the concept of self-determination by the OAU and the United Nations, it is not possible to conclude that the use of mercenaries against people struggling for the right of self-determination will always be condemned.

Within the municipal arenas, only East Germany seems to expressly prohibit the recruitment of Germans to participate in wars that seek to frustrate the exercise of the right of self-determination. The Law on Defence of Peace, 1950, provides in Article 2, paragraph 1, that "whoever ... recruits, induces, or incites Germans to take part in war-like actions which serve to subjugate another people shall be punished ...".[46]

FOOTNOTES

1. H.W. Halleck, International Laws and Laws of War (1861), 385.

2. M. de Vattel, The Laws of Nations, (Trans. by J. Chitty 1861), 400.

3. See R. Higgins, The Development of International Law Through the Political Organs of the United Nations (1963), 87.

4. C.W. Jenks, A New World of Law? (1969), 31-32.

5. OAU Doc. ECM/Res.55 (III) Addis-Ababa, Sept. 10, 1964; I. Brownlie, Basic Documents on African Affairs (1971), 534.

6. U.N. SC. Res. 199, 19 U.N. SCOR, Supp. (Oct.-Dec. 1964), at 328-29, U.N. Doc. S/6129, (Dec. 30, 1964).

7. OAU Doc. Ad 6135, (Sept. 14, 1968), 2-3.

8. See The Observer, (Dec. 31, 1968), 1.

9. U.N. SC. Res. 290, 25 U.N. SCOR, Supp. (Oct.-Dec. 1970), at 89, U.N. Doc. S/10030, (Dec. 8, 1970).

10. See Report of the Security Council Commission on Enquiry Established under Resolution 496 (1981), U.N. Doc. S/14905 (March 14, 1982), 6.

11. U.N. SC. Res. 496, 36 U.N. SCOR, Res. & Dec. 1981 at 11, U.N. Doc. S/14793, (Dec. 15, 1981).

12. See Report of the Security Council Commission of Inquiry, supra note 10, 51.

13. H.C. Burmester, "The Recruitment and Use of Mercenaries in Armed Conflicts," 72 Am. J. Int'l L. (1978), 37, 50.

14. See O.Y. Asamoah, The Legal Significance of the Declaration of the General Assembly of the United Nations (1966), 180; C. Eagleton, "Excesses of Self-determination," 31 For. Aff., (1953), 593. Contra: M.K. Nawaz, "Bangladesh and International Law," 11 Indian J. Int'l L. (1971), 251, 255.

15. See G. Abi-Saab, "Wars of National Liberation and the Laws of War," 3 Annals Int'l Stud. (1972), 93, 93; I. Brownlie, Principles of Public International Law (1979), 594.

16. U.N. G.A. Res. 1514, 15 U.N. GAOR, Supp. (No. 16) at 66-67, U.N. Doc. A/4684 (Dec. 14, 1960).

17. U.N. G.A. Res. 1654, 16 U.N. GAOR, Supp. (No. 17) at 65, U.N. Doc. A/5100 (Nov. 27, 1961).

18. U.N. G.A. Res. 2200, 21 U.N. GAOR, Supp. (No. 16) at 49, U.N. Doc. A/6316 (Dec. 16, 1966).

19. Ibid., 52.

20. On Article 1 of both Covenants, see E. Schwelb, "Some Aspects of International Covenants on Human Rights of December 1966" in International Protection of Human Rights (Ed. by A. Eide and A. Schou, 1968), 103, 110-13.

21. U.N. G.A. Res. 2625, 25 U.N. GAOR, Supp. (No. 28) at 121, U.N. Doc. A/8028 (Oct. 24, 1970).

22. For an examination of these provisions of the Declaration, see A. Cassese, "Political Self-Determination - Old Concepts and New Developments" in U.N. Law/Fundamental Rights (ed. by A. Cassese, 1979), 137, 143-47; R. Rosenstock, "The Declaration of Principles of International Law Concerning Friendly Relations: A Survey," 65 Am. J. Int'l L. (1971), 713, 731; G.A. Ruiz, "The Normative Role of the General Assembly of the United Nations and the Declaration of Principle of Friendly Relations," Recueil des Cours (III, 1972), 431, 562-65.

23. U.O. Umozurike, Self-Determination in International Law (1972), 274.

24. R. Higgins, supra note 3, 103.

25. See H. Johnson, Self-Determination Within the Community of Nations (1967), 51; S.P. Sinha, "Has Self-Determination become a Principle of International Law?" 14 Indian J. Int'l L. (1974), 332, 361.

26. L. Gross, "The Right of Self-Determination" in the New States in the Modern World (ed. by M. Kilson) quoted in R. Emerson, "Self-Determination," 65 Am. J. Int'l L. (1971), 459, 461.

27. Sir G. Fitzmaurice, "The Future of Public International Law and the International Legal System in the Circumstances of Today," 5 Int'l Rel. (1975), 743, 761.

28. See R. Emerson, supra note 26, 459.

29. See R.R. Baxter, "Humanitarian Law or Humanitarian Politics? The 1974 Diplomatic Conference on Humanitarian Law," 16 Harv. Int'l L.J. (1975), 1, 16.

30. See M. St. Korowicz, "The Problem of International Personality of Individuals," 50 Am. J. Int'l L. (1956), 533, 552-58.

31. See O.Y. Asamoah, supra note 14, 167.

32. See M.K. Nawaz, supra note 14.

33. See R. Emerson, supra note 26, 459.

34. For the text of Protocol 1, see (1977), 16 Int. Leg. Mat. 1391.

35. For the role of the OAU on the question of racial-colonial affairs, see P. Saenz, "The Organization of African Unity in the Subordinate African Regional System", 13 Afr. Stud. Rev. (1970), 203, 211-16.

36. The countries were Tanzania, Gabon, Ivory-Coast, Zambia and Haiti.

37. See V.P. Nanda, "Self-Determination in International Law: The Tragic Tale of Two Cities - Islamabad (West-Pakistan) and Dacca (East-Pakistan)," 66 Am. J. Int'l L. (1972), 321, 326-27.

38. See generally, E. Suzuki, "Self-Determination and World Public Order: Community, Response to Territorial Separation," 16 Va. J. Int'l L. (1976), 783.

39. For an examination of the issues relating to the former Spanish Sahara, see M. Franck, "The Stealing of the Sahara," 70 Am. J. Int'l L. (1976), 694.

40. See The Time, (London) (July 18, 1982), 9.

41. U.N. G.A. Res. 2465, 23 U.N. GAOR, Supp. (No. 18) at 4, U.N. Doc. A/7218, (Dec. 20, 1968).

42. U.N. G.A. Res. 2548, 24 U.N. GAOR, Supp. (No. 30), at 5, U.N. Doc. A/7630, (Dec. 11, 1969).

43. U.N. G.A. Res. 2708, 25 U.N. GAOR, Supp. (No. 28) at 7, U.N. Doc. A/8028, (Dec. 14, 1970).

44. U.N. G.A. Res. 3103, 28 U.N. GAOR, Supp. (No. 30) at 142, U.N. Doc. A/9030, (Dec. 12, 1973).

45. U.N. G.A. Res. 31/34, 31 U.N. GAOR, Supp. (No. 39) at 42, U.N. Doc. A/31/39, (Nov. 30, 1976).

46. 46 Am. J. Int'l L. Supp. (1952), 99.

CHAPTER IV

CLAIMS RELATING TO PERMISSIBLE USE OF MERCENARIES

The discussion in the previous chapter seems to indicate that international law does not yet outlaw the use of mercenaries even though international opinion may be against their use. This chapter examines some of the justifications upon which the continued use of mercenaries may be based.

Section 1: Individuals Are Not Subjects of International Law

In considering the question of outlawing mercenaries by international law, a central issue which may be raised is whether individuals not being subjects of international law can be regulated by it. Using the term "subjects" of law to connote those upon whom the law confers rights and imposes duties it is concluded that States are the principal participants in the world power process.[1] However, States appear not to be the only subjects of international law. Public international organizations, for example, may also be subjects of international law. In its Advisory Opinion on Reparation for Injuries Suffered in the Service of the United Nations the International Court of Justice held, that the United Nations is, under international law, an international person. According to the

Court:

> That is not the same thing as saying that it is a State, which it certainly is not, or that its legal personality and rights and duties are the same as those of a State ... What it does mean is that it is a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims.[2]

The above decision concerned the status of the United Nations, but it is said to apply to other international organisations.[3]

Although individuals may not be subjects of international law, the trend has been in the direction of according them rights and duties.

First, the Charter of the United Nations did recognise the fundamental rights of individuals independent of the law of the State. For example, Article 55 of the U.N. Charter provides that the United Nations shall promote "Universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion." Under Article 56, "all Members pledge themselves to take joint and separate action in co-operation with the organization for the achievement of the purposes set forth in Article 55." However, the provisions of the Charter of the United Nations relating to human rights have been held to be too general to impose binding obligations on Member States.[4] The Universal Declaration of Human Rights,[5] adopted by the United Nations General

Assembly in December 1948, expanded on the provisions of the Charter of the United Nations in the matter of human rights. The Declaration formulated the principal human rights and fundamental freedoms that ought to be recognised. The civil and political rights recognised include freedom of speech, freedom from arbitrary arrest, the right of the individual to take part in the government of his country, directly or through freely chosen representatives and the right to work. But the Declaration is not a treaty[6] and it provides no machinery for the enforcement of those rights.[7]

The International Covenant on Economic, Social and Cultural Rights,[8] the Covenant on Civil and Political Rights adopted by the United Nations General Assembly on December 16, 1966[9] and the Optional Protocol to the International Covenant on Civil and Political Rights[10] provide some machinery for the implementation of human rights. Under the International Covenant on Economic, Social and Cultural Rights, States that ratify the Covenant are required to submit progress reports to the Economic and Social Council, which, after studying the reports, may make general recommendations to the General Assembly or assist the United Nations specialised agencies and subsidiary organs in deciding on the advisability of international measures likely to contribute to the effective progressive implementation of the rights stipulated in the Covenant. Under the International Covenant on Civil and Political Rights, States which are parties to it undertake to submit reports to a Human

Rights Committee on the measures which they have adopted to ensure civil and political rights. The Human Rights Committee, which consists of eighteen members appointed by the States parties may make such general comments as it may consider appropriate to States which have ratified the Covenant. The Covenant also gives States parties the option under Article 41 to allow the Human Rights Committee to receive claims of one State Party against another State party that the latter is not fulfilling its obligations under the Covenant provided both parties have accepted the Committee's competence to consider such claims. The Committee may offer its good offices to the parties, make a report, or under Article 42, refer the claim with the consent of both parties to a Conciliation Commission. The Commission may in turn try to bring about an "amicable solution" and, failing this, submit a report embodying its views on the possibility of an amicable solution. Under the Optional Protocol to the Covenant on Civil and Political Rights, it is possible for an individual to make a claim against a State. However, the Human Rights Committee can only consider complaints from private individuals claiming to be victims of a violation of human rights only if the State against whom the claim is made has ratified the Protocol. In those cases in which the Committee is competent to receive individual complaints, the Committee forwards its views to the State party concerned and the individual complainant. Proposals to provide for a reference of legal

questions raised in claims by States against States or individuals against States, to the International Court of Justice for an advisory opinion were rejected.[11]

The Covenant on Economic, Social and Cultural Rights and the Covenant on Civil and Political Rights came into force in 1976 after ratification by thirty-five States.[12]

The International Convention on the Elimination of all forms of Racial Discrimination adopted on December 21, 1965 by the U.N. General Assembly[13] and entered into force on January 4, 1969 elaborates in some detail the fundamental obligations of State Parties to prohibit and bring to an end racial discrimination. As one leading commentator has rightly emphasized the "substantive provisions of the 1965 Convention represent the most comprehensive and unambiguous codification in treaty form the idea of equality of races."[14] Article 2, paragraph 1(d), for example, provides that "Each State Party shall prohibit and bring to an end by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization." The Convention provides for the creation of an international machinery to supervise the implementation of obligations that the State Parties have assumed. This supervisory responsibility is entrusted to the Committee on the Elimination of Racial Discrimination. Under Article 14 of the Convention the Committee may deal with communications by individuals claiming to be victims of

a violation of the Convention committed by any State Party that has recognized the right of private petition, provided that at least ten States Parties have made the the requisite declaration.

The right of the individual to petition in respect of alleged violations of human rights appear to have been enhanced as a result of the adoption of Resolution 1503 (XLVII) by the Economic and Social Council in 1970.[15] This resolution authorized the Human Rights Commission to consider communications that reveal "gross and consistent" violations of human rights and called upon the Sub-Commission on Prevention of Discrimination and Protection of Minorities, to devise appropriate procedures for determining the question of the admissibility of communications received by the Secretary-General of the United Nations alleging such violations. In the event any communication is referred to the Commission by the Sub-Commission on Prevention of Discrimination and Protectionof Minorities, Resolution 1503 authorizes the Commission to determine:

> (a) whether the communication requires a thorough study by the Commission and a report and recommendation thereon to ECOSOC; and
>
> (b) whether the communication should be a subject of an investigation by an ad hoc committee appointed by the Commission which investigation will be only undertaken
>
> (i) with the express consent of the State concerned under conditions determined by agreement with such State, and

(ii) if all domestic remedies have been exhausted and if the situation does not relate to a matter which is being dealt with under procedures within the United Nations, its specialized agencies, regional organizations or any other international procedure.

In accordance with Resolution 1503, the Sub-Commission on Prevention of Discrimination and Protection of Minorities on August 14, 1971 adopted Resolution 1 (XXIV),[16] which provides for provisional procedures for dealing with the question of admissibility of communications.[17]

On the regional level, the European Convention for the Protection of Human Rights and Fundamental Freedoms[18] signed at Rome on November 4, 1950, provides a machinery for the implementation of human rights. Under the Convention, there were established a European Commission of Human Rights with administrative power to investigate and report on violations of human rights, and a European Court of Human Rights which started to function in 1959. Both the Commission and the Court have inquired into a violation of human rights alleged by an individual against his own government. However, the jurisdiction of those organs is limited and they operate in respect of those States which have accepted their competence.[19]

Mention should also be made of the American Convention on Human Rights,[20] opened for signature on November 22, 1969. The Convention defines the rights which are protected and provides for the establishment of an Inter-

American Court of Human Rights.[21] The analysis thus far tends to support the proposition that individuals may also be direct addressees of international law in terms of rights.

Of immediate relevance to the competence of international law to prohibit mercenary activities is the question whether international law can impose duties on individuals directly. Early in the development of international law, it was recognized that a State had the right to punish individuals who violated the law of nations even though the crime had no direct effect on the State seeking to exercise jurisdiction.[22] One of the first examples is the law against piracy. Any State which apprehended a pirate could under the rules of international law, exercise jurisdiction and punish him for his crimes.[23] By treaty and custom the law of nations which individuals are under a duty to respect have been expanded to include the law against slavery and the Laws of War.[24] Since the decision of the Nuremberg Tribunal,[25] the trend of international law has been towards attaching direct responsibility to individuals. In this case the defendants were charged, inter alia, for crimes against peace, crimes against humanity, and crimes under the laws of wars. It was submitted on behalf of the defendants that international law is concerned with the actions of sovereign States, and provides for no punishment for individuals.[26] The Tribunal rejected this submission and held that international law imposes

duties and liabilities upon individuals as well as upon States.[27]

The rule in the Nuremberg Judgment that international law may impose duties on individuals directly was reaffirmed in the Genocide Convention[28] adopted by the United Nations General Assembly on December 9, 1948. Article IV of the Convention for example, provides that persons committing the acts should be punished "whether they are constitutionally responsible rulers, public officials or private individuals".

Therefore, although mercenaries are private individuals and not States, international law can regulate their activities. The competence of international law to impose duties directly on individuals seems not to be based on the recognition of individuals as subjects of international law. Professor Georg Schwarzenberger writes:

> Yet it would be unwarranted assumption to hold that only if the international personality of the individual were recognized could the individual be treated as an object of proceedings of an international character.[29]

Section 2: Humanitarian Role for "Mercenaries"

It has been suggested that the use of force by individuals in their private capacity should be permissible "for reasonably necessary sanction of human right

violations when State law enforcement entities are unable or unwilling to maintain order or to implement basic human rights."[30] A relevant question here is who is to judge that there is gross violation of human rights to justify outside intervention. In absence of some objective standards to be applied, there is a danger that some States or individuals might interfere in the internal affairs of other States on the pretext that they are stopping gross violations of human rights. The temptatioin of some States or group of persons seeking to interfere in the internal affairs of other States is real for a number of reasons. First, superpowers are constantly competing for spheres of influence. With the intensification of the contention and rivalry between the superpowers in Africa, Latin America and Asia, bearing out direct confrontation for fear of such confrontation escalating into a full scale nuclear war, direct intervention also being costly and unpopular both at home and abroad, the organization and use of mercenaries and other proxy forces is a possibility.[31]

Second, the relative instability of developing States contributes to the interventionary activities by other States through the use of mercenaries. Professor John Norton Moore explains:

> The degree of internal stability of the actors within the internal system seems to be another factor affecting the degree of interventionary activity. In this regard, the built-in functional dis-equilibrium of many Third World States and the concern

over the viability of existing colonial boundaries heighten the problem.[32]

The cases of Zaire and Guinea epitomize the problem being referred to by J.N. Moore above. In Zaire, the power structure installed at independence was characterized by political and institutional instability. And according to Jean-Claude Willame, this political and institutional instability was due, "largely from the imperfect assimilation of the democratic rules of the game by the government leaders."[33] He contrasts the political institution of Zaire with those of Europe: "In the Western Countries, political institutions developed parallel to the overall structure of society: though acute problems of adjustment arise, they form part of a relatively well integrated whole. These institutions have engendered traditions, standards and rules without which their functioning would be haphazard. In the Congo, parliamentary institutions are not only novelty, but a novelty which does not co-exist with the structure of society."[34]

The invasion of Guinea by mercenaries in November 1970 followed a year of sporadic unrest inside Guinea during which several invasion plots were reported to involve Guinean exiles and the Governments of neighbouring countries, especially Portuguese Guinea.[35]

Although the Republic of Seychelles is not a direct object of rivalry between the super-powers, except when considered in the broader context of the struggle for the control of the Indian Ocean,[36] and while the Government

of Albert Rene was enjoying a reasonable measure of stability and popularity, notwithstanding the fact that it came to power in June 1977 through a military coup that ousted James Mancham, its leftist character seems to have been the major reason for the South African Government to sanction the attack on that Republic by mercenaries.[37]

Unfortunately, the Charter of the OAU, for example, does not provide for any machinery under which allegations of violations of human rights within an independent African State can be investigated or condemned. In fact, the provision relating to the independence and territorial integrity of Member States of the OAU is interpreted so strictly that under no circumstances can gross human rights violations ever be examined by the OAU.[38] In absence of any such provision the Charter of the United Nations can be turned to for guidance, since all the members of the OAU are also members of the United Nations. Under the Charter of the United Nations the World organ is precluded from intervening in matters which are essentially within the domestic jurisdiction of any State.[39] The interpretation given to the above article through the organs of the United Nations seems to be different from that of the OAU. For the United Nations the content of what is within the domestic jurisdiction of Member States seems to be determined by the international community and it depends upon the development of international law.[40] Under this interpretation gross violation of human rights by a government or viola-

tions of any major purpose of the United Nations can warrant international reaction. But there are also problems of implementation with the United Nations system. First, the competence of the International Community to determine what is within the domestic jurisdiction of Member States has not been accepted without any qualification. The case in point is the United States Declaration accepting the compulsory jurisdiction of the International Court of Justice also known as the Connally Amendment.[41] The Declaration seeks to exclude the jurisdiction of the International Court of Justice, disputes which are essentially within the domestic jurisdiction as determined by the United States. Second, members of the United Nations are reluctant to condemn delinquents for fear of creating precedents which could be used as a basis for investigating their own conduct.[42] Third, if intervention is permissible the question is whether force can lawfully be applied to protect human rights. Fourth, if intervention by force in the defence of human rights is lawful, a further question is whether it can be undertaken individually or collectively. Under the Charter of the United Nations, measures to enforce its violations are provided in Chapter VII. But these measures, including the use of force, can only be applied when a violation is a threat to the peace and on the recommendation of the Security Council.[43] The linking of human rights violation and a threat to the peace presents problems even though on some occasions violations of

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human rights have been authoritatively described as situations which can endanger international peace and security.[44] In December 1966, the Security Council stating that it was acting in accordance with Articles 39 to 41 of the Charter held that, "the present situation in Southern Rhodesia constitutes a threat to international peace and security."[45] It then decided on selected economic sanctions and made them mandatory. In 1967, the U.N. General Assembly, by a vote of 89 to 2 with 12 abstentions, adopted a resolution reiterating its condemnation of apartheid as a "crime against humanity" and "its conviction that the situation in South Africa constitutes a threat to international peace."[46] The Resolution also provided that "action under Chapter VII of the Charter ... is essential in order to solve the problem of apartheid" and that "universally applied mandatory economic situations are the only means of achieving a peaceful solution."

Assuming that community response to gross violations of human rights fails as was the case in East Pakistan/Bangladesh[47] or in Democratic Kampuchea under the "Khmer Rouges"[48] a relevant question is whether unilateral intervention is still permissible. Opinions here differ. One view takes the position that humanitarian intervention is now impermissible. Three main arguments have been advanced in support of the view that humanitarian intervention is illegal. The first argument holds that the United Nations Charter as a whole prohibits the use of military

force save for self-defence and collective action on the ground that the basic policies of the Charter are to promote peaceful change and to minimize unauthorised coercion. Professor C.W. Jenks, one of the proponents of this argument, puts it this way:

> The law must debar recourse to armed force save in the common interest. The Charter of the United Nations is unequivocal on the subject. The obligation of members to refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes of the United Nations is absolute. Without such an obligation, the prospects of maintaining world peace by more effective international organisations becomes altogether illusory. The obligation becomes meaningless and inoperative if we allow it to be qualified by anything other than the necessary right of individual and collective self-defence, reasonably construed and subject to impartial review.[49]

A possible weakness in the above argument may lie in its attempt to equate peace with the prevention of global armed conflict only. Consequently, that any gross deprivation of human rights can only be terminated through non-violent means. Gross deprivation of human rights in many instances gives rise to expectations of violence so as to constitute a potential threat to international peace. This potential threat to international peace could be regarded as arising from the external responses to gross violation of human rights.[50] Under those circumstances States have been customarily regarded as justified in unilaterally resorting to the coercive strategies of humanitarian intervention.[51] The possible implication of a total

prohibition of unilateral use of force by private persons or by States is spelt out by Professor Reisman:

> [I]nsistence on non-violence and deference to all established institutions in a global system with many injustices can be tantamount to confirmation and re-inforcement of those injustices. In certain circumstances, violence can be the last appeal or the first expresed demand of a group or unorganized stratum for some human dignity.[52]

The second argument in favour of the impermissibility of humanitarian intervention, is based on a literal interpretation of Articles 2(4) and 51 of the Charter of the United Nations. Under this mode of interpretation, humanitarian intervention is inconsistent with the purposes of the United Nations and, hence impermissible. The combined effect of Article 2(4) and Article 51 of the Charter of the United Nations is represented as rendering all use of force illegal except in the exercise of the right of self-defence if an armed attack occurs.[53]

The third argument is that because the doctrine of humanitarian intervention is highly susceptible to abuse it is impermissible under the Charter of the United Nations. One of the main reasons why M. Franck and S. Rodley reject the lawfulness of the doctrine, for example, is that of the six principal cases of post-1945 military interventions, they examined in which humanitarian grounds were advanced, four appear to be largely bogus. They concluded:

> Neither the historic nor the contemporary practice of nations in the least sustains the proposition that there is a general right or conventional practice on the part of a State to use military force to intervene for genuinely human purposes. Similarly none of the resolutions, declarations or conventions on human rights in any way purport to extend this right. On the contrary, the United Nations has made it clear that any such unilateral use of force is wholly illegal.[54]

On the other hand, it has been maintained that the remedy of humanitarian intervention is still permissible under contemporary international law.[55] Under the Charter of the United Nations, there is an overriding commitment to the protection and fulfillment of human rights to achieve the objective of "universal respect for and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion, and Member States are obliged, under Article 56, to "take joint and separate action in cooperation with the organization." Given the reality and widespread perception of the intimate link between human rights and international peace and security, the use of armed force in the defence of human rights may be emphatically in the common interest as a mode of maintaining international peace and security.[56]

On a number of occasions the United Nations General Assembly has recommended for individual States to provide assistance to peoples fighting for their right of self-determination. On November 17, 1967, the U.N. General Assembly passed Resolution 2270 which says:

> The General Assembly ... Appeals again to all States to grant the peoples of the territories under Portuguese domination the moral and material assistance necessary for the restoration of their inalienable rights ....[57]

The Southern Rhodesian Resolution of November, 1968, seems to have authorized individual use of force on behalf of those persons fighting against colonial or discriminatory regimes. The resolution urged:

> All States, as a matter of urgency, to render all moral and material assistance to the National liberation movements of Zimbabwe [Southern Rhodesia], either directly or through the Organization of African Unity ....[58]

The U.N. General Assembly Resolution of December 13, 1967 on South Africa provides:

> Noting with grave concern that racial policies of the Government of South Africa has led to violent conflict and an explosive situation,
> Convinced that the situation in the Republic of South Africa and the resulting explosive situation in Southern Africa continue to pose a grave threat to international peace and security ...
>
> 8. Appeals to all States and organizations to provide appropriate moral, political and material assistance to the people of South Africa in their legitimate struggle for the rights recognized in the Charter ....[59]

On the basis of those recommendations of the United Nations General Assembly, it is possible to assume that foreign soldiers who fight on the side of those struggling for rights recognised in the Charter of the United Nations, would not be condemned as mercenaries.

The foregoing arguments are not intended to minimize the basic need of regulating the use of mercenaries.

Within that regulation it may be suggested that the use of force by individuals should be permissible to prevent gross violations of human rights. As Professor Ian Brownlie suggests, "there should be responsibility of permitting volunteers to join the aggressor while they should be permitted to join the victim State or its allies or take part in the peace enforcement action by the United Nations, even though the State of origin takes no part in the collective self-defence or peace enforcement action."[60] But the lawfulness of the use of force by individuals or States should be determined by the following conditions: (1) there must be an ongoing or imminent large-scale deprivation of the most fundamental human rights; (2) peaceful means of settling the dispute must have been exhausted; (3) absence of collective action; (4) force used should be for the achievement of humanitarian objectives only; (5) the whole issue should be reported and submitted to an appropriate international organization.[61]

Section 3: Difficulties of Enforcing Prescriptions that Seek to Regulate the Use of Mercenaries

Assuming that a sufficiently strong case has been made for the prohibition of the use of mercenaries, there is an equally important task of creating institutions and procedures by which persons can be prevented from taking part as mercenaries. Without such effective procedures,

any rule of law which seeks to prohibit the use of mercenaries would remain a mere rhetoric. A duty exists on neutral States to prevent the recruitment of mercenaries.[62] Experience thus far has shown the inadequacy of such duty in minimizing the participation of private individuals in armed conflicts. It is suggested to extend the duty of prevention in relation to recruiting to the exit of private individuals intending to enlist as mercenaries. In response to this suggestion it has been argued[63] that such a strategy could be contrary to Article 13, paragraph 2, of the Universal Declaration of Human Rigths.[64] That provision reads: "Everyone has the right to leave any country, including his own, and to return to his country." It is observed that, on its face, Article 13, paragraph 2, confers an unrestricted right on individuals to leave any country. Consequently, it may be concluded that any rule of law that prevents the exit of private individuals intending to enlist as mercenaries would be contrary to the Universal Declaration of Human Rights.

An examination of other parts of the Declaration, however, shows that lawful exercise of any right, including the right to leave one's own country is conditional. For example, Article 30 of the Declaration provides that "Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein." In the

preamble to the Declaration, the General Assembly expressed that, "it is essential to promote the development of friendly relations between nations." The departure of mercenaries or volunteers from a State with the purpose of participating in a war of civil strife in foreign territory scarcely tends to develop friendly relations between the nations concerned.[65]

Municipal laws have also been pleaded as being obstacles in the way of preventing individuals from leaving their countries with the intention of enlisting as mercenaries. In responding to the suggestion that British citizens should be prevented from leaving the country for the purpose of serving as mercenaries, the Committee of Privy Counsellors appointed to inquire the Recruitment of Mercenaries had this to say:

> We do not think that there are any means by which it would be practicable to prevent a United Kingdom citizen from volunteering while he is abroad to serve as a mercenary and from leaving the United Kingdom to do so, we should regard any attempt to impose such prohibition upon him by law as involving a deprivation of his freedom to do as he wish which would require to be justified by a much more compelling reason of public policy than the prohibition of active recruiting of mercenaries within the United Kingdom.[66]

International law precludes a State from pleading that a treaty or a valid rule of international law cannot be enforced because of its municipal law. For example, it was stated by the P.C.I.J. in its Advisory Opinion in Exchange of Greek and Turkish Populations that:

> There is a principle which is self-evident according to which a State which contracted valid international obligations, is bound to make in its legislation such modifications as may be necessary to ensure the fulfillment of the obligation undertaken.[67]

The same court declared in its Advisory Opinion in the Treatment of Polish Nationals in Danzig that Poland could not avoid an obligation on pretext that the terms of an international agreement had not been incorporated into Polish municipal law.[68]

In holding States responsible for the conduct of persons, international law does not provide the strategies for the fulfillment of those duties. It is up to each State to enact appropriate legislation. Professor Quincy Wright elaborates:

> International law does not define the means which a State must take in performing its duties of prevention. It is not of international importance whether it chooses to control its subjects and the use of its territory by means of criminal penalties, requirements of bonds or other guarantees, or the use of military force; so long as it exercises "due diligence" or the means at its disposal, the methods are entirely a matter of internal policy.[69]

FOOTNOTES

1. See 1 L. Oppenheim, International Law (8th ed. by H. Lauterpacht, 1955), 19-22.

2. Advisory Opinion on Reparation for Injuries Suffered in the Service of the United Nations, (1949) I.C.J. Reports, 174, 179.

3. See generally D.W. Bowett, International Organisations (2nd ed. 1970).

4. See for example, Sei Fujii v. The State of California (1952), 38 Cal. 2nd. 718 (decision of the Supreme Court of California) which held that human rights provisions of the United Nations Charter (Articles 55-56) were not self-executing in the sense that they could not be binding on American Courts until the necessary legislation was enacted.

5. U.N. G.A. Res. 217, 3 U.N. Doc. A/810 at 71 (Dec,10, 1948). It was unanimously approved with eight abstentions.

6. However, it has been observed that the Universal Declaration of Human Rights is expressive of customary international law. See M.S. McDougal, H.D. Lasswell and L. Chen, Human Rights and World Public Order: The Basic Policies of an International Law of an International Law of Human Dignity (1980), 180.

7. See generally, H. Lauterpacht, "Universal Declaration of Human Rights" 25 Brit. Y.B. Int'l L. (1948), 354; E. Warren, "It's time to implement the Declaration of Human Rights" 59 A.B.A.J. (1973), 1257.

8. U.N. G.A. Res. 2200, 21 U.N. GAOR Supp. (No 16), at 49 U.N. Doc. A/6316 (Dec. 16, 1966).

9. Ibid., 52.

10. Ibid., at 59.

11. See L. Gross "The International Court of Justice and the United Nations" 121 Hague Academy Receuil des Cours (I, 1967), 319, 424.

12. However, a large number of States including the United States have not ratified both Covenants.

13. U.N. G.A. Res. 2106, 10, U.N. GAOR, Supp. (No. 14) at 47, U.N. Doc. A/6014 (Dec. 21, 1965).

14. E. Schwelb, "The International Convention on the Elimination of all forms of Racial Discrimination," 15

Int'l & Comp. L.Q. (1966), 996, 1057. On the Convention generally see, B.V. Bitker, "The International Treaty Against Racial Discrimination," 53 Marquette L. Rev. (1970), 68; F.C. Newman, "The New International Tribunal - The International Control of Racial Discrimination," 56 Cal. L. Rev. (1968), 1559; W.M. Reisman, "Responses to Crimes of Discrimination and Genocide: An Appraisal of the Convention on the Elimination of Racial Discrimination," I Den. J. Int'l L. & Pol'y (1971), 29.

15. U.N. E.S.C. Res. 1503, 49 U.N. ESCOR, Supp. (No. 1A), U.N. Doc. E/4822/Add.1 (May 27, 1970).

16. U.N. Doc. E/CM.4/1070 and Corr. 1 (Aug. 20, 1971).

17. For an examination of the Resolution see "Report: An Analysis of the Procedures of the United Nations Regarding individual Petitions with respect to Human Rights" 4 Human Rights J. (1975), 217.

18. 213 U.N.T.S. (1950), 211.

19. See Lawless v. Government of Ireland Case (Merits) 56 Am. J. Int'l L. (1962) 187.

20. O.A.S.O.R., OEA/Ser. K/XV1/1.1. Doc. 65, Rev. 1, Corr.1, (Jan.7, 1970); (1970) 9 Int'l Leg. Mat. 101.

21. See D.T. Fox, "The American Convention on Human Rights and Prospects for United States Ratification" 3 Human Rights J. (1973), 243.

22. See W.B. Cowles, "Universality of Jurisdiction Over War Crimes," 33 Cal. L. Rev. (1945), 177, 190-91.

23. See H. Kelsen, "Collective and Individual Responsibility in International Law With Particular Regard to the Punishment of War Criminals," 31 Cal. L. Rev. (1943), 530, 534.

24. See W.B. Cowles, supra note 22.

25. International Military Tribunal (Nuremberg) Judgement and Sentences, 47 Am. J. Int'l L. (1947() 172.

26. Ibid., 220.

27. Ibid.

28. 78 U.N.T.S. (1951), 277.

29. G. Schwarzenberger "The Problem of an International Criminal Law" in International Criminal Law (ed. By O.W. Mueller & E.M. Wise, 1965), 3, 15.

30. See J.J. Paust, "Response to Terrorism: A Prologue to Decision Concerning Private Measures of Sanction," 12 Stan. J. Int'l Stud. (1977), 79, 111.

31. A statement of this effect was made by the representative of China during a debate in the Security Council on the question of mercenary activity in Benin. See Y.B. U.N. (1977), 213.

32. J.N. Moore, Law and the Indo-China War (1972), 150.

33. J. Claude, "Military Intervention in the Congo," 11 Afr. R. (1966), 41, 42.

34. Ibid.

35. See The Observer, (Nov. 29, 1970), 9.

36. For a discussion of the struggle for the control of the Indian Ocean, see generally, C.A. Crocker, "The African Dimension of Indian Ocean Policy," 20 Orbis (1976), 637; T.B. Miller, "The Indian and Pacific Oceans: Some Strategic Considerations," The International Institute for Strategic Studies (1969), 1; G. Jukes, "The Indian Ocean in Soviet Naval Policy," The International Institute for Strategic Studies (1972) 1.

37. In his testimony before a United Nations Security Council Commission of Inquiry investigating the invasion of Seychelles by mercenaries, Martin Dolinschek, a South African intelligence officer stated that Seychelles was believed by South Africa to be a strict marxist regime; South Africa therefore, thought that it would be doing the people of Seychelles a great service by rescuing them from such regime. See Report of the Security Council Commission of Inquiry Established under Resolution 496 (1981), U.N. Doc. S/14905 (March 14, 1982), 19.

38. See generally, A.B. Akinyemi, "The Organization of African Unity and the Concept of Non-Interference in the Internal Affairs of Member States," 46 Brit. Y.B. Int'l L. (1973), 393.

39. U.N. Charter, Article 2(7).

40. See Tunis-Morocco, Nationality Decrees (1923) P.C.I.J., Ser. B., No. 4.

41. For the text of the Declaration, see Doc. US/ICJ/5, 15 Dept. St. Bull., No. 375 (Sept. 8, 1946), 452.

42. See generally J. Carey, U.N. Protection of Civil and Political Rights (1970).

43. See R.J. Vincent, Non-Intervention and International Order (1974), 309.

44. For an examination of violations of human rights as threats to the peace, see: V. Van Dyke, "Violations of Human Rights as Threats to the Peace," in The Search of World Order, (ed. by A. Lepawsky, E.H. Buehng and H.D. Lasswell 1971), 198.

45. U.N. SC. Res. 232, 21 U.N. SCOR, Supp. (Oct.-Dec. 1966), at 169-70, U.N. Doc. S/7621/Rev.1, (Dec. 16, 1966).

46. U.N. G.A. Res. 2307, 22 U.N. GAOR Supp. (No. 16) at 19-20, U.N. Doc. A/6914 (Dec. 13, 1967). The legal significance of the United Nations Resolutions on Rhodesia are examined by: J.C. Fawsett, "Security Council Resolutions on Rhodesia," 41 Brit. Y Int'l L. (1966), 103; M.S. McDougal & W.M. Reisman, "Rhodesia and the United Nations: The Lawfulness of International Concern," 62 Am. J. Int'l L. (1968), 1.

47. See generally, V.P. Nanda, "A Critique of the United Nations Inaction in the Bangledesh Crisis," 49 Denver L.J. (1972), 53; The Events in East Pakistan 1971. A legal study by the Secretariat of the International Commission of Jurists, Geneva 1972. The report states that gross violations of human rights took place and that the United Nations could not act.

48. For the gross violation of Human Rights in Kampuchea under the "Khmers Rouges", see Int'l Commission of Jurists, The Review No. 20 (1978), 6-9; C. Warbrick, "Kampuchea: Representation and Recognition," 30 Int'l & Comp. L.Q. (1981), 234.

49. C.W. Jenks, Law in the World Community (1967), 58.

50. See generally C.G. Fenwick "When is there a threat to the peace? - Rhodesia" 61 Am. J. Int'l L (1967), 753; D. Acheson, "The Arrogance of International Lawyers" 2 Int'l Law. (1968), 591.

51. See W.M. Reisman, "Humanitarian Intervention to Protect the Ibos" in Humanitarian and the United Nations (ed. by R. Lillich (1973), 167 (hereinafter referred to as W.M. Reisman Humanitarian Intervention to Protect the Ibos).

52. Ibid., "Private Armies in a Global War System: Prologue to Decision" in Law and Civil War in the Modern World, (ed. by J.N. Moore (1974), 252, 259.

53. See I. Brownlie, International Law and the Use of Force by States (1963), 340-341.

54. M. Franck & N.S. Rodley, "After Bangladesh: The Humanitarian Intervention by Military Force," 67 Am. J. Int'l L. (1973), 275, 299.

55. See R.B. Lillich, "Intervention to Protect Human Rights," 15 McGill L.J. (1969), 205, 209; W.M. Reisman, Humanitarian Intervention to Protect the Ibos, supra note 51, 168-70.

56. See M.S. McDougal, H. Lasswell & L. Chen, supra note 6, 241.

57. 22 U.N. GAOR, Supp. (No. 6) at 47-48, U.N. Doc. A/6716 (Nov. 17, 1967).

58. U.N, G.A. Res. 2383, 23 U.N. GAOR, Supp. (No. 18) at 58, U.N. Doc. A/7218 (Nov. 7, 1968), Art. 14.

59. U.N. G.A. Res. 2307, 22 U.N. GAOR Supp. (No. 16) at 19-20, U.N. Doc. A/6716 (Dec. 13, 1967).

60. I. Brownlie, "Volunteers and the Law of War and Neutrality," 3 Int'l & Comp. L.Q. (1957), 570, 579.

61. For a detailed examination of these conditions, see: J.P.L. Fonteyne, "The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity Under the Charter," 4 Cal. W. Int'l L.J. (1974), 203, 258-68.

62. For an examination of this duty, see chapter 5 infra.

63. See I. Brownlie, supra note 60.

64. U.N. G.A. Res. 217A (III), U.N. Doc. A/810 (Dec. 10, 1948); 43 Am. J. Int'l L. Supp. (1949), 127.

65. See M. Garcia-Mora, International Responsibilty for Hostile Acts of Private Persons Against Foreign States (1962), 70.

66. See The Report of the Committee of Privy Counsellors Appointed to Inquire in the Recruitment of Mercenaries, Cmnd. 6569 (1976), para. 15.

67. (1925) P.C.I.J., Series B, No. 10, 20.

68. (1932) ibid., Series A/B, No. 44, 24.

69. P.Q. Wright, The Enforcement of International Law Through Municipal Law in U.S. (1961), 5.

CHAPTER V

STATE RESPONSIBILITY FOR MERCENARY ACTIVITIES AGAINST FOREIGN STATES

In this chapter, the issue for consideration is the responsibility of a State towards other subjects of international law, where that State's citizens participate in armed conflicts as mercenaries. Until recently, the conduct of wars was regulated largely by the Hague Conventions of 1899[1] and 1907[2] and the Geneva Conventions of 1949.[3] With respect to the enlistment and recruitment of mercenaries on the territory of a neutral State, Articles 4 and 6 of the 1907 Hague Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land respectively provide:

> Corps of combatants must not be formed nor recruiting agencies opened on the territories of a neutral power to assist the belligerents.
>
> The responsibility of a neutral power is not engaged by the fact of persons crossing the frontier separately to offer their services to one of the belligerents.

Before those provisions are analyzed in detail, the extent to which the traditional law of war as represented by the Hague and Geneva Conventions apply to the contemporary armed conflicts in which mercenaries have been employed will be examined. Since World War II, many of the armed conflicts involving the use of mercenaries have taken

place within States and not between States. These conflicts include Congo/Zaire, Nigeria/Biafra, North Yemen and Angola. The traditional laws of war make a distinction between armed conflicts which take place between States and those conflicts which take place within States. It is the former category of armed conflicts which are subject[4] to Hague and Geneva Conventions and the latter category as non-international armed conflicts are not subject[5] to those Conventions. The traditional rule regulating the relationship between third parties and a State in which there is civil strife is that aid may be extended to a widely recognized incumbent and that no help should be given to the insurgents.[6] A State which assists the rebels through the use of armed force may be accused of an unlawful intervention in the domestic affairs of the State in which the hostilities are carried on.[7] There are at least three situations in which a civil war might be regulated by international law of war. One, if the government of a State resisting the insurrection mounted by rebels were to recognize the belligerency of the rebel faction, then the conflict would be treated as if it were an international one for the purpose of application of the international law of war.[8] The recognition of belligerency by the parent State compels acquiescence in the new order on the part of the third parties.[9] However, few incumbent governments in States experiencing civil strife have been willing to recognize the belligerency of rebel factions.[10] At least

two factors may explain the near absence of recognition of belligerency of rebel factions by incumbent governments. First, under customary international law, there are no clear and generally accepted norms requiring incumbent governments to extend recognition to rebel forces.[11] Second, incumbent governments fear that through their recognition a legal state of war would be established which might enhance the scope and success of the rebels.[12] For example, the assistance which incumbent governments are entitled to receive under the majority view that prior to belligerence foreign States were free to help incumbent governments would stop since after recognition of belligerency neutrality would be enjoined.[13]

The second situation under which a civil war might be governed by international law is where a third State recognizes the belligenrency of the rebel faction. That third State would be subject to the same rights and duties of neutrality as in an international conflict.[14] Recognition of the status of belligerency by a third party implies conforment on the insurrectionists as well as on the established authorities international rights and duties and may transform an internal conflict into a war governed by international law of war.[15] A question for consideration is when are third parties justified in recognizing the belligerence of rebel forces? The conditions which must precede the recognition of belligerency are established by general international law. L. Oppenheim and H. Lauterpacht

list the following conditions:

> [T]he existence of a civil war accompanied by a state of general hostilities; occupation and a measure of orderly administration of a substantial part of national territory by the insurgents; observance of the rules of warfare on the part of the insurgent forces acting under a responsible authority; the practical necessity for third States to define their attitude to a civil war.[16]

In absence of those conditions, recognition of the belligerency of rebel forces by a third party is premature and may amount to intervention.[17] However, lack of a centralized international procedure of recognition means that each nation makes its own appraisal of the facts to see if the requisite conditions exist as far as its own situation is concerned.[18] In appraising the facts, for the purpose of deciding whether or not to recognize the belligerency of rebel factions, third States take into account national interests.[19] Since there appears to be no duty on the part of third parties to recognize the belligerency of rebel factions[20] and subjective considerations taking primacy over objective criteria in providing the basis upon which third parties decide to extend recognition,[21] there are a few instances of recognition of rebel factions by third parties.

The participation of third parties in a civil war may also internationalize the conflict.[22] For example, it has been argued that participation of the United States in the conflict in Vietnam transformed that conflict from a civil strife into an international conflict.[23]

Apart from those circumstances, civil wars have remained outside the realm of international law of war in so far as third parties are concerned. However, Protocol 1 Additional to the Geneva Conventions of 1949[24] seems to have widened the scope of international armed conflicts. Article 1 of the Protocol, adopted by eighty-seven votes to one, with eleven abstentions, mostly from Western countries provide:

> 3. This Protocol, which supplements the Geneva Conventions of 12 August, 1949 for the Protection of War Victims, shall apply in the situations referred to in Article 2 common to those Conventions.
>
> 4. The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in accordance with the Charter of the United Nations.

Article 1(4) of Protocol I employs the term "self-determination" without defining it. As already indicated there is uncertainty as to the exact scope of the principle of self-determination. However, by incorporating the Declaration on the Principles of International Law Concerning Friendly Relations and Co-operation Among States,[25] article 1(4) of Protocol I seems to restrict the meaning of the term "self-determination" to the way it has been used by the United Nations General Assembly. Under this mode of interpretation, in addition to interstate conflicts, only

armed conflicts waged by national liberation movements against colonial, alien or racist regimes seem to be classified as international conflicts. Excluded from the Protection of Protocol 1 are wars fought within States but not necessarily against colonial, alien or racist regimes, even when the rebel forces have achieved a substantial measure of success. The latter would be non-international armed conflicts. The criterion embodied in article 1(4) for classifying a conflict as international or non-international has been characterized as arbitrary. According to Kalshoven, "It is this element of arbitrariness in selecting one particular politically determined, category of non-interstate armed conflicts which to my mind is most in conflict with proven principles of legislation."[26] The exclusion of civil wars not fought against colonial, alien or racist regimes from the application of Protocol I tends to diminish the importance of article 1(4). Wars fought against colonial or racist regimes as contemplated by article 1(4) appear to be of a temporary nature. This is because reference to "colonial domination" and "racist regimes" in article 1(4) were directed essentially at South Africa, South West Africa/ Namibia, Rhodesia/Zimbabwe and the former Portuguese Colonies.[27] At the moment only the struggle against South Africa and South West Africa/Namibia could be characterized as colonial or racist, within the meaning of article 1(4).[28] Suggestions have been made that article 1(4) should have been broader so as to include wars

fought for self-determination though not necessarily against colonial, alien or racist regimes.[29] Such a suggestion would probably be resisted by many States on the ground that it would be used against them.

A relevant question for consideration is whether article 1(4) of Protocol I can be said to represent customary international law. The answer to this question depends on the extent to which Protocol I becomes of general application. Only those States which ratify Protocol I are bound by its provisions.[30] At the moment, Protocol I has been ratified by very few States and none of these States is a major military power. If few States ratify Protocol I and in particular if the West European countries do not become parties to the Protocol, then, it would be difficult to conclude that article 1(4) is of general application. Professor Baxter summarizes the likely consequence:

> 1. New Protocols to which preponderantly developing countries and Eastern European countries are parties will be of little utility. The existing humanitarian law has drawn much of whatever strength it has from the fact that there is almost universal participation in the Geneva Conventions of 1949. If the United States and a number of NATO powers and other countries do not become parties to the new Protocols, there is the possibility that many international armed conflicts will not be governed by the Protocols because only one of the two contending States is a party to the new agreements. It is important that the major military powers should find the new agreements acceptable.
>
> 2. If some but not all parties to the Geneva Conventions of 1949 become parties to the new Protocols, the community of Geneva

> Convention States will itself be weakened by the controversy and by the fact that different groups of States are bound by different treaty obligations. There is thus a danger not only of failure to achieve new law but also of weakening what existing law there is.[31]

A. The Organization of hostile military expeditions

In situations where mercenaries organise themselves in a form of military expedition for action against other States, it is commonly agreed that a State within which such organization takes place and which is not a party to an armed conflict, is under a duty to prevent the formation of the organization on its territory or if it has already been formed there is a duty to prevent it from leaving the country.[32] Failure to prevent the formation of a hostile military expedition seems to engage the international responsibility of a State.[33] In case of armed conflicts regulated by international law of war the duty of prevention imposed upon a neutral State is expressed in Article 4 of 1907 Hague Convention. However, this duty of prevention has not always been observed. One possible explanation, among others, is the lack of consensus as to what amounts to "organization" of a hostile military expedition. While no definite number of men may be specified as necessary to the formation of an expedition, it cannot be constituted by one or two men no matter what their intention.[34] States, in denying responsibility in cases

where persons within their jurisdictions have crossed the frontier to participate in armed conflicts as mercenaries or volunteers, have argued that there was no "organization" of a military expedition. Therefore, that they are not responsible. Mention may be made of the denial by Germany and Italy that there was organization of military expeditions in case of the German and Italian units, with arms, which departed for Spain during the Civil War.[35] In response to the Chinese denial of responsibility for the participation of its citizens as volunteers in the Korean War, one commentator considers that the movement of such a large army could not proceed without such organization as would engage the neutral's responsibility.[36]

B. Individuals Crossing the Frontier to Enlist as Mercenaries

As already indicated Article 6 of the Hague Convention V of 1907 provides that "a neutral power does not incur responsibility by the fact that persons cross the frontier singly in order to place themselves at the service of one of the belligerents." This means that there is no duty on a State to prevent the participation by its subjects in an armed conflict, as long as they cross the frontier as individual and not organized into a military expedition. The defect in the customary international law of armed conflict is apparent. Professor John B. Moore once said:

> No act, for example, could be more clearly unneutral than that of a citizen of a neutral country in going abroad and enlisting in the military or naval service of a belligerent; and yet this is an act which a neutral government is not obliged to prevent and neutral governments do not in fact undertake to prevent it.[37]

The rationale for the law of neutrality in not obliging a neutral State to prevent its citizens in enlisting in the armed forces of a belligerent is offered by Professor Garcia-Mora. He states that "the cardinal distinction embodied in these two articles reflect the nineteenth century laissez faire philosophy whereby a line of demarcation was drawn between the sphere of the government and that of the individual, thus implicitly assuming that purely private actions of the individual could not be imputed to the State."[38] It was assumed that an individual person crossing the frontier to enlist as a mercenary or a volunteer was not a unit capable of immediate hostilities.[39] The recent role of mercenaries in many parts of the world indicate that there is need for a review of the existing customary international law.

C. The Recruitment of Mercenaries

Article 4 of the Hague Convention of 1907 imposes a duty not to permit recruiting offices to be opened on the territory of a neutral country. But, like the duty of

preventing the organization of hostile military expeditions, the duty of preventing recruiting offices from being opened has not been observed by neutral States. One of the reasons for lack of observance of this duty is that although it is a duty founded on the law of neutrality, the chief consideration for its observance is avoidance of usurpation of sovereignty rather than strict fulfillment of neutral duties.[40] In fact, Vattel states the duty solely in terms of avoidance of usurpation of sovereignty. He says:

> As the right of levying soldiers belongs solely to the nation or the sovereign, no person must attempt to enlist soldiers in a foreign country, without the sovereign's permission, and, in general, whoever entices away the subjects of another State, violates one of the most sacred rights of the prince and the nation. This crime is distinguished by the name of kidnapping, or man stealing, and it is punished by the utmost severity in every well regulated State. Foreign recruiters are hanged without mercy, and with great justice. It is not presumed that their sovereign has ordered them to commit a crime, and, even supposing that they had received such an order, they ought not to have obeyed it, their sovereign having no right to command what is contrary to the law of nature. If it appear that they acted by order, such a proceeding in a foreign sovereign is justly considered as an injury, and is sufficient causes for declaring war against him, unless he makes suitable reparation.[41]

The effect of adopting such an attitude by States which are faced with the problem of recruitment of their nationals for service as mercenaries means that those States will only protest when they view the recruitment as

an affront to their sovereignty. Since, in many cases, the recruitment of individuals for service as mercenaries has taken place in those States whose governments are sympathetic to the causes for which the individuals have been called to defend protest against recruitment has been lacking.

The second weakness in the customary international law imposing a duty on States to prevent the recruitment of individuals as mercenaries or volunteers is the distinction made between those enlisting before leaving national territory and those leaving with intent to enlist. It has been interpreted by States that they are bound to prevent only those who enlist before leaving and not the latter category.[42] This opens the way for individuals to leave without enlisting but with intent to do so.

D. Fault as a Basis of State Responsibility

In instances where a State is held responsible for the action of its citizens as mercenaries or volunteers liability is not absolute but based on the principle of fault. Support for this view is found in arbitral and judicial decisions and among publicists.

In the arbitration of the Albama Claims[43] the issue was the international liability of Great Britain for alleged failure to prevent the building and equipping in its ports of naval expeditions in the service of the

Conference State in the American Civil War. Both the United States and Great Britain agreed that the duty imposed on Great Britain as a neutral was to use or exercise "due diligence" in its own ports and waters, and, as to all persons within its jurisdiction, to prevent any violation of the obligations and duties. However, there was no agreement on the meaning of the phrase "due diligence". Great Britain contended that due diligence "signifies that measure of care which government is under an obligation to use for a given purpose." For their part, the United States suggested that it must be a diligence "proportional to the magnitude of the subject, and to the dignity and strength of the power which is to exercise it." The tribunal held that it must be a diligence exercised by neutrals "in exact proportion to the risks to which either of the belligerents may be exposed, from a failure to fulfill the obligations of neutrality on their part."[44]

Therefore, the responsibility of the State in cases of military or naval expeditions departing from its territory is to be determined by the degree of "due diligence" that it has shown in discharging its international obligations.[45] Because of the criticisms of the above interpretation, the Thirteenth Convention of the Hague Conference of 1907[46] replaces the phrase "to use due diligence" with the phrase that a State must use "the means at its disposal."

The Albans Claims[47] also demonstrates that the international responsibility of a neutral is engaged only if it is at fault. In this case the United States sought to hold the British Government responsible for the attack in 1864 upon the town of St. Albans, Vermont, by a small party of persons who, acting in the interests of the Conference States, prepared their expeditions in Canadian territory. The arbitral tribunal unanimously disallowed the claims on the ground that the expedition was conducted with such secrecy that no care or diligence which one nation might reasonably require of another would have been sufficient to discover it.

The Corfu Channel Case between Great Britain and Albania, involving the international responsibility of Albania for mines found within its territorial waters, incorporates the doctrine of no responsibility without fault. The International Court of Justice said:

> It is clear that knowledge of the mine-laying cannot be imputed to the Albanian Government by reason merely of the fact that a minefield discovered in Albanian territorial waters caused the explosions of which the British warships were the victims .... It cannot be concluded from the mere fact of control exercised by a State over its territory and waters that the State necessarily knew, or ought to have known of any unlawful act perpetrated therein, nor yet that it necessarily knew or should have known, the authors. This fact, by itself and apart from other circumstances, neither involves prima facie responsibility nor shifts the burden of proof.[48]

The majority of writers also base State responsibility on fault. Grotius, the earliest writer to argue that responsibility cannot exist without fault said:

> A civil community, first as any other community, is not bound by the act, apart from some act or neglect of its own. ...[49]

Emerich de Vattel, while accepting the idea that there is a general duty of the State not to permit its subjects to offend other nations, asserts that fault must precede responsibility. According to Vattel, "it is impossible for the best governed State or for the most watchful and strict sovereign to regulate at will all the facts of their subjects and to hold them on every occasion to the most exact obedience ..."[50]

Among the contemporary writers on international law, Professor Hans Kelsen[51] maintains the view that the liability of a State for acts of private persons arises in situations where the State has clearly been negligent either in preventing the commission of the act or in punishing the guilty party after the offence has been committed.

There are many difficulties with a theory of State responsibility which is based on fault. First, it reinforces the out-moded idea that duties of a State in maintaining international peace are different from that of its subjects. Secondly, the effect of requiring proof of fault before a State is held responsible is to make it very

difficult for a State to be blamed for the actions of its subjects. Consequently, the theory enhances the chances of States to use private individuals as instruments of government policy.

Given the control that modern State exercise over their subjects, a possible approach is to hold States responsible for the actions of individuals without requiring proof of due diligence. Elaborating on this point Professor C.C. Hyde said:

> The underlying principle would seem to be that what a State claims the right exclusively to control, such as its own territory, it must possess the power and accept the obligation to endeavour so to control as to prevent occurrences therein from becoming by any process the immediate cause of such injury to a foreign State as the latter, in consequence of the propriety of its own conduct, should not be subjected to at the hands of a neighbor.[52]

In cases where persons within a State's jurisdiction commit offences against foreign States, it is not, therefore, unfair to hold that that State should be responsible in absence of fault. This leads to consideration of the principle of absolute or strict responsibility.

E. Absolute or Strict Responsibility

Some writers have attempted to eliminate fault and to substitute therefore an objective responsibility on the part of the State. Accepting the view that a Sate may

violate international law by failing to restrain the act of the individual Tripel,[53] for example, argues that there is no question of fault. According to him, the State is responsible for its own acts.

Anzilloti's[54] exposition is also a theory of State responsibility based upon an objective violation of an international obligation. He states that when individuals engage in hostile acts against foreign States, the State in whose jurisdiction the act takes place commits an international delinquency regardless of whether it ratifies or approves them directly or tacitly by the negligent failure to prevent them.[55]

However, focus of attention is on Article 15 of a Draft Convention submitted by Nigeria to the United Nations during its thirty-fifth session and which is one of the draft conventions being considered by the Ad Hoc Committee on the Drafting of an International Convention Against the Recruitment, Use and Financing of Mercenaries.[56] The article if accepted would establish the right of the injured State to claim reparation against any State guilty of an act or omission which constitutes an offence as outlined in Article 2.[57] It has been observed that the effect of Article 15(2) would be to encourage States both to aid in the enforcement of the law against mercenaries and to take measures aimed at the prevention of mercenary activity within their jurisdiction.[58] It has also been said that such an expansion of State responsibility would strengthen

the international effectiveness of the anti-mercenary laws.[59]

Many States, notably from the West, have objected to the degree of responsibility that Article 15 proposes to place on States whose nationals are found to have participated in mercenary activities abroad.[60] At least two reasons have been advanced in support of the objections. First, that it would be unrealistic to expect a State to prevent its nationals from engaging in mercenary acts overseas.[61] Secondly, that the power of States to control such activities on foreign soil would be extremely limited.[62]

If States, whose nationals are found to be involved in mercenary activities abroad, were required to make reparation to victim parties, would fill a gap in the existing customary international law of State responsibility. Although a duty to prevent the organization of a hostile military expedition and the recruitment of individuals as mercenaries or volunteers on the territory of neutral States has been recognised under customary international law, it has not always been clear that a State which is in breach of the said duty is bound to make reparation. Acts which a State would be under a duty to prevent under the draft convention submitted by Nigéria are much wider than what customary international law ever admitted.[63] Individuals leaving to enlist as mercenaries, the advertising and training of mercenaries are but a few examples of the acts which are not prohibited by customary interna-

tional law, but which would be prevented if the Nigerian draft Convention is adopted. However, when Article 15, paragraph 2 of the Draft Convention is read together with paragraph 3 of the same article, then, what appears as an attempt to broaden the responsibilty of States ceases. A claim for damages or reparation by an aggrieved State would only be considered when attempts to secure criminal prosecution of the individuals have failed.

F. Criminal Responsibility of States

Even more touchy than the proposal that States whose nationals have been engaged in mercenary activities abroad, should make reparation to victim States, is the suggestion that States can be accused of the crime of being a mercenary.[64]

There is controversy in the theory of international law whether States can be the subject of criminal liability. Some writers hold the view that international law insofar as it seeks to regulate the conduct of States is incompatible with the structure of the law of nations. Oppenheim and Sir Arnold McNair, for example, stated:

> The nature of the Law of Nations as a law between, not above, sovereign States excludes the possibility of punishing a State for an international delinquency and of considering the latter in the light of a crime ... The only legal consequence of an international delinquency that are possible under existing circumstancaes are such as to create a reparation of the moral and material wrong done.[65]

In a Sub-committee meeting of the United Nations War Crimes Commission, Sir Arnold McNair[66] again declared that the State cannot be the subject of criminal liability and that this position had not been altered by the Pact of Paris. In rejecting the possibility of States being subjected to criminal penalties, Sir John Fisher Williams[67] argues that the punishment or attempted punishment of a State is itself an offence against international order. In this respect, Sir John Fisher Williams seems to be supported by Judge Anzilotti in his dissenting opinion in the case of the Diversion of Water from the Meuse, between Belgium and Holland, decided in June 1937. The Belgian application asked the Court to enjoin Belgium "to discontinue any supplying of water held to be contrary to the [relevant] Treaty, and to refrain from creating new facilities for supplying water contrary to the Treaty." Judge Anzilotti pointed out that the word 'enjoin' "is not entirely appropriate in international proceedings".[68] It has been observed that the use of the word "enjoin" was objected to because it "savoured of punishment - a possibility which many writers reject as almost blasphemous".[69] Pieter J. Drost advances two reasons for objecting to State criminality: first, the impossibility of establishing the guilt of the State, and, second, the impossibility of punishing a State. He argues:

> The criminality of the State ... if it is to have any real significance, purpose and consequence at all, must lead to the

> punishability of the State .... Whilst the punishment of such body of men in turn must start from the classic precept of penal justice: actus non facit reum, nisi mens sit rea. The question is, therefore, whether the State can have a guilty mind or, if not really but only fictionally so, whether such a guilty mind could under certain circumstances be legally imputed to such group of human beings. Except in the case of certain statutory offences criminal punishment must be based on personal guilt ... but the law should not attribute responsibility based on guilt where no guilt can be possibly present, i.e. in the mental and moral vacuum of the legal person.[70]

He further argues:

> The criminality of collective bodies, in particular of the State, makes sense only if it leads to the punishability of the person moralis, inept expression for the juristic person who ex ipsa natura cannot act morally, illegally, or criminally. However, the punishability of the legal person disappears as a practical proposition when one visualizes the glaring impracticability of inflicting capital punishment or even of imprisoning thousands of culprits found collectively guilty and liable to punishment for such crimes as aggression or genocide.[71]

Drost concludes by stating that "State responsibility has meaning, and consequences only in relation to State punishability and since the latter cannot be properly conceived nor practically put into effect, the former does not serve a useful purpose at bar."[72] There are also practical problems of prosecuting States. Sovereign States cannot be subjected to a foreign jurisdiction without their consent. The Permanent Court of International Justice stated in the Eastern Carelia case:

> It is well-established in international law that no State can, without its consent, be compelled to submit its disputes with other States either to mediation or to arbitration or to any other kind of pacific settlement.[73]

In his Fifth Report on State Responsibility,[74] Professor R. Ago, Special Rapporteur of the International Law Commission, after a detailed examination of international practice, judicial decisions and the writings of publicists, took the view that:

> General international law provides for two different regions of responsibility. One applies in the case of a breach by the State of an obligation whose respect is of fundamental importance to the international community as a whole, for example, the obligation not to commit genocide. The other régime applies in cases where a State merely fails to respect an obligation of less and less general importance. On this basis, two different categories of internationally wrongful acts of the State may be distinguished: a more limited category comprising particularly serious offences, generally known as international "crimes" and a much broader category covering a whole range of less serious offences, generally known as "simple breaches."[75]

On the basis of this view he proposed a draft article to the International Law Commission on State responsibility.[76] If one accepts the proposals of Professor R. Ago and the International Law Commission, it may be possible for a convention to provide that a State can be guilty of a crime. Ever since the use of the term law was accepted to describe the rules regulating relations between States,[77] notwithstanding the absence of a number of characteristics commonly ascribed to national laws like central legislative

body, compulsory adjudication, capital punishment, and prisons, it is no longer inconceivable to find other legal terms used in national legal systems to be applied in international law. What is required when considering the criminal responsibility of States is to accept some modification with respect to the nature of attributing guilt to the State and of punishing it.[78] It cannot be denied that a violation of rules of international law which threaten the fundamental interests of the community of nations like genocide, slavery and wars of aggression attract more condemnation than violations of other rules of international law. Consequently, that there is need for a more strict observance of the former category of rules of international law than the latter category. To provide that a State can be guilty of a particular crime is, if nothing else, to help to identify those rules which threaten the fundamental interest of the community of nations from other rules. The characterization of an act as criminal is itself a potentially effective technique for the control of deviant behaviour.[79]

However, care must be taken before suggesting that a State may be guilty of the crime of mercenarism. While failure of a State to prevent the organization and recruitment of mercenaries may be an international wrong, it does not appear to be so important that its violation would threaten the fundamental interests of the community of nations, to qualify as an international crime. A number of

State are also opposed to the idea of linking individual and State responsibility in a convention which would regulate mercenary activities.[80] Therefore, providing for the possible criminal responsiblity of States in a convention on mercenaries may lead to its non-ratification by a number of influential States, which would in turn reduce its effectiveness.

Section 3: National Laws "Regulating" Mercenary Activities

A. Great Britain

1. The Foreign Enlistment Act, 1870[81]

The current legislation which prohibits British subjects to serve in Foreign Service or to recruit others for such service is the Foreign Enlistment Act passed in 1870. According to this statute, it is an offence to enlist for a foreign State or induce another to do so. Section 4 reads:

> If any person, without the licence of Her Majesty, being a British subject, within or without Her Majesty's dominions, accepts or agrees to accept any commission or engagement in the military or naval service of any foreign State at war with any foreign State at peace with Her Majesty, and in this Act referred to as a friendly State or whether a British subject or not within Her Majesty's dominions, induces any other person to accept or agree to accept any commission or engagement in the military or naval service of any foreign State as aforesaid ....

It is also an offence for those persons who leave Britain or any other of Her Majesty's dominions, with the intention of enlisting for a foreign State. Section 5 reads:

> If any person, without the license of Her Majesty being a British subject, quits or goes on board any ship with a view of quitting Her Majesty's dominion, with intent to accept any commission or engagement in the military or naval service of any foreign State at war with a friendly State, or, whether a British subject or within Her Majesty's dominions, induces any person to quit or to go on a view of quitting Her Majesty's dominions with the like intent ....

A reading of those two sections indicates that there is no specific mention of the term "mercenary". It is only by construing the phrase "any person" to include mercenaries that it can be said that the Foreign Enlistment Act, 1870 prohibits British subjects from becoming mercenaries or that recruitment of mercenaries is prohibited.

The offence committed under the Act is punishable by fine and/or imprisonment, to a maximum of two years.

Because the Act talks of service against "a foreign State" at peace with Her Majesty, a question for consideration is whether service against a war of national self-determination or in a civil war is covered by the Act. For a possible answer to this question attention is focused on Section 30, the interpretation section of the Act. It provides:

> "Foreign State" includes any foreign prince, colony, province, or part of any province or people, or anyperson or persons exercising or assuming to exercise the powers of government in or over any foreign country, colony, province, or part of any province or people.

The above definition is very broad. For example, it would seem to include rebels as a foreign State at peace with Her Majesty. When Madagascar then a protectorate was engaged in hostilities against France as the protecting State, the Law Officers pointed out that it was a friendly foreign State, so that "when a state of hostilities exists between two such States, and they are recognized by Her Majesty's Government as belligerents, the Foreign Enlistment would apply to either."[82]

With respect to the Spanish Civil War, Lord McNair[83] concluded that the definition (in section 30) of "foreign State" covered both the Spanish Government and Franco's Government as being "foreign States". On January 10, 1937, the Foreign Office issued a public warning calling 'attention to the fact that the Foreign Enlistment Act, 1870, and in particular sections 4 and 5, are applicable in the case of the present conflict in Spain so that it was an offence for a British subject to serve in any of the forces of either party or to leave the King's dominions for this purpose or for any person in the United Kingdom to induce British subjects to do either of these things."[84] Notwithstanding that warning, British soldiers left for service in Spain and no one was prosecuted.[85]

A further question is whether the application of the Foreign Enlistment Act, 1870, to civil wars is dependent upon the recognition by the Governmet of the status of belligerency. There appears to be no binding interpretation, in the sense of a decision of the Court, of this issue. On the one hand, Lord McNair observes:

> (c) I can see nothing in the relevant sections of the statute which requires a Court to hold that a civil war cannot be a war within the meaning of sections 4 and 5 unless His Majesty has accorded recognition of belligerency; that is an internatinal act, having, it is true, certain domestic repercussions, but I can see no reason why it should be essential before an English municipal court can hold that a State of war exists; from the point of view of the mischief aimed at by the statute it seems to me quite as objectionable that British subjects should be participating in a foreign civil war in which we have not granted recognition of belligerency as in one in which we have.
>
> (d) It is simply a matter of the construction of the world 'war' occurring in a statute; that statute expressly includes civil strife within its aim, as appears from the definition of 'foreign State, ... and I cannot see any justification for displacing the plain meaning by implying after it in cases of civil war the expression 'in which His Majesty has granted recognition of belligerency to a rebel government.'[86]

The opinion of the Law Officers seems to be that rebels would be regarded as a foreign friendly State even though there had been no recognition of insurgency or belligerency. For example, in the case of a British ship intended to be used by unrecognised Cuban Insurgents against the Spanish Government, the Law Officers doubted if

the ship "fitted out as a privateer and to be used in the service of an unrecognised nationality could be dealt with as a piratical vessel".[87]

However, the Committed appointed to inquire into the recruitment of merceanries in the United Kingdom, while accepting the interpretation that the definition of "foreign State" in Section 30 of the Act is broad enough to make it an offence to enlist in the armed forces raised by rival governments in a civil war regardless of any recognition being accorded to the rival factions, concludes that this part of the Act is unsuitable to continue to be used as a penal statute. The Committee suggests that recognition should be made a prerequisite on these grounds:

> But the description of the offences requires that the persons on whose behalf the force is raised should also constitute an entity possessed of characteristics which in international law entitle it to recognition as being "at war" with another State and so enable it to exercise belligerent rights vis-à-vis neutral States. As a minimum this requires not only that the persons controlling the force should be claimant to be entitled to act as a independent sovereign government but that they should also have been actually exercising effectively and with some degree of permanence exclusive governmental powers over an identifiable part of the territory to which they lay claim; and their opponents must either be a government which is recognised de jure by Her Majesty's Government or must also satisfy the same criteria a de facto government. In a prosecution for illegal enlistment or recruitment under the Act would thus be necessary to prove that Her Majesty's Government had recognized the persons on whose behalf the armed force was raised and the opponents against whom they were fighting as being de facto or de jure governments.[88]

The Foreign Enlistment Act, 1870, was not applied to control the recruitment of mercenaries for the Civil War in Nigeria. The official attitude of the British Government was that it was totally opposed to any British subjects being recruited to fight for either side in Nigeria. The reason for refusing to prosecute was that the Foreign Enlistment Act did not apply to Commonwealth countries.[89] This view is supported by the Diplock Report:

> No country that is a member of the Commonwealth, even though it has adopted a republican constitution, is a "foreign State" within the meaning of the Act ... Enlistment or recruitment for mercenary service on either side in an international conflict in which a Commonwealth country was a belligerent or on either side in any internal conflict which took place within the territory of a Commonwealth country would not be an offence under the Act.[90]

However, it was held in R. v. Jameson[91] that the Act applies to all British subjects wherever they may be. In this case Jameson, a British subject, was accused of assisting to prepare a military expedition to proceed against the South African Republic without the license of Her Majesty. The Court held that any British subject who assists such preparation will be guilty of an offence. Jameson was sentenced to fifteen months in jail.

The application of the Foreign Enlistment Act, 1870, was again sought with regard to the recruitment of British mercenaries for the Angolan civil war but the government did not apply the Act. The reason for the

refusal to enforce the law was that the Act was of doubtful effect. In response to demands for the Act to be enforced, Prime Minister Wilson made a statement below to the House of Common on February 10, 1976:

> There is some doubt about the interpretation of that Act. It was last involved, I think, in the case of the Jameson raid in the last century. Whether or not it is applicable here is a legal matter into which it would not be appropriate for me to enter. From the advice one gets from those most highly competent in the matter of the application of the Foreign Englishment Act, 1870 to a situation such as this, it is very difficult to get a clear view. The Act itself is now, I think, very much outdated in some of its particulars. One has only to read what it says about principalities, powers, peshwas and all the rest of it. It is a little difficult to advise the House whether on the advice given to me, the Act can be invoked in this particular case.[92]

The Prime Minister subsequently appointed the Diplock Committee with the following terms of reference:

> In the light of recent events, to consider whether sufficient control exists over the recruitment of United Kingdom citizens for service as mercenaries; to consider the need for legislation, including possible amendment of the Foreign Enlistment Act; and to make recommendations.[93]

Because the report of the Committee is likely to influence future government policies on the question of enlistment of mercenaries it merits a more detailed examination.

2. The Diplock Report[94]

First, the Diplock Report reinforced the Government's view that absence of prosecution under the Act was due to the "difficulties of proving to the satisfaction of a criminal court what a particular individual had done while he was abroad" and "the omissions and obscurities resulting from the inadequacy of the language of the Act."[95] In the absence of an authoritative interpretation of the Act the above view is difficult to arrive at.

Secondly, the Diplock Report recommended that the statutory offence of illegal enlistment should be repealed and that service as a mercenary should not be outlawed. The Committee advances many reasons for its suggestion. One of the reasons is that "it is not practicable just to try to define an offence of enlisting as a mercenary in such a way that guilt would depend upon proof by the prosecution of a particular motive as actuating the accused to do so."[96] It has already been agreed, as the Report observes, that a definition of the word "mercenary" which is based on the motive of the participant is impracticable. But nowhere in the Foreign Enlistment Act, 1870, is the word "mercenary" used. The Act was enacted to prevent the enlistmnet of persons in foreign armed forces in any capacity. The characterization of any persons who takes part in foreign armed conflicts as mercenaries appears not to be a necessary condition before the Act can be applied.

To the extent that the Act avoids the problem of defining the word "mercenary" and by prohibiting the enlistment and recruitment of persons to serve in foreign armed forces in any capacity, the Act is probably capable of dealing with the kinds of situation in which mercenary forces have been involved in the last thirty years.

The Diplock Report correctly states that the principal public interest which may be harmed by the presence of United Kingdom citizens serving as mercenaries "is the maintenance of good international relations between the United Kingdom and other States."[97] However, the Report recommends against making service as a mercenary a statutory offence. The reason, the Committee advances, is that it cannot be justified on grounds of public interest "to impose a general prohibition on United Kingdom citizens from serving in some capacity or another (e.g. as instructor or technician) in the armed forces of a friendly State at a time when there are no hostilities in which that force is engaged."[98] The basis upon which the Committee could come to this conclusion is difficult to find. The Committee's terms of reference as already mentioned were to consider whether sufficient control exists over the recruitment of United Kingdom citizens for service as mercenaries "in light of the recent events." The recent events as interpreted by the Committee were "the recruitment in the United Kingdom of some 160 men to serve with or in support of the armed forces of FNLA in Angola in their struggle

against the MPLA."[99] In other words, it is the involvement of United Kingdom citizens as mercenaries in armed conflicts like the Angolan Civil War that was the relevant issue for consideration by the Committee. In absence of internal disorders military assistance may be provided to a widely recognized government.[100]

In conclusion, the Diplock Report recommended that any fresh penal legislation should be directed against recruitment of mercenaries in the United Kingdom. The prohibited acts should also cover advertisements of mercenaries.

B. The United States of America

In the United States of America, the first legislation concerned with the enlistment of her citizens in the army of another country was enacted in 1794. Section 3 provides:

> Every citizen of the United States who, within the territory of jurisdiction thereof, accepts and exercises a commission to serve a foreign prince, state, colony, district or people, in war, by land or by sea, against any prince, state, colony or people, with whom the United States are at peace, shall be guilty of a high misdemeanor.[101]

The immediate objective of the legislation was to prevent American citizens to enlist in the French army during the War of 1793. The United States felt that a neutral State had a duty to prevent its subjects from enlisting in the service of a belligerent.[102] In fulfill-

ing this object the President made a proclamation of April 22, 1793.[103] This proclamation was followed by another one of March 24, 1794.[104] Prosecution under these proclamations was unsuccessful in absence of a specific statute. This explains the passage of the first neutrality Act, already mentioned, which specified crimes against neutrality and fixed penalties.

In 1974, one Isaac Williams was convicted for accepting a commission under the French Republic and under its authority committing acts of hostility against Great Britain. The defendant's plea that he had expatriated himself was overruled.[105] The principles of neutrality are still the basis of the current legislation. Section 959 says:

> (a) Whoever, within the United States, enlists or enters himself, or hires or retains another to enlist or enter himself or to go beyond the jurisdiction of the United States with intent ot be enlisted or entered in the service of any foreign prince, state, colony, district or people as a soldier or as a marine or seaman on board any vessel of war, letter of marque, or privateer, shall be fined not more than $1,000 or imprisoned not more than three years, or both.[106]

The law forbids anyone in the United States, regardless of nationality from recruiting or enlisting or leaving the United States to serve "any foreign prince, state, colony, district or people." There is no requirement that the foreign State be involved in an armed conflict. There are, however, a number of exceptions. First,

citizens of the United States may enlist in the Army of an ally of the United States in the time of war.[107] Secondly, citizens of foreign States transiently in the United States, may also enlist.[108] Thirdly, enlistment in the service of a foreign force or the hiring of others to do such act must take place within the territory of the United States. It has been held that the section or provi-sion does not forbid leaving the country with intent to enlist abroad, either individually[109] or in parties.[110] It is not clear whether advertising for mercenaries is covered by the law of the United States. Burmerster[111] is of the opinion that a mere advertisement is not proscribed. His authority for the opinion is the case of Gayon v. McCarthy.[112] This case concerns the recruitment of a sailor in the force raised by Felix Diaz against the government of Mexico.

On the other hand, Professor L.C. Green[113] agrees that the advertising for and recruitment of mercenaries to serve in foreign places is prohibited by the law of the United States. His view is based upon section 960 of the Neutrality Act which reads:

> Whoever within the United States, knowingly begins or sets on foot or provides or prepares a means for or furnishes the money for, or takes part in any military or naval expedition or enterprise to be carried on from thence against the territory or dominion of any foreign prince or state, or of any colony, district, or people with whom the United States is at peace.

One difficulty in prosecuting those who advertise for mercenaries is the fine legal line drawn between actually recruiting United States Nationals to serve as mercenaries and merely providing information to the public about jobs opportunities in other countries.[114] While the former is contrary to the law, the latter activity is not. Many organizations which advertise for persons to serve as mercenaries emphasize in their advertisements that they only offer information and do not recruit.[115]

Advertising for mercenaries does not raise the issue of criminality of those who advertise only, but it is also an important source of evidence for the purpose of identifying those who are recruited. Given the involvement of U.S. citizens in mercenary activities in the Third World one would expect to find many prosecutions.[116] However, as in Great Britain, there are very few prosecutions. But the attitude of the United States Government, unlike that of the British Government is not that the law relating to the recruitment of persons as mercenaries is inadequate. The official position of the United States Government in explaining refusal to prosecute has been that there is no evidence. On October 9, 1975, Congressman Donald Fraser made a statement in the Fourth Committee of the United Nations General Assembly. Among other things, he said:

> My government does not approve of participation by American citizens in the forces of Ian Smith regime. Our laws provide that any citizen enlisting in the armed forces

> of another country runs the risk of losing his U.S. citizenship. In addition, he could be subjected to criminal prosecutions under U.S. laws which provide fines and prison terms for those found guilty. If there is any specific evidence that Americans are serving in military forces under Ian Smith, my government wishes to be aware of it in detail in order that appropriate legal action may be considered under our laws.[117]

During a United Nations Security Council debate on the armed attack on Benin, by mercenaries, the representative of the United States said that his country opposed the use of mercenaries to intervene in the internal affairs of other countries and was committed to enforcement of its laws concerning recruitment of United States citizens as mercenaries.[118]

The question is whether evidence of United States citizens participating in armed conflicts as mercenaries, is lacking. There are at least six magazines published in the United States which carry advertisement offering information about opportunities in foreign military forces.[119] As a result of those advertisements persons have offered their services.[120] Prosecutions have been undertaken when circumstances made such action particularly advantageous to the United States policy goals.[121] For example, the United States Government has recently prosecuted and secured convictions of several American citizens who helped to finance and organize an invasion of the Island of the Dominica in order to overthrow the Government of Prime Minister Mary Eugenia Charles and to replace it with another headed by

former Prime Minister Patrick John.[122]

The Neutrality Act provides for the imposition of a fine or imprisonment on being convicted of serving in a foreign force. In addition, the convicted person may lose his citizenship. The Immigration and Nationality Act of 1952 provides for the loss of citizenship by any U.S. national, whether by birth of naturalization, who enters or serves in the armed forces of a foreign State without the prior written authorization of the Secretary of State and Secretary of Defence. The possible loss of citizenship would probably have a deterrent effect on persons intending to join foreign forces. However, the competence of Congress to take away a person's citizenship by legislation has been successfully challenged. In U.S. ex rel. Marks v. Esperdy[123] the Supreme Court held that Marks had abandoned his citizenship. Herman F. Marks was a United States citizen, born in Milwaukee. He went to Cuba in 1958 to joint Fidel Castro in the Sierra Maestra. After the victory he continued to serve as a captain, in charge of La Cabana, the military prison in Havana. After disagreements, he returned to the United States in July 1960 and was arrested and charged with unlawfully attempting to enter the United States as an illegal immigrant. It was alleged that he was alien, who had lost his citizenship under section 1481, having served in a foreign force. The Supreme Court held that he had voluntarily joined up with the revolutionary forces and thereby chosen to abandon his

citizenship.

In Afroyim v. Rusk,[124] the Supreme Court probably overturning Marks v. Esperdy, held that there must be evidence that the offender had voluntarily abandoned his citizenship. Afroyim was Polish-born, a naturalized citizen of the United States, who had gone to Israel and voted in elections for the Knesset. It was held by a bare majority of five judges to four that that act was not of itself sufficient unequivocal evidence of an intention to abandon United States citizenship. In this case, the act which infringed the Code was not serving in a foreign army, but voting in a foreign election. However, the decision is said to be of general application.[125]

C. France

The French Penal Code prohibits the recruitment of soldiers on behalf of a foreign power. Article 85 of the Penal Code provides:

> Whoever in French territory in time of peace shall recruit soldiers on behalf of a foreign power, shall be punished by imprisonment of from one to five years and a fine of 3,000 to 30,000 francs.[126]

The interpretation of the above provision is that the crime is committed by anyone, French or foreign, who on French territory in time of peace recruits civilians or soldiers for a foreign force.[127]

Notwithstanding the participation of French soldiers in various civil wars, no prosecution seems to have been undertaken under the above law.[128] Whenever the Government felt compelled to control the departure of French soldiers for a particular war it passed or enacted measures of a temporary character.[129] The British and French Governments, alarmed at the supplies and volunteers pouring into Spain during the civil war endeavored to stop the fighting. To this end, the two governments passed legislations to stop the recruitment of volunteers for Spain.

The French law of January 21, 1937[130] authorised the government to take the necessary measures to prevent the departure of volunteers to participate in the Spanish Civil War. Article 1 provided:

> The Government is authorized to take by means of Decree in the Council of Ministers all measures serving to obstruct:
>
> 1.(a) The enlistment and acts leading to the enlistment of persons for the forces now in conflict in Spain or in the Spanish possessions including the Spanish zone of Morocco;
>
> (b) Departure and transit of all persons bound for the regions for the said purpose.

The law was made applicable only to Spain and its duration was limited to six months. The Courts also interpreted the above provisions rather narrowly. In the case of Public Prosecutor v. Ledkowski and Others,[131] three Russians residing in Paris, admitted having left Paris,

with the intention of crossing the frontier and enlist in Franco's army. The Court held that their journey within the country with the ultimate intention of crossing into Spanish territory is not the commencement of a 'departure' within the meaning of the law, but should be considered as a mere preparatory act, which under the Penal Code is not liable to punishment.

D. Belgium

During the Spanish Civil War, Belgium passed specific legislation to deal with the volunteers. By the Law of June 11, 1937,[132] the recruitment and departure of any person to serve in Spain was prohibited. The purpose of the law was to ensure the non-intervention of Belgium in the Civil War. Article 1 provided:

> The following are forbidden in Belgium:
>
> (a) Recruitment and all act of a nature to provoke or to facilitate the recruitment of persons other than those of Spanish nationality, for the benefit of an army or a troop in Spain or in the Spanish possessions, including the Spanish zone of Morocco.
>
> (b) Departure and transit of persons other than those of Spanish nationality, for service in an army or a troop specified in the preceding paragraph.

In 1951, a law was enacted which prohibited the recruitment of civilians to serve in a foreign army without licence of the Crown. Article 135 states:

> Anyone who recruits any person or incites or takes engagement of any person for profit in a foreign army or force, by gifts, payment, promises, threats, abuses of authority or power, shall be punished by imprisonment of from eight days to six months.
>
> Exceptions from the prohibition of recruitment by gifts, payments and promises may be proclaimed by the King.[133]

Under the above-mentioned article, it is not an offence of an individual to enlist for service in a foreign army. Although many Belgian nationals served as mercenaries in Congo/Zaire, no law was enacted to prosecute them.[134] However, by a law dated August 1, 1979 individuals who enlist for service in a foreign army may be prosecuted.[135] Article 1 prohibits any recruitment of persons in Belgium for a foreign army or force being in the territory of a foreign State. By virtue of article 2, the King could prohibit the enlistment, departure or transit of persons with a view to service in a foreign army or force being in the territory of foreign State. Article 3 prohibits the enlistment of Belgian nationals outside the national territory for a foreign army or force.

States other than those already discussed, have legislations which deal in one way or another with foreign enlistment. Canada, for example, enacted the Canadian Foreign Enlistment Act, 1970.[136] The Canadian Act, however, is similar to the British Foreign Enlistment Act, 1870. For example, the definition of a 'foreign State' is the same. It is an offence for any Canadian, wherever he

may happen to be, to accept an engagement in the armed forces of "any foreign State at war with any friendly foreign State." Any person in Canada, regardless of nationality, who induces another to leave with such intent equally commits an offence. Recruitment within Canada for the "armed forces of any foreign State or other armed forces operating in such a State" is forbidden. The Canadian Act, therefore, applies to rebels, whether recognized or not, and whether a state of belligerency is recognized.[137] The punishment for the offences is a fine and/or two years imprisonment. In addition, the Canadian Act provides for the restriction, cancellation or impounding of passports.

The preceding discussion has demonstrated that there are national statutes regulating the participation of individuals in foreign armed conflicts. However, because the attitude of the international community towards the conditions under which foreign soldiers in their private capacity can lawfully be employed have changed, national statutes drafted decades ago leave many loopholes of interpretation to be capable of fulfilling the new expectations. Most statutes, for example, do not use the word mercenary let alone "mercenarism" a term not found in English, French or Spanish. Part of the satisfaction of this new expectation lies in State officials to accept that they are under a duty to control the involvement of their nationals in foreign armed conflicts as mercenaries. This may, in turn, accelerate the needed reforms of internal laws.

FOOTNOTES

1. Convention with respect to the Laws and Customs of War on Land, July 29, 1899, 32 stat. 1803, T.S. No. 403.

2. See for example, Convention respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539; Convention respecting the Rights and Duties of Neutral Powers and Persons in case of War on Land, Oct.18, 1907, 36 Stat. 2310, T.S. No. 540.

3. See for example, 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 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; 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.

4. Article 2, common to the four Geneva Conventions of 1949, provides that the Conventions

> ... shall apply to all cases of declared war or 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.

For the meaning of this Article, see J. Stone, Legal Controls of International Conflict (Rev. ed. 1959), 313n.85; J. Pictet, Commentary on the Geneva Convention Relative to the Treatment of Prisoners of War (1960), 22-23.

Article 20 of the 1907 Hague Convention Respecting the Rights and Duties of Neutral Powers and Persons and Person provides that, "the provisions of the present convention are applicable only among the contracting powers, and only in case the belligerents are all parties to the convention."

5. Except article 3, common to all four of the Geneva Convention which required that:

> In case of an armed conflict not of an international character occuring in the territory of one of the High Contracting Parties each party to the conflict would be required to conform to a short bill of rights for war victims.

On this provision, see generally T. Farer, "Humanitarian Law and Armed Conflicts: Toward the Definition of

International Armed Conflict", 71 Cal. L. Rev. (1971), 37.

6. See 11 L. Oppenheim, International Law (7th ed. by H. Lauterpacht 1952), 660. Contra: C. Hyde, Principles of International Law (7th ed., 1930) 131-32. For the criticism of the norm that outside States are free to help the incumbent in a civil war, see W. Friedmann, "United States Policy and the Crisis of International Law," 59 Am. J. Int'l L. (1965), 857, 866.

7. See R.R. Baxter, "lus in Bello Interno; The Present and Future Law" in Law and the Civil War in the Modern World (ed. by J.N. Moore 1974), 518, 524-25.

8. See W. Hall, A Treatise on International Law (8th ed. by A.P. Higgins, 1924), 36.

9. See V.A. O'Rourke, "Recognition of Belligerency and the Spanish War," 31 Am. J. Int'l L. (1937), 398, 412.

10. The American Civil War and Nigeria/Biafra conflict are few examples in which belligerency appears to have been recognized by incumbent governments. See H.J. Taubenfeld, "The Applicability of the Laws of War in Civil War" in Law and the Civil War in the Modern World, supra note 7, 499, 515.

11. See, H. Lauterpacht, Recognition in International Law (1947), 246; M.S. McDougal & F.P. Feliciano, Law and Minimum World Public Order (1960), 536.

12. See V.A. O'Rourke, supra note 9, 403.

13. See T.J. Farer, "The Law of War 25 Years After Nuremberg," 583 Int. Conc. (1971), 5, 31.

14. See W.E. Hall, supra note 8.

15. See H. Kelsen, Principles of International Law (1952), 292.

16. 11 L. Oppenheim, supra note 6, 249.

17. Ibid., 250.

18. See R.A. Falk, Legal Order in a Violent World (1968), 124-26.

19. See H. Lauterpacht, supra note 11, 239-40.

20. See T.J. Farer, supra note 13.

21. Ibid.

22. See R.A. Falk, "Janus Tormented: The International Law of Internal War," in International Aspects of Civil Strife (ed. by J. Rosenau 1964), 185, 218.

23. See H. Meyrowitz, "The Law of War in the Vietnamese Conflict" in 11 The Vietnam War and International Law (ed. by R.A. Falk 1969), 516, 532.

24. For the text of Protocol I, see (1977), 16 Int. Leg. Mat. 1391.

25. U.N. G.A. Res. 2625, 25 U.N. GAOR Supp. (No.) at U.N. Doc. A/8028 (Oct. 24, 1970).

26. F.C. Kalshoven, "Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict: The First Session of the Diplomatic Conference," 5 Neth. Y.B. Int'l (1974), 3, 32.

27. See R.R. Baxter, "Humanitarian Law or Humanitarian Politics? The 1974 Diplomatic Conference on Humanitarian Conference," 16 Harv. Int'l L.J. (1975) 1, 12.

28. Ibid.

29. See A. Cassese, "A Tentative Appraisal of the Old and the New Humanitarian Law of Armed Conflict," in The New Humanitarian Law of Armed Conflict (ed. by A. Cassese, 1975) 461, 468.

30. See Article 10 of the Protocol, supra note 24.

31. R.R. Baxter, supra note 27, 25.

32. See I. Brownlie, "Volunteers and the Law of War and Neutrality," 3 Int'l & Comp. L.Q. (1957), 570, 571.

33. See G.M. Garcia-Mora, International Responsibility for Hostile Acts of Private Persons Against Foreign States (1962), 51.

34. See R.E. Curtis, "The Law of Hostile Military Expeditions as Applied by the United States," 2 Am. J. Int'l L. (1906), 1, 15.

35. See W.E. Watters, An International Affair (Non-Intervention in the Spanish Civil War) 1936-1939 (1971), 256.

36. See J. Stone, Supra note 4, 389.

37. Quoted in 3 C.C. Hyde, International Law Chiefly As Interpreted and Applied by the United States (2nd ed. 1945), 2306.

38. M. Garcia-Mora, supra note 33, 68.

39. See R.E. Curtis, supra note 34, 8.

40. See I. Brownlie, supra note 32, 572.

41. E. de Vattel, Le Droit des Clens, Bk. II, Ch. VI, S. 2 (Trans. by C.G. Fenwick, 1916).

42. See I. Brownlie, supra note 32, 572.

43. United States v. Great Britain (1871). This arbitration is recorded in 7 J.B. Moore, A Digest of International Law (1906), 1059-67.

44. Ibid., 1067.

45. M. Garcia-Mora, supra note 33, 62.

46. Convention Concerning the Rights and Duties of Neutral Powers in Naval War, Oct. 18, 1907, 36, Stat. 2351, T.S. No. 542.

47. Quoted in 4 J.B. Moore, A Digest of International Arbitration, (1898), 4042.

48. Corfu Channel Case (Merits), (1949) I.C.J. Reports, 18.

49. H. Grotius, De Jure Belli Ac Pacis Libri Ires, Bk. II, Ch. XXI, S. 2 (translated by F.W. Kelsely, 1925).

50. E. de Vattel, supra note 41, s. 73.

51. H. Kelsen, supra note 15, 119-22.

52. 1 C.C. Hyde, supra note 37, 723.

53. Tripel, Volkerrecht und Landesrecht, p. 324; quoted in C. Eagleton, The Responsibility of States in International Law (1928), 211.

54. I.D. Anzilotti, Cours de Droit International (Transl. by G. Gidel, 1920), 466-67.

55. Ibid.

56. U.N. Doc. A/35/366/Add.1, 10-16 (Dec. 4, 1980). See Appendix 3, infra.

57. Ibid., art. 15(2).

58. See Note, "Leashing the Dogs of War: Outlawing and Recruitment and Use of Mercenaries," 22 Va. J. Int'l L. (1982), 589, 607-608.

59. Ibid.

60. See Summary Record of the 21st Meeting, Sixth Committee U.N. Doc. A/C.6/35/SR.21, at 8 (Oct. 20, 1980), comments by Mr. Clark;

Summary Record of 24th Meeting, Sixth Committee, U.N. Doc. A/C.6/35/SR.24, at 11 (Oct. 17, 1980), comments by Mr. Duchene);

Summary Record of 18th Meeting, Sixth Committee U.N. Doc. A/C.6/36/SR.18, at 4 (Oct. 27, 1981), comments by Mr. Anderson.

61. See Summary Record of 24th Meeting, supra note 60 (comments by Mr. Duchene).

62. See Summary Record of 21st Meeting, supra note 60 (comments by Mr. Clark).

63. See Art. 2, Appendix 3, infra.

64. See Art. 2(2) of the OAU draft Convention for the Elimination of Mercenaries in Africa, 1972, Appendix 1 infra; Art. 1, Draft Convention for the Prevention and Suppression of Mercenarism, Luanda 1976, Appendix 2 infra; Art. 2(1), The International Convention Against the Activities of Mercenaries, Appendix 3 infra.

65. 1 L. Oppenheim, International Law (4th ed. by A.D. McNair 1928), 298-99.

66. See History of the United Nations War Crimes Commission and the Development of the Law of War (1948), 181.

67. Sir J.F. Williams, Aspects of Modern International Law (1939), 84.

69. 1 H. Lauterpacht, International Law (ed. by E. Lauterpacht 1970), 390.

68. (1937) P.C.I.J., Series A/B, No. 70, 49.

70. P.N. Drost, The Crime of State Homanicide, (Bk. 1, 1959), 290-93. Contra: H. Kelsen, "Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals," 31 Cal. L. Rev. (1943), 530, 533.

71. P.N. Drost, supra, note 70.

72. Ibid.

73. Eastern Carelia Case, (1923), P.C.I.J., Series B, No. 5, 27-28.

74. U.N. Doc. A/CN.4/291/Add.2 (July 23, 1976).

75. Ibid., para. 84.

76. Ibid., para. 26. Prof. Ago's views have been adopted by the International Law Commission and on the basis of those views it has formulated draft Article 19 entitled, "International Crimes and International Delicts" on State Responsibility. For the provision of the Article, see infra p. 163.

77. See H. Kelsen, General Theory of Law and State (1946), 3-327.

78. See 1 H. Lauterpacht, supra note 69, 391-92.

79. See W.M. Reisman, "Responses to Crimes of Discrimination and Genocide: An Appraisal of the Convention on the Elimination of Racial Discrimination," 1 Den. J. Int'l L. & Pol'y (1971) 29,34.

80. See for example, Summary Record of 23rd Meeting, Sixth Committee, U.N. Doc. A/C.6/35/SR.23 (Oct. 22, 1980), comments by Mr. Rosenstock (United States); Summary Record of 21st Meeting, Sixth Committee U.N. Doc. A/C.6/SR.21 at 8 (Oct. 20, 1980), comments by Mr. Clark (Canada).

81. 33 & 34 Vict., c. 90.

82. Report Feb. 27, 1895, 1 A.D. McNair, International Law Opinions (1956), 58, 61.

83. Ibid. "Law Relating to Civil War in Spain," 53 L.Q.R. (1937), 471, 495.

84. See H. Lauterpacht, supra note 11, 266.

85. See L.C. Green, "The Status of Mercenaries in International Law," 8 Isr. Y.B. on Human Rights (1978) 9, 30.

86. A.D. McNair, supra note 83, 497.

87. Opinion of the Law Officers of 10 October, 1876, quoted in H. Lauterpacht, supra note 11, 265-66.

88. The Report of the Committee of Privy Counsellors Appointed to Inquire in the Recruitment of Mercenaries, Cmnd. 6569 (1976). The Committee was chaired by Lord Diplock and the report hereinafter is referred to as the Diplock Report).

89. The Observer (Dec. 10, 1967), 2.

90. The Diplock Report, supra note 88, para. 32.

91. (1896) 2 Q.B. 425.

92. Hansard, (Feb. 10, 1976), Cols. 236-47.

93. The Diplock Report, supra note 88, para. 1.

94. For some useful comments on the Diplock Report, see D. Roebuck, "The Diplock Report on Mercenaries", New Statesman (Aug. 13, 1976), 202.

95. The Diplock Report, supra note 88, paras. 38 and 39.

96. Ibid., para. 42.

97. Ibid., para. 12.

98. Ibid., para. 46.

99. Ibid., para. 2.

100. See J.N. Moore, Law and the Indo-China War (1972), 180.

101. 2nd Cong., Sess. 1, c. 50, 1 Stat. 381 (June 5, 1794).

102. See W. Burchett & D. Roebuck, The Whores of War: Mercenaries Today (1977), 180.

103. Proclamation, April 22, 1793, 11 Stat. 753.

104. Proclamation, March 24, 1794, 11 Stat. 753.

105. U.S. v. Isaac Williams, 2 Cranch, 82 Fed. Cas. 17,708 (1797), quoted in C.G. Fenwick, Cases on International Law (1951), 178.

106. 18 U.S.C., §§958-965 (1976).

107. Ibid., s. 959(b).

108. Ibid., s. 959(c).

109. See U.S. v. Hartz, Fed. Cas. 15 (1855), 337.

110. See In re Henfield, Fed. Cas. 6360 (1793).

111. H.C. Burmester, "The Recruitment and Use of Mercenaries in Armed Conflicts, 72 Am. J. Int'l L. (1978), 37, 52.

112. 252 U.S. (1920), 171.

113. L.C. Green, supra note 85, 23.

114. See A.H. Thobhani, "The Mercenary Menace," 23 Afr. Today (1976) 61, 66.

115. Ibid.

116. For some cases of those who may have been prosecuted, see W. Churchill, "U.S. Mercenaries in Southern Africa: The Recruiting Network and U.S. Policy," 27 Afr. Today (1980), 21, 32-5.

117. Quoted in D. Anable, "The Return of the Mercenaries," 20 Afr. Rep. (1975), 2, 3.

118. See Y.B. U.N. (1977), 212.

119. See, for example, Shotgun News, Gun Week, Sports Afield, Shooting Times, Guns Magazine and Soldier of Fortune.

120. Gearhart, one of the mercenaries convicted and executed in Angola in 1976 placed an advertisement offering his services in Soldier of Fortune; see W. Burchett & D. Roebuck, supra note 102, 74-5.

121. See Note: "Leashing the Dogs of War: Outlawing the Recruitment and Use of Mercenaries," supra note 58, 596.

122. See N.Y. Times (May 21, 1981), A13, Col. 1; N.Y. Times (Oct. 11, 1981), A18, Col. 3.

123. 673 F. 2d (1963), 315.

124. 253 U.S. (1967), 387.

125. L.C. Green, supra note 85, 24.

126. For text of the French Code, see I.F. Deak & P.C. Jessup, A Collection of Neutrality Laws, Regulations and Treaties of Various Countries (1939), 603.

127. See W. Burchett & D. Roebuck, supra note 102, 224.

128. Ibid.

129. See, for example, Article 5 of the Declaration of Neutrality in the American Civil War, (June 10, 1861), quoted in F. Deak & P.C. Jessup, supra note 126, 590.

130. Quoted in N.J. Padelford, International Law and Diplomacy in the Spanish Civil Strife (1939), 327.

131. Ann. Dig. 1935-1937 (1941), 278.

132. For the text see, N.J. Padelford, supra note 130, 316.

133. Article 135, Law of June 15, 1951, quoted in W. Burchett & D. Roebuck, supra note 102, 220.

134. Ibid., 222.

135. See The Daily Telegram (Aug. 25, 1979), 13d.

136. The Foreign Enlistment Act, R.S.C. 1970, c. F.29.

137. See L.C. Green, supra note 85, 30.

CHAPTER VI

MERCENARIES AND INTERNATIONAL CRIMINAL LAW

State officials differ as to whether international law proscribes mercenary activity. On the one hand, it has been stated that international law does not make the act of serving as a mercenary criminal. In testimony on August 9, 1976, before the House International Relations Committee Special Sub-Committee on Investigations, Assistant Secretary of State, William E. Schaufele Jr. said:

> A legally accepted definition of what constitutes a mercenary does not exist in international law. Nor is the act of serving as a mercenary a crime in international law,[1] not to mention Angolan law where the Angolan authorities were forced to use a set of guidelines for their combatants the MPLA issued in 1966.[2]

On the other hand, it has been asserted that the crime of mercenaries is recognized by international law in accordance with several Resolutions and Declarations of the United Nations and the OAU.[3] The legal significance of these resolutions will be analyzed with a view to finding out the extent to which they can be held to form a basis for apprehension, trial and subsequent conviction of mercenaries. The point of departure in this regard is the question of the meaning of the term "international criminal law."

Section 1. Definition of "International Criminal Law"

At least six different meanings have been attributed to the term "International Criminal Law".[4] It may be identified with the territorial scope of municipal criminal law. It may be equated with international authorized municipal criminal law. It may mean internationally prescribed municipal law. It may refer to municipal criminal law common to civilized nations. It may signify international cooperation in the administration of municipal criminal law, and finally, it may stand for international criminal law in the material sense of the term. A brief examination of each of these meanings is undertaken before identifying which one is most revelant to the present discussion.

A. International Criminal Law in the meaning of territorial scope of municipal criminal law

Under this meaning, international criminal law may refer to the competence of States to prosecute and punish for crime. For example, in prosecuting and punishing for crime, a state should not "overstep the limits which international law places upon its jurisdiction."[5] Jurisdiction is conceded by international law in situations where "there exists a meaningful point of relation which rationally connects the factual context of the act to the legitimate interests of the prosecuting State."[6] The Harvard Research

in International Law on Jurisdiction with Respect to Crime identifies five points of relation establishing the competence of States to prosecute and punish for crime.[7] First, the territorial principle, which determines jurisdiction by reference to the place where the offence is committed. This principle is regarded everywhere as of primary importance and of fundamental character.[8] However, there are two views as to the scope of the territorial principle. Under the subjective view, jurisdiction extends over all persons in the State and their violating its laws. Under the objective view, jurisdiction extends over all acts which take effect within the State even though the author is elsewhere.[9] Second, the nationality principle, which determines jurisdiction by reference to the nationality or national character of the person committing the offence no matter where the national may be. This principle is said to be universally accepted, though there are differences in the extent to which it is used in different national systems.[10] Third, the protective principle which determines jurisdiction by reference to the national interest injured by the offence." For example, counterfeiting committed abroad may be punished by a State wronged.[11] Fourth, the universality principle, determining jurisdiction by reference to the custody of the person committing the offence. In case of piracy, for example, by the law of nations universal jurisdiction has been conceded under which the person charged with the offence may be tried and punished

by any State into whose jurisdiction he may come.[12] Fifth, the passive personality principle, determining jurisdiction by reference to the nationality or national character of the person injured by the offence. This principle has been asserted by a considerable number of States but contested by others.[13] For instance, the argument of Judge Zubia in the Cutting Case,[14] that even if the offence of defamation was committed exclusively in the United States, Mexico would have jurisdiction under the passive personality theory because the person injured was a Mexican, was challenged in the diplomatic protests of the United States Government.[15]

B. International criminal law in the meaning of internationally prescribed municipal criminal law

Under this meaning the term "international criminal law" refers to instances in which international law imposes a duty on States to punish acts of individuals. The duty on States may arise through customary international law or from treaties. For example, the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitutions of Others[16] of March 21, 1950 imposes on signatory States, duties of prosecution against this kind of dealings. The Convention on Narcotic Drugs[17] of March 30, 1961 similarly creates extensive duties of criminal prosecution for the signing States. These duties to prosecute include an express requirement of imprisonment for serious violations of the relevant

provisions.

C. International criminal law in the meaning of internationally authorised municipal criminal law

Under this meaning international law though not necessarily obliges States to punish certain acts of individuals it authorises States to exercise jurisdiction. For instance, in case of piracy, international law authorises every State to assume jurisdiction on the high seas over pirate ships.[18] Likewise, it is a rule of general international law that private individuals, not belonging to the armed forces of the enemy who take up arms against the armed forces of the occupant State, may be treated by the latter as criminals.[19] International law confers upon the occupant State the right to punish those individuals for acts of illegitimate warfare.[20]

D. International criminal law in the meaning of municipal criminal law common to civilised nations

This meaning covers crimes which are punishable in most civilised countries. For example, offences against liberty, life and property are punishable in most States even though international customary law may not impose any obligation on States to prohibit those acts.[21]

E. International criminal law in the meaning of international co-operation in the administration of municipal criminal justice

International criminal law may refer to those norms of international law under which States assist each

other in the administration of criminal justice.[22] The principal instrument of this co-operation is the practice of extradition.[23] Under this system the authorities of a State in which an alleged offender is residing surrender him over to the officials of another State either for the purpose of prosecution or for the enforcement of a criminal judgment.[24] Extradition treaties[25] supplemented by national extradition statutes[26] usually form the basis of this co-operation. Extradition treaties specify conditions under which a request for the surrender of fugitives may be granted. A common condition is that extradition is limited to offences committed outside the territory of the requested States.[27] It is customary to stipulate that the act charged must have been made a crime by the laws of both the requesting and requested State.[28] A second common condition is that the offence committed should not be of a political character.[29] A third common condition is that the evidence submitted together with the request for extradition should be such as to establish a prima facie case against the accused.[30]

Other types of international co-operation include the assumption of a foreign criminal proceedings pending in a foreign State,[31] the execution of foreign criminal judgments,[32] and the supervision of offenders who have been conditionally sentenced abroad.[33]

F. International criminal law in the material sense of the word

These are rules of a prohibitive character, strengthened by punitive sanctions of their own.[34] In order to make certain rules international crimes in the material sense of the word, they should be expressed in clearly prohibitive terms and be supported by penal sanctions.[35] The enforcement of these rules against individuals should be direct and not through States.

It is the second, third and sixth meaning of the term "international criminal law" which are of immediate relevance to the present discussion. International law may proscribe certain acts of individuals and either prescribe sanctions directly or leave each State by its own municipal criminal law to impose sanctions on individuals. By the latter method, States may be under a duty to impose sanctions on individuals or they may be authorised to punish them. Under the three methods it is still appropriate to use the term "international criminal law" in a sense comparable to municipal criminal law.[36] There are a number of advantages for each State to enact legislation for the punishment of individuals who are guilty of violating international law. For example, it is logically compatible with the fundamental principles of sovereignty and equality. Since each State is permitted to fix its own standards of treatment of individuals, there is no imposition of the

sense of justice of one State on another. Such a convention would be fairly easy to implement on the ground that each State can pass its legislation.[37] Professor Georg Schwarzenberger,[38] however, limits the use of the term "international criminal law" in a sense comparable to municipal criminal law to the sixth meaning. His reason for excluding the application of the term international criminal law to situations where treaties impose a duty on States to enact municipal criminal law to punish certain acts committed within their territorial jurisdiction is that if States fail to live up to their treaty obligations, they themselves do not commit any international crime, but are merely responsible for breach of their treaty obligations. Therefore, he concludes: "these offences of individuals against the 'law of nations' are not crimes under international law, but offences against rules of internationally postulated municipal criminal law."[39]

The question then is what acts should be classified as crimes under international law? An analysis of general principles of international law and of criminal law suggests the following definition: "A crime against international law is an act committed with intent to violate a fundamental interest protected by international law or with knowledge that the act will probably violate such an interest, and which may not be adequately punished by the exercise of the normal criminal jurisdiction of any State."[40] In other words, it is those acts which threaten

the fundamental interests of the moral and material order for which the establishment of peaceful relations between members of the international community calls.[41] This is the definition which was adopted by the International Law Commission in 1976. Article 19 on State Responsibility provides:

> 2. An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole, constitutes an international crime.
>
> 3. Subject to paragraph 2, and on the basis of the rules of international law in force, an international crime may result, inter alia, from:
>
> (a) a serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression;
>
> (b) a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination;
>
> (c) a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and apartheid;

(d) a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such aas those prohibiting massive pollution of the atmosphere or of the seas.

4. Any internationally wrongful act which is not an international crime in accordance with paragraph 2, constitutes an international delict.[42]

The next question is whether the activities of mercenaries can be said to constitute a violation of the fundamental interests of members of the international community. There is no explicit authoritative statement on this point. What has been observed is that the use of mercenaries under certain conditions has been condemned as a threat to the peace,[43] and a threat to the right of self-determination.[44] Unless those grounds are taken as a sufficient basis for declaring the acts of mercenaries a violation of the fundamental interests of the international community, then, there is no justification for characterizing mercenaries as criminals in international law.

In raising the possibility of outlawing mercenaries, Professor W. Jenks has posed the following questions:

> Should there not be a general international convention making it a crime against the common peace to seek adventure or gain at the expense of other people's peace and particularly the peace of newly emerging nations?

> Should they not be liable to severe punishment in any jurisdiction where they may be found?[45]

A further question for consideration is how acts which threaten the fundamental interests of the community of nations are constituted as crimes. There is no international legislature which can by statutory process define international crimes. One possible method as Professor W. Jenks[46] suggests is through treaties. It has also been observed that an act is adjudged to be a crime according to international custom.[47] For example, it has been stated that the Nuremberg Tribunal was justified "in assuming that the acts for which the defendants were being tried were crimes under international law, and as an international court it clearly had a legal right to apply international law to the accused individuals".[48] Can the claim that mercenaries are criminals under international law be justified under any of the above sources?

Section 2: Customary International Law

The question here is whether customary international law outlaws mercenaries. Until recently, the limits to the involvement of mercenaries in wars has not been legal but moral. For instance, if the war was unjust it was immoral for mercenaries to take part in it. E.B.F. Midgley states:

> Sylvester had maintained that if common soldiers had doubts about the justice of a war, they were bound to make enquiries. Although he considered that subjects were allowed to fight even if they failed to dispel their doubts, those who were not subjects could not legitimately ignore their doubts and join in the war as mercenaries. Cajetan generally agreed with Sylvester about the mercenary's duty to abstain from joining in a war which he had doubts. Cajetan suggest, however, that those mercenaries who had bound themselves to fight in consequence of enlistment in peacetime might conduct themselves as subjects.[49]

Under the traditional laws of war, mercenaries were not prohibited from taking part in armed conflicts. In other words, they were lawful combatants and they were treated, when taken by the enemy, the same as the nationals of the State whose force they joined.[50] This position is reflected in Article 17 of the Hague Convention No. V of 1907, Respecting the Rights and Duties of the Neutral Powers and Persons in Case of War on Land,[51] which provided that the neutral shall not be more severely treated by the belligerents as against whom he has abandoned his neutrality than a national of the other belligerent State could be for the same act. From the above provision, therefore, mercenaries who took part in armed conflicts were treated either as privileged or unprivileged belligerents.[52] To be treated as a privileged belligerent is to be accorded Prisoner of War status. One implication linked to the concept of prisoners of war is that while prisoners of war may be held in custody for the duration of the war, they may not as lawful combatants be punished for the sole

reason of having participated in hostilities.[53] Unprivileged belligerents were generally subject to trial and punishment by the detaining power.[54] They might be killed in combat, and on capture, were liable to be treated as marauders and executed summarily at the discretion of the captor commander.[55]

To be treated as privileged belligerents under the Hague[56] and Geneva[57] Conventions, mercenaries must be members of regular or irregular armed forces. In the case of members of regular armed forces, the conditions on which the status of privileged belligerents depends are taken for granted. They were assumed to be subject, prior to capture, to the relatively uniform laws of civilized nations.[58]

If a mercenary formed part of the irregular forces he was entiled to be treated as a prisoner of war on fulfilling the following conditions: (1) military command; (2) distinctive badge; (3) open arms; (4) conformity to the laws and customs of war.[59] The post-World War II crimes trials held that the killing of irregulars who complied with Article 1 of the Hague Convention IV of 1907 rather than according them Prisoner of War status, was a war crime.[60] This is illustrated by the case of Schoengrath[61] before a British military court in Germany in 1946. In this case, the defendants, seven members of the Nazis, were charged with committing a war crime "in the killing of an unknown allied airman, a prisoner of war." The facts concerned an airman who had descended by parachute from his damaged

bomber aircraft which had been flying westward over occupied Holland. The defendants, apparently acting on the assumption that he was an allied airman, shot him shortly after his capture rather than accord him status as a prisoner of war. The defence contended that there was no case to answer because the prosecution had produced no evidence to show that the victim was in fact an allied airman. The Court convicted the defendants as charged even though the nationality of the airman was not proved. Some commentator on this case have stated that the decision is sound because the airman was entitled to prisoner of war status in the light of the facts which were shown.[62] Even if he had been a neutral national serving in the air force of an allied State, he would have been entitled to privileged combatant status without discrimination.[63]

If mercenaries did not meet these standards, then they would be treated like other civilians who had taken up arms, that is to say, as "unprivileged belligerent". In the latter event, they would be subject to trial and punishment by the detaining power.[64] This would be the position in an international armed conflict.

In a non-international armed conflict, the exact status of mercenaries is not clear. It has been said for example, that they would have no protection except the few safeguards provided by Article 3 common to the four Geneva Conventions of 1949 for protection of War Victims.[65] As foreign nationals mercenaries could also claim the benefit

of the minimum standard of international law under international customary law,[66] this would be claimed on their behalf by their home State. According to the traditional doctrine of State responsibility, individuals were to be considered as objects rather than subjects of international law. While a State was generally free to treat persons within its borders as it wished, an exception arose when persons being injured were nationals of another State. As As Vattel wrote in 1758:

> Whoever ill-treats a citizen indirectly injures the State, which must protect that citizen. The sovereign of the injured citizen must avenge the deed and if possible, force the aggressor to give full satisfaction or punish him, since otherwise the citizen will not obtain the chief end of civil society, which is protection.[67]

Under the above doctrine, therefore, a mercenary was entitled to a certain standard of treatment. In particular, a mercenary, like any other foreign national, is entitled to a fair trial, and any torture or cruel, inhuman or degrading treatment or punishment is prohibited. These requirements of the minimum standard of civilisation are reiterated in the Universal Declaration of Human Rights of 1948,[68] and the European Convention of Human Rights of 1950.[69]

When a question arises as to which category a mercenary belongs, the mercenary is entitled to the protection of the Convention until the determination of such a

question. Article 5 of the Prisoner of War Convention provides:

> Should any doubt arise as to whether persons having committed a belligerent act and having fallen into the hands of the enemy, belong to any of categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such times as their status has been determined by a competent tribunal.[70]

The actions of mercenaries in Congo/Zaire and other parts of the world seem to have changed the attitude of the international community. This change of attitude is exhibited in a number of resolutions of the General Assembly of the United Nations which have declared that mercenaries themselves are criminals.[71] The question is whether those resolutions have changed the existing customary international law as it relates to the criminality of mercenaries. The answer to the above question depends upon the extend to which the resolutions of the General Assembly can be said to form a basis of customary international law. Under Article 10 of the Charter of the United Nations, the General Assembly only issues "recommendatins" which have long been held to be texts creating no legal obligations for member States. Judge Lauterpacht in the South-West Africa Voting Procedure case states:

> Although decisions of the General Assembly are endowed with full legal effect in some spheres of the activity of the United Nations and with limited legal effect in

> other spheres, it may be said, by way of broad generalisation, that they are not legally binding upon the members of the United Nations .... In general, they are in the nature of recommendations that, although on proper occasions they provide a legal authorisation for members determined to act upon them individually or collectively, they do not create a legal obligation to comply with them.[72]

However, it has been argued that practice within the United Nations indicate that Generaly Assembly resolutions can be more than mere recommendations.[73] As Professor Rosalyn Higgins, for example, notes:

> Resolutions of the Assembly are not per se binding; though these rules of general international law which they may embody are binding on member States, with or without the help of the resolutions. But the body of resolutions as a whole, taken as indications of general customary law, undoubtedly provide a rich source of evidence.[74]

Obed Asamoah has argued that General Assembly resolutions "constitute [evidence of] the practice of States or originate practice, they corroborate customary rules of international law, and, in appropriate cases, supply the opinion juris sive necessitatis of existing practice."[75]

The decision of the International Court of Justice in the Western Sahara Advisory Opinion seems to lend some weight ot the resolutions of the General Assembly. The Court stated:

> General Assembly Resolution 1514(XV) provides the basis for the process of decolonization which has resulted since 1960 in the creation of many States which

> are members of the United Nations. It is complemented in certain of its aspects by the General Assembly Resolution 1541(XV), which has been invoked in the present proceedings ... [c]ertain of Resolution 1541(XV)'s provisions give effect to the essential feature of the right of self-determination as established in Resolution 1514(XV).[76]

Assuming the possibility that some resolutions of the General Assembly may be a source of customary international law, a question is whether resolutions declaring mercenaries to be criminals do constitute customary international law. The answer to this question in turn depends on the type of conditions under which a General Assembly resolution can be said to express a rule of customary international law and whether those conditions exist with respect to the resolutions condemning the activities of mercenaries and declaring them criminals.

There is no clear-cut criterion which can be applied to determine whether a resolution of the General Assembly expresses a rule of customary international law. Instances in which some resolutions of the General Assembly have been held to be expressive of rules of customary international law are examined as guidelines. One instance which has been construed as clothing a resolution of the General Assembly with a binding character in the sense of a customary rule of international law, is where all the members vote for a resolution. The Universal Declaration of Human Rights,[77] unaminously adopted by the General Assembly of the United Nations, is often cited as one of those resolutions

of the General Assembly which expresses a rule of customary international law.[78] One of the reasons for holding that international law outlaws the practice of genocide is that all members of the United Nations have twice unanimously declared the practice of genocide a crime under international law and that States should cooperate to prevent and punish the practice.[79] The Soviet Union and the United States also treated Resolutions 1721 of December 20, 1961 on outer space as binding because it had been adopted unanimously by the General Assembly.[80] It remains to be seen whether any of the resolutions declaring mercenaries as criminals had the unanimous approval of the General Assembly. Examination of those resolutions indicate that none of them was adopted unanimously.[81] It may, therefore, be concluded that on the principle of unanimity, resolutions of the General Assembly which seek to make mercenary a crime are not expressive of customary international law.

But consensus which does not mean unanimity has been said to be a basis of international obligation. Professor Richard A. Falk writes:

> If international society is to function effectively, it requires a limited authority, at minimum, to translate an overriding consensus among States in rules of order and norms of obligation despite the opposition of one or more sovereign States.[82]

On the basis of this approach it has been held that Resolution 1803 on Permanent Sovereignty over Natural

Resources[83] expresses a rule of customary international law.[84] This Resolution was adopted by 87 votes to 2, with 12 abstentions. The Declaration on the Granting of Independence to Colonial Countries and Peoples of 1960[85] was adopted by 90 votes, none against, and 9 abstentions. Professor Egon Schwelb[86] concludes that because of this overwhelming adoption without substantive dissent the Declaration of 1960 amounts to an assertion about present international law.

Finally, the degree to which a United Nations resolution is cited by the United Nations is said to be another indicator of its potential source of a customary rule of international law. In a 1969 survey of several General Assembly declarations, Professor Samuel Bleicher concluded:

> The repeated reference by the General Assembly to certain previous resolutions as a standard by which to judge the behaviour of a specific State, or as an expression of principles which should be respected by all States, reinforces the expectation that those principles will in fact be followed. This process of recitation distinguishes those resolutions which express deeply-held, temporally stable convictions from those which are of only passing or mild concern.[87]

Turning to General Assembly resolutions declaring mercenaries to be criminals, a number of authoritative commentators have concluded that those resolutions do not express customary international criminal law. For example, the International Commission of Jurists based in Geneva has observed that "mercenarism" should be, but is not yet a

crime in international law.[88] In observing that mercenarism is not yet a crime in international law, the basis on which mercenaries in Angola were tried, Professor Lars Rudebeck stated:

> About the legality which is not the same thing as fairness of procedures, it can be stated quite clearly that the trial was based upon two kinds of laws, one was an international law about to be born and which has not yet been codified but has been expressed in three or four U.N. Resolutions and in a couple of resolutions from the OAU.[89]

After a careful analysis of the General Assembly resolutions on mercenaries, Professor Leslie Green concludes that they do not make mercenarism a crime.[90] On the basis of those opinions it may be concluded that General Assembly resolutions on mercenarism have not resulted in a change of customary international law so as to make mercenarism a crime. It is significant that in those resolutions of the General Assembly the term "mercenary" has not been defined. Given the many different ways of defining the term as indicated in chapter one of this study, the absence of a definition of "mercenary" in the resolutions of the General Assembly casts doubt on the possibility of these resolutions being expressive of customary international law.

Section 3: Attempts to Regulate the Status of Mercenaries by Treaty

A. Under the United Nations

If a treaty making an act criminal is sponsored through the United Nations, condemnation of the act by the General Assembly is usually the first step, followed by the establishment of a committee to prepare a draft. In case of genocide, for example, the General Assembly of the United Nations adopted a resolution condemning genocide as a crime under international law at its first session in December 1946.[91] Pursuant to the above mentioned Resolution, a United Nations Ad Hoc Committee on Genocide was established by the Economic and Social Council. The Ad Hoc Committee was entrusted with the preparation of a draft convention on the crime of genocide, and such a draft was prepared by it in 1948.[92] The Economic and Social Council transmitted the draft to the Third Session of the General Assembly.[93] The Genreal Assembly unanimously approved the text of a Convention on the Prevention and Punishment of the Crime of Genocide and proposed it for signature and ratification or accession.[94]

Turning to the case of mercenaries it can be seen that only two of the above steps have been fulfilled. Several resolutions have been passed by the General Assembly of the United Nations declaring that mercenaries are outlaws. For example, in 1969 in Resolution on the Implementa-

tion of the Declaration on the Granting of Independence to Colonial Countries and Peoples, the General Assembly declared, "... that mercenaries themselves are outlaws."[95] The need for a treaty to deal with mercenaries has also been expressed. For example, during a debate in the General Assembly, on a resolution condemning the attack on Benin by mercenaries in 1977, the representative of Mauritius stated that in his country's view, the adoption of international criminal legislation through a convention would be a timely initiative for dealing with mercenarism, which should be outlawed as an international crime like piracy and genocide.[96] However, it was during the Thirty-Fourth Session that the General Assembly expressed its desire to draft a convention against mercenary activities.[97] The resolution recommended that a convention concerning mercenaries be included as an agenda item at the Assembly's Thirty-Fifth Session.[98] During its Thirty-Fifth Session, the General Assembly passed a resolution establishing an Ad Hoc Committee on the Drafting of an International Convention Against the Recruitment, Use, Financing and Training of Mercenaries.[99] This resolution was based on a resolution drafted by the Sixth Committee to establish the Ad Hoc Committee.[100] The Ad Hoc Committee has so far presented to the General Assembly two reports; one during its Thirty-Sixth Session[101] and the second during its Thirty-Seventh Session.[102] The Ad Hoc Committee is still continuing its work on drafting of a convention which would regulate the

activities of mercenaries.

From the above exposition it may be concluded that although the process of drafting a treaty on mercenaries has began any present claim that mercenaries are outlawed by international law cannot be based on a convention. This conclusion, however, applies to an international convention emanating from the United Nations. Attempts to change the status of mercenaries through treaties have also been considered by the OAU and the Diplomatic Conference on Humanitarian Law Relating to Armed Conflicts which was held in Geneva between 1974 and 1977. The efforts of the OAU are examined first.

B. Under the OAU

The role of the OAU in condemning mercenaries as being a threat to the peace and encouraging the enactment of penal laws to suppress them had already been discussed. However, it was in 1970 that its Council of Ministers passed a resolution asking the Administrative Secretary General to prepare a draft convention outlawing mercenaries.[103] In 1971, the OAU, in an elaborate declaration made by the meeting of Heads of State and Government in Addis Ababa, condemned the "scourage" of mercenary activity in Africa and expressed African resolve to "prepare a legal instrument coordinating, harmonizing and promoting the struggle of the African peoples and States against mercenaries."[104] The

OAU Committee of Legal Experts presented a report to the Nineteenth Ordinary Session of the Council of Ministers at Rabat in June 1972.[105] The report was adopted and took the form of a draft convention for the elimination of mercenaries in Africa.[106] Article 2, paragraph 1 of the draft convention makes mercenary activity a crime, "against the peace and security of Africa and punishable as such." The convention does not provide any sanctions to be imposed on individuals. However, States that adopt the convention are obligated to prevent their nationals, as well as foreigners within their territory, from engaging in mercenary activities and to enact severe criminal penalties for the offences defined by the Convention.[107] A State's request for the extradition of a suspected mercenary located in another State can only be rejected if the State holding the suspect agrees to prosecute the accused under its own laws.[108]

This draft convention was submitted to member States for consideration but has not yet been ratified.[109] Even if it were ratified it is intended to bind only Member States of the OAU. The effective implementation of the principles espoused in the convention, however, requires the compliance of non-members of the OAU. Since most of the persons who have served as mercenaries in Africa came from outside the continent there is need for a comprehensive treaty involving all members of the United Nations.[110]

C. Under Protocol 1[111] Additional to the Geneva Conventions of 12 August 1949

Protocol 1 Additional to the Geneva Conventions of 12th August, 1949 seeks to change the traditional competence of mercenaries to engage in armed conflicts and their subsequent status as prisoners of war. Article 47(1) of the Protocol provides that a mercenary does not have a right to be treated as a combatant or a prisoner of war. What, then, is the status of a captured mercenary? His rights are rather unclear. The mere fact of being a mercenary is not, however, made a criminal act.[112] At the 1976 session of the Diplomatic Conference, it was accepted by the Working Group of Committee III on the treatment to be accorded to mercenaries, that as a minimum persons found to be mercenaries should be entitled to be humanely treated in accordance with national laws of the capturing power.[113] The enforceability of this national standard of treatment is not ensured since it is not expressly incorporated in the Protocol. Even if the national standard of treatment was expressly incorporated in the Protocol, to the extent that it may exclude the application of the international standard of treatment it may not be an appropriate standard of treatment. States continue to exhibit different standards of justice that making the national treatment the minimum standard of treatment may not lead to the fulfillment of the overriding humanitarian objects of the Law of Armed Conflicts. For example, one of the objectives of the Geneva Conventions of

1949 was to reinforce certain basic humanitarian rights that belong to every individual involved in armed conflicts.[114]

Article 75 of the Protocol provides for a number of fundamental guarantees and it applies to those persons "affected by a situation referred to in Article 1 of this Protocol ... who are in a power of a party to the conflict and who do not benefit from the more favourable treatment under the Convention or under this Protocol." However, Article 47 of the Protocol which defines mercenary and his status, does not specifically make the fundamental guarantees of Article 75 applicable to him. The failure of Article 47 to make reference to the application of Article 75 has been interpreted to mean that mercenaries are not entitled to a fair trial or any standard of treatment.[115] on the basis of Article 47, paragraph 3 of the Protocol, which provides that "any person who has taken part in hostilities and who does not benefit from the more favourable treatment in accordance with the Fourth Convention (1949 Geneva Civilian Persons Convention) shall have the right at all times to the protection of Article 75 under this Protocol, "it may be concluded that a mercenary is entitled to the safeguards of Article 75.[116]

Therefore, with respect to mercenaries Protocol 1 seems to have several implications. First, they are not lawful combatants. Second, although they are not criminals by the mere fact of being mercenaries, they may be tried for specific acts like murder, treason and destruction of

property. Third, when tried for specific offences, under municipal statutes, they are entitled to some fundamental guarantees. Article 95 of the Protocol provides that it shall enter into force "six months after two instruments of ratification or accession have been deposited." Protocol 1 came into force, and it binds those States which have ratified it, on December 7, 1978 after the Government of Ghana (on February 28, 1978) and that of the Libyan Arab Jamahiriya (on June 7, 1978) deposited their letters of ratification and accession with the Swiss Federal Council. Although Protocol has not yet been tested in practice, it is likely, however, that in the future the international community may not object to the prosecution of mercenaries for specific offences. Support for the above interpretation may be found in the response of the Security Council to a desire by Benin to prosecute the mercenaries who had attacked that country in 1977. In Resolution 419 of 1977, the Security Council:

> 4. Takes note of the desire of the Government of Benin to have the mercenaries who participated in the attacking forces against the Peoples Republic of Benin on 16 January, 1977 subjected to due process of law; ...
>
> 7. Requests the Secretary General to watch over the implementation of the present resolution, with particular reference to paragraphs ... 4 ...".[117]

Section 4: The Practice of States

The general practice of States has been to treat captured mercenaries and volunteers as prisoners of war and not as common criminals. The American practice during the civil war for example, was to treat neutral individuals employed by insurgent government as prisoners of war on capture.[118]

During the First World War of 1914-18, while the United States was neutral, the German Government indicated that if American serving in the French Army should be captured they might be shot as civilians and not held as prisoners of war.[119] Contending that the German proposal was contrary to established usage and practice, Counsellor for the Department of State said:

> [I]t had always been the right of individuals to enter the army of a foreign nation ... And that never ... had those foreigners when captured, been treated otherwise as prisoners of war.[120]

He added that:

> If such a course was followed, it would be entirely unwarranted by international usage, and ... this Government would not view such treatment of Americans with indifference, for although its policy was to discourage its citizens from enlisting in foreign military service, it had always recognized their right to do so.[121]

Elwayn Gibbon, an American citizen fought in the Chinese air forces against Japan. While on his way from

Hong Kong to the United States, he was arrested by Japan and charged under Japanese Penal Code, with participating in the bombing of Taihoku and in active military operations against Japan. However, he was released, after interposition by the Department of State, on the ground that the Penal Code was not applicable to him because he was a neutral on his way to the United States.[122]

During the Spanish Civil War, the Non-Intervention Committee sought the release of captured foreign soldiers. The efforts of the Committee were rewarded when Franco announced that he was going to release all his foreign prisoners of war.[123] In earlier Spanish Civil Wars, foreign soldiers would have been shot out of hand. For example, the British mercenaries who fouht in the Carlist War of 1834 were shot on being captured.[124]

Franco's action of releasing foreign soldiers was followed by an agreement between the Basque Government and the insurgents, whereby, with the French Government acting as intermediary, an exchange of two German airmen for two Russian pilots was arranged. The two German pilots had been under sentence of death by the Basque Government.[125]

The practice of the Nazis and the Japanese unlike that of the Allied Powers was to refuse to accord privileged combatant status to irregular forces which includes volunteers and mercenaries.[126] But the post-World War II crimes trials held that the killing of irregulars, at least those who complied with the customary rules of warfare rather than

according them prisoner of war status, was a war crime.[127]

During the Korean War, the captured Chinese Peoples volunteers were treated as prisoners of war and not as common criminals. Within a week of the United Nations and the United States decision to aid South Korea, General Douglas MacArthur as United Nations Commander announced that captured enemy personnel "will be treated in accordance with humanitarian principles applied by civilized nations involved in armed conflicts."[128] Three weeks later he directed his field commanders that the handling of prisoners of war will be in accordance with the 1949 Geneva Convention and the International Committee of the Red Cross was notified to this effect. At the end of hostilities the Chinese Peoples volunteers were treated as a separate army and not as part of the Korean People's Army. For example, the Korean Armistice of July 27, 1953, was concluded between "the Commander-in-Chief, United Nations Commander, on the one hand, and the Supreme Commander of the Korean People's Army and the Commander of the Chinese People's volunteers on the other hand."[129]

Contrary to the general practice, during the Nigerian Civil War, mercenaries seem to have been excluded from prisoner of war status.[130] According to an operational Code of Conduct for the Nigerian Army issued by the Central Government in July 1967, the armed forces were "in honour bound to observe the rules of the Geneva Convention in whatever action you will be taking against rebel Lieutenant-

Colonel Odumegwu Ojukwu and his clique."[131] On military prisoners the Code contained the following passage:

> Soldiers who surrender will not be killed. They are to be disarmed and treated as prisoners of war. They are entilted in all circumstances to humane treatment and respect for their person and their honour. Foreign nationals on legitimate business will not be molested, but mercenaries will not be spared; they are the worst enemies.[132]

However, there seems to be no published reports on the capture of such mercenaries.[133].

During the Arab-Israeli War of 1973, the Egyptian Government announced that captured foreign volunteers would be considred as mercenaries enjoying no rights under the Geneva Convention.[134] In response to this announcement, the International Committee of the Red Cross stated that foreign volunteers were entitled to protection of the Geneva Convention guaranteeing prisoner of war humane treatment.[135] The response of the International Committee of the Red Cross indicates that in its view the law protected mercenaries and volunteers.

A. The Trial of Rolf Steiner in the Sudan

Rolf Steiner was tried by the government of the Sudan in August 1971 before a six-man military tribunal.[136] During the trial Steiner was charged as a mercenary and the prosecutor Sayed Khalafalla el Rashid condemned mercenary

activity as an international crime plaguing the Third World. Steiner denied he was a mercenary, depicting himself as an ideologist who had sought to help the Southern Sudan's oppressed blacks free themselves from the domination of the Arab North.[137] But Steiner was not convicted of the crime of being a mercenary. The reason is that the penal code of Sudan did not include the crime of mercenarism and the Court rejected international law as a potential source.[138] Steiner was convicted of violations of domestic law. The Court cited section 98 of the Sudan Penal Code, which "seeks to punish whoever collects arms, men or ammunition or otherwise prepares to wage war against the Sudan Government."[139] The Judge-Advocate Daffala advised the Court that:

> The sections of the law under which the accused is being tried all start with the word whosoever which could mean a mercenary or any body [sic] else. Your concern would be to look into the deeds of the accused and the interests of the society safeguarded by law which these deeds threaten. It is the gravity or no gravity of such acts which should motivate you to mitigate punishment or otherwise.[140]

Steiner was found guilty and sentenced to death, but President Jaafar Numeiry commuted the sentence to 20 years imprisonment.[141] Steiner's case is more consistent with the way Protocol 1 Additional to the Geneva Convention of 1949 has been interpreted. He was not treated as a prisoner of war, but at the same time he was not convicted of the crime of being a mercenary. He was convicted of

violating specific offences under the Penal Code.

B. The Trial of 13 Mercenaries in Angola

The events that led to the participation of mercenaries and other foreign soldiers in the Angolan Civil War have already been narrated.

In February 1976, thirteen of the mercenaries were captured while on patrol. They consisted of ten British Nationals and three Americans. The British were Costas Georgiou (Callan), McKenzie, McIntyre, Marchant, Lawlor, Evans, Wiseman, Fortuin, Barker, Nammock; the United States Nationals were Grillo, Gearhart and Acker.[142] On May 26, 1976, they were indicted by the People's Revolutionary Court of Angola established by law No. 7/76 of May 1, 1967.[143]

First, the indictment charged all 13 defendants with the crime of being mercenaries,[144] in violation of two Organization of African Unity Resolutions[145] and four United Nations Resolutions.[146]

Second, all the defendnats were charged with crimes against peace, in violation of the Statute of the Nuremberg International Military Tribunal, confirmed by the United Nations Resolution 95(1) of December 11, 1946.

Third, all the defendants were accused of murders, maltreatment, insults and harassment of members of the civilian population; murder of MPLA members; of other mercenaries and FNLA soldiers; kidnapping of civilians and

stealing of their property ...."[147]

Finally, the indictment charged each defendant separately with various offences. The trial which began on June 11 and ended on June 16, 1976, was conducted in Portuguese and translated into English, French, Spanish and Russian.[148]

In response to the charges, a number of arguments were advanced by the defendants and on their behalf. One, the defendants denied committing any of the crimes and asked for leniency.[149] Two, it was submitted on their behalf that they should be treated as prisoners of war.[150] Three, it was argued that they were tools of imperialist aggression and four, that the blame should be on the United States and British Governments for permitting the recruitment of mercenaries.[151]

The Court convicted all the 13 mercenaries. Nine of them were given prison sentences. Callan, McKenzie, Barker and Gearhart were sentenced to death which was confirmed by President Neto on July 9, 1976.[152] They were executed the following day.[153]

A major weakness with this judgment is that the law constituting the People's Revolutionary Court and prescribing the punishable offences within the jurisdiction of the Court was enacted after the defendants had been captured.[154] The application of ex post facto laws in criminal cases seems to constitute a denial of justice under international law.[155] Article (1) of the International Covenant on

Civil and Political Rights,[156] for example, provides that no one shall be held guilty of an offence on account of any act or omission which did not constitute a crime under national or international law at the time when it was committed. On the basis of the above provision the Angolan Court in exercising its jurisdiction on a law enacted after the defendants had been captured seem to have been contrary to international law.[157] However, there are exceptions to the non-retroactivity rule. Persons may be punished for acts or omissions which were criminal according to general principles of law at the time when they were committed but not yet expressly subjected to penal sanction.[158] Article 15, paragraph 1 of the International Covenant on Civil and Political Rights provides:

> Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to general principles of law recognized by the community of nations.

The European Convention on Human Rights and Fundamental Freedoms[159] expressly provide that the non-retroactive rule "shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to general principles of law."

A question for consideration is whether the Angolan trial is covered by the exception to the non-retroactivity

rule. The prosecution relied on a number of resolutions of the General Assembly of the United Nations which condemn mercenary activities as criminal and which call for its abolition as a basis for holding that mercenarism was already a crime under international law.[160] These resolutions of the General Assembly have already been examined and the conclusion has been that they did not constitute a crime of mercenarism. The prosecution in the Angolan Court also relied on the two OAU resolutions which gave rise to the OAU Draft Convention for Elimination of Mercenaries in Africa.[161] As already indicated this draft convention has not been ratified by any Member State of the OAU. Consequently, it is not in force. Even if it were in force, the Angolan Court appears not to have applied it in convicting the 13 defendants for mercenary activities. Since the prosecution relied on OAU draft Convention for the argument that international law outlawed mercenaries, one would have expected the Angolan Court to construe "mercenary crimes" in the same way it had been defined under the OAU draft Convention. Instead, the Court made reference first to the existence of mercenarism in traditional penal law. The Court stated:

> Mercenarism was not unknown in traditional penal law, where it was always dealt with in relation to homicide.[162]

Later the Court seems to conclude that mercenarism ceased to exist as a crime:

> Yet it is important that in the modern penal law, and in the field of comparative law, the mercenary crime lost all autonomous existence and was seen as a common crime, generally speaking aggravated by the profit motive which prompts it. And this mercenary crime, which is known today as "paid crime to order," comes within the laws of criminal complicity, it being through them that the responsibility of he who orders and he who is ordered is evaluated.[163]

On the basis of the conclusion of the Court, the thirteen persons may not have been convicted for the crime of being a mercenary. The Angolan trial, therefore, is not a good precedent for holding that a person can be tried and convicted for being a mercenary per se.

C. The Trial of 7 Mercenaries in the Seychelles

The mercenaries in question were Susan Ingles, the only woman, Bernard Carey, Jeremiah Purren, Frank Brooks, Roger England, Martin Dolincheck and Robert Sims. In this case the defendants were not charged with the crime of mercenarism but with treason and firearm offences. The probable reason for their not being charged with the crime of mercenarism is that it is not defined in the Penal Code of Seychelles. With respect to the charge of treason, the defence submitted that the seven accused would not be tried for treason. The objection was overruled by the Chief Justice Earie Seation.[164] In so far as international law is concerned the Chief Justice seems to have been correct in rejecting the submission by the defence that the accused

persons cannot be tried for treason. It is generally recognized and accepted in international law that a State possesses the right of trying and punishing aliens for all infractions of its penal laws committed inside its territory.[165] The universally recognized principle of territorial jurisdiction is phrased by the Harvard Research as follows:

> Article 3. A state has jurisdiction to any crime committed in whole or in part within its territory. This jurisdiction extends to (a) any participation outside its territory in a crime committed in whole or in part within its territory; and (b) any attempt outside its territory to commit a crime in whole or in part within its territory.[166]

The territorial principle of jurisdiction applies to aliens as well as to nationals.[167] Therefore, on coming within the jurisdiction of the State against which they intend to wage war, the members of a military expedition are at once subject to the municipal law of the State.[168] If they have attempted to usurp governmental authority in a treasonable way, they became criminally liable to the offended State, and in dealing with them there need be no account taken of their origin in another country.[169] Admittedly in a number of jurisdictions the question whether a man can be guilty of treason depends of whether or not he owes allegiance to a State prosecuting him for that offence.[170] This, however, seems to be a matter of municipal law and not a matter of international law.

In the case of seven mercenaries in Seychelles the charge against Susan Ingles was dropped and she was set free

without any explanation.[171] Four of the accused persons, namely Bernard Carey, Jeremiah Purren, Frank Brooks and Roger England pleaded guilty to the charge and were sentenced to death.[172] Martin Dolincheck who had not pleaded guilty was convicted and sentenced to twenty years in prison.[173] Robert Sims who had had the charge of treason dropped pleaded guilty to firearms offences.[174] It is seen here that the captured mercenaries in Seychelles were tried for specific offences under the Penal Code and not for being mercenaries per se.

FOOTNOTES

1. Emphasis is added.

2. See 71 Am. J. Int'L. (1977) 140.

3. Statement to this effect was made by President Angostino Neto of the Republic of Angola, see N.Y. Times, (July 10, 1976), A6, Col. 4.

4. See B.N. Mehrish, War Crimes and Genocide in International Law: The Trial of Pakistan War Criminals (1972); G. Schwarzenberger, "The Problem of an International Criminal Law", in International Criminal Law (ed. by G.O.W. Mueller and E. M. Wise, 1965), 3, 4-14.

5. The Lotus Case (1927) P.I.C.J. Series A. No. 10, 19.

6. H.H. Jescheck, "International Criminal Law: its object and recent developments" in I A Treatise on International Criminal Law (ed. by. M.C. Bassiouni and V.P. Nanda 1973), 49, 51.

7. "Harvard Research in International Law, Jurisdiction with Respect to Crime," 29 Am. J. Int'L Supp. (1935), 439, 445 (herein after cited as Harvard Research); see also B.J. George "Extra territorial Application of Penal Legislation" 64 Mich. L. R. (1966), 609, 613-14.

8. See Harvard Research supra note 7.

9. See generally, W. Berge "Criminal Jurisdiction and the Territorial Principle" 30 Mich. L. R. (1931), 238.

10. See Harvard Research supra note 7.

11. Ibid.

12. See C.G. Tornaritis, "Individual and Collective Responsibility in International Criminal Law" in 1 A Treatise on International Law, supra note 6, 103, 106-07.

13. See Harvard Research, supra note 7.

14. See J.B. Moore, Report on Extraterritorial Crime and the Cutting Case (1887), 9, quoted in H.W. Briggs, The Law of Nations (2nd ed. 1952), 571.

15. See H.W. Briggs. supra note 14, 577.

16. 96. U.N.T.S. 271.

17. 520 U.N.T.S. 151.

18. See H. Kelsen, "Collective and Individual Responsibility in International Law with particular regard to the Punishment of War Criminals" 31 Cal. L.R. (1943), 530, 534.

19. Ibid., 536.

20. Ibid.

21. See G. Schwarzenberger supra note 4, 10-11.

22. Ibid., 11-12.

23. See M.c. Bassiouni, International Extradition and World Public Order (1974), 3-41.

24. See Harvard Research, supra note 7, 66-67.

25. For a list of extradition treaties see Ibid, 241-42. see also, generally, S.D. Bedi, "Procedures for extradition to and from Commonwealth Countries" 21 Indian J. Int'l L (1971), 381; P.O. Higgins, "European Convention on Extradition" 9 Int'l & Comp. L.Q. (1960), 491.

26. For a list of national extradition statutes see Harvard Research, supra note 7, 356-434.

27. Ibid., 92.

28. See generally, E.M. Borchard, "The Factor Extradition Case" 28 Am. J. Int'l L (1934), 742; M.O. Hudson, "The Factor Case and Double Criminality in Extradition, 28 Am. J. Int'l L. (1934), 274.

29. See generally, L.L. Deere, "Political Offences in the Law and Practice of Extradition," 27 Am. J. Int'l L. (1933), 247.

30. See A.G.D. Levy, "Criminal Responsibility of Individuals and International Law," 12 U. Chicago L.R. (1945), 313, 328.

31. See, for example, The European Convention on the Punishment of Road Traffic Offences (Nov., 30, 1964), E.T.S. No. 52.

32. See, for example, The European Convention on the International Validity of Criminal Judgements (May 28, 1970), E.T.S. No. 70.

33. See, for example, The European Convention on the Supervision of Conditionally Convicted and Conditionally Released Officers (Nov. 30, 1964), E.T.S. No. 50.

34. See G. Schwarzenberger, supra note 4, 13-14.

35. See J.W. Bridge, "The Case for an International Court of Justice and the Formulation of International Criminal Law," 13 Int'l & Comp. L.Q. (1964), 1255, 1266.

36. See H. Kelsen, supra note 18; P.K. Ryu and H. Silving, "International Criminal Law - A Search for Meaning in I A Treatise on International Criminal Law, supra note 6, 22, 25.

37. For a detailed discussion of some of these advantages, see M.C. Bassiouni, International Criminal Law: A Draft International Code (1980), 23.

38. G. Schwarzenberger, supra note 4, 7-8; see also J.W. Bridge, supra note 35, 1260-61.

39. G. Schwarzenberger, supra note 4, 7-8.

40. See Q. Wright, "The Law of the Nuremberg Trial", in International Criminal Law, supra note 4, 239, 260.

41. See B.N. Merish, supra note 4, 5; V. Pella, "Towards an International Criminal Court," 44 Am. J. Int'l. (1950), 37, 55-6.

42. See Report of the International Law Commission, G.A.O.R. Supp. (No. 10), 226, U.N. Doc. A/31/10, (1976).

43. See p. 58 supra.

44. See p. 64 supra.

45. C.W. Jenks, A New World Law? (1969), 46.

46. Ibid.

47. See B.N. Merish, supra note 4, 19; G. Schwarzenberger, supra note 4, 15; Q. Wright, "Proposal for an International Criminal Court," 46 Am. J. Int'l (1952), 60, 70-71. Contra: S.P. Sinha, "The Position of the Individual in an International Criminal Law," in A Treatise on International Criminal Law, supra note 6, 122, 137.

48. See R.K. Woetzel, The Nuremberg Trial in International Law (1962), 50-52.

49. E.B. Midgley, The Natural Law Tradition and the Theory of International Relations (1975), 121.

50. See H.C. Burmester, "The Recruitment and Use of Mercenaries in Armed Conflicts," 72 Am. J. Int'l L. (1978), 37, 53; D.P. Myers, "Contemporary Practice of the United States Relating to International Law," 54 Am. J. Int'l L. (1960), 632, 656.

51. 36 Stat. 2310 T.S. No. 540; 1 Bevans 654; 2 Am. J. Int'l L. Supp. (1908), 117.

52. See Note, "Mercenaries at Geneva," 70 Am. J. Int'l L. (1976), 811, 811.

53. See A. Rosas, The Legal Status of Prisoners of War (1976), 222.

54. See Note, "Mercenaries at Geneva," supra note 52.

55. See G.I.A. Draper, "The Status of Combatants and the Question of Guerilla Warfare," 45 Brit. Y.B. Int'l L. (1971), 173, 175.

56. 36 Stat. 2310 T.S. No. 540; 1 Bevans 654; 2 Am. J. Int'l. Supp. (1908), 117.

57. The Geneva Convention Relative to the Treatment of Prisoners of War done at Geneva, Aug. 13, 1949, 75 U.N.T.S. 135; 47 Am. J. Int'l L. Supp. (1953), 119.

58. See G. Schwarzenberger, "Terrorists, Hijackers, Guerilleros and Mercenaries," 24 Curr. Leg. Probs. (1971), 257, 267.

59. See Art. 1 of the Hague Convention (IV) of 1907 Respecting the Laws and Customs of War on Land (Oct. 18, 1907), 36 Stat. 2277.

60. See W.T. Mallison & S.V. Mallison, "The Juridical Status of Irregular Combatants under Internatinal Humanitarian Law of Armed Conflicts," 9 Case W. Res. J. Int'l L. (1977), 39, 46.

61. The Trial of Schoengrath, 11 Rep. U.N. Comm'n (1949), 83.

62. See W.T. Mallison & S.V. Mallison, supra note 60, 69.

63. Ibid.

64. See Note, "Mercenaries at Geneva," supra note 52.

65. Ibid. The Common Article 3(1)(d) concerning internal conflicts requires that judgements concerning combatants must be pronounced by "a regularly constituted court affording all the juridical guarantees which are recognized as indispensable by civilized peoples".

66. See G. Schwarzenberger, supra note 58, 266.

67. M. de Vattel, Law of Nations (Trans. by J. Chitty, 1861), 400.

68. Art. 5, U.N. G.A. Res. 217A (III), U.N. Doc. A/810 (Dec. 10, 1948); 43 Am. J. Int'l L. Supp. (1949), 127.

69. 213 U.N.T.S. (1950), 211, Art. 6.

70. 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.

71. See for example, U.N. G.A. Res. 2548, 24 U.N. GAOR, Supp. (No. 30), 5 U.N. Doc. A/7630 (Dec. 11, 1969); U.N. G.A. Res. 3103, 28 U.N. GAOR, Supp. (No. 30) 142, U.N. Doc. A/9030 (Dec. 13, 1973).

72. South-West Africa - Voting Procedure [1955] I.C.J. 67, 115. Quoted in L.C. Green, International Law Through the Cases (3rd ed. 1970), 798.

73. See generally, H. Johnson, "The Effect of Resolutions of the General Assembly of the United Nations," 32 Brit. Y.B. Int'l L. (1955), 97; O. Schachter, "The Development of the International Law Through the Legal Opinions of the United Nations Secretariat," 25 Brit. Y.B. Int'l L. (1948), 91; F.B. Sloan, "The Binding Force of a Recommendation" of the General Assembly of the United Nations," 25 Brit. Y.B. Int'l L. (1948), 1.

74. R. Higgins, The Development of International Law through the Political Organs of the United Nations (1963), 5.

75. O. Asamoah, The legal significance of Declarations of the General Assembly of the United Nations (1966), 46.

76. Western Sahara Advisory Opinion, [1975] I.C.J. 12, 32.

77. U.N. G.A. Res. 217, 3 U.N. Doc. A/810 at 71 (Dec. 10, 1948).

78. See M.S. McDougal, H.D. Lasswell and L. Chen, Human Rights and World Public Order (1980), 180; L.B. John, "The Universal Declaration of Human Rights" 8 J. Int'l Comp. Jur. (1967), 17, 26.

79. See B.N. Mehrish, supra note 4, 33.

80. See. B. Cheng, United Nations Resolutions on Outer Space Instant International Law?, 5 Indian J. Int'l L. (1965) 23, 59.

81. See, for example, U.N. G.A. Res. 2506, 24 U.N. GAOR, Supp. (No. 30) at 23 U.N. Doc. A/7630 (Nov. 21, 1969) adopted by 101 votes to 2 with 6 abstentions.

82. R.A. Falk, "On the Quasi-Legislative Competence of the General Assembly," 60 Am. J. Int'l L. (1966) 783, 785.

83. U.N. G.A. Res. 1803, 17 U.N. GAOR, Supp. (No. 17) at 15, U.N. Doc. A/5217 (Dec. 18, 1962); 57 Am. J. Int'l L. (1963), 710.

84. See, B.H. Weston, "The Charter of Economic Rights and Duties of States and Deprivation of Foreign Owned Wealth," 75 Am. J. Int'l L. (1981) 437, 448. The same view was taken by sole arbitrator in Texaco Overseas Petroleum Co./California Asiatic Oil Co. v. Libyan Arab Republic, (1978) 17 Int'l leg. Mat. 1, 27-31.

85. U.N. G.A. Res. 1514, 15 U.N. GAOR, Supp. (No. 16) at 66, U.N. Doc. A/4684, (Dec. 14, 1960).

86. E. Schwelb, Human Rights and International Community (1964), 70. See also, O.Y. Asamoah, supra note 75, 79-100.

87. S. Bleicher, "The legal Significance of Re-Citation of General Assembly Resolutions," 63 Am. J. Int'l L. (1969) 444, 477. Contra. G.A. Ruiz, "The Normative role of the General Assembly of the United Nations and the Declaration of Principles of friendly relations" Recueil Des Cours (111, 1972), 431, 476.

88. See N.Y. Times (July 10, 1976), A6, Col. 4.

89. Quoted in 6 African Political Economy (1977), 71. Professor Lars Rudebeck, Uppsala University, Sweden, was a member of the International Commission of Enquiry on Mercenaries, Angola, 1976.

90. L.C. Green "The Status of Mercenaries in International Law," 8 Isr. Y.B. on Human Rights (1978), 9, 36-45.

91. U.N. G.A. Res. 96(1), U.N. Doc. A/64/Add.1 at 188 (Dec. 11, 1946).

92. U.N. E.S.C. Res. 117, 6, U.N. Doc. E/777 at 19 (March 2, 1948).

93. U.N. E.S.C. Res. 153, 7, U.N. Doc. E/1065 at 27 (Aug. 30, 1948).

94. U.N. G.A. Res. 260A, 3, U.N. Doc. A/810 at 174 (Dec. 9, 1948).

95. U.N. G.A. Res. 2548, 24 U.N. GAOR, Supp. (No. 30) at 5, U.N. Doc. A/763, (Dec. 11, 1969).

96. See Y.B. U.N. (1977), 211.

97. U.N. G.A. Res. 34/140, 34 U.N. GAOR, Supp. (No. 46) at 42, U.N. Doc. A/34/46 (Dec. 14, 1979).

98. Ibid.

99. U.N. G.A. Res. 35/48, 35 U.N. GAOR, Supp. (No. 48), 257-58, U.N. Doc. A/34/48 (Dec. 4, 1980).

100. U.N. Doc. A/C.6/35/L.14 (Dec. 4, 1980).

101. 36 U.N. GAOR, Supp. (No. 43), U.N. Doc. A/36/143 (March 17, 1981).

102. 37 U.N. GAOR, Supp. (No. 43), U.N. Doc. A/37/43 (Sept. 30, 1982).

103. See OAU Res. 17 (VII), OAU Doc. ECM Lagos (Dec. 1970).

104. OAU Doc. CM/St.6 (XVII) (June 21-23, 1971).

105. OAU Doc. CM/1/33 Ref. 1, Rabat, (June 1972).

106. OAU Doc. CM/433/Rev.L., Annex 1, see Appendix 1 infra.

107. Ibid., art. 3.

108. Ibid., art. 4.

109. See R. Martin, "Mercenaries and the Rule of Law," Int'l Comm. Jurists (Rev.) (1977), 51 52.

110. The regional limitation of the OAU draft convention led Nigeria to present a draft convention to the General Assembly for consideration. See Summary Record, 20th mtg. Sixth Comm., U.N. Doc. A/C.6/35/-SR.20 at 7 (Oct. 22, 1980), comments of Mr. Clark (Nigeria).

111. Protocol 1 Additional to the Geneva Convention of 1949 (June 8, 1977), U.N. Doc. A/32/144, Annex. 1, (1977) 16 Int. Leg. Mat. 1391.

112. See H.C. Burmester, supra note 50, 55; L.C. Green, "The New Law of Armed Conflicts," 15 Can. Y.B. Int'l L. (1977), 3, 17.

113. Doc. CDDH/111/361, Add. 1 at 3 (June 7, 1976).

114. See J.S. Pictet, Commentary on the Geneva Conventions Relative to the Treatment of Prisoners of War (1960), 1-16.

115. L.C. Green, supra note 112, 24-25.

116. See R.J. Erickson, "Protocol 1: A merging of the Hague and Geneva Law of Armed Conflict," 19 Va. J. Int'l L. (1979). 557, 591.

117. U.N. SC. Res. 419, 32 U.N. SCOR/Supp. (Jan.-Dec. 1977) at 76, U.N. Doc. S/12454 Rev. 1 (Nov. 24, 1977).

118. See M. Bernard A Historical Account of Neutrality of Great Britain During American Civil War. (1870), 323-24.

119. See 7. G.H. Hackworth, Digest of International Law (1943), 413. Some of Americans referred to belonged to the Escadrille Américaine in the French Air Force in 1914; see J. Stone, Legal Controls of International Conflicts (Rev. 1959), 38 9n.

120. Memorandum of the Counsellor for the Department of State, Aug. 22, 1914, 1 For. Rel. (1939), 26.

121. Ibid.

122. See E.M. Borchard, "The Power to Punish Neutral Volunteers in Enemy Armies," 32 Am. J. Int'l L. (1948), 535, 535.

123. See W.E. Watters, An International Affair (Non-Intervention in the Spanish Civil War 1936-1939 (1971), 205.

124. Ibid., 16-17.

125. Ibid., 206.

126. See W.T. Mallison & S.V. Mallison, supra note 60, 46. During the Second World War, examples of the neutral individuals include the "Eagle" squadrons of American pilots in the R.A.F. enlisted in Canada in 1940-41 and the "Flying Tigers" organised by Colonel Chennault,

operating against Japan. See J. Stone, supra note 119.

127. See, for example, The Einsatzgruppen Case, 4 U.S. Trials War. Crim. (1949), 1.

128. See S.M. Meyers & W.C. Bradbury, "The Political Behavior of Korean and Chinese Prisoners of War in the Korean Conflict: A Historical Analysis," in Mass Behavior in Battle and Captivity: The Communist Soldier in Korean War (ed. by S.M. Meyers and A.D. Biderman (1968), 210, 217-18.

129. See 47 Am. J. Int'l L. Supp. (1953), 186.

130. See A. Rosas, supra note 53, 201.

131. For the text of the Code, see 1 A.H.M. Kirk-Green, Crisis and Conflict in Nigeria: A Documentary Source Book 1966-1969 (1971), 455-57.

132. Ibid.

133. See E.I. Nwogugu, "The Nigerian Civil War: A case Study in the Law of War," 14 Indian J. Int'l L. (1974), 13, 51.

134. See N.Y. Times (Oct. 21, 1973), A26, Col. 1.

135. Ibid.

136. See, "In the Trial Steiner: A Court-Martial, "Sudan L.J. & Rep. (1971), 147 (hereinafter referred to as the Trial of E.R. Steiner - A Court-martial).

137. See, "Sudan: Africa's Nuremberg Trial," Newsweek (Sept. 6, 1971), 31.

138. The Trial of E.R. Steiner - A Court-Martial, supra note 136, 152.

139. Ibid., 155.

140. Ibid., 172.

141. See Time (Magazine) (Nov. 22, 1971), 53.

142. See G.H. Lockwood, Q.C., "Report on the Trial of Mercenaries: Luanda, Angola, June 1976," 7 Manitoba L.J. (1977), 183, 184. Mr Lockwood was a member of the International Commission of Enquiry on Mercenaries and attended the trial in Angola.

143. See Notes, "The Laws of War and the Angolan Trial of Mercenaries: Death of the Dogs of War," 9 Case W. Res. J. Int'l L. (1977), 323, 327.

144. Ibid., p. 333.

145. OAU Doc. AHG/Res. 49(IV), Sept. 11-14, 1967; CM/St.6 (XVII), June 21-23, 1971.

146. U.N. G.A. Res. 2395, 23 U.N. GAOR, Supp. (No. 18) at 59, U.N. Doc. A/7218 (Dec. 20, 1968); U.N. G.A. Res. 2465, 23 U.N. GAOR, Supp. (No. 18) at 5 U.N. Doc. A/7218 (Dec. 20, 1968); U.N. G.A. Res. 2548, 24 U.N. GAOR, Supp. (No. 30), at 5 U.N. Doc. A/7630 (Dec. 11, 1969); U.N. G.A. Res. 3103, 28 U.N. GAOR, Supp. (No. 30) at 142, U.N. Doc. A/9030 (Dec. 13, 1973).

147. See Note, "The Laws of War and the Angolan Trial," supra note 143, 333.

148. Ibid., 327.

149. Ibid., 328.

150. Ibid.

151. Ibid.

152. See N.Y. Times, (July 10, 1976), A6, Col.4.

153. Ibid., (July 11, 1976), A1, Col. 5.

154. The Act referred to here is No. 7/76 of May 1st. 1976. For the text see notes, The Laws of War and The Angolan Trial of Mercenaries, supra note 143, 382.

155. See Q. Wright, "The Law of the Nuremberg Trial" supra note 40, 251.

156. U.N. G.A. Res. 2200, 21 U.N. GAOR, Supp. (No. 16), at 52 U.N. Doc. A/6316 (Dec. 16, 1966); (1967) 6 Int'l Leg. Mat. 368.

157. See Notes, The Laws of War and Angolan Trial of Mercenaries, supra note 143, 352.

158. See H.W. Baade, "Individual Responsibility" in The Future of the International Legal Order (ed. by C.E. Black and R.A. Falk 1972), 291, 309; Q. Wright, supra note 40, 261-64.

159. 213 U.N.T.S. (1950), 211.

160. For these resolutions see, supra note 146.

161. OAU Doc. CM/433/Rev.L., Annex 1 see Appendix 1 infra.

162. Quoted in G.H. Lockwood, supra note 142, 198.

163. Ibid., 199.

164. See N.Y. Times (June 18, 1982), A5, Col. 5.

165. See W.E. Beckett, "The Exercise of Criminal Jurisdiction over Foreigners," 6 Brit. Y.B. Int'l L (1925), 44, 25.

166. Harvard Research, supra note 7, 439.

167. See H.W. Briggs, supra note 14, 576.

168. See E.R. Curtis, "Law of Hostile Military Expedition as applied by the U.S." 6 Am. J. Int'l L (1906), 1, 33.

169. Ibid.

170. Great Britain is one obvious example. See Joyce v. Director of Public Prosecutions (1946). A.C. 347; H. Lauterpacht, "Allegiance, Diplomatic Protection and Criminal Jurisdiction over Aliens," 9 Cambridge L.J. (1947), 330-48.

171. See N.Y. Times (June 18, 1982), A 5, Col. 5.

172. See The Times (London) (July 7, 1982), 4.

173. Ibid.

174. Ibid.

CHAPTER VII

CONCLUSION

In addition to the observations and suggestions made in the preceding chapters, this study is concluded by recommending for the establishment of an international tribunal to resolve disputes which arise as a result of the employmentof mercenaries in armed conflicts. This proposal does not appear in any of the draft conventions before the United Nations Ad Hoc Committee on mercenaries.[1] In the realm of international criminal law, to which offences which may be committed by individuals who serve as mercenaries belong, the suggestion for the establishment of an international criminal tribunal is not new. The establishment of the International Military Tribunal at Nuremberg under the London Agreement of August 8, 1945[2] for the prosecution of Nazi war criminals is one obvious example.[3]

There are many reasons for the need to establish an international tribunal to try persons who may have served as mercenaries in armed conflicts. First, as it has been demonstrated in the previous chapters, the employment of mercenaries in armed conflicts covers many legal questions of some difficulty and considerable interest to the international community. In absence of an international tribunal, terms like "mercenary," "mercenarism," "organising" of a hostile military expedition and "recruiting" of mercenaries would be interpreted differently and such interpretations may not necessarily be acceptable to the international community as a whole. To develop an acceptable

and uniform standard of interpretation of such terms, requires, as of necessity, the establishment of an international tribunal.

Second, the establishment of an international tribunal to try persons accused of mercenary offences, would clearly lead the international community to recognize that those offences are international crimes. The existing draft conventions provide for States to enact statutes creating offences connected with mercenary activities.[4] The enforcement of these statutes would be through national courts. Doubts have been expressed about crimes proscribed by international law but enforced through municipal courts being also international crimes in a sense comparable to municipal criminal law.[5]

Third, the existence of an international tribunal may also enhance the enforcement of rules regulating the use of mercenaries. It has already been observed that although many resolutions of the United Nations have recommended that States enact legislation to prevent the recruitment and training of mercenaries and called for the punishment of those persons who have served as mercenaries very few States have done so. It is conceivable that with the establishment of an international tribunal, there would be more trials since the enforcement of international law on mercenaries would not depend entirely on municipal statutes and courts.

Fourth, an international tribunal trying alleged mercenaries would not be accused of being biased, a common characterization of trials of non-nationals by municipal courts of offences of a political nature. In the trial of Eichmann by an

Israeli Court, for example, counsel for the defence submitted that the fact that the judges on the tribunal were of Jewish nation and the State of Israel might prejudice them against the accused in view of the charges involved.[6] According to Professor R.K. Woetzel,[7] criticism of Israeli policy in exercising jurisdiction over Eichmann could have been avoided through the institution of an international trial. As an answer to the criticism directed at the trial of mercenaries in Angola, R. Martin[8] also recommends for the establishment of a permanent international criminal tribunal.

Assuming a case for the establishment of an international tribunal has been made a question for consideration is the method of setting up such a tribunal. One method is to include a provision in a convention on mercenaries that any person charged with mercenary offences would be tried by an international tribunal appointed by the United Nations. This approach implies that every trial of an alleged mercenary would require a specific appointment of an international tribunal by the United Nations. There are many practical and political problems involved in establishing an international tribunal to hear specific cases of alleged mercenaries. For example, the debate in United Nations on the issue of setting up an international tribunal to try a specific case of an alleged mercenary would be along political alliances that any appointment following the debate would be deprived of its impartial character. To minimize some of the drawbacks of the above mentioned method and mercenaries being a perennial phenomenon, calls for the

establishment of a permanent international tribunal. Such a tribunal could be set up either under a convention on mercenaries or under the Draft Statute for an International Criminal Court.[9] Under Article 1 of the Draft Statute, the Court would try "natural persons accused of crimes generally recognized under international law." The Draft Statute for an International Criminal Court has not yet been adopted by the United Nations. However, the current efforts of the General Assembly of the United Nations to draft a convention on mercenaries provide an opportunity for adopting the Draft Statute for an International Criminal Court.

FOOTNOTES

1. See, for example, OAU Draft Convention for the Elimination of Mercenaries in Africa, OAU Doc. CM/433/Rev. L., Annex 1 (1972), Appendix 1 infra; The Draft Convention on the Prevention and Suppression of Mercenarism (1976) quoted in W. Burchett and D. Roebuck, The Whores of War: Mercenaries Today, (1977), 237, Appendix 2 infra; International Convention Against the Activities of Mercenaries, U.N. Doc. A/35/366/Add.1, at 10-16 (Dec. 4, 1980), Appendix 3 infra.

2. For text see, 1 Trial of the Major War Criminal Before the International Military Tribunal (1946-1947), x, xi.

3. For efforts to set up an international criminal court before 1945, see United Nations Secretariat, Historical Survey of the Question of International Criminal Court (1949).

4. See Art. 5 of the OAU Draft Convention for the Elimination of Mercenaries in Africa, supra note 1; Arts. 6 and 7 of the Draft Convention on the Prevention and Suppression of Mercenarism (1976), supra note 1; Arts. 3 and 4 of the International Convention Against the Activities of Mercenaries, supra note 1.

5. See G. Schwarzenberger, "The Problem of an International Criminal Law" in International Criminal Law (ed. by G.O.W. Mueller and E.M. Wise 1965), 3, 7-8.

6. The Attorney-General of the Government of Israel v. Eichmann, 56 Am. J. Int'l L. (1962), 805.

7. R.K. Woetzel, "The Eichmann Case in International Law," Crim. L.R. (1972), 671, 681-82.

8. R. Martin, "Mercenaries and the Rule of Law," Int'l Comm'n of Jurists, The Review (1976), 51, 56.

9. For text, see Report of the 1953 Commiteee on International Criminal Jurisdiction, 9 GAOR Supp. (No. 12) at 23-26 U.N. Doc. A/2645 (1954); this Draft Statute is examined by G.A. Finch, "Draft Statute for an International Criminal Court," 46 Am. J. Int'l L. (1952), 89; F.J. Klein and D. Wilkes, "United Nations Draft Statute for an International Criminal Court: An American Evaluation," in 12 International Criminal Law, supra note 5, 526; V.V. Pella, "Towards an International Criminal Court," 44 Am. J. Int'l L. (1950), 37.

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APPENDIX I

OAU CONVENTION FOR THE ELIMINATION OF MERCENARIES IN AFRICA

O.A.U. Doc. CM/433/Rev.L, Annex 1 (1972)

PREAMBLE

We Heads of State and Government of Member States of the Organization of African Unity,

Considering the grave threat which the activities of mercenaries represent to the independence, sovereignty, territorial integrity and harmonious development of Member States of OAU,

Considering that total solidarity and co-operation between Member States are indispensable for putting an end, once and for all, to the subversive activities for mercenaries in Africa,

Decided to take all necessary measures to eradicate from the African continent the scourge that the mercenary system represents. We agree on the following:

ARTICLE ONE

Under the present Convention a 'mercenary' is classified as anyone who, not a national of the state against which his actions are directed, is employed, enrols or links himself willingly to a person, group or organization whose aim is:

(a) to overthrow by force of arms or by any other means the government of that Member States of the Organization of African Unity;

(b) to undermine the independence, territorial integrity or normal working of the institutions of the said State;

(c) to block by any means the activities of any liberation movement recognized by the Organization of African Unity.

ARTICLE TWO

Offence

1. The actions of a mercenary, in the meaning of Article One of the present Convention, constitute offences considered as crimes against the peace and security of Africa and punishable as such.

2. Anyone who recruits or takes part in the recruitment of a mercenary, or in training, or in financing his activities or who gives him protection, commits a crime in the meaning of

paragraph I of this article.

ARTICLE THREE

Duties of State

The Member States of the Organization of African Unity, signatories to the present Convention, undertake to take all necessary measures to eradicate from the African continent the activities of mercenaries.

To this end, each State undertakes particularly:

(a) to prevent their nationals or foreigners living in their territory from committing any of the offences defined in Article Two of the present Convention;

(b) to prevent the entry to or the passage through their territory of any mercenary or equipment intended for their use;

(c) to forbid in their territory any activity by organizations or individuals who employ mercenaries against the African States Members of the Organization of African Unity;

(d) to communicate to other Member States of the Organization of African Unity any information, as soon as it comes to their knowledge, relating to the activities of mercenaries in Africa;

(e) to forbid on their territory the recruitment, training or equipping of mercenaries or the financing of their activities;

(f) to take as soon as possible all necessary legislative measures for the implementation of the present Convention.

ARTICLE FOUR

Sanctions

Every contracting State undertakes to impose severe penalties for offences defined in Article Two of the present Convention.

ARTICLE FIVE

Competence

Every contracting State undertakes to take the measures necessary to punish any individual found in its territory who has committed one of the offences defined in Article Two of the present Convention, if he does not hand him over to the State against which the offence has been committed or would have been committed.

ARTICLE SIX

Offences calling for extradition

In accordance with the provisions of Article Seven of the present Convention, the offences defined in Article Two above should be considered as offences calling for extradition.

ARTICLE SEVEN

Extradition

1. A request for extradition, cannot be rejected, unless the State from which it is sought undertakes to prosecute the offender in accordance with the provisions of Article Five of the presnet Convention.

2. When a national is the subject of the request for extradition, the State from which it is sought must, if it refuses, undertake prosecution of the offence committed.

3. If, in accordance with sections 1 and 2 of this Article, prosecution is undertaken, the State from which extradition is sought will notify the outcome of such prosecution to the state seeking extradition and to any other interested Member State of the Organization of African Unity.

4. A state will be regarded as an interested party for the outcome of a prosecution as defined in section 3 of this Article if the offence has some connection with its territory or militates against its interests.

(Articles 8 to 11 are formal.)

APPENDIX II

DRAFT CONVENTION ON THE PREVENTION AND SUPPRESSION OF MERCENARISM

(Draft produced by the International Commission of Inquiry on Mercenaries, in Luanda, Angola, June 1976)

PREAMBLE

The High Contracting Parties

Seriously concerned at the use of mercenaries in armed conflicts with the aim of opposing by armed force the process of national liberation from racist colonial and neo-colonial domination:

Considering that the crime of mercenarism is part of a process of perpetuating by force of arms racist colonial or neo-colonial domination over a people or State;

Considering the resolutions of the United Nations (Res. 2395 (XXIIX), 2465 (XXXXX), 2548 (XXIV) and 3103 (XXVIII) of the General Assembly and of the Organization of African Unity (ECM/Res.5(III), 1964; AHG Res.49(IV), 1967; ECM/Res.17(VII), 1970, and OAU Declaration on the Activities of Mercenaries in Africa CM/St.9 (XVII), which have denounced the use in these armed conflicts of mercenaries as a criminal act, and mercenaries as criminals, and which have urged States to take forceful measures to prevent the organization, recruitment and movement on their territory of mercenaries, and to bring to justice the authors of this crime and their accomplices;

Considering that the resolutions of the UN and the OAU and the statements of attitude and the practice of a growing number of States are indicative of the development of new rules of international law making mercenarism an international crime;

Convinced of the need to codify in a single text and to develop progressively the rules of international law which have developed in order to prevent and suppress mercenarism, the High Contracting Parties are convinced of the following matters:

ARTICLE ONE

Definition

The crime of mercenarism is committed by the individual, group or association, representatives of state and the State itself which, with the aim of opposing by armed violence a process of self-determination, practices any of the following acts:

(a) organizes, finances, supplies, equips, trains, promotes, supports or employs in any way military forces consisting of or including persons who are not nationals of the country where they are going to act, for personal gain, through the payment of a salary or any other kind of material recompense;

(b) enlists, enrols or tries to enrol in the said forces;

(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 abovementioned forces.

ARTICLE TWO

The fact of assuming command over mercenaries or giving orders may be considered as an aggravating circumstance.

ARTICLE THREE

1. When the representative of a State is responsible by virtue of the foregoing provisions for acts or omissions declared by the foregoing provisions to be criminal, he shall be punished for such an act or omission.

2. When a State is responsible by virtue of the foregoing provisions for acts or omissions declared by the foregoing provisions to be criminal, any other State may invoke such responsibility:

(a) in its relations with the State responsible, and
(b) before competent international organizations.

ARTICLE FOUR

Mercenaries are not lawful combatants. If caputred they are not entitled to prisoner of war status.

ARTICLE FIVE

Crimes of mercenaries and other crimes for which mercenaries can be responsible.

A mercenary bears responsibility both for being a mercenary and for any other crime committed by him as such.

ARTICLE SIX

National legislation

Each contracting State shall enact all legislative and other measures necessary to implement fully the provisions of the present Convention.

ARTICLE SEVEN

Jurisdiction

Each contracting State undertakes to bring to trial and to punish any individual found in its territory who has committed the crime defined in Art. 1 of the present Convention, unless it hands him over to the State against which the crime has been committed or would have been committed.

ARTICLE EIGHT

Extradition

1. Any State in whose territory the crime of mercenarism has been committed or of which the persons accused of the crimes defined in Art. 1 are nationals, can make a request for extradition to the State holding the persons accused.

2. The crimes defined in Art. 1 being deemed to be common crimes, they are not covered by national legislation excluding extradition for political offences.

3. When a request for extradition is made by any of the States referred to in para. 1, the State from which extradition is sought must, if it refuses, undertake prosecution of the offence committed.

4. If, in accordance with paras. 1-3 of this article, prosecution is undertaken, the State in which it takes place shall notify the outcome of such prosecution to the State which had sought or granted extradition.

ARTICLE NINE

Judicial guarantees

Every person or group brought to trial for the crime set out in Art. 1 is entitled to all the essential guarantees of a fair and proper trial. These guarantees include:

> the right of the defendant to get acquainted in his native language with all the materials of the criminal case initiated against him, the right to give any explanation regarding the charges against him, the right to participate in the preliminary investigation of the evidence and during trial in his native language, the right to have the services of an advocate, or defend himself if he prefers, the right to give by himself or through an advocate testimony in his defence, to demand that his witnesses be summoned and participate in their investigation as well as in the investigation of witnesses for the prosecution.

APPENDIX III

INTERNATIONAL CONVENTION AGAINST THE ACTIVITIES OF MERCENARIES

U.N. Doc. A/35/366/Add.1, at 10-16 (1980)

The States Parties to this Convention,

Reaffirming the purposes and principles of the Charter of the United Nations concerning effective collective measures for the prevention and removal of all threats to international peace and security,

Bearing in mind the need for the strict observance of the principles of equality, sovereign independence, territorial integrity and self-determination of all peoples as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations

and Co-operation among States in accordance with the Charter of the United Nations,

Recognizing in particular that the General Assembly and the Security Council in several resolutions have condemned the activities of mercenaries aimed at overthrowing the Governments of Member States or jeopardizing the legitimate interest of national liberation movements,

Considering the urgent need by the international community to co-operate and to exercise utmost vigilance against the danger posed by the activities of mercenaries by all States in the interest of international peace and security.

Convinced that an international convention against the activities of mercenaries faithfully implemented will provide an effective collective measures against the menance of mercenarism,
Have agreed as follows:

ARTICLE 1

Definition

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 the territory controlled by a Party to the conflict;

(e) is not a member of the regular 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.

ARTICLE 2

Definition of mercenarism

1. The crime of mercenarism is committed when an individual, group or association, or body corporate registered in that State or representative of a State or the State itself with the aim of opposing by threat or armed violence the territorial integrity of another State or the legitimate aspirations of national liberation movements jeopardizes the process of self-

determination or manifests by overt acts any of the following:

(a) organizes, finances, supplies, equips, trains, promotes, supports, or employs in any way individuals, bands or military forces consisting of or including persons who are not nationals of a Party to the conflict and who act for personal gains through payment of salary or any other kind of material recompense;

(b) participates as an individual, group or association or body corporate or enlists in any force;

(c) advertises, prints or causes to be advertised any information regarding paragraphs (a) and (b) of this article;

(d) allows or tolerates the activities mentioned in paragraphs (a), (b) and (c) of this article to be carried out in any territory or place under its jurisdiction or control or affords facilities for transit, transport, or other operation of the above mentioned forces;

(e) actually participates in any of the acts mentioned in paragraphs (a), (b), (c) and (d) of this article which result in the destruction of life and property.

2. Any person, group or association, representative of a State or the State who:

(a) attempts to commit any act of mercenarism (hereinafter referred to as 'the offence') mentioned in article 2;

(b) participates as an accomplice of any one who commits or attempts to commit the offence also commits the offence for the purpose of this Convention.

3. The offence if committed shall be deemed an offence against the peace and security of a State.

Article 3

Penalties

Each State Party shall by appropriate national legislation make the offences set forth in Article 2 punishable by appropriate penalties which take into consideration the grave nature of the offence.

Article 4

Implementation

Each State Party shall take all appropriate administrative legislative measures to implement fully the provisions of the Convention.

Article 5

Status of mercenaries

Mercenaries are not lawful combatants and if captured shall not be accorded prisoner of war status.

Article 6

Establishment of jurisdiction

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offence in the following cases:

(a) when the offence is committed in its territory;
(b) when the offence is committed by any of its nationals, or body corporate registered in that State;
(c) when the offence is committed by the representative of a State;
(d) when the offence is committed against that State.

2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over the offence in the case where the alleged offender is present in its territory and it does not extradite him pursuant to article 13 to any of the States mentioned in paragraph 1 of this article.

3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.

Article 7

Concurrent jurisdiction

When a State Party is accused by virtue of the provisions of article 2 and article 8 for acts or omissions declared to be the offence under the present Convention, any State Party having jurisdiction may invoke the provisions of this Convention against the offending State before any competent international organization or tribunal.

Article 8

Preventive measures

Each State Party shall take all necessary measures to prevent the departure from its territory of any individual, group or association or body corporate, representative of a State reasonably believed to be involved in any of the activities mentioned in article 2 of this Convention, including denial of transit and other facilities to them.

Article 9

Mutual assistance

1. State parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of the offence stated in article 2 of this Convention. The law of the requested State shall apply.

2. Each State Party shall be obliged to communicate directly or through the Secretary-General of the United Nations to the other State Party concerned any information related to the activities of mercenaries as soon as it comes to its knowledge.

Article 10

Taking of custody

Upon being satisfied that the circumstances so warrant, any State Party in the territory of which the alleged offender is present shall in accordance with its laws take him into proper custody or take such other measures to ensure his presence for such time as is necessary to enable any criminal or extradition proceedings to be instituted. The State Party shall immediately make a preliminary inquiry into the facts.

Article 11

Judicial guarantee

Any individual or group or associations, or body corporate, representative of a State or the State itself, on trial for the offence defined in article 2 of this Convention shall be entitled to all the judicial guarantees ordinarily granted to an alleged offender in the same circumstances.

Article 12

Communication of final proceedings

The State Party where the alleged offender is prosecuted shall in accordance with its laws communicate the final outcome of the proceedings to the Secretary-General of the United Nations, who shall transmit the information to the other States concerned and the international intergovernmental organizations concerned.

Article 13

Extraditable offences

1. For the purposes of this Convention, any of the offences mentioned in article 2 shall be deemed to be included as extra-

ditable offences in any existing or future extradition convention or treaty between the State Parties. This convention may also be the legal basis for extradition in respect of offences listed in article 2.

2. Each State party having jurisdiction mentioned in article 6 of this Convention may request for extradition from the other State Party where the alleged offender is found.

Article 14

Extradition

1. For the purposes of extradition between State Parties, an offence of mercenarism shall not be regarded as a political offence or as an offence inspired by political motives.

2. Where however the State Party in whose territory the alleged offender is found fails to extradite him, that State Party shall be obliged, without exception whatsoever and whether or the offence was committed in its territory, to submit the case to its competent authorities for the purposes of prosecution in accordance with the laws of that State.

Article 15

Action for damages/reparation

1. Where a State Party which suffers damage or whose national or juridical person suffers any damage or loss of life as a result of mercenarism is unable to prosecute or cause prosecution of the alleged offender because of the refusal or otherwise of the other State Party in whose territory the alleged offender is found or its national, it may nonetheless present a claim for damages or reparation as the case may be against that other State Party.

2. The State Party which has suffered damages by reason of the commission of the offence mentioned in article 2 of this Convention may also claim damages or reparation against any State Parties jointly or severally for any act or omission which constitutes the offence.

3. However a claim for damages or reparation may only be considered when attempts to secure criminal prosecution have failed.

Article 16

Settlement of disputes

1. Any dispute between two or more State Parties concerning the interpretation or application of this Convention which is not settled by negotiation shall at the request of any one of them be submitted to arbitration. If within six months from the

date of the request for arbitration the parties are unable to agree on the organization of the arbitration, any one of the parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.

2. Each State may at the time of signature, or ratification of this Convention or accession thereto declare that it does not consider itself bound by paragraph 1 of this article. The other State Parties shall not be bound by paragraph 1 of this article with respect to any State Party which has made such a reservation.

3. Any State Party which has made a reservation in accordance with paragraph 2 of this article may at any time withdraw that reservation by notification to the Secretary-General of the United Nations.

(Article 17-20 are formal.)