

MERCENARIES AND INTERNATIONAL LAW

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I. INTRODUCTION

The use of mercenaries in armed conflicts and in civil wars is an age-old phenomenon. However, it is only in recent years that the international community has tried to curb this practice. International interest in this problem was brought about by a number of factors, the most prominent being the activities of mercenaries during the Congolese and Angolan civil wars, and the trial of those mercenaries who participated in the Angolan civil war at Luanda after the establishment of an independent Angolan government.

The development of an international legal framework to control the use of mercenaries started in the 1960's. At that time, the United Nations became concerned that the use of foreign mercenary forces could prevent and hinder the exercise of the right to self-determination of peoples under colonial domination. What developed at the international level was a recognition that mercenary activities were an affront to the principles of sovereign equality, political independence and territorial integrity of states.¹ In addition, it was recognized that mercenary activities violated the fundamental rights of individuals,

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¹ See G.A. Res. 42/96, U.N. GAOR 3d Comm., 42d Sess., Supp. No. 49, at 91, U.N. Doc. A/42/773 (1987); G.A. Res. 43/107, U.N. GAOR 3d Comm., 43d Sess., Supp. No. 49, at 184, U.N. Doc. A/43/778/Add. 1 and A/43/L.49 (1988); S.C. Res. 239, U.N. SCOR, 22d Sess., 1367th mtg. at 13, U.N. Doc. S/INF/22/Rev.2 (1967); S.C. Res. 405, U.N. SCOR, 32d Sess., 2005th mtg. at 18, U.N. Doc. S/12322 (1977); S.C. Res. 419, U.N. SCOR, 32d Sess., 2049th mtg. at 18, U.N. Doc. S/12454/Rev.1 (1977); S.C. Res. 496, U.N. SCOR, 36th Sess., 2314th mtg. at 11, U.N. Doc. S/PV. 2314 (1981); S.C. Res. 507, U.N. SCOR, 37th Sess., 2370th mtg., U.N. Doc. S/15127 (1982); U.N. ESCOR, Comm'n. Hum. Rts., 42d Sess., Supp. No. 2, 50th mtg. at 84, U.N. Doc. E/1986/26 (1986); U.N. ESCOR, Comm'n. Hum. Rts., 43d Sess., Supp. No. 5, 52d mtg. at 58, U.N. Doc. E/1988/7 (1987); U.N. ESCOR, Comm'n. Hum. Rts., 44th Sess., Supp. No. 2, 29th mtg. at 35, U.N. Doc. E/1988/7 (1988); U.N. ESCOR, Comm'n. Hum. Rts., 45th Sess., Supp. No. 2, 51st mtg. at 69, U.N. Doc. E/1989/21 (1989); U.N. ESCOR, Comm'n. Hum. Rts., 46th Sess., Supp. No. 2, 29th mtg. at 27, U.N. Doc. E/1990/7 (1990); *The International Convention Against the Recruitment, Use, Financing and Training of Mercenaries*, G.A. Res. 44/34, U.N. GAOR, 6th Comm., 44th Sess., Supp. No. 49, at 306, U.N. Doc. A/44/766 (1989).

such as the right to life, physical integrity and security and the enjoyment of property.²

After briefly examining the definition and historical context of mercenarism, this article will describe and discuss the efforts that have been made at the international level in order to tackle the mercenary problem. The aim of the article is to demonstrate that although the activity of mercenarism and the mercenaries themselves are now under greater control than ever, the international community must continue to denounce the practice and must strive to attain an international consensus on how such activities can be controlled.

II. HISTORICAL PERSPECTIVE

To understand the current debate concerning the use of mercenaries and the reason why international law did not seek to put an earlier end to the practice of mercenarism, it is essential to examine the role mercenaries have played throughout history. Mercenarism is an ancient profession.³ Fighting or enlisting for gain was a prominent feature of the Teutonic tribesmen in the Roman armies, of the medieval knights-errant, of 17th century English and Scottish Continental armies, and of the Swiss Papal guards.⁴

Mercenarism as a profession can be traced as far back as antiquity.⁵ As regards European history, mercenaries have been known to exist

² See generally the reports on the question of the use of mercenaries as a means of impeding the exercise of the right of peoples to self-determination, submitted by Special Rapporteur E. B. Ballesteros at: U.N. GAOR, 43d Sess., U.N. Doc. A/43/735 (1987); U.N. ESCOR, 44th Sess., U.N. Doc. E/CN.4/1988/14 (1988); U.N. ESCOR, 45th Sess., U.N. Doc. E/CN.4/1989/14 (1989); U.N. ESCOR, 46th Sess., U.N. Doc. E/CN.4/1990/11 (1990); U.N. ESCOR, 47th Sess., U.N. Doc. E/CN.4/1991/14 (1991).

³ See generally C.C. BAYLEY, *MERCENARIES FOR THE CRIMEA: THE GERMAN, SWISS AND ITALIAN LEGIONS IN BRITISH SERVICE, 1854-56* (1977); MICHAEL MALLETT, *MERCENARIES AND THEIR MASTERS: WARFARE IN RENAISSANCE ITALY* (1974); G.T. GRIFF, *THE MERCENARIES OF THE HELLENISTIC WORLD* (1968); JOHN SCHLIGHT, *MONARCHS AND MERCENARIES: A REAPPRAISAL OF THE IMPORTANCE OF KNIGHT SERVICE IN NORMAN AND EARLY ANGEVIN ENGLAND* (1968); RICHARD G. PRESTON ET AL., *MEN IN ARMS* (rev. ed. 1964).

⁴ See George Schwarzenberger, *Terrorists, Hijackers, Guerrilleros and Mercenaries*, 24 *CURRENT LEGAL PROBS.*, 279-80 (1971); ABDULGAWI A. YUSUF, *Mercenaries in the Law of Armed Conflicts*, in *THE NEW HUMANITARIAN LAW OF ARMED CONFLICTS* 113 (Antonio Cassese ed., 1979); C.M. Peter, *Mercenaries and International Humanitarian Law*, 24 *INDIAN J. OF INT'L L.* 373, 375-78 (1984).

⁵ See E. DAVID, *MERCENAIRES ET VOLONTAIRES INTERNATIONAUX EN DROIT DES GENS* 4 (Editions de l'Université de Bruxelles 1978).

from the beginning of the 12th and 13th centuries.⁶ During that period, private forces were widely used in Italy. Special contractors, "condottieri," recruited mercenaries into their ranks and then hired out these men to the various princes who were engaged in wars.⁷ This practice of using hired troops to wage war spread throughout Europe. Mercenaries were then used as the sole combatants of an army or to assist the hirer's own army in war.⁸ During the 12th century, mercenaries were mostly used for colonial conquests and for maintaining foreign domination in the colonized countries.⁹

With the rise of monarchy, the status of mercenaries was enhanced.¹⁰ Rulers relied on mercenaries to maintain order within their own kingdoms and to fight their wars. They were useful to the kings because:

Since as a rule only the king could afford to hire mercenaries in bulk they strengthened both King and nobles against the people with whom they had no ties or sympathy. While much more expensive than native troops, they left no troublesome widows and orphans; and at the end of the campaign they could be sent away unlike a country's own men coming home from the wars.¹¹

During the 15th and 16th centuries, mercenaries were indispensable to kings and noblemen. Because their employment was accepted as a practice among states, mercenaries possessed an international status of legitimacy.¹² In the early stages of the 16th century, however, there emerged a new form of mercenarism which was linked to the strengthening of the State and to the gradual extinction of private wars. In that period, the practice was no longer that of an individual selling his services to a foreign king, but rather that of a king renting out some of his people to foreign sovereigns.¹³

⁶ Leszek Sosnowski, *The Position of Mercenaries Under International Law*, 19 INDIAN J. OF INT'L L. 382 (1979).

⁷ David, *supra* note 5, at 9.

⁸ Sosnowski, *supra* note 6.

⁹ *Id.*

¹⁰ Peter, *supra* note 4, at 376.

¹¹ V. KIERMAN, "FOREIGN MERCENARIES AND ABSOLUTE MONARCHY," PAST AND PRESENT 69 (1958).

¹² M.O. Tandon, *Legal and Political Status of Mercenaries in History and in the Contemporary World*, (1978) (unpublished LL.M. dissertation, University of Dar-es-Salaam), cited in Peter, *supra* note 4, at 376.

¹³ DAVID, *supra* note 5, at 10.

With the advent of the 18th century and the rise of nationalism and the formation of the citizen soldier, mercenarism declined.¹⁴ During this period armies and army personnel were recruited among citizens of the State and were paid monthly wages. The standing army, therefore, replaced mercenaries as a means of defending the State.¹⁵ By the beginning of the 19th century, the popularity of mercenaries continued to decline, but the practice of mercenarism was by no means extinct. The growth of the standing armies and the development of the law of neutrality, however, made it more difficult to legally defend the use of mercenaries and the practice of mercenarism.¹⁶

Despite the fact that mercenarism faced a certain decline during the 19th century, the practice resurfaced in another form in the 20th century.¹⁷ After the Second World War and the recognition of the right of peoples to self-determination, mercenaries were used to thwart movements of national liberation.¹⁸ As Peter explains:

The oppressed were organized in Liberation Movements which started guerilla warfare against their oppressors. Though poorly equipped, their determination and commitment led to unexpected success. To combat the national liberation movements, the imperialists could no longer come out in the open and expose themselves. This would make them lose face. All they wanted was to "invisibly" control these countries. It is in this context that the modern mercenary has become an important tool of imperialism. Mercenarism as a form of soldiering is used as a vehicle for fighting the liberation movements and independent developing countries.¹⁹

It is during this period that a change of attitude occurred in the international community. Mercenaries were no longer accepted as an integral part of armies; they were now regarded as criminals. As Green argues: "the profession of arms as conducted by professionals prepared to serve an alien master came to be regarded with such obloquy that it seemed almost to have sunk to the level of the supreme crime against mankind."²⁰ It is precisely at this juncture that the

¹⁴ James L. Taulbee, *Myths, Mercenaries and Contemporary International Law*, 15 CAL. W. INT'L L.J. 339 (1985).

¹⁵ DAVID, *supra* note 5, at 11.

¹⁶ See generally 2 OPPENHEIM'S INTERNATIONAL LAW (H. Lauterpacht ed., 1952).

¹⁷ J. Tercinet, *Les Mercenaires et le Droit International*, 1977 ANNUAIRE FRANCAIS DE DROIT INTERNATIONAL 269 (1977).

¹⁸ Sosnowski, *supra* note 6.

¹⁹ Peter, *supra* note 4, at 377-78.

²⁰ L. C. Green, *The Status of Mercenaries in International Law*, 9 MANITOBA L.J. 201, 224 (1979).

United Nations started condemning the use of mercenaries.

III. DEFINING MERCENARIES AND MERCENARY ACTIVITIES

The first step in prohibiting mercenary activities and the use of mercenaries is to have a clear and workable definition of who qualifies as a mercenary. If one is to punish mercenaries and deprive individuals of important legal rights, there must exist clear criteria by which it is possible to identify who will be punished. Further, if States are to be forced to control certain activities within their territory, there must exist clearly defined parameters that set out what is prohibited and what is permitted. Until recently, there did not exist a consensus on the precise meaning of what constituted a mercenary for legal purposes. It is not surprising, therefore, that arriving at an international legal definition of the term "mercenary" was the main task of the international community once it decided to curb the use of mercenaries.

The traditional view of mercenaries is that they are non-nationals who fight for monetary gain rather than loyalty and who are usually indifferent to the claims of legality or the interests of their native country.²¹ Burmester defines mercenaries as volunteers who, for monetary reward, agree to fight for the armed forces of a foreign state or an entity.²²

A. OAU Convention

One of the first organizations which tried to arrive at a general definition of mercenaries was the Organization of African Unity ("OAU").²³ In 1967, definitions were examined by the Ad Hoc Committee for Expulsion of Mercenaries and in 1971 by the OAU's Council of Ministers' Committee of Legal Experts. The Committee

²¹ ANTHONY MOCKLER, *THE MERCENARIES* 23 (1969). See also Riley Martin, *Mercenaries and the Rule of Law*, 17 REV. INT'L COMM. JURISTS 51, 53 (1977) (arguing that "it is impossible satisfactorily to define a mercenary without reference to his motivation.").

²² H.C. Burmester, "The Recruitment and Use of Mercenaries in Armed Conflicts", 72 AM. J. INT'L L. 37 (1978).

²³ Nowhere was the problem of the interference of mercenaries more prominent than in Africa. As Martin remarked: "the mercenary represents to the African everything he fights to defeat: namely, racism and colonialism. For the mercenary is almost invariably white and his participation in African liberation struggles inevitably carries racist overtones. Moreover, the mercenary is seen as the accomplice of powerful colonial interests—those which stand most to gain from maintaining the status quo." Martin, *supra* note 21, at 32.

of Experts charged with drafting a convention on mercenaries presented a report to the OAU's Council of Ministers in 1972,²⁴ and the OAU adopted the Convention for the Elimination of Mercenarism in Africa at Libreville in 1977.²⁵

Article 1 of the Convention defines "mercenary" in the following manner:

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 or 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.

Therefore, under Article 1 a mercenary cannot be a national of the State against which his actions are directed, and he must be willingly employed with the purpose of either overthrowing by force the government of a member State of the OAU, or obstructing the activities of a liberation movement. One should note that under Article 1 no reference is made to the question of private gain or compensation received for the carrying out of the activities.

B. Additional Protocol I of 1977 to the Geneva Conventions of 12 August 1949

The question of mercenaries was also examined by the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts which was held in Geneva from 1974 to 1977. In 1976, the Nigerian delegation took the initiative and introduced in the Working Group of Committee III a proposal for an article defining mercenaries and their status, which was to be inserted in Protocol I on International Armed Conflicts.²⁶ However, no consensus could be reached in 1976 on a

²⁴ OAU Doc. CM/1/33/Ref. 1 (1972).

²⁵ OAU Doc. CM/433/Rev.L, Annex I (1972) [hereinafter OAU Convention]. This Convention entered into force in 1985.

²⁶ The Nigerian proposal defined mercenaries in the following manner:

2. A mercenary includes any person not a member of the armed forces of

definition of "mercenary."²⁷ The reason for this stalemate was a divergence of approaches between the Third World countries who wanted a wide, all-encompassing definition (since they are the ones who must endure the activities of mercenaries) and Western states who were pushing for a narrow definition (because they are the main suppliers of mercenaries).²⁸

However, further debate in 1977 on the question of a definition led to the adoption of Article 47 in Protocol I. According to paragraph 2 of Article 47, 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, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that party;
- (d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
- (e) is not a member of the armed forces of a Party to the conflict; and

a party to the conflict who is specially recruited abroad and who is motivated to fight or to take part in armed conflict essentially for monetary payment, reward or other private gain.

III Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, 3d Sess., Doc. CDDH/III/GT/82 at 192 (1976).

For more information on Protocol I, see *infra* notes 175-189 and accompanying text.

²⁷ For a general discussion of the 1976 deliberations, see H.W. Van Deventer, *Mercenaries at Geneva*, 70 AM. J. INT'L L. 811 (1976). Taulbee notes that the issues discussed during the 1976-77 debates centered around:

- (1) whether a distinction should be drawn between non-resident non-nationals and resident nationals;
- (2) whether a 'mercenary' includes all who meet certain operative tests, or whether some overt actions directly related to hostilities are necessary;
- (3) whether outside private forces and national troops should be considered different from third party States;
- (4) whether individuals recruited for a specific conflict should be distinguished from those recruited under other circumstances;
- (5) whether motive should be defined through objective tests; and
- (6) whether a legal distinction should be drawn between "legitimate" and "non-legitimate" movements for national liberation.

Taulbee, *supra* note 14, at 351.

²⁸ R.C. HINGORANI, PRISONERS OF WAR, 62 (1982).

(f) has not been sent by a State which is not a Party to the conflict on official duty as a member of the armed forces.

As can be seen from this article, the segments of the definition used to identify mercenaries are cumulative. This means that no one requirement found in subparagraphs (a) to (f) is sufficient in itself for a person to be classified as a mercenary. All requirements must be met before a person can be described as a mercenary.

The features of the definition contained in Article 47 are: money is the basic motive in the decision to enlist; the recruitment and enlistment is for the purpose of fighting in an armed conflict; the person does participate in the combat; the person must be a non-resident foreigner; and no one may be a mercenary who is a member of the armed forces of a party to the conflict or who has been sent on official duty as a member of its armed forces by a State which is not a party to the conflict. When interpreting the scope of each element of the definition, it should be remembered that "the intention in the Protocol . . . was, on the one hand, to make a distinction between mercenaries pursuing their own 'interests' and selfless international volunteers, and on the other hand, to disregard the particular cause served by the mercenary, and even the fact that he used his skill to illegal ends"²⁹

Because the definition will determine who can be viewed as a mercenary and, therefore, be denied prisoner of war status, each element of the definition is of critical importance. As will be seen, though, the definition in Protocol I creates as many problems as it solves. By stating that a mercenary must be a person who is specially recruited locally or abroad in order to fight in an armed conflict, subparagraph (a) tried to clarify the position of volunteers. It excludes from the definition volunteers who enter service on a permanent or long-lasting basis in a foreign army as a result of an individual enlistment (for example, the French Foreign Legion) or through an arrangement by their national authorities.³⁰ However, those included in the subparagraph are volunteers who are specially recruited locally or abroad in order to fight in an armed conflict.

The second element of the definition is that to be a mercenary, an individual must take a direct part in the hostilities. As Aldrich explained, this subsection means that "even a mercenary is not a

²⁹ COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 850 (Yves Sandoz et al. eds., 1987).

³⁰ *Id.* at 578. See also Yusuf, *supra* note 4, at 579.

mercenary until he goes to combat.”³¹ This condition excludes from the definition foreign advisers and military technicians.³² As long as the experts do not take any direct part in the hostilities, they are regarded as civilians who do not participate in combat.³³ Problems exist however with this aspect of the definition as was demonstrated when Polisario—the national liberation movement in the Sahara—announced its intention to treat French technicians captured in Mauritania as mercenaries.³⁴ As Rosas stated: “[t]he distinction between an adviser and a mercenary may be a matter of taste.”³⁵

The third feature of the definition is that money must be the basic motive in the decision to enlist.³⁶ The reference to motivation is qualified by the requirement that material compensation be “substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that party.” This test was adopted so that a court could distinguish a mercenary from a volunteer who, motivated by his ideals, accepts the usual or ordinary conditions of pay of the other soldiers, and also to distinguish a mercenary from other members of the regular armed forces.³⁷ The subparagraph also specifies that comparison of salaries between mercenaries and other combatants must be made as regards similar ranks and functions. As the Report of the Rapporteur specifies: “pilots

³¹ Aldrich, *New Life for the Laws of War*, 75 AM. J. INT'L L. 764, 776 (1981).

³² See Green, *supra* note 20, at 243. See also XV Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, 4th Sess., Doc. CDDH/407/Rev.1, para. 25, at 454 (1978). Article 47(2) of Protocol I “excludes mere advisers by requiring that to be a mercenary, one must in fact take a direct part in hostilities, that is, become a combattant, albeit an illegitimate one.”

³³ Sandoz, *supra* note 29, at 579.

³⁴ *Le Polisario Traite en 'Mercenaires' les Techniciens Francais de Mauritanie*, LE MONDE, May 24-25, 1977, at 1, cited in Green, *supra* note 20, at 243.

³⁵ A. ROSAS, *THE LEGAL STATUS OF PRISONERS OF WAR*, 395 (1976).

³⁶ It should be noted that the subparagraph gave rise to a number of criticisms. For some, it was unclear that mercenaries are essentially motivated by private gain. See XV Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, 4th Sess., Doc. CCH/III/SR.57, para. 47 at 200 (1977) and DAVID, *supra* note 5, at 577. It was also argued that the formulation would encourage the emergence of a new category of mercenaries: those who base their actions on ideology. Doc. CCH/III/SR.57, para. 21 at 193 (1977). And finally, it was advanced that “a party to a conflict would be hard put to prove generous remuneration, since mercenaries’ wages were paid either in their own countries or into bank accounts in other countries.” *Id.*

³⁷ Sandoz, *supra* note 29, at 479-80; Yusuf, *supra* note 4, at 117.

would be judged by the same standards of compensation as other pilots, not by the standard of infantrymen."³⁸

The problem with this aspect of the definition is that not everyone agrees that motivation should be a part of the definition.³⁹ For example, in 1976 the Diplock Report, which examined the question of the recruitment of mercenaries, noted that:

any definition of mercenaries which required 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.⁴⁰

That is why the Committee advised that mercenarism should not in itself be made a crime, but that the recruitment in the U.K. of persons to fight in foreign armed conflicts should be made an offense. The main criticism of the motivation requirement is that, although the subsection speaks of being "essentially" motivated by private gain, the monetary reward is not always the main reason why people decide to enlist in conflicts.⁴¹

The definition in Article 47 also excludes from the class of mercenaries nationals of a party to the conflict and residents of territory controlled by a party to the conflict. Although most mercenaries are of a different nationality than their host, there is a danger that by excluding from the definition of mercenaries nationals and residents of a party, subparagraph (b) "may encourage nationals or residents of a state which is a party to a conflict to enroll as mercenaries with the forces fighting against the state of which they are nationals or residents."⁴²

³⁸ Report of the Rapporteur, XV Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, 4th Sess., Doc. CDDH/407/Rev.1, para. 26, at 511 (1977).

³⁹ See, e.g., Burmester, *supra* note 22, at 37 (arguing that "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").

⁴⁰ Report of the Committee of Privy Counsellors appointed to inquire into the recruitment of mercenaries, Cmnd. 6569, para. 7 (August 1976).

⁴¹ Guy B. Roberts, *The New Rules for Waging War: The Case Against Ratification of Additional Protocol I*, 26 VA. J. INT'L L. 109, 138 (1985) (arguing that most participants in national liberation movements "are almost always motivated in part by political convictions").

⁴² E. Kwakwa, *The Current Status of Mercenaries in the Law of Armed Conflict*, 14 HASTINGS INT'L & COMP. L. REV. 67, 72 (1990).

As regards sub-paragraph (e), it specifies that a mercenary cannot be a member of the armed forces of a party to the conflict. The main problem with this formulation is that it does not mention the length of time that a person must be in the armed forces of a party to the conflict. As Yusuf argues: "this raises a doubt as to whether a person who enlisted in the armed forces of a foreign State or other entity for that particular conflict should or should not be considered a mercenary."⁴³ Because there is no specification on the question of time, it is possible for parties to a conflict to disguise their use of mercenaries by enlisting the mercenaries in their armed forces for the duration of the conflict. It is this lack of specification which renders the definition of mercenaries meaningless.⁴⁴ As Best has argued: "[a]ny mercenary who cannot exclude himself from this definition deserves to be shot—and his lawyer with him."⁴⁵

Sub-paragraph (f) specifies that a mercenary is any person who has not been sent on official duty as a member of its armed forces by a State which is not a party to the conflict. This element of the definition was inserted to emphasize the idea of the private, non-governmental nature of a mercenary: a mercenary is one who enlists on his own account.⁴⁶ This formulation has also been criticized because it "allows mercenaries to come through the backdoor as military advisers, trainers, mechanics, etc."⁴⁷

Although the definition of a mercenary contained in Article 47 is a welcome attempt to clarify, in an international instrument, just who can be considered a mercenary, many problems remain with its possible application, as can be gleaned from the discussion above.⁴⁸

⁴³ Yusuf, *supra* note 4, at 117.

⁴⁴ XV Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, 3d Sess., Doc. CDDH/236/Rev.1, para. 102, at 406 (1976).

⁴⁵ G. BEST, HUMANITY IN WARFARE: THE MODERN HISTORY OF THE INTERNATIONAL LAW OF ARMED CONFLICTS, 328 n.83 (1980).

⁴⁶ Yusuf, *supra* note 4, at 117.

⁴⁷ Peter, *supra* note 4, at 391.

⁴⁸ The Special Rapporteur of the Commission of Human Rights was also aware of the definitional problems of Article 47 when he drew attention to the fact that:

(a) The definition of the mercenary in Article 47 refers to mercenaries in situations of international armed conflict. Nowadays, it is in non-international armed conflicts that mercenaries are most often to be found. Preventive and punitive legislative measures should be adopted for these mercenary practices.

(b) The current definition refers solely to the mercenary, rather than to the phenomenon of mercenarism, which is broader and more complex. The

C. International Convention Against the Recruitment, Use, Financing and Training of Mercenaries

Because of the numerous shortcomings of the definition of mercenaries in Article 47 and because of the limited application of that article, an Ad Hoc Committee within the United Nations was established to draft a Convention Against the Recruitment, Use, Financing and Training of Mercenaries.⁴⁹ After nine years of debate, a Convention was finally adopted in 1989.⁵⁰ Although the definition of a mercenary contained in the Convention is by no means perfect, the Convention is still an important document because it is the only one dealing directly with the question of mercenaries.

In Article 1 of the Convention, the term "mercenary" is defined in the following manner:

mercenary has an individual responsibility for his acts, but he takes part in a collective and complex offence involving the entity (group, organization or State) which sponsors it, the recruiter, the funder, the supplier of arms, the instructor, the carrier and, of course, the executing agent.

(c) The definition needs to be revised so that it incorporates different kinds of mercenary activity, depending on the nature of the armed conflict in which they occur

(d) The motives for mercenarism should be reviewed and treated more flexibly, since material gain, i.e. money, is not necessarily the sole reason for enlisting. The possibility of other factors should be considered, such as ideological fanaticism, a desire for adventure, racism, an obsession with war and other forms of psychological pressure which are relieved by the exercise of violent military activity. It should be recognized that while money is probably always an inducement, it is not the decisive factor in all cases.

(e) It should be borne in mind that if article 47 is to be revised, or expanded and incorporated in an international convention on the subject, that should not have the effect of making it impossible in practice for the victim of aggression to prove the existence of mercenary practices despite evidence showing them to be an element in the situation. It is not desirable to make the definition of "mercenary" applicable to all and sundry, but it is also undesirable to go to the other extreme and set up requirements for proof that will in the end make it easy for mercenaries to disguise themselves as something else.

Report on the Question of the Use of Mercenaries as a Means of Impeding the Exercise of the Right of Peoples to Self-determination, U.N. ESCOR, 44th Sess. at 28-29, U.N. Doc. E/CN.4/1988/14 (1988).

⁴⁹ In 1979, the United Nations General Assembly established the Ad Hoc Committee on the Drafting of an International Convention Against the Recruitment, Use, Financing and Training, of Mercenaries. See G.A. Res. 35/48, U.N. GAOR, 35th Sess., Supp. No. 48, U.N. Doc. A/35/48.

⁵⁰ G.A. Res. 44/34, U.N. GAOR 6th Comm., 44th Sess., 72d plen. mtg., Annex, Agenda Item 144, U.N. Doc. A/44/766 (1989). See *infra* notes 111-128 and text.

1. A mercenary is any person who:
 - (a) Is specially recruited locally or abroad in order to fight in an armed conflict;
 - (b) Is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar rank and functions in the armed forces of that party;
 - (c) Is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict;
 - (d) Is not a member of the armed forces of a party to the conflict; and
 - (e) Has not been sent by a State which is not a party to the conflict on official duty as a member of its armed forces.
2. A mercenary is also any person who, in any other situation:
 - (a) Is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at:
 - (i) Overthrowing a Government or otherwise undermining the constitutional order of a State; or
 - (ii) Undermining the territorial integrity of a State;
 - (b) Is motivated to take part therein essentially by the desire for significant private gain and is prompted by the promise or payment of material compensation;
 - (c) Is neither a national nor a resident of the State against which such an act is directed;
 - (d) Has not been sent by a State on official duty; and
 - (e) Is not a member of the armed forces of the State on whose territory the act is undertaken.

Article 2 of the Convention expands the definition of mercenary by stating that:

Any person who recruits, uses, finances or trains mercenaries, as defined in Article 1 of the present Convention, commits an offence for the purposes of the Convention.

The first part of the definition in Article 1 simply reproduces the main elements of Article 47 of Additional Protocol I. However, the second part of Article 1 expands on and adds to the definition in Article 47. As was stated by the Special Rapporteur, the second part of Article 1, "gives States better protection against mercenary activities, in view of the variety of criminal and destabilizing ends for which mercenaries are now used."⁵¹

⁵¹ 1990 Report of the Special Rapporteur, U.N. ESCOR, 46th Sess. at 23-24, U.N. Doc. E/CN.4/1990/11 (1990).

Despite this major improvement, the criticisms advanced in connection with Article 47 continue to be applicable under the Convention. Of particular disappointment is the fact that the question of motives was not further elaborated and that the Convention did not recognize that a mercenary need not be a foreigner. However, as is evident from the Reports of the Ad Hoc Committee, no Convention would have been adopted if the definition of mercenary had been all-encompassing.⁵² Despite these problems the Convention broadens and refines the definition of mercenary, and is therefore a welcome addition.

D. Draft Code of Crimes Against the Peace and Security of Mankind

The International Law Commission in the context of its drafting a Code of Crimes Against the Peace and Security of Mankind has decided to include mercenarism among its acts which constitute an offense. In his third report, the Special Rapporteur specified that he was concerned with mercenaries "who have been specially recruited for the purpose of attacking a country in order to destabilize or overthrow the establishing authorities, for any number of reasons, generally of an economic or political nature."⁵³ Article 18 of the Draft Code, which was adopted at the Commission's forty-second session, reflects this concern. The definition of a mercenary adopted by the Commission is identical to the definition found in Article I of the 1989 Convention.⁵⁴

IV. TOPOLOGY OF MERCENARISM

Mercenarism today has changed both in theory and in practice; mercenaries are used in a variety of situations and contexts. As was noted by the Special Rapporteur, these changes reflect the greater complexity of international relations and the interaction between do-

⁵² See e.g. *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, 40th Sess., Supp. No. 43, U.N. Doc. A/40/43 (1984); U.N. GAOR, 41st Sess., Supp. No. 43, U.N. Doc. A/41/43 (1986); U.N. GAOR, 42d Sess., Supp. No. 43, U.N. Doc. A/42/43 (1987); U.N. GAOR, 43d Sess., Supp. No. 43, U.N. Doc. A/43/43 (1988); U.N. GAOR, 44th Sess., Supp. No. 43, U.N. Doc. A/44/43 (1989).

⁵³ See 1985 Y.B. INT'L L. 80 (Vol. II, pt. 1).

⁵⁴ For the text of Article 18 see *Report of the International Law Commission*, U.N. GAOR, 45th Sess., Supp. No. 10, U.N. Doc. A/45/10 (1990).

mestic situations and international power structures.⁵⁵ Any legal remedies that are adopted to stop the practice of mercenarism must reflect these changes.

A. Mercenarism in International Armed Conflicts

This is the traditional type of situation in which mercenaries are involved. Under this heading fall the acts of aggression that were perpetrated against the African people who were fighting for independence. This type of mercenarism involves the planning, recruitment, training, financing and use of mercenaries by one country which is in an armed conflict with another, or which intervenes on behalf of one party to a conflict and uses mercenary forces for this purpose.⁵⁶ The involvement of mercenaries usually arises in the context of decolonization and their action is usually directed against the efforts of national liberation movements that try to achieve self-determination. This type of mercenarism can be regarded as an internationally wrongful act because it contravenes the rights of peoples to self-determination and the rights of States to territorial integrity, independence and sovereignty.

B. Mercenaries in Other Conflicts

Mercenaries are also used in non-international armed conflicts to provoke an internal armed conflict or unrest, or to encourage existing conflicts. As is explained by the Rapporteur, the goal of this type of interference is to "impair the State's sovereignty, by bringing about the overthrow of the Government, undermining the constitutional order of the State, violating its territorial integrity and independence or preventing it from making a free decision as to the policies it considers appropriate for its social development and political system."⁵⁷

C. Mercenaries and Those Who Hire Them

Before a mercenary becomes involved in a conflict, someone has to plan and prepare all the stages leading up to the mercenary act and someone has to pay the money that will be used to hire the mercenary. Those who are involved in the planning, recruiting and financing stages of the operation can also be characterized as par-

⁵⁵ U.N. ESCOR, 44th Sess. at 31, U.N. Doc. E/CN.4/1988/14 (1988).

⁵⁶ *Id.*

⁵⁷ *Id.*

ticipating in mercenarism. Punishment needs to be extended to anyone involved in mercenarism. This principle must apply even if the culprit is not an individual or an organization but is in fact a State. Indeed, a State is often the one who organizes mercenary operations and uses public funds for the carrying out of illegal acts. As was stated by the Rapporteur: "responsibility must extend to the State, in that the action is being taken in its name or on its behalf, and because the crime was committed to further a specific aim and the political interests of the State in question."⁵⁸

V. INTERNATIONAL RESPONSE TO THE THREAT OF MERCENARIES
AND THE LEGAL OBLIGATIONS OF STATES WITH RESPECT TO THE
RECRUITMENT AND USE OF MERCENARIES

A. *Resolutions and Declarations*

When the use of mercenaries began to be considered illegal under international law in the 19th century, it was in the context of the impartiality of neutral States. The accepted concept of neutrality was established by the provisions of the 1907 Hague Convention regarding the Rights and Duties of Neutral Powers and Persons in Case of War on Land.⁵⁹ The relevant provisions state:

Art.4. Corps of combatants cannot be formed nor recruiting agencies opened on the territory of a neutral Power to assist the belligerents.

Art.5. A neutral Power must not allow any [such] acts to occur on its territory.

Art.6. 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.⁶⁰

According to Article 4 of the Convention, a neutral State has the obligation not to allow the formation of armed expeditions or to permit recruiting to be done on its territory.⁶¹ However, it does not

⁵⁸ *Id.* at 32.

⁵⁹ Hague Convention V of 1907, 36 Stat. 2310, T.S. No. 540 [hereinafter Hague Convention V], *reprinted in* 2 AM. J. INT'L L. 117 (1908).

⁶⁰ *Id.* at arts. 4-6. It must be noted that Article 6 of the Convention refers to "persons crossing the frontier separately." The Convention however does not specify what is meant by the word "separately." Green argues that "[p]resumably so long as [such persons] do not constitute an organized corps of combatants no liability on the part of the neutral state concerned could arise." Green, *supra* note 20, at 223.

⁶¹ Hague Convention V, *supra* note 59, at art. 4.

have the obligation to prevent persons from crossing its borders to enlist in the armed forces of a belligerent.⁶²

After World War II, attention was directed to controlling the use of force and prohibiting unilateral violations of State autonomy.⁶³ The emphasis was no longer on a State's neutrality obligations, but on the need to protect all States from the threat or use of force so that they could maintain their territorial integrity and political independence.⁶⁴ It is within this context that States tried to prohibit the use of mercenaries. Article 2(4) of the Charter of the United Nations⁶⁵ reflects these concerns as it stipulates 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 other manner inconsistent with the Purposes of the United Nations.⁶⁶

It was only in the 1960's, however, that a major change in attitude occurred at the international level as regards the legality of mercenaries. This change was brought about by the decolonization process of peoples under colonial domination. At this stage, the international community became concerned with the use of foreign mercenary forces to prevent or hinder the exercise of the right to self-determination. There was also concern that mercenary forces were used in attempts to overthrow or destabilize some of the governments of the States that had recently won their independence.

⁶² *Id.* States have tried of their own accord, however, to control the comings and goings of their nationals when they intend to enlist in foreign forces. This is done both in treaties and in domestic legislation. The Treaty of Amity with Great Britain, for example, stipulated that the subjects and citizens of one State were not to serve in the armed forces of any foreign prince or State, enemies to the other State. Treaty of Amity, Commerce, and Navigation, signed at London, Nov. 19, 1794, U.S.-Gr. Brit., art. 21, 8 Stat. 116. The Treaty of Peace and Amity of the Central American States provides at article 14 that "none of the Contracting Governments will permit the persons under its jurisdiction to organize armed expeditions or to take part in any hostilities which may arise in a neighboring country." General Treaty of Peace and Amity of the Central American States, Feb. 7, 1923, art. 14, reprinted in 2 INTERNATIONAL LEGISLATION 906 (Manley O. Hudson ed., 1931). These obligations, however, have been voluntarily assumed by States. They do not, as of yet, reflect customary international law. See Burmester, *supra* note 22, at 42.

⁶³ See Taulbee, *supra* note 14, at 345.

⁶⁴ Despite this goal, none of the major international instruments specifically addressed the issue of the use and recruitment of mercenaries. *Id.*

⁶⁵ U.N. CHARTER art. 2, para. 4.

⁶⁶ *Id.*

The first step the General Assembly took was to adopt the Declaration on the Granting of Independence to Colonial Countries and Peoples.⁶⁷ In this resolution, the General Assembly proclaimed the "necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations."⁶⁸ In the preamble to the Declaration, the General Assembly referred to the "need for the creation of conditions of stability and well-being and peaceful and friendly relations based on respect for the principles of equal rights and self-determination of all peoples, and of universal respect for, and observance of, human rights and fundamental freedoms for all"⁶⁹ It expressed the belief that "in order to avoid serious crises, an end must be put to colonialism and all practices of segregation and discrimination associated therewith" and that "all peoples have an inalienable right to complete freedom, the exercise of their sovereignty and the integrity of their national territory."⁷⁰ Paragraph 4 of the Declaration further stated that:

All armed action or repressive measures of all kinds directed against dependent peoples shall cease in order to enable them to exercise peacefully and freely their right to complete independence, and the integrity of their national territory shall be respected.⁷¹

It was during the struggle for independence in the Belgian Congo that the international commitment to condemning the use of mercenaries truly came to light.⁷² During this conflict, the Security Council and the General Assembly adopted a number of resolutions which urged that mercenaries, along with all foreign personnel, evacuate the Belgian Congo.⁷³ In 1964, the OAU also appealed to the Democratic Republic of Congo to end its recruitment of foreign soldiers and to expel those who still remained in the country.⁷⁴

⁶⁷ G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, U.N. Doc. A/4684 (1960).

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² For more information, see generally MOCKLER, *supra* note 21; RICHARD G. LAWSON, *STRANGE SOLDIERING* (1963); SMITH HEMPSTONE, *REBELS, MERCENARIES AND DIVIDENDS: THE KATANGA STORY* (1962).

⁷³ See, e.g., S.C. Res. 169, U.N. SCOR, 16th Sess., 982d mtg., U.N. Doc. S/5002 (1961); S.C. Res. 161, U.N. SCOR, 16th Sess., 942d mtg., U.N. Doc. S/4741 (1961).

⁷⁴ OAU Doc. ECM/Res. 55 (III) (1964).

In 1967, the Security Council adopted a resolution in which it condemned "any state which persists in permitting or tolerating the recruitment of mercenaries and the provision of facilities for them, with the objective of overthrowing the Governments of States Members of the United Nations."⁷⁵ The resolution further called upon "[g]overnments to ensure that their territory and other territories under their control, as well as their nationals, are not used for the planning of subversion, and the recruitment, training and transit of mercenaries designed to overthrow the Government of the Democratic Republic of the Congo."⁷⁶ The resolution demonstrates that the international community does not accept as a matter of fact the use of mercenaries. It is, however, far from being a complete denunciation of the use of mercenaries. Despite the resolution, doubts remained regarding the obligations imposed on States to assure that their nationals not join mercenary troops. As Green asserted: "it is clear that the Security Council was not prepared to state that mercenarism was a crime or that mercenaries were not entitled to treatment of war or the protection of the international law of armed conflict. All it was willing to do was call upon member States to take the measures they might consider necessary to prevent mercenaries from taking action against any State."⁷⁷ Burmester also argued that the obligation imposed on States by the Security Council was "in the exercise of its powers to prevent a breach of the peace and related only to the situation in the Congo and thus did not reflect a general norm of international law."⁷⁸

⁷⁵ S.C. Res. 239, U.N. SCOR, 22d Sess., 1367th mtg., U.N. Doc. S/INF/22/Rev. 2 (1967).

⁷⁶ *Id.* Reference can also be made to a series of resolutions in which the Security Council condemned Portugal's involvement in the conflict. In 1966, Congo accused Portugal of allowing mercenaries to operate from its colonial territories against the Congo. Although Portugal denied the allegation, the Security Council urged Portugal "not to allow foreign mercenaries" to use Angola as a base. In 1967, the Council further called upon "all countries receiving mercenaries who have participated in the armed attacks against the Democratic Republic of the Congo to take appropriate measures to prevent them from renewing their activities against any State." The Council also condemned Portugal for having failed to "prevent the mercenaries from using the territory of Angola under its administration as a base for operations" against the Congo. *Id.*

⁷⁷ Green, *supra* note 20, at 195.

⁷⁸ Burmester, *supra* note 22, at 49. It should be, however, noted that Yusuf, *supra* note 4, at 121, argues that the United Nations was trying and did in fact impose an obligation on States to prevent the enlistment of their nationals as mercenaries in foreign conflicts.

The second situation where the General Assembly became involved with the use of mercenaries occurred when problems arose in the territories under Portuguese administration. In 1968, the General Assembly in Resolution 2395 condemned Portugal for its failure to grant independence to the territories under its domination.⁷⁹ The resolution further appealed to all States:

to take all measures to prevent the recruitment or training in their territories of any persons as mercenaries for the colonial war being waged in the Territories under Portuguese domination and for violations of the territorial integrity and sovereignty of the independent African States.⁸⁰

The language used in Resolution 2395 is very similar to that used in the previous resolution. The same problems mentioned above, therefore, continue to apply.

A major step, however, was taken in 1968 when the General Assembly adopted Resolution 2465 on the implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples.⁸¹ In paragraph 8 of the resolution, the Assembly declared that:

the practice of using mercenaries against movements for national liberation and independence is punishable as a criminal act and that the mercenaries 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.⁸²

In 1969, the Assembly reiterated its position on the question of mercenaries in Resolution 2548,⁸³ in Resolution 2708, and in 1970, it stated once again that "the practice of using mercenaries against national liberation movements in the colonial territories constitutes a criminal act."

In 1970, the General Assembly again indirectly addressed the issue of mercenaries when it adopted the Declaration on Principles of

⁷⁹ G.A. Res. 2395, U.N. GAOR, 23d Sess., 1730th mtg., at 8, U.N. Doc. A/7352 (1968).

⁸⁰ *Id.*

⁸¹ G.A. Res. 2465, U.N. GAOR, 23d Sess., 1751st mtg., U.N. Doc. A/L.560/Rev.1, A/L.561/Add.1, A/L.563.

⁸² *Id.* at ¶ 8.

⁸³ G.A. Res. 2548, U.N. GAOR, 24th Sess., 1829th mtg., U.N. Doc. A/L.581/Add.1 (1969). The language used in this resolution, as regards mercenaries, is the same as the one found in Resolution 2465, *supra* note 81.

International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.⁸⁴ Under the principle that "States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations,"⁸⁵ the following statement appears:

Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State.⁸⁶

Under the Declaration, however, the obligation of States in regard to mercenaries continues to be limited. States need only control the actual organization of mercenary and other irregular forces on their territory; there is no obligation on States to prevent their nationals from joining a mercenary force.⁸⁷ This limited obligation on States was also incorporated in the definition of aggression that was adopted by the General Assembly in 1974.⁸⁸ Among the acts in Article 3 described as constituting aggression is, "the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against other States"⁸⁹ The definition continues by stating that:

Nothing in this definition, and in particular Article 3, could in any way prejudice the right to self-determination, freedom and independence . . . of peoples forcibly deprived of that right . . . , particularly peoples under colonial and racist regimes or other forms of alien domination; nor the right of these peoples to struggle to that end and to seek and receive support⁹⁰

⁸⁴ G.A. Res. 2625, U.N. GAOR, 25th Sess., 1883d mtg., U.N. Doc. A/8082 (1970).

⁸⁵ *Id.* at Annex.

⁸⁶ *Id.* at Annex.

⁸⁷ See Burmester, *supra* note 22, at 43.

⁸⁸ G.A. Res. 3314, 29th Sess., 2319th mtg., U.N. Doc. A/9890 (1974). For a discussion of the resolution and of its effects see generally NICHOLAS NYIRI, *THE UNITED NATIONS' SEARCH FOR A DEFINITION OF AGGRESSION* (1989); BERT V.A. RÖLING, *THE 1974 U.N. DEFINITION OF AGGRESSION, THE CURRENT LEGAL REGULATION OF THE USE OF FORCE* 413 (A. Casse ed., 1986); Bengt Broms, *The Definition of Aggression*, 154 *RECUEIL DES COURS D'ACADEMIE DE DROIT INTERNATIONAL [R.C.A.D.I.]* 300 (1977).

⁸⁹ G.A. Res. 3314, *supra* note 88, at Annex, art. 3.

⁹⁰ *Id.* at art. 7.

This definition of aggression neither extends a State's obligations nor does it proscribe the actual organization of illegal forces. What the definition proscribes is simply the *sending* of troops.⁹¹ Further, the resolution contributes little to the control of mercenary activities because the use of mercenaries is irrelevant to the question of aggression. Indeed, the actions of an attacking State constitute aggression regardless of the nationality of the troops involved. The resolution, therefore, provides no deterrence to mercenary warfare.⁹²

During the late 1960's and early 1970's, the OAU also denounced mercenary aggression and urged all States to adopt laws making the recruitment and training of mercenaries a criminal offense.⁹³ As for the Security Council, in 1970 it continued to condemn mercenaries, this time in relation to New Guinea.⁹⁴ In 1973, the General Assembly specifically addressed the issue of mercenary forces in colonial territories.⁹⁵ In Resolution 3103, it reaffirmed its position that the practice of using mercenaries against national liberation movements in the colonial territories constitutes a criminal act.⁹⁶ The General Assembly declared:

The use of mercenaries by colonial and racist regimes against the national liberation movements struggling for their freedom and independence from the yoke of colonialism and alien domination is considered to be a criminal act and the mercenaries should accordingly be punished as criminals.⁹⁷

At this point, despite the numerous resolutions of the General Assembly and the Security Council, many problems remained concerning the use and control of mercenaries. The resolutions of the General Assembly which condemned mercenaries as outlaws did so in the context of opposition to national liberation and independence movements. Up until then, the General Assembly, "aware that its

⁹¹ See Burmester, *supra* note 22, at 43; Julius Stone, *Hopes and Loopholes in the 1974 Definition of Aggression*, 71 AM. J. INT'L L. 224 (1978).

⁹² See also P.W. Mourning, *Leashing the Dogs of War: Outlawing the Recruitment and Use of Mercenaries*, 22 VA. J. INT'L L. 589, 594-95 (1982).

⁹³ See, e.g., OAU Doc. AHG/Res. 49 (Sept. 1967); OAU Doc. ECM/Res. 17 (1970); OAU Doc. CM/St.6 (1971).

⁹⁴ S.C. Res. 289, U.N. SCOR, 25th Sess., 1558th mtg. at 2, U.N. Doc. S/9988 (1970).

⁹⁵ G.A. Res. 3103, U.N. GAOR, 28th Sess., 2197th mtg., U.N. Doc. A/9412 (1973).

⁹⁶ *Id.*

⁹⁷ *Id.*

Resolutions are only *vœux* did no more than call upon states to make recruitment and enlistment of mercenaries for such campaigns criminal offenses. It did not even go to the extent of calling upon the International Law Commission to codify the law on mercenaries, nor on the members of the United Nations to enter into negotiations for a treaty to this end.”⁹⁸ It would be a few more years before a more definitive step would be taken towards curbing and outlawing the use of mercenaries.

In 1977, the Security Council once again was faced with the problem of mercenaries, this time in the People's Republic of Benin. In Resolutions 405 and 419,⁹⁹ the Council denounced the use of mercenaries and condemned any State which permitted or tolerated the recruitment of mercenaries within its territory. It further urged States to adopt measures to prohibit the recruitment, training and transit of mercenaries on their territory. The resolution also condemned the use of mercenaries as a means of interfering in the internal affairs of States in order to destabilize them and to violate their territorial integrity.¹⁰⁰ This is an important resolution because it specifically refers to the use of mercenaries in attempts to overthrow or destabilize governments.¹⁰¹

⁹⁸ Green, *supra* note 20, at 230.

⁹⁹ S.C. Res. 405, U.N. SCOR, 32d Sess., 2005th mtg., U.N. Doc. S/12322 (1977); S.C. Res. 419, U.N. SCOR, 32d Sess., 2049th mtg., U.N. Doc. S/12454/Rev.1 (1977).

¹⁰⁰ Resolution 405 of April 1977 stipulates:

The Security Council,

3. Reaffirms its resolution 239 (1967) of 10 July 1967, by which, *inter alia*, it condemns any State which persists in permitting or tolerating the recruitment of mercenaries and the provisions of facilities to them, with the objective of overthrowing the Governments of Member States;

4. Calls upon all States to exercise the utmost vigilance against the danger posed by international mercenaries and to ensure that their territory and other territories under their control, as well as their nationals, are not used for the planning of subversion and recruitment, training and transit of mercenaries designed to overthrow the Government of any Member State;

5. Further calls upon States to consider taking necessary measures to prohibit, under their respective domestic laws, the recruitment, training and transit of mercenaries on their territory and other territories under their control;

6. Condemns all forms of external interference in the internal affairs of Member States, including the use of international mercenaries to destabilize States and/or to violate their territorial integrity, sovereignty and independence.

S.C. Res. 405, *supra* note 99, at paras. 3-6; *see also* S.C. Res. 419, *supra* note 99.

¹⁰¹ G.A. Res. 34/140, U.N. GAOR, 34th Sess., 104th mtg., at 1, U.N. Doc. A/

In 1979, the General Assembly took another positive step in the control of mercenaries, when in Resolution 34/140 it decided to consider the drafting of an international convention to outlaw mercenarism in all its manifestations. It was this initiative which led to the adoption of a convention in 1989. The Assembly at that time stipulated that "mercenarism is a threat to international peace and security and, like murder, piracy and genocide, is a universal crime." With this language, the Assembly went further than ever before in its condemnation of mercenaries.

While the wording of the Convention was being debated, the General Assembly continued to condemn the use of mercenaries in a series of resolutions.¹⁰² During the 1980s, the Commission on Human Rights also discussed the problem of mercenaries in the context of the right of peoples to self-determination. Just like the General Assembly, the Commission denounced the use of mercenaries against developing countries and their use as a means of destabilizing a government in place.¹⁰³

34/L.58/Add.1 (1979). Similar language was used by the Council in Resolutions 496 of December 1981 and 507 of May 1982. See S.C. Res. 496, U.N. SCOR, 36th Sess., 2314th mtg., U.N. Doc. S/PV.2314 (1981); S.C. Res. 507, U.N. SCOR, 37th Sess., 2370th mtg., U.N. Doc. S/15127 (1982). Both resolutions condemn the use of mercenaries against the Republic of Seychelles.

¹⁰² See G.A. Res. 45/132, U.N. GAOR, 45th Sess., 68th mtg., U.N. Doc. A/45/759 (1990); G.A. Res. 44/81, U.N. GAOR, 44th Sess., 78th mtg., U.N. Doc. A/44/717 (1989); G.A. Res. 42/96, U.N. GAOR, 42d Sess., 93d mtg., U.N. Doc. A/42/773 (1987); G.A. Res. 496, U.N. SCOR, 41st Sess., 97th mtg., U.N. Doc. A/41/809 (1986).

¹⁰³ See *The Right of Peoples to Self-Determination and its Application to Peoples Under Control or Alien Domination or Foreign Occupation*, U.N. ESCOR, Comm'n. Hum. Rts., 38th Sess., Supp. No. 2, 38th mtg., at 126, U.N. Doc. E/1982/16 (1982); *The Right of Peoples to Self-Determination and its Application to Peoples Under Control or Alien Domination or Foreign Occupation*, U.N. ESCOR, Comm'n. Hum. Rts., 39th Sess., Supp. No. 3, 22d mtg., at 120, U.N. Doc. E/1983/4 (1983); *Situation in Southern Africa*, U.N. ESCOR, Comm'n. Hum. Rts., 41st Sess., Supp. No. 2, 32d mtg., at 25, U.N. Doc. E/1985/6 (1985); *Situation in Southern Africa*, U.N. ESCOR, Comm'n. Hum. Rts., 42d Sess., Supp. No. 2, 50th mtg., at 84, U.N. Doc. E/1986/26 (1986); *The Use of Mercenaries as a Means of Impeding the Exercise of the Right of Peoples to Self-Determination*, U.N. ESCOR, Comm'n. Hum. Rts., 42d Sess., Supp. No. 2, 50th mtg., at 84, U.N. Doc. E/1986/26 (1986); *The Use of Mercenaries as a Means of Impeding the Exercise of the Right of Peoples to Self-Determination*, U.N. ESCOR, Comm'n. Hum. Rts., 43d Sess., Supp. No. 5, 52d mtg., at 58, U.N. Doc. E/1987/16 (1987); *The Use of Mercenaries as a Means of Impeding the Exercise of the Right of Peoples to Self-Determination*, U.N. ESCOR, Comm'n. Hum. Rts., 44th Sess., Supp. No. 2, 29th mtg., at 35, U.N. Doc. E/1988/7 (1988); *The Use of Mercenaries as a Means of Impeding the Exercise of the Right of Peoples to Self-Determination*, U.N. ESCOR, Comm'n. Hum. Rts.,

The sheer number of resolutions against mercenarism adopted by international organizations underlines the importance of the issue, particularly in the context of national self-determination, and the awareness of the international community of its implications. The resolutions also point to the fact that it is up to the States concerned to take the necessary measures under their respective domestic laws to prohibit the recruitment, financing, training and transit of mercenaries on their territory and to prohibit their nationals from serving as mercenaries. Although international condemnation may force individual States to enact the necessary legislation, the last step in eradicating the practice of mercenarism remains within the realm of individual States.

B. International Conventions

The first convention to deal with the subject of mercenaries was adopted by the OAU. As noted earlier, a draft convention on the elimination of mercenaries in Africa was submitted to the Assembly of Heads of State of the OAU in 1972. In 1977, the OAU adopted the Convention, which entered into force in 1985.¹⁰⁴

It is not surprising that the first major legal enforcement system directed towards the prohibition of mercenary activities came out of Africa. Indeed, Africa is the continent that has been the most seriously affected by mercenarism. Mercenaries were used against a number of countries in order to curb their independence process and again after independence was achieved, in order to infringe upon the sovereignty of a number of States as well as their right to self-determination and their territorial integrity.¹⁰⁵

The OAU Convention defines mercenaries and mercenarism, which are both outlawed. Under the Convention, the activity of mercenarism is considered a crime against peace and security in Africa, whether it is committed by an individual, a group, an association or a State. The Convention also establishes individual criminal offenses. These

45th Sess., Supp. No. 2, 51st mtg., at 69, U.N. Doc. E/1989/21 (1989); *The Use of Mercenaries as a Means of Impeding the Exercise of the Right of Peoples to Self-Determination*, U.N. ESCOR, Comm'n. Hum. Rts., 46th Sess., Supp. No. 2, 51st mtg., at 27, U.N. Doc. E/1990/7 (1990).

¹⁰⁴ See *supra* part III B.

¹⁰⁵ See generally David M. Isabirye, *Mercenaries and International Criminal Law*, 63 REVUE DE DROIT INTERNATIONAL DE SCIENCES DIPLOMATIQUES ET POLITIQUES [R.D. INT'L] 223, 237-38 (1985); U.N. ESCOR, 44th Sess. at 12, U.N. Doc. E/CN.4/1988/14 (1988).

include the activities that define mercenary under Article 1, as well as the recruitment, training, and financing of mercenaries.¹⁰⁶

The Convention also establishes State obligations with regard to the prevention of mercenarism. States must also communicate to other member States any information relating to the activities of mercenaries and they must adopt severe legislative measures in order to punish the crime of mercenarism.¹⁰⁷ Further, States responsible for criminal acts or omissions relating to the crime of mercenarism can be accused before any competent OAU or international organization, tribunal or body.¹⁰⁸ The Convention makes provisions for the jurisdiction of each State, extraditable cases, mutual assistance among States parties, and rules for the settlement of disputes between States regarding the interpretation and application of the provisions of the Convention. It also establishes judicial guarantees for any person on trial for the crime of mercenarism by stating that such person is entitled to all the guarantees normally given to any ordinary person by the State on whose territory he or she is being tried.

This Convention represented a significant step when it was adopted in 1977—it was the first complete legal instrument to deal with the problem of mercenaries.¹⁰⁹ As the Special Rapporteur noted in 1988,¹¹⁰ this was the first instrument of international criminal law which was applicable in the territory of the States party to the Convention and to all persons covered by its provisions. It was also notable because it imposed well defined obligations on each of the parties and stressed the need to adopt appropriate measures in each State's domestic criminal law. The only drawback to the Convention as an international instrument was its regional character. It did not have a world-wide effect; only the African States that ratified it were required to comply with the Convention.

The International Convention Against the Recruitment, Use, Financing and Training of Mercenaries was the second convention against mercenarism to be adopted.¹¹¹ The Ad Hoc Committee man-

¹⁰⁶ OAU Convention, *supra* note 25, at art. 2.

¹⁰⁷ OAU Convention, *supra* note 25, at arts. 3-4.

¹⁰⁸ OAU Convention, *supra* note 25, at art. 5.2.

¹⁰⁹ For a discussion of the effects of the convention see Taulbee, *supra* note 14, at 346-47; *see also* Mourning, *supra* note 92, at 600-601; *see generally* W. BURCHETT & D. ROEBUCK, *THE WHORES OF WAR: MERCENARIES TODAY* (1977).

¹¹⁰ U.N. ESCOR, 44th Sess. at 12, U.N. Doc. E/CN.4/1988/14 (1988).

¹¹¹ G.A. Res. 44/34, U.N. GAOR 6th Comm., 44th Sess., 72d plen. mtg.; Annex, Agenda Item 144, U.N. Doc. A/44/766 (1989), *reprinted in* U.N. GAOR, 44th Sess.,

dated to draft the Convention first had to decide whether to emphasize the punishment of mercenaries or whether to emphasize the illegality of the actions of those promoting, organizing and tolerating such activities.¹¹² The resulting Convention reflects mainly the first position, that is, the importance of punishing the mercenaries themselves.¹¹³ However, the Convention also attempts, to a lesser extent, to show its disapproval towards and to punish those who promote or organize mercenary activities.¹¹⁴

Supp. No. 49, at 306, U.N. Doc. A/44/49 (1990) [hereinafter *Convention Against Mercenaries*]. The Convention enters into force 30 days after the deposit with the Secretary-General of the twenty-second instrument of ratification or accession. *Id.* at art. 19. The Convention has been signed and ratified by Suriname and acceded to by Seychelles, and signed (but not ratified) by Italy, Zaire, Nigeria, the Congo, Maldives, the Ukrainian Soviet Socialist Republic, Morocco, and Uruguay. U.N. ESCOR, 47th Sess., Agenda Item 9, at 35, U.N. Doc. E/CN.4/1991/14 (1990).

¹¹² *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, 42d Sess., Supp. No. 43, U.N. Doc. A/42/43 (1987).

¹¹³ *See The Right of Peoples to Self-Determination and Its Application to Peoples Under Colonial or Alien Domination or Foreign Occupation, Written Statement Submitted by the Andean Commission of Jurists, a Non-Governmental Organization in Consultative Status*, U.N. ESCOR, 44th Sess., Agenda Item 9, at 3, U.N. Doc. E/CN.4/1988/NGO/10 (1988).

¹¹⁴ The aims of the Convention are expressed in its preamble which stipulates the intent of States Parties:

Reaffirming the purposes and principles enshrined in the Charter of the United Nations and in the Declaration on Principles of International Law concerning Friendly Relations and Co-Operation among States in accordance with the Charter of the United Nations,

Being aware of the recruitment, use, financing and training of mercenaries for activities which violate principles of international law, such as those of sovereign equality, political independence, territorial integrity of States and self-determination of peoples,

Affirming that the recruitment, use, financing and training of mercenaries should be considered as offenses of grave concern to all States and that any person committing any of these offenses should be either prosecuted or extradited,

Convinced of the necessity to develop and enhance international co-operation among States for the prevention, prosecution and punishment of such offenses,

Expressing concern at new unlawful international activities linking drug traffickers and mercenaries in the perpetration of violent actions which undermine the constitutional order of States,

Also convinced that the adoption of a Convention against the recruitment, use, financing and training of mercenaries would contribute to the eradication of these nefarious activities and thereby to the observance of the purposes and principles enshrined in the Charter,

Cognizant that matters not regulated by such a convention continue to be

The Convention takes account of the fact that mercenaries in today's society continue to be used, recruited, financed and trained for activities that are contrary to the principles of international law.¹¹⁵ It establishes that these activities constitute offenses for which persons must be prosecuted or extradited. The preamble also recognizes new forms of mercenary activities, notably the link between drug traffickers and mercenaries. As the Special Rapporteur in 1990 noted: "The Convention thus contains an update that may help to ensure stricter observance of the purposes and principles of the Charter of the United Nations, without prejudice to the fact that issues not covered will continue to be governed by the rules and principles of international law."¹¹⁶

The definition of "mercenary" under Article 1 of the Convention parallels that of Additional Protocol I of 1977 to the Geneva Conventions of 1949, save that the 1989 Convention Against Mercenaries does not require a person to take direct part in any hostilities to be considered a mercenary.¹¹⁷ The Convention also stipulates that:

2. Any person who recruits, uses, finances or trains mercenaries, as defined in Article 1 of the present Convention, commits an offence for the purposes of the Convention.

3.(1) A mercenary, as defined in Article 1 of the present Convention, who participates directly in hostilities or in a concerted act of violence, as the case may be, commits an offence for the purposes of the Convention.

governed by the rules and principles of international law,
Have agreed

Convention Against Mercenaries, *supra* note 111, at Preamble.

¹¹⁵ The aims expressed in the preamble of the Convention are in accord with the views of the Ad Hoc Committee as regards the position of international law. In their report to the 36th session of the General Assembly the Committee stipulated that:

Since the practice of resorting to mercenaries resulted in a direct form of interventionism, it should be viewed as a threat to international peace and security of mankind [-and thus an act of aggression-] and a dangerous manifestation of international terrorism. The use of mercenaries against national liberation movements similarly constituted a criminal act and mercenaries themselves were criminals.

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, 36th Sess., Supp. No. 43, para. 17, U.N. Doc. A/36/43 (1981).

¹¹⁶ 1990 *Report of the Special Rapporteur*, U.N. ESCOR, 46th Sess., at 23, U.N. Doc. E/CN.4/1990/11 (1990).

¹¹⁷ See *Convention Against Mercenaries*, *supra* note 111, at art. 1. For definition of mercenary under Protocol I, see *supra* part III B.

(2) Nothing in this article limits the scope of application of Article 4 of the present Convention.

4. An offence is committed by any person who:

(a) Attempts to commit one of the offenses set forth in the present Convention;

(b) Is the accomplice of a person who commits or attempts to commit any of the offenses set forth in the present Convention.

5.(1) States Parties shall not recruit, use, finance or train mercenaries and shall prohibit such activities with the provisions of the present Convention.

(2) States Parties shall not recruit, use, finance or train mercenaries for the purpose of opposing the legitimate exercise of the inalienable right of peoples to self-determination, as recognized by international law, and shall take, in conformity with international law, the appropriate measures to prevent the recruitment, use, financing or training of mercenaries for that purpose.

(3) They shall make the offenses set forth in the present Convention punishable by appropriate penalties which take into account the grave nature of the offenses.

6. States Parties shall co-operate in the prevention of the offenses set forth in the present Convention, particularly by:

(a) Taking all practicable measures to prevent preparations in their respective territories for the commission of those offenses within or outside their territories, including the prohibition of illegal activities of persons, groups and organizations that encourage, instigate, organize or encourage in the perpetration of such offenses;

(b) Co-ordinating the taking of administrative and other measures as appropriate to prevent the commission of those offenses.

7. States Parties shall co-operate in taking the necessary measures for the implementation of the present Convention.¹¹⁸

Other articles which refer to the procedures for the implementation of the provisions of the Convention include: the establishment of jurisdiction by each State Party (art. 9); custody of an alleged offender in the territory of a State Party and the relevant notifications (art. 10); fair treatment (art. 11); extraditable offenses (art. 15); and disputes (art. 17).¹¹⁹

¹¹⁸ *Convention Against Mercenaries*, *supra* note 111, at arts. 2-7.

¹¹⁹ *Id.* at arts. 9-11, 15, 17.

The Convention, as adopted, confirms the judicial character of the United Nations resolutions and declarations condemning mercenary activities.¹²⁰ It broadens the scope of the international regulations dealing with the issue: before the adoption of the Convention, the main juridical instrument that could be used under international law was Article 47 of Additional Protocol I to the Geneva Conventions of 1949. This article was limited to international armed conflicts and simply denied mercenaries the status of prisoner of war. A more comprehensive measure was needed if mercenaries were to be controlled. Further, the Convention, if followed by States, will help guarantee the right of peoples to self-determination and it will ensure a certain stability to lawfully constituted governments. As the Special Rapporteur in his 1991 report noted:

The formulation of broader, more comprehensive and more precise international regulations updated to take account of the forms which mercenarism has assumed in recent years with the aim of overthrowing Governments and undermining the constitutional order or territorial integrity of States highlights the importance of this new multilateral instrument and the necessity and desirability of its prompt entry into force.¹²¹

A number of problems, however, remain in the application of the Convention. First, Article 9 of the Convention, which outlines the jurisdiction of States over the crime of mercenarism, stipulates that a State shall have jurisdiction when the offense is committed in its territory (or on board a ship or aircraft registered in that State) and when the offense is committed by any of its nationals. The jurisdiction granted to States is far more restrictive and falls well short of the jurisdiction given to States with respect to universal crimes such as piracy and genocide.¹²² If mercenarism and the activities of mercenaries are to be eradicated, these activities must be viewed as universal

¹²⁰ See U.N. ESCOR, Comm'n. Hum. Rts., 47th Sess., Agenda Item 9, at 35, U.N. Doc. E/CN.4/1991/14 (1990).

¹²¹ *Id.*

¹²² The fact that mercenarism was not declared a universal crime seems to be the result of Western influences. For example, in 1980, an Italian representative to the United Nations declared that it would be "inappropriate . . . to qualify recourse to mercenaries as a crime against humanity in the same category as piracy or genocide." See *Drafting of an International Convention Against the Recruitment, Use, Financing and Training of Mercenaries*, U.N. GAOR, 35th Sess., Supp. No. 366, Agenda Item 29, Addendum pt. 2, U.N. Doc. A/35/366/Add.2 (1980).

crimes, thus giving all States jurisdiction to punish such crimes. The inclusion of an article dealing with mercenaries and the activity of mercenarism in the Draft Code of Crimes Against the Peace and Security of Mankind is, however, a step in the right direction.

A second objection to the Convention is that it does not address the treatment of both aggrieved and offending countries, as was the case in the earlier drafts.¹²³ In these drafts, Article 2 of the Convention defined the crime of mercenarism as an offense "against the peace and security of a State." Article 15 established the right of the injured State to claim reparation against any State guilty of an act or omission which constituted an offense as outlined in Article 2.¹²⁴ Despite the fact that this right was limited to situations in which the damaged party had been unable to secure criminal prosecution of the individual offenders, it encouraged 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.¹²⁵ By creating such an encompassing system of State responsibility, the Convention encouraged the international effectiveness of anti-mercenary law.¹²⁶

The third problem with the Convention is that it does not provide for any monitoring machinery.¹²⁷ Unless the Commission on Human Rights itself assumes a monitoring function, it will be impossible to determine if the obligations created by the Convention are met.

¹²³ *Drafting of an International Convention Against the Recruitment, Use, Financing and Training of Mercenaries*, U.N. GAOR, 35th Sess., Supp. No. 366, Agenda Item 29, Addendum pt. 1, U.N. Doc. A/35/366/Add.1 (1980) (Nigerian Draft Convention).

¹²⁴ Nigerian Draft Proposal, *supra* note 26, at art. 15(2) stipulates:

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.

¹²⁵ See Nigerian Draft Proposal, *supra* note 26, at art. 15(3); Mourning, *supra* note 92, at 605.

¹²⁶ Western States opposed the idea that a State which fails to prevent mercenary activity should be liable for damages to the victim for such an omission. Their representatives argued that Article 15 had no parallel in other conventions. These States also argued that while a breach of international obligations gives rise to responsibility, the question of reparation should be left to customary practice. 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, 37th Sess., Supp. No. 43, at 17-18, U.N. Doc. A/37/43 (1982).

¹²⁷ This problem was discussed by the Special Rapporteur in his 1990 Report. U.N. ESCOR, 46th Sess. at 24, U.N. Doc. E/CN.4/1990/11 (1990).

C. *Trials of Mercenaries*

The trials of mercenaries, and the rules applied to them during their trials, are good examples of how the international community has tried to cope with the rules of international law. In Africa, for example, a number of trials are known to have taken place. These include the trial in Conakry of the mercenaries who invaded Guinea in 1970, the trial of Rolf Steiner in the Sudan in 1971, the trial of thirteen mercenaries in Angola in 1976, and the trial of mercenaries in the Seychelles in 1981.¹²⁸

The first trial to receive world-wide attention was that of Rolf Steiner in the Sudan.¹²⁹ Steiner joined the Anyanya rebel army in Sudan and aided them in waging a war against the government. Later he was arrested by Ugandan authorities in Uganda and handed over to the Sudan. He was tried in 1971 and charged with violations of domestic law. Steiner was not convicted of the crime of being a mercenary because the penal code of Sudan did not include the crime of mercenarism. During the trial, the court recognized that Steiner's acts by their nature constituted a political crime, but the court rejected international law as a possible source because there was no "unequivocal and uniform yard-stick as to what is and what is not a political offense to make it a rule of international law."¹³⁰ Notwithstanding the fact that he was not convicted of the crime of mercenarism (which was not considered a crime under the national legislation), he was convicted of violating specific offenses under Sudanese law.¹³¹ He was found guilty and sentenced to death, but the sentence was later commuted to twenty years imprisonment.

The second sensational trial was that of thirteen mercenaries in Angola.¹³² In 1976, the mercenaries were captured while on patrol and were later indicted by the People's Revolutionary Court of An-

¹²⁸ For a brief description of the case of the captured mercenaries in the Seychelles see Isabirye, *supra* note 105, at 245-46.

¹²⁹ For a general discussion, see *In the Trial of F.E.R. Steiner—A Court Martial*, 1971 SUDAN L. J. REP. 147.

¹³⁰ *Id.* at 152.

¹³¹ For a general discussion of the case, see Peter, *supra* note 4, at 385-86, and Isabirye, *supra* note 105, at 242.

¹³² For a complete description of the trial, see Mike J. Hoover, Note, *The Laws of War and the Angolan Trial of Mercenaries: Death to the Dogs of War*, 9 CASE W. RES. J. INT'L L. 323 (1977); see generally Marcum, *Lessons of Angola*, 54 FOREIGN AFF. 407 (1976); see also Ebinger, *External Interventions in Internal War: The Politics and Diplomacy of the Angolan Civil War*, 20 ORBIS 669 (1976).

gola.¹³³ The indictment first charged all thirteen defendants with the crime of being mercenaries.¹³⁴ The defendants were accused of violating two OAU resolutions¹³⁵ and four United Nations resolutions.¹³⁶ The defendants were also charged with crimes against peace, in violation of the Statute of the Nuremberg International Military Tribunal, as confirmed by U.N. Resolution 95(1) of December 1946.¹³⁷ 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 of other FNLA soldiers; kidnapping of civilians and stealing of their property . . ."¹³⁸ Finally, the indictment charged each defendant separately with specific crimes.¹³⁹

The court convicted all thirteen defendants on the charge of being mercenaries.¹⁴⁰ Nine were given prison sentences and four were sentenced to death. The court prefaced its judgment by referring to the existence of mercenarism in traditional penal law. It stated that "mercenarism was not unknown in traditional penal law where it was always dealt with in relation to homicide."¹⁴¹ The court at this point seemed to be arguing that when an individual is accused of mercenarism it is important to look beyond the term and examine

¹³³ The captured mercenaries consisted of one Irish, nine British and three United States citizens. Hoover, *supra* note 132, at 327.

¹³⁴ For the text of the indictment *see id.* at 352-74.

¹³⁵ *Statement of the Heads of States and Governments of the Member Countries of the Organisation of African Unity*, Sept. 11-14, 1967, AHG/Res. 49 (IV) (Kinshasa, Congo); *Statement on Mercenary Activities in Africa*, June 21-23, 1971, CM/St. 6 (XVII) (Addis Ababa, Ethiopia).

¹³⁶ G.A. Res. 2395, U.N. GAOR, 23d Sess. 1, Supp. 18, at 59, U.N. Doc. A/7218 (1968); G.A. Res. 2465, U.N. GAOR, 23d Sess., Supp. 18, at 5, U.N. Doc. A/7218 (1968); G.A. Res. 2548, U.N. GAOR, 24th Sess., Supp. 30, at 5, U.N. Doc. A/7630 (1969); G.A. Res. 3103, U.N. GAOR, 28th Sess., Supp. 30, at 142, U.N. Doc. A/9030 (1973).

¹³⁷ Hoover, *supra* note 132, at 371.

¹³⁸ *Id.* at 372.

¹³⁹ C. Georgiou was charged with the murders of civilians, FAPLA soldiers, and other mercenaries. McKenzie was charged with stealing and destruction of military and civilian equipment and property, with maltreatment and kidnapping of civilians, and with the murder of other mercenaries. As for McIntyre, Marchant, Evans, and Wiseman, they were charged with being members of Georgiou's contingent and with killing FAPLA soldiers in combat. The other defendants were accused generally of participating in armed actions against FAPLA forces, and Gearhart was specifically charged with soliciting his role as a mercenary by placing an advertisement in *Soldier of Fortune* magazine. *Id.* at 334.

¹⁴⁰ *See id.* at 374 for the text of the judgment.

¹⁴¹ *Id.* at 379.

the common crimes it encompasses such as murder, rape and so on.¹⁴² This would mean that defendants could be convicted for common crimes that are recognized and defined in national legislation. The court stated that:

Yet it is important that in 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.¹⁴³

As Lockwood argues, this part of the judgment seemed to categorize the crime of mercenarism as a common crime.¹⁴⁴ The court then concluded this section of the judgment by stating that:

In our case, mercenarism is provided for in Art. 20 No. 4 of the Penal Code in force. This annuls the objection of the defence that the crime of mercenarism has not been defined and that there is no penalty for it. It is in fact provided for with penalty in most evolved penal systems. As a material crime, of course!¹⁴⁵

With this statement the court seemed to be coming back to its original position, stating that the crime of mercenarism includes, and consists of, specific crimes that exist in all penal systems. The court then referred to the resolutions of the United Nations and to the statements of the OAU in order to affirm that mercenarism is considered a crime by all nations and that the mercenaries need to be punished.¹⁴⁶ The court also referred to the resolutions to affirm that:

[A]cceptance is given to the allegation of the defence that the defendants are not solely guilty. Also guilty, alongside them, are the governments of the countries of which they are nationals, which encouraged their recruitment, armed them and paid them wages. Governments persisting in their racist philosophies and blinded by imperial delirium, which have disregarded UN Resolution 2465, and again shown themselves to be against peace for the peoples and

¹⁴² See George H. Lockwood, *Report on the Trial of Mercenaries: Luanda, Angola*, 7 *MANITOBA L. J.* 183, 198 (1977).

¹⁴³ Hoover, *supra* note 132, at 379.

¹⁴⁴ Lockwood, *supra* note 142, at 199.

¹⁴⁵ Hoover, *supra* note 132, at 379-80.

¹⁴⁶ *Id.* at 380.

unworthy of sharing the company of the community of civilized nations.¹⁴⁷

The court's reliance on the U.N. and O.A.U. resolutions has been widely criticized on the basis that the resolutions did not confer on the Angolan court the necessary basis for finding the defendants guilty because the resolutions did not create law.¹⁴⁸ One should note, however, that despite the validity of this criticism, and the conclusion that "no nation . . . can create precedent by its own acts which are contrary to existing law,"¹⁴⁹ there is no denying that the trial played an important role in defining the crime of mercenarism, for it showed the inadequacies of international law at that time and drew attention to the problem of the use of mercenaries.

The third trial dealing with the problem of mercenaries is that of Nicaragua against the United States. Although this case is somewhat different from the two discussed above, in that it does not deal with the direct prosecution of individuals but with a government's accusation that another government is using mercenaries in its country, the trial nonetheless shows the evolution of the crime of mercenarism and its acceptance in international law.

In 1986, the International Court of Justice handed down a judgment on the merits of the case concerning *Military and Paramilitary Activities in and Against Nicaragua*.¹⁵⁰ Before the Court, Nicaragua argued it was the victim of foreign economic and armed aggression

¹⁴⁷ *Id.*

¹⁴⁸ For example, Hoover draws attention to the fact that although the New People's Republic of Angola had been recognized by the OAU, it was not a member of the U.N. *Id.* at 350-51. Secondly, the resolutions when read together simply called upon member States to enact legislation into their own penal codes in order to prohibit the crime of mercenarism. No such statute was passed by the Council of Revolution at the time the defendants were captured. Finally, although the resolutions did show a trend towards a condemnation of the activities of mercenaries, they left it up to each State to define the precise substance and scope of the crime in their national legislation. Several authors argue that the resolutions are declarations rather than laws. See Isabirye, *supra* note 105, at 244; Green, *supra* note 20, at 200; and Cesner & Brant, *Law of the Mercenary: An International Dilemma*, 6 CAP. U.L. REV. 339, 349 (1977). According to Cesner and Brant, "these declarations are by their terms nothing more than a collective group of resolutions seeking to define the problem of mercenary activities and requesting sovereign nations to take action against those who promote such conduct." Cesner & Brant, *supra*, at 349.

¹⁴⁹ Cesner & Brant, *supra* note 148, at 355.

¹⁵⁰ *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27). For the provisional order of the International Court of Justice, see *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States)*, 78 AM. J. INT'L L. 750 (1984).

which created an internal armed conflict, that the United States was responsible for overt and public acts of intervention against the government of Nicaragua, and that these acts violated international law and agreements that bound the two nations. Nicaragua invoked the Charter of the United Nations, the Charter of the Organization of American States, and the Treaty of Friendship, Commerce and Navigation between the United States and Nicaragua.¹⁵¹ Although the United States was not present during the proceedings,¹⁵² its position was that its actions were justified as an exercise of the right of collective self-defense.

Regarding the issue of mercenaries, Nicaragua asserted that the United States authorized, created, and organized a mercenary army, the forces of the *contras*, which were involved in activities that were hostile to the government of Nicaragua.¹⁵³ Nicaragua's contention

¹⁵¹ The substance of the charges made by Nicaragua were that: 1) the United States, in recruiting, training, arming, equipping, financing, supplying and otherwise encouraging, supporting, aiding, and directing military and paramilitary actions in and against Nicaragua has violated and is violating its Charter and treaty obligations to Nicaragua. Violations include Article 2, paragraph 4 of the Charter of the United Nations, Articles 18 and 20 of the Charter of the Organization of American States, Article 8 of the 1933 Montevideo Convention on Rights and Duties of States and Article 1, paragraph 3 of the 1928 Convention Concerning the Duties and Rights of States in the Event of Civil Strife; 2) the United States was violating the sovereignty of Nicaragua by armed attacks against Nicaragua, by incursions into its territorial waters and its air space, and by trying to intimidate the government of Nicaragua; 3) the United States was using force and the threat of force against Nicaragua, and was intervening in its internal affairs, creating a situation of internal conflict; and 4) the United States has a duty to cease and desist from the use of force against Nicaragua, from violating the territorial integrity of Nicaragua, from supporting those who are engaged in military and paramilitary actions against Nicaragua and from trying to block or impede the economic activities of Nicaragua. 78 AM. J. INT'L L. at 750-52.

¹⁵² On April 6, 1984, the United States Secretary of State delivered a letter to the Secretary General of the United Nations purporting to withdraw the United States consent to the jurisdiction of the International Court of Justice for a period of two years with respect to disputes arising out of the situation in Central America. See *United States: Letter to U.N. Secretary General Concerning Non-Applicability of Compulsory Jurisdiction of the International Court of Justice with Regard to Disputes with Central American States*, 23 I.L.M. 670 (1984). On January 18, after the Court had upheld its jurisdiction to hear the complaint, the government of the United States announced that it would not participate in the case and that it would not appear in the proceedings on the merits. See U.S. Withdrawal from the Proceedings Initiated by Nicaragua in the ICJ, DEP'T ST. BULL., Mar. 1985, at 64 (statement of U.S. Department of State, Jan. 18, 1985).

¹⁵³ On the question of the use and financing of mercenaries, Nicaragua adopted

was that the acts committed by the *contras* were the acts of the United States.

The Court in its judgment rejected a number of Nicaragua's arguments, in particular its contention that the *contra* forces had been created, directed, and controlled by the United States to such a degree as to make them in effect the agents of the United States.¹⁵⁴ The Court on the issue of the use of force found that the United States, by directly attacking Nicaragua through the actions of its officials and individuals acting on its behalf, had infringed the principle of the prohibition in customary international law against the threat or use of force without justification against another nation.¹⁵⁵ The Court also held that the United States had violated the prohibition against

its own definition of what constitutes a mercenary. As is stated in the 1989 Report of the Special Rapporteur, Nicaragua does not adopt the definition of mercenary that appears in Article 47 of Additional Protocol I to the 1949 Geneva Conventions. U.N. ESCOR, 45th Sess. at 38-39, U.N. Doc. E/CN.4/1989/14 (1989). The Rapporteur notes:

[Nicaragua] objects to th[e] definition since, in its opinion, the mercenary cannot be defined exclusively on the basis of nationality, since mercenarism takes a form proper to the nature of the act itself, the ignoble motivation, the retribution and the transgression of international law. Nicaragua's definition of the mercenary derives from the armed conflict in which it is engaged and cannot be understood in isolation from the origin, scope and nature of the conflict.

The starting point of the Nicaraguan case . . . is that Nicaragua is being subjected to external aggression aimed at impairing the right to self-determination of the Nicaraguan people. The United States Government is responsible for that aggression and has recruited, trained and financed Nicaraguans and other nationals for that purpose since 1981. On the basis of this premise, the Nicaraguan case dispenses with the factor of nationality, since it considers all those recruited in that way to be "mercenaries" or "mercenary gangs".

. . . It is argued that the *contras* are merely gangs of mercenaries recruited, organized, paid and commanded by the United States Government. Consequently, they have no genuine independence vis-a-vis the United States Government. The consequence drawn from that premise is that the unlawful acts committed by the *contras* are imputable to the United States Government, as would be the case of any other force placed under its authority. The other consequence of this premise is that, as far as Nicaragua is concerned, the military and paramilitary attacks inflicted on it do not constitute a case of civil strife; they are essentially acts committed by the United States, through mercenary gangs.

Id.

¹⁵⁴ See *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14 at 53-65 (June 27).

¹⁵⁵ See *id.* at 118.

the use of force by arming and training of the *contras*.¹⁵⁶ The Court did not consider simply supplying funds to the *contras* as a use of force in violation of international law, but rather a violation of the principle of non-intervention.¹⁵⁷ The Court also found, however, that the actions of the *contras* could not, as a whole, be imputed to the United States.¹⁵⁸

In regard to the principle of non-intervention, the Court found that the *contras*' goal was the overthrow of the government and that support of such a group was impermissible. The Court found that "the support given by the United States, up to the end of September, 1984, to the military and paramilitary activities of the *contras* in Nicaragua, by financial support, training, supply of weapons, intelligence and logistic support, constitute a clear breach of the principle of non-intervention."¹⁵⁹

Although the Court nowhere referred to the issue of mercenaries, it did conclude in section 3 of its judgment that:

the United States of America, by training, arming, equipping, financing and supplying the *contra* forces or otherwise encouraging, supporting and aiding military and paramilitary activities in and against Nicaragua has acted, against the Republic of Nicaragua, in breach of its obligations under customary international law not to intervene in the affairs of another State¹⁶⁰

The Court also found that the actions of the United States which violated the principles of the non-use of force and nonintervention also violated the principle of State sovereignty, which was a norm of customary international law.¹⁶¹

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 118-19.

¹⁵⁸ *Id.* at 64-65.

¹⁵⁹ *Id.* at 124.

¹⁶⁰ *Id.* at 146.

¹⁶¹ See *id.* at 147. For a complete analysis of the Court's judgment, see James P. Rowles, *Nicaragua Versus the United States: Issues of Law and Policy*, 20 INT'L LAW. 1245 (1986); Abram Chayes, *Nicaragua, The United States, and the World Court*, 85 COLUM. L. REV. 1445 (1985).

One should note that Nicaragua also lodged a complaint to the Special Rapporteur in regard to the use of mercenaries against the government of Nicaragua. In his 1989 report, the Special Rapporteur concluded that:

the presence of foreigners answering to the description of mercenary agents involved in the Nicaraguan conflict on behalf of one of the parties to the conflict—the *contra* forces—is something of which there is proof, as things now stand within the terms of article 47 of Additional Protocol I. Such

Finally it is important to note that the non-nationals who were captured and tried by the Nicaraguan courts in connection with the armed conflict were not tried or sentenced as mercenaries. Despite the fact that Nicaragua described these persons as mercenaries, there was nothing in Nicaraguan law that established mercenarism as an offense. Captured non-nationals were therefore tried for offenses against public order and safety.¹⁶²

VI. HUMANITARIAN LAW, MERCENARIES, AND THE STATUS OF PRISONERS OF WAR

Because in earlier days (prior to the 1900's) mercenaries were respected professionals, they were usually accorded the status of prisoner of war when captured.¹⁶³ During the 20th century this position persisted for some time. Under the early laws of war, aliens who enlisted in a foreign force committed no offense against international law. When they were captured, therefore, they were treated the same as the nationals of the State whose force they had joined.¹⁶⁴ Article 17 of the Hague Convention of 1907 provided that a neutral could not avail himself of his neutrality if he voluntarily enlisted in the armed forces of one of the parties and that:

In such a case, the neutral shall not be more severely treated by the belligerent as against whom he has abandoned his neutrality than a national of the other belligerent State could be for the same act.¹⁶⁵

The question of the protection of prisoners of war was widely considered in the 1949 Geneva Convention Relative to the Treatment of Prisoners of War.¹⁶⁶ The Convention, however, contains no article

persons were recruited to fight in an armed conflict, did take part in the hostilities, received material compensation for it, were not Nicaraguan nationals and were not on official duty as members of the armed forces of another State, since there is no State that admits to being a party to the armed conflict in Nicaragua. In short, they did not take part for their own ends, but on behalf of those recruited to help them overthrow the Nicaraguan government.

U.N. ESCOR, 45th Sess. at 47, U.N. Doc. E/CN.4/1989/14 (1989).

¹⁶² *Id.*

¹⁶³ For a discussion of the historical evolution of the status of mercenaries as prisoners of war see John R. Cotton, *Comment: The Rights of Mercenaries as Prisoners of War*, 77 MIL. L. REV. 143 (1977).

¹⁶⁴ 2 OPPENHEIMS INTERNATIONAL LAW 261 (H. Lauterpacht ed., 1952).

¹⁶⁵ Hague Convention V of 1907, 36 Stat. 2310.

¹⁶⁶ Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

which deals specifically with the question of mercenaries.¹⁶⁷ Despite this lack of mention, under the 1949 Geneva Convention mercenaries are entitled to prisoner of war treatment.¹⁶⁸ The main provision granting this protection is Article 4 of the Geneva Convention.¹⁶⁹

¹⁶⁷ Cotton argues that this lack of mention of the status of mercenaries can be interpreted in two ways. He advances that:

It is possible that the lack of specific consideration or mention was intentional, and that as a result, mercenaries are specifically excluded from the class of individuals protected by the Convention. On the other hand, it is possible that the Convention was intended to be general in character and that in light of historical precedent at the time of the drafting of the Convention, mercenaries were assumed to fall within one of the protected categories.

Cotton, *supra* note 163, at 155.

¹⁶⁸ See, e.g., Van Deventer, *supra* note 27, at 811; Schwarzenberger, *supra* note 4, at 280-82. Some authors, however, argue that the fact that mercenaries fight for money sets them apart from other members of the armed forces. For example, Mallison & Mallison mention that:

Neither Art. 9 of the Brussels Declaration, nor Art. 1 of the Hague Regulations, nor Art. 4 of the 1949 Conventions provides legal authority for armed bands of marauders or pirates acting principally for private purposes as opposed to public ones. Even if such bands used an internal military-like discipline, they could not meet the Brussels-Hague-Geneva criteria.

W. Thomas Mallison & Sally V. Mallison, *The Juridical Status of Irregular Combatants Under the International Humanitarian Law of Armed Conflict*, 9 CASE W. RES. J. INT'L L. 39, 50 (1977).

¹⁶⁹ Article 4 states:

A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

(1) Members of the armed forces of a party to the conflict, as well as members of militia or volunteer corps forming part of such armed forces.

(2) Members of other militia and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied provided that such militia or volunteer corps, including such organized resistance movements fulfill the following conditions:

(a) that of being commanded by a person responsible for his subordinates;

(b) that of having a fixed distinctive sign recognizable at a distance;

(c) that of carrying arms openly;

(d) that of conducting their operations in accordance with the laws and customs of war.

(3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.

(4) Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labor units or of services responsible for the welfare of the armed forces, provided that they have

Under the Convention, it can be argued that mercenaries, if they are members of the "armed forces of a Party to the conflict" or of "militia or volunteer corps forming part of such armed forces" or if they meet the requirements in Article 4, subparagraph A(2), are entitled to prisoner of war status.¹⁷⁰ If these standards are not met, mercenaries who are involved in international armed conflicts are treated like any other civilians who have taken up arms—that is, like unprivileged belligerents—and they are subject to trial and punishment by the detaining power.¹⁷¹ In situations of non-international armed

received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.

(5) Members of crews, including masters, pilots and apprentices, of the merchant marine and crews of civil aircraft of the Parties to the conflict, who do not benefit by more favorable treatment under any other provisions of international law.

(6) Inhabitants of a non occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

B. The following shall likewise be treated as prisoners of war under the present Convention:

(1) Persons belonging, or having belonged, to the armed forces of the occupied country, if the occupying Power considers it necessary by reason of such allegiance to intern them, even though it has originally liberated them while hostilities were going on outside the territory it occupies, in particular where such persons have made an unsuccessful attempt to rejoin the armed forces to which they belong and which are engaged in combat, or when they fail to comply with a summons made to them with a view to internment.

(2) The persons belonging to one of the categories enumerated in the present Article, who have been received by neutral or nonbelligerent Powers on their territory and whom these Powers are required to intern under international law, without prejudice to any more favorable treatment which these Powers may choose to give and with the exception of Articles 8, 10, 15, 30, fifth paragraph, 58-67, 92, 126 and, where diplomatic relations exist between the Parties to the conflict and the neutral or nonbelligerent Power concerned, those Articles concerning the Protecting Power. Where such diplomatic relations exist, the Parties to a conflict on whom these persons depend shall be allowed to perform towards them the functions of a Protecting Power as provided in the present Convention, without prejudice to the functions which these Parties normally exercise in conformity with diplomatic and consular usage and treaties.

Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 4, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention] (entered into force Oct. 21, 1950).

¹⁷⁰ See *id.* at art. 6.

¹⁷¹ See Van Deventer, *supra* note 27, at 811.

conflicts, mercenaries have no protection except those provided by Article 3 of the Geneva Convention.¹⁷²

The question of the status that should be given mercenaries was also discussed during the Angolan trial of thirteen mercenaries. The Angolan court on this issue stated that:

the defendants cannot claim the status of prisoners of war, for the definitive reason that they are irregular members of an army. And it is already on record that in U.N. resolutions a mercenary is regarded as a common criminal.¹⁷³

This position was reaffirmed by the International Commission of Enquiry on Mercenaries in the Draft Convention on the Prevention and Suppression of Mercenarism, which followed the decision of the Angolan Court. Article 4 of the Draft Convention stipulated that mercenaries are not lawful combatants and that they were not entitled to prisoner of war status (for text of the Draft Convention, see

¹⁷² Article 3 of the Convention provides:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each party in the conflict shall be bound to apply, as a minimum, the following provisions: (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arm and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, color, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) Violence to the life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular, humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavor to bring into force, by means of special agreement, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

Geneva Convention, *supra* note 169, at art. 3.

¹⁷³ Hoover, *supra* note 132, at 380-381 (reproducing verdict of People's Revolutionary Court of Angola, June 19, 1976).

Hoover, *supra* note 132, at 404). The OAU Convention also stipulated that mercenaries cannot be granted the status of prisoner of war.

The issue of the status of mercenaries was once again discussed during the debates of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts.¹⁷⁴ During the second session, a number of delegates affirmed that Protocol I should deny combatant status to mercenaries used in a conflict with a national liberation movement or against the sovereignty and territorial integrity of a State.¹⁷⁵ However, no consensus on this question was reached. The issue was once again raised by the Nigerian delegation in 1976 when it proposed a draft amendment to Article 42 of Protocol I. The amendment affirmed that "the status of a combatant or prisoner of war shall not be accorded to any mercenary who takes part in armed conflicts referred to in the Conventions and the present Protocol."¹⁷⁶

The main criticism of the Nigerian proposal was that it was too categorical. Many delegations felt that it was up to the capturing power to decide whether it would accord prisoner of war or combatant status to mercenaries.¹⁷⁷ As the International Committee of the Red Cross noted, the Nigerian proposal "would have led to a surprising situation for a humanitarian text, since any Contracting Party according such status to a mercenary, would then have violated the Protocol."¹⁷⁸ The provision which was finally adopted in 1977 reflects

¹⁷⁴ See *supra* part III B.

¹⁷⁵ See V Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, 3d Sess., Doc. CDDH/SR.33 at 379-92 (1976); VI Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, 4th Sess., Doc. CDDH/SR.34-37 at 19-64 (1977). Protocol I, entitled Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protections of Victims of International Armed Conflicts, is reproduced with comments by the International Committee of the Red Cross in INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 at 19 (Yves Sandoz et. al. eds., 1987).

¹⁷⁶ See III Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, 3d. Sess., Doc. CDDH/III/GT/82 at 192 (1976).

¹⁷⁷ See XV Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, 4th Sess., Doc. CDDH/III/361 (Add.1) (1976); III Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, 3d. Sess., Doc. CDDH/III/GT/97 (1976).

¹⁷⁸ See Sandoz et. al., *supra* note 175, at 575.

this concern.¹⁷⁹ Article 47 of Protocol I stipulates that "[a] Mercenary shall not have the right to be a combatant or a prisoner of war."¹⁸⁰ The article as formulated allows each contracting State to decide for itself whether it will grant to mercenaries the status of a prisoner of war. As Yusuf points out, "as it appears now, the provision is addressed to the mercenary rather than to a party to the conflict. A mercenary cannot claim the status of a prisoner of war, nor pretend to be treated as such, although no obligation is imposed on the Detaining Power to deny him such status."¹⁸¹

The effect of Article 47, in denying prisoner of war status, is to:

deprive the mercenary of the treatment of prisoner of war as laid down in the Third Convention, and to make him liable to criminal prosecution. Such prosecution can be instigated both for acts of violence which would be lawful if performed by a combatant, in the sense of the Protocol, and for the sole fact of having taken a direct part in hostilities¹⁸²

Because a mercenary is deprived of the status of combatant and prisoner of war, he becomes a civilian, and therefore can fall under Article 5 of the Fourth Convention.¹⁸³ One should note, however, that before a mercenary can be deprived of the status of prisoner of war, there must be a decision based on the definition of paragraph 2 of Article 47 that he is in fact a mercenary. The rule is that, pending a final determination by a competent tribunal,¹⁸⁴ the accused

¹⁷⁹ Article 47 was adopted by consensus at a plenary meeting. VI Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, 4th Sess., Doc. CDDH/SR.41, at 156 (1977). For a discussion of the article and its problems see Sandoz et. al., *supra* note 175, at 156-161, 175-176, 182, 184-185, 191-194, 197-198, and 202-204.

¹⁸⁰ For a criticism of the article as adopted see R.C. HINGORANI, *PRISONERS OF WAR* 63 (1982).

¹⁸¹ YUSUF, *supra* note 4, at 124. See also BOTHE, PARTSCH, & SOLF, *NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949* at 270 (1982).

¹⁸² Sandoz et. al., *supra* note 178, at 575.

¹⁸³ As the International Committee of the Red Cross notes: "[i]t is precisely this article which removes an important part of the guarantees from any person under legitimate suspicion of being engaged in an activity endangering State security." *Id.*

¹⁸⁴ See Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, art. 5, para. 2, (Appointment of Protecting Powers and of Their Substitutes), reproduced in Sandoz et. al., *supra* note 175, at 75; Protocol I, art. 45 (Protection of Persons Who Have Taken Part in Hostilities), reproduced in Sandoz et. al., *supra* note 175, at 543.

person is presumed to be a prisoner of war¹⁸⁵ and is therefore protected by the Third Convention.¹⁸⁶

If the competent tribunal decides that the captured person is a mercenary under the definition of paragraph 2 of Article 47, then it seems that Article 75 dealing with fundamental guarantees applies.¹⁸⁷ Although the Protocol does not specifically mention that Article 75 will apply, the Rapporteur's report notes that "although the proposed new article makes no reference to the fundamental protections of Article 65 [75], it was understood by the Working Group that mercenaries would be one of the groups entitled to the protections of Article 65 [75]."¹⁸⁸ Further, this explanation was accepted at a plenary meeting by the representative of Nigeria,¹⁸⁹ and it was confirmed by a number of statements by other delegates.¹⁹⁰

Despite the clear language of Article 47 of Protocol I, it must be remembered that the article deals only with *international* armed conflict. Therefore, mercenaries who are involved in non-international conflicts are not covered by the Protocol. As the International Committee of the Red Cross notes:

[I]n case of capture, these mercenaries undeniably benefit from the protection of Article 3 of the Conventions, and the corresponding provisions of Protocol II, when the latter is applicable, as well as from the provisions of international human rights legislation, when these apply. In fact, the person concerned will not normally be prosecuted on account of his mercenary status, but for endangering State security.¹⁹¹

VII. MERCENARIES IN TODAY'S SOCIETY

Why anyone today would want to be employed as a mercenary remains a mystery. Many reasons are advanced, however, to explain

¹⁸⁵ See Protocol I, art. 45, *supra* note 184.

¹⁸⁶ See Protocol I, art. 5, para. 2, *supra* note 184.

¹⁸⁷ For a similar point of view see Sandoz et. al. *supra* note 175, at 576; BOTHE, PARTSCH, & SOLF, *supra* note 181, at 271-72; Yusuf, *supra* note 4, at 125; Shearer, *Commentary*, 9 AUSTL. Y.B. INT'L L. 41, at 44 (1985).

¹⁸⁸ XV Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, 4th Sess., Doc. CDDH/III/369, at 511 (1977).

¹⁸⁹ VI Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, 4th Sess., Doc. CDDH/Sr.41, para. 81, at 157 (1977).

¹⁹⁰ See *Id.* at 159, para. 92; *id.* at 160, paras. 97-98; *id.* at 175-76, 192, 194-95.

¹⁹¹ Sandoz et. al., *supra* note 175, at 577.

the phenomenon. One need only refer to the high salaries which are paid to mercenaries and to the fact that, despite an international condemnation of the use of mercenaries, mercenarism is often portrayed as a flamboyant and colorful profession. It is portrayed in fact as a great adventure.¹⁹² There are also a number of people who want to be involved in armed conflicts and who need to feel that they are fighting for a just cause. However, as Enloe explains:

Most mercenaries come from groups—Gurkhas, Irish, Hessians, Meos—that are economically and politically disadvantaged. Being a mercenary is not so much an indication of an adventurous spirit as it is a testimony to minimal opportunities available to an individual.¹⁹³

If the practice of mercenarism is to be eliminated, the underlying reasons for becoming a mercenary must also be addressed. Even the existence of legal sanctions may not necessarily deter all people from becoming mercenaries. If the international community is serious about eliminating the practice of mercenarism it must also deal with a series of broader issues.

VIII. CONCLUSION

Mercenaries have been the subject of debate within the United Nations since the early 1960's. Despite this international concern with the use and financing of mercenaries, they continue to play an important role in the destabilization process of a number of countries. One need only refer to the recent mercenary activities in Africa and more specifically to the use of mercenaries in Angola, South Africa, the Comoros and Mozambique.¹⁹⁴ Mercenary activities have also occurred in such countries as the Republic of Maldives, Nicaragua and Colombia.¹⁹⁵ As the Special Rapporteur in his 1988 report noted: "the problem of mercenaries continues to be as important a factor as ever in conflicts of various kinds Mercenary practices have

¹⁹² See Peter, *supra* note 4, at 377.

¹⁹³ C.H. Enloe, *Mercenarization*, in U.S. MILITARY INVOLVEMENT IN SOUTHERN AFRICA 109-29 (Western Massachussets Association of Concerned African Scholars ed. 1978).

¹⁹⁴ For a more complete analysis of the recent problems of mercenaries in Africa, see *The Right of Peoples to Self-Determination and its Application to Peoples Under Colonial or Alien Domination or Foreign Occupation*, U.N. ESCOR, Comm'n. Hum. Rts., 47th Sess., Agenda Item 9, U.N. Doc. E/CN.4/1991/14 (1990) (Report of Special Rapporteur).

¹⁹⁵ *Id.* at pp. 22-36.

increased in volume and proportion . . . and have become a more complex phenomenon by virtue of the manifold forms of organization and intervention that have developed."¹⁹⁶

It is essential that the international community grant top priority to the question of curbing the use of mercenaries because mercenarism is an affront to the principles of sovereign equality, political independence, and territorial integrity of States. Mercenarism has continued to flourish because there did not exist before 1989 any rules of positive international law that directly condemned mercenary practices and that specified both the obligations of States and the preventive measures needed to be taken against the recruitment, utilization, financing, and training of mercenaries.¹⁹⁷ Although a number of resolutions were adopted within the United Nations which condemned mercenarism and the activities of mercenaries, these resolutions were not formerly incorporated in any international instrument.¹⁹⁸ With the adoption of the 1989 Convention, however, there is no longer any reason why the practice of mercenarism and the activities of mercenaries should go unpunished.

The only obstacle in the process of punishment of mercenaries is the fact that few States have ratified or acceded to the Convention. It is therefore imperative that efforts now be concentrated on getting States to ratify the Convention. As the Special Rapporteur states in his 1991 Report, "[b]ringing the Convention into force will be a real and effective step forward in eliminating mercenary activities and will make it easier for States to classify such activities as a crime under their internal law."¹⁹⁹

Along with encouraging States to ratify the Convention, the international policy of condemning and rejecting mercenary activities should continue. As part of a policy of prevention, the organs of the United Nations must also suggest to member States that they include in their internal laws provisions which define the recruitment

¹⁹⁶ U.N. ESCOR, 44th Sess. at 33, U.N. Doc. E/CN.4/1988/14 (1988).

¹⁹⁷ *Id.*

¹⁹⁸ Several authors argue that General Assembly resolutions and declarations do not have any legally binding force. See, e.g., Jenks, *The Scope of International Law*, 1954 BRIT. Y.B. INT'L L. 1; Onuf, *Professor Falk on the Quasi-Legislative Competence of the General Assembly*, 64 AM. J. INT'L L. 349 (1970); but see Schachter, *The Evolving International Law of Development*, 15 COLUM. J. TRANS-NAT'L L. 1 (1976), who argues that legal effect can be given to the collective pronouncements of the General Assembly.

¹⁹⁹ U.N. ESCOR, Comm'n. Hum. Rts., 47th Sess., Agenda Item 9, at 45, U.N. Doc. E/CN.4/1991/14 (1990).

of mercenaries as an offense.²⁰⁰ In light of the recent developments linking the use of mercenaries with the activities of trafficking in arms, drugs, and currency, it is necessary that the U.N. Commission on Human Rights continue to examine the situation and that it strive to formulate a juridical solution to the problem.²⁰¹

What is truly needed is a statement emanating from the international community establishing categorically that mercenarism is a crime against humanity. The inclusion of mercenarism in the Draft Code of Crimes Against Humanity is a step in the right direction. If the international community continues to reiterate in international documents the idea that mercenary activities must be condemned and punished both with respect to the mercenary directly involved, and with respect to those using mercenaries and the entity recruiting and training mercenaries, then the existence and the use of mercenaries may be eradicated. The essential element is international co-operation.

²⁰⁰ For a survey of the domestic laws condemning the use of mercenaries and creating offenses for their recruitment see *The Right of Peoples to Self-Determination and Its Application to Peoples Under Colonial or Alien Domination or Foreign Occupation: Report of the Secretary-General*, U.N. ESCOR, Comm'n. Hum. Rts., 39th Sess., Agenda Item 9, U.N. Doc. E/CN.4/1983/13 (1982); U.N. ESCOR, Comm'n. Hum. Rts., 40th Sess., Agenda Item 9, U.N. Doc. E/CN.4/1984/16 (1982); U.N. ESCOR, Comm'n. Hum. Rts., 41st Sess., Agenda Item 9, U.N. Doc. E/CN.4/1985/13 (1984); U.N. ESCOR, Comm'n. Hum. Rts., 42d Sess., Agenda Item 9, U.N. Doc. E/CN.4/1986/44 (1985); U.N. ESCOR, Comm'n. Hum. Rts., 43d Sess., Agenda Item 9, U.N. Doc. E/CN.4/1987/12 (1986); U.N. ESCOR, Comm'n. Hum. Rts., 44th Sess., Agenda Item 9, U.N. Doc. E/CN.4/1987/12/Add.1 (1987); U.N. ESCOR, Comm'n. Hum. Rts., 45th Sess., Agenda Item 9, U.N. Doc. E/CN.4/1989/14 (1989); U.N. ESCOR, Comm'n. Hum. Rts., 46th Sess., Agenda Item 10, U.N. Doc. E/CN.4/1989/14 (1990); U.N. ESCOR, 47th Sess., U.N. Doc. E/CN.4/1991/14 (1990).

²⁰¹ For a discussion of the link between drug traffickers and mercenaries see U.N. ESCOR, 46th Sess., U.N. Doc. E/CN.4/1990/11 (1990); U.N. ESCOR, 47th Sess., U.N. Doc. E/CN.4/1991/14 (1990).