# *REPORT ON THE TRIAL OF MERCENARIES: LUANDA, ANGOLA JUNE, 1976*

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## 1. INTRODUCTION

Towards the end of May, 1976 I received an invitation from the government of Angola to be a member of an International Commission of Enquiry on Mercenaries, convened by that government.

The stated purpose of the Commission was to observe the trial of the white mercenaries beginning on the 8th of June and to make recommendations for international action to deal with the problem of mercenaries.

I left Winnipeg on Friday, the 4th of June and travelled to Luanda via Lisbon. Luanda, the capital of Angola, is situated on the coast in the northwest area of the country. I arrived in Angola at midnight on Saturday, the 5th. The next morning I was supplied with a copy of the indictment, 35 pages in length, and with certain relevant legal documents such as the Constitution of Angola and a consolidation of law called Revolutionary Penal Legislation. This included an extract from the Combatants- Disciplinary Law, a Service Order requiring confirmation by the President of any death penalty and a decree setting up the Directorate of Information and Security of Angola.

It also included law no. 7/76 of the lst of May setting up the People's Revolutionary Court and establishing its procedures. I shall refer to the latter as the Procedural Code.

The Commission was formally opened on Monday, the 7th with a speech by the Minister of Justice, Diogenes Boavida. After brief formalities, the Commission got down to business.

The fifty-one Commissioners were drawn from thirty-seven different countries, representative of all the continents. I was the only representative from Canada. There were three from the United States of America, one from Brazil, one from Mexico. Sweden, France, Belgium, England, Holland, Italy and Germany were represented. There were representatives from many of the newly independent African nations, which were formerly colonies of Britain, France and Portugal. There were two Soviet representatives, and a law professor from Tasmania.

The representatives were mainly law teachers, practising barristers or judges. There was, however, a sprinkling of other

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disciplines. Beatriz Allende was there from Chile; she is a qualified medical doctor and at present teaches in Cuba. One of the representatives from France is a biologist. The representative from Sweden is a professor of political science.

## 2. COMMISSION OF ENQUIRY AND ITS PURPOSE

At the outset, the Commissioners elected a president and organized three subcommittees, each with a specific task.

The first subcommittee was asked to prepare a draft international convention on the prevention and suppression of mercenary activity. The second subcommittee was asked to prepare a general declaration on the question. The third subcommittee was asked to check the fairness of the trial and the legality of the charges. The subcommittees were then to report to the Commissioners in plenary session.

I joined the third subcommittee and we went to work the next day. The trial by this time had been adjourned for three days to Friday the 11th of June, at the request of two American lawyers.

The mercenaries to be tried consisted of ten British Nationals and three Americans. The British were Costas Georgiou (Callan), McKenzie, McIntyre, Marchant, Lawlor, Evans, Wiseman, Fortuin, Barker, Nammock; the Americans, Grillo, Gearhart and Acker. They were originally provided with court-appointed Angolan lawyers. When the American lawyers arrived, Grillo chose to retain his Angolan lawyer, Gearhart and Acker accepted the American lawyers in substitution for their Angolan defence counsel.

By Article 12 of the Procedural Code, substitution of counsel can take place up to the day of the trial; however, substitution was allowed in the case of the British defendants when lawyers suddenly arrived from Britain on the third day of the trial. Three of the British defendants chose to accept the newly arrived advocates.

The subcommittee of which I was a member, which I shall call the "Judicial Committee", consisted of lawyers from the two main systems of law in the Western world: the Common Law System and the Civil Law System. Our chairman was a High Court Judge from Nigeria who was called to the Bar at Lincoln's Inn before Nigeria's independence. There were several other members of Lincoln's Inn from former British Colonies, such as Ghana and Tanzania.

Lawyers from both systems agreed that there are certain basic principles recognized by both systems which are essential to the fairness of a trial in a procedural sense. The following were agreed upon:

(a) A defendant has the right to know the charges made against him.

(b) A defendant has the right to examine the case file (this is peculiar to civil law procedure; the closest equivalent in our system would be the furnishing of particulars or, in the case of an indictable offence, the holding of a Preliminary Inquiry.)

(c) A defendant has the right to question the witnesses for the prosecution.

(d) A defendant has the right to be heard.

(e) A defendant has the right to present his own witnesses.

(f) A defendant has the right to be assisted by counsel.

(g) The trial must be public.

The one difficult and contentious problem was the question of the legality of the charges. In particular, whether the crime of being a mercenary in fact existed in the law of Angola at the time of the alleged offence. I will return to this later.

3. THE TRIAL AND PRELIMINARY PROCEDURES

The trial was conducted in accordance with civil law procedures inherited from the Portuguese. Angolan independence was declared on the 11th of November, 1975. The trial was conducted by the People's Revolutionary Court established by law no. 7/76 of the lst of May, 1976, pursuant to Article 44 of the Constitutional Law of the 11th of November, 1975. I have already referred to law no. 7/76 as the Procedural Code.

The court was composed of five judges, two of whom are required to be graduates in law. At the trial of the mercenaries, the presiding judge, Ernesto Teixeira Da Silva, was legally qualified and is in fact the Attorney General of Angola. The other legally qualified judge is the Director of Angolan Television. Two of the judges were army officers and the third, a woman, is a member of the National Council of Women in Angola. The judges of this court are appointed for six months and may combine this appointment with other functions.

The courtroom was semi-circular in shape, the prosecutor sat to the left of the Bench, as you fact it, at a desk at right angles to the Bench. Defence counsel sat opposite the prosecutor in rows at desks similarly placed at right angles to the Bench. The accused sat in two rws in front of and facing the Bench. Behind the accused there was a row of soldiers; behind them in the central area of the courtroom sat the Commissioners of Enquiry. To their right sat various diplomatic and governmental representatives, to the left of the Commissioners there were members

of the general public. The composition of this section changed from day to day.

There were three galleries around the semi-circle facing the tribunal. The first one contained translation booths on one side and television cameras on the other. There were television cameras and journalists in the gallery above them. In addition to this the trial was recorded by audio-visual equipment at the back of the courtroom, on the main floor.

Each judge and each counsel had a microphone, there was one microphone immediately in front of the Bench which was used by the witnesses as they came forward. Everyone, including every member of the audience, was provided with headphones for simultaneous translation. The language of the trial was Portuguese. Some of the witnesses gave evidence in native languages which were translated into Portuguese. There was then simultaneous translation into English, French, Spanish and Russian.

Before trial, a case is prepared. Those familiar with French procedure will recognize this as the equivalent of the French dossier prepared by an examining magistrate. By virtue of Legal Decree no. 3/75 of the 29th of November which forms part of the Revolutionary Penal Legislation referred to above, the case is prepared by the Directorate of Information and Security of Angola. The case may be filed away and not proceeded with either by the prosecutor or the court if either thinks that the evidence of a punishable offence is insufficient.

If the prosecutor finds that the case shows sufficient evidence of a punishable offence, the identity of the offenders and their responsibility, he formulates a charge in an Indictment which specifies:

(a) the name and facts relating to the identity of the defendant;

(b) a summary of the facts;

(c) an indication of the laws infringed;

(d) a request for punishment;

(e) a list of witnesses and an indication of other proofs.

(Article 10 of the Procedural Code).

If the court decides that the case should be the object of a trial, the presiding judge issues a Notice of Charges, a duplicate of which must be given to the accused. The Notice includes the Indictment and also contains:

(a) the content of the charges;

(b) the name of the official defence counsel together with an indication that the defendant may obtain counsel of his choice up to the day of the trial;

(c) an indication that the case file can be seen in the court office during a period of eight days and may be freely consulted by defence counsel;

(d) an indication that during this period defence counsel can present his case for the defence in writing.

(Article 12 of the Procedural Code).

The decision of the court to proceed with a trial is made after an examination of the case and in the words of Article 11 of the Procedural Code:

> ". . . if it is found that there is sufficient substantive evidence to show the criminal responsibility of the defendant".

On the face of it, this seems to amount to a pretrial presumption of guilt; however, as against this, by Article 21 the defendant has the right to remain silent at the trial, the witnesses listed in the Notice of Charges may not all be produced at the trial for one reason or another, and, if they are produced, they may not be believed. In addition to this the accused may have a good defence to the charges, either in fact or in law. The procedure under Article 11 therefore may be compared to our own procedure on a Preliminary Inquiry whereby the judge must commit the accused for trial if the evidence shows that the accused is *probably* guilty.

I should mention at this point that a copy of the case file was made available to the Commissioners of Enquiry. It was kept in the room where the Judicial Committee met. It consisted of bound volumes which stood about five feet high. It contained statements of the accused and of witnesses and documentary exhibits of various kinds including newspaper reports.

As mentioned previously, there was a delay in the beginning of the trial at the request of the American defence counsel. Instead of starting on Tuesday, the 8th of June, it started on Friday, the 11th. It continued through the weekend. The evidence was completed by the evening of Wednesday, the 16th of June. Arguments took place on Thursday, the 17th, after which judgment was reserved. I left at the completion of the evidence and before argument. The working hours of the court were 9:00 — 1:00 and 3:00 — 7:00, that is to say an eight hour day. The Commissioners held their meetings usually in the evening and on more than one occasion, between the hours of 10:00 P.M. and 2:00 A.M.

## 4. THE INDICTMENT

Turning now to the charges and the evidence, the indictment charged all the defendants with the crime of being mercenaries and with crimes against peace. It was more particularly alleged that they committed numerous murders of civilians, maltreated civilians, destroyed military and civilian property and robbed and looted. The alleged criminal activity of each defendant was then dealt with separately. The alleged criminal activity of Costas Georgiou, known as Callan, was said to include, among other things, the murder of civilians, of FAPLA soldiers taken prisoner, of FNLA members and of other mercenaries.

It should be noted that there were three factions fighting in Angola; the MPLA, whose soldiers were called FAFLA, the FNLA and UNITA. The MPLA became the governing body with the declaration of independence (Article 2, Contitutional Law, 11th of November, 1975).

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|---|---|
| MPLA: | Popular Movement for the Liberation of Angola; |
| FAPLA: | the MPLA armed forces; |
| FNLA: | National Front for the Liberation of Angola; |
| UNITA: | National Union for the Total Independence of Angola. |

McKenzie was alleged to have been a member of the "killer group" commanded by Callan. He was more particularly charged with destruction of military and civilian property, maltreatment and kidnapping of civilians and participating in the murder of other mercenaries, in particular the murder of thirteen British mercenaries on the 1st of February, 1976. These were the mercenaries, who having arrived in Angola, decided that they wanted to go back to England.

The defendants, McIntyre, Marchant, Evans and Wiseman were also said to have been members of the "killer group" but no specific acts of murder were charged against them although they were accused of killing MPLA soldiers in combat. The rest of the British mercenaries, Lawlor, Fortuin, Barker and Nammock were charged in fairly general terms and not accused of any specific acts of murder. A similar comment applies to the three American defendants, Grillo, Gearhart and Acker.

The Indictment listed as proof:

(a) confessions of the defendants;

(b) twenty-one witnesses;

(c) expert evidence i.e. reports of psychiatric, clinical and forensic doctors.

## 5. TESTIMONY OF DEFENDANTS

The defendants were the first called upon to testify; all of them with the exception of Callan, gave evidence. They were not obliged to do so (Article 21 of the Procedural Code).

The defendants were not sworn, they were questioned first by the judges; usually any two of the five judges questioned each defendant. When they had finished, the prosecutor asked questions, after which defence counsel were permitted to question each defendant but only on matters relevant to their own client. Generally speaking, the judges asked questions of fact. The prosecutor, who was somewhat excitable, frequently asked leading questions and adduced hearsay evidence. Many of his questions were long rambling statements with political overtones. Defence counsel, in the main, brought out details of the background of the defendants to explain their motive in becoming mercenaries and, in some cases, led evidence through their clients to show that most of them had seen very little action in Angola.

Marchant testified that he saw Callan shoot a British mercenary near Maquela De Zombo; at the same time Callan ordered the execution of thirteen other British mercenaries. He also testified that McKenzie shot one of them. He said that Callan ordered that no prisoners be taken. I noted at this point that none of the other defendants were in the courtroom although accusations were being made against some of them. The procedure followed was to bring them in one at a time to testify, after which they remained in the courtroom.

Fortuin, one of the British mercenaries, testified that Callan shot two people for stealing.

When Callan took the stand the judge told him that he was not obliged to answer questions except those relating to his identification. Callan simply said that the mercenaries were soldiers under his command and followed his orders and that he was responsible for anything they did.

McKenzie testified that Callan executed one of the mercenaries who wanted to return home and admitted that he himself had taken part in the execution of the other thirteen. He identified the members of the killer group as Callan, McKenzie, McIntyre, Evans, Wiseman, Marchant. He said he had no choice but to carry out Callan's orders.

Lawlor testified that he saw Callan kill one of the fourteen mercenaries and order the execution of the rest of them.

Evans drove the truck carrying the fourteen British mercenaries to be executed on Callan's orders.

The evidence cited above was essentially the only evidence of specific crimes given by the defendants. There was evidence that a group of the mercenaries forcibly billetted themselves on a farmer and his wife. This evidence will be referred to further on.

I do not treat seriously the allegation that armed action against the government forces or their supporters can properly be regarded as a crime.

The remainder of their testimony dealt with their recruitment, how they travelled to Angola, what they did when they got there (in most cases not very much, most of them were captured shortly after their arrival), and details of their personal history and background.

6. TESTIMONY OF WITNESSES

Twenty-one witnesses were listed in the indictment. The prosecutor asked permission to substitute witnesses on the basis that he was unable to produce some of his witnesses because of transportation and communication difficulties. The presiding judge denied the request on the basis that it would take the defence by surprise. In the end, the prosecutor only called ten of the twenty-one listed.

Each witness was sworn by the presiding judge in words similar to the following "Do you swear on your honour that you will testify without fear or malice?". The prosecutor then led evidence through the witness. The presiding judge asked a few questions mainly related to the identity of the defendants after which defence counsel were permitted to ask questions related to the defence of their own clients.

The first witness (Barros) made general statements about tortures, rape and murder. He said that the mercenaries gave orders to the FNLA who behaved very badly towards the civilian population. He identified Callan and Gearhart. He said that he saw Callan shoot a civilian. I recorded a note that the evidence of this witness was largely worthless; much of it consisted of answers to leading questions; much of it was rambling and irrelevant.

The second witness (Joao) was a school teacher. He stated that when the FNLA began to disintegrate, the mercenaries became their masters and gave them orders. There was looting and destruction of property. My comment on his evidence in chief was that most of his answers were given to leading questions. He could not identify any of the defendants and in my view his evidence was worthless. (Article 22 of the Procedural Code prohibits leading questions).

The third witness (Antonio), a trapper and peasant farmer, gave shelter to some of the mercenaries when they were on the run. His wife (Isabel) also gave evidence. In the Indictment, McKenzie, in particular, was charged with occupying the house of the peasant family, exercising physical and mental violence against the wife, keeping them prisoner, using them as hostages and threatening to shoot them. The husband identified Callan, Evans and McKenzie. He eventually escaped leaving his wife behind. Apart from some general evidence of threats and the taking of crops for food, his evidence, in my view, left the impression that the couple were not particularly illtreated and may, in fact, have sheltered the mercenaries willingly. The wife's evidence was that the mercenaries insisted on her husband taking 1000 escudos (about $30.00) and cigarettes. She said that he refused to take the money. She also said that they forced her husband to accept a watch and put it on his wrist but he took it off and put it on the floor. The mercenaries drank their palm wine and broke their cassava trees. She said that they threatened to kill her husband. She said that there were eight of them. She could only identify McKenzie and Grillo. Significantly, both of these men were wounded. McKenzie had lost one of his legs and was in a wheel chair; Grillo had leg wounds which forced him to walk on crutches. She obviously identified them by looking for the leg wounds. The evidence was, in fact, that only Callan was wounded at the time. The identification, therefore, was worthless. After her husband left she managed to escape. A statement was read to her in which she had said that her husband was threatened and that one of the mercenaries had interceded to save his life. She did not admit to having made this statement. Her evidence reinforced the impression in my mind that this couple was not badly treated and, may, in fact, have assisted the mercenaries either willingly or under mild duress.

Another witness (Giangue), a farmer, said that the chief of the mercenaries killed two Angolan soldiers because they were in civilian dress. He said that in the beginning the mercenaries paid for their supplies but when the FAPLA was advancing they became worse, they shot people and laid mines on the roads and in the fields. This witness identified six of the mercenaries. In answer to questioning by defence counsel, he stated that he knew that the mercenaries were under the command of Callan. He further admitted that they looked alike and that it was difficult to tell one from another.

Yet another witness (Carlos) said that the FNLA were bad

enough and the situation worsened with the arrival of the mercenaries. He said that seventy-three Angolans were taken from a prison, tied up and shot. Under quessioning by the presiding judge, he said that the victims were MPLA soldiers. He didn't see them shot; he was told they had been shot. He saw them taken from the prison in trucks which returned empty. He identified Callan and McKenzie. He gave evidence of the looting of a bank by mercenaries and FNLA troops.

The next witness (Moises) was cited for perjury by the presiding judge; his evidence, therefore, can be disregarded.

A witness (Gasper) described as an anodizing technician gave evidence of bad conduct and raping on the part of the opposing forces. My comment on his evidence was that it was worthless. It was all hearsay.

The eighth witness, (Rodrigues) said that he saw mercenaries beating people and heard the shooting of the fourteen British mercenaries although he didn't see it. He identified Callan and McKenzie. He said that he saw them shoot people in a club. In chief he had stated that it was almost impossible to go into the streets after eight o'clock; on the other hand, he gave evidence of visiting clubs and bars. Defence counsel questioned him about his ability to go in and out of bars as he pleased. The impression was left that this man was probably a collaborator with the FNLA.

The last witness (Matos) was a Commander in the Angolan Army. The defendant Barker had been handed over to him for questioning. Barker himself had been in command of a military zone for a short time.

7. DEFENCE EVIDENCE

After the completion of the evidence of the last witness the presiding judge called Callan to the microphone. The judge asked him whether he thought he acted according to the code of honour of soldiers. Callan said that he had not. Callan was asked whether he had anything more to say in his defence. His answer was that he had not.

The defendant McKenzie was then permitted to question the eighth witness, Rodrigues, who had testified that he had seen McKenzie shoot people in a club. The witness was pressed for details, in particular, the name of the club and the date of the alleged shooting. He said that the shooting took place at the beginning of January. McKenzie said that in January he was still in England.

The American lawyer, Cesner, asked for the two psychiatric

doctors to appear for questioning about the mental condition of Acker, one of his clients.

8. AUDIO-VISUAL EVIDENCE

At the end of the oral evidence a film was shown. It consisted of an interview with President Ford and documentary shots of tanks and troop movements in Angola. There were also scenes of destruction and mass graves. There was nothing to link this specifically to the defendants before the Court. Finally, there was a sound interview from British television dealing with the recruitment of mercenaries in Britain.

9. COMMENT ON TRIAL PROCEDURE AND LEGALITY OF THE CHARGES

I am satisfied that from a purely procedural point of view, the trial was a fair trial. All the basic principles agreed upon at the outset by the Judicial Committee were complied with. The trial itself, like most trials, was good in parts. All the judges conducted themselves with dignity. The presiding judge, in particular, was obviously very experienced. His questioning was incisive. The rulings he made on motions were astute and in general he was at pains to be fair towards the defendants. On the other hand, whilst he did censure the prosecutor from time to time and ask him to stick to the point, he did not restrain the prosecutor in his use of leading questions. By the same token, neither did he restrain defence counsel, who very quickly adapted to the pattern of asking leading quesitons. Hearsay was not excluded. I suspect that this is because of the nature of the inquisitorial system in which the expressed aim is to "reveal the truth" (Articles 19 and 23 of the Procedural Code). This, of course, is philosophically a far cry from the adversary system.

My main criticism of the conduct of the trial concerns the introduction of the documentary film, referred to above, which was not linked in any direct way to any of the defendants. Such evidence could only be prejudicial and inflammatory and I assume that it was introduced for a political rather than a legal reason. The showing of the film was similar in kind to the political statements frequently made by the prosecutor in condemnation of imperialism in general and Great Britain and the United States of America in particular.

The most difficult question is the question relating to the legality of the charges. According to the indictment these feel into four categories.

1. All the defendants were charged with the crime of being mercenaries.

2. All the defendants were charged with crimes against peace.
3. All the defendants were charged with "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".
4. Two of the defendants, namely Callan and McKenzie, were more specifically charged with murder along with other crimes similar to those set out in item number 3 above.

Taking these categories in reverse order, it is clear from the evidence that Callan and McKenzie were both properly convicted of murder. Apart from that, the only relevant evidence in support of the specific allegations in the indictment was that of Antonio who gave evidence of the occupation of his house by a group of mercenaries. He identified Callan, Evans and McKenzie. The identification by his wife Isabel of McKenzie and Grillo should not, in my view, have been accepted as a valid identification.

In support of the allegations of crimes against peace or war crimes, the indictment relied on the Statute of Nuremburg International Military Tribunal confirmed by United Nations resolution No. 95 (1) of the 11th of December, 1946 and by the United Nations General Assembly resolution of 1974.

In my view, reliance on the Statute of Nuremburg was inappropriate. That statute established an international court. The tribunal in this case was the tribunal of a national state. Apart from this, no soldier can be accused of crimes against peace. The only individuals who are accountable under the Nuremburg statute are heads of state, the head of a department of government or a division commander. According to my notes of the evidence, apart from Callan, the only other commander was Barker. He was variously described as a senior soldier, a company commander of ninety Angolan soldiers, and commandant of an airfield.

It follows that the defendants were not justly convicted under this head.

We are left with the alleged crime of being mercenaries. It is, of course, true that all of the defendants were mercenaries; they admitted it, although some of them had difficulty defining the word. I should add that the Commissioners also had difficulty with the definition. The following definition was accepted in

plenary session as Article 1 of the Draft Convention on the Prevention and Suppression of Mercenarism:

> "The crime of mercenarism is committed by the individual, group or association, representatives of state and the state itself which, with the eim of opposing by armed violeece a process of self-determination, practices any of the following acts:
>
> (a) organizes, finances, supplies, equips, trains, promotes, supports or employs in any way military forces consisting of or including persons who are not nationals of the country where they are going to act, for personal gain, through the payment of a salary or any other kind of material recompense;
>
> (b) enlists, enrolls or tries to enroll in the said forces;
>
> (c) allows for the activities mention in paragraph (a) to be carried out in any territory under its jurisdiction or in any place under its control or affords facilities for transit, transport or other operations of the above-mentioned forces."

The legal basis for the charge as set out in the indictment was as follows:

1. Statement of the heads of states and governments of member countries of the O A U (Organization of African Unity) held in Kinshasa in 1967.
2. Statement on Mercenary Activities in Africa, Addis Ababa, 1971.
3. Resolutions no. 2395 (XXIII), 2465 (XXIII), 2548 (XXIV) and 3103 (XXVII) of the United Nations General Assem

and 3103 (XXVII) of the United Nations General Assembly.

Reliance on the proceedings of the Organization of African Unity will not hold water. Their most recent relevant document, prepared by a committee of experts charged with drafting a convention on mercenaries for the council of ministers of the Organization of African Unity, is dated at Rabat, June 1972. In the introduction to this document in paragraph 2 there is the following statement:

> "The committee also acknowledged that existing laws do not really cover the specific problem of mercenarism".

Annexed to the report is a draft convention for the elimination of mercenaries in Africa. The convention has not yet been signed. I was told by the representative of the Organization of African Unity that it has been submitted to the member states for their consideration and comments.

The Kinshasa statement referred to above was a condemnation of mercenary activity in the Congo and an appeal to the nations of the world to promulgate laws making the recruiting

and training of mercenaries on their territories a crime.

The 1971 statement was a reiteration of previous condemnations and a proclamation of the desire of the Organization of African Unity to elaborate a juridical instrument to deal with the problem.

The most compelling argument in support of the position that the crime of being a mercenary existed in Angolan law at the time the alleged offence was committed is based on the United Nationn resolutions referred as item no. 3 above.

I have the tests of two of them in a non-official translation in French, namely 2465 and 3103. 3103 reaffirms previous resolutions including 2548. They are as follows:

> "2465 (XXIII). Mise en oeuvre de la Declaration de Concession de l'Independance des Colonies et des Peuples.
>
> *L'Assemblee Generale.*
>
> 8. Declarons que l'emploi de mercenaires contre les mouvements de liberation nationale et d'independance est punissable comme un acte criminel et que les mercenaires eux-memes sont proscrits, et appelons aupres des gouvernements de tous les pays de promulguer la legislation declarant le recrutement, la financement et l'entrainement des mercenaires dans leur territoires, d'etre punissable et interdit a leurs nationaux.
>
> Le 20 Decembre 1968"
>
> "3103 (XXVIII). Principes fondamentaux du statut legal des combattants qui luttent contre la domination coloniale et etrangere et aussi contre les regimes racistes.
>
> *L'Assemblee Generale.*
>
> *En reaffirmant* les declarations faites a l'Assemblee Generale, resolutions 2548 (XXIV) du 11 Decembre 1969 et 2708 (XXV) du 14 Decembre 1970 que l'emploi des mercenaires contre les mouvements de liberation nationale dans des territoires coloniaux constitue un acte criminel,
>
> 5. L'emploi de mercenaires par des regimes coloniaux et racistes contre les mouvements de liberation nationale en lutte pour leur liberte et independance du joug du colonialisme et de la domination etrangere est considere comme un acte criminel et les mercenaires doivent aussi etre condamne comme des criminels.
>
> Le 12 Decembre 1973"

It seems from the above that the so-called resolutions are more properly termed declarations.

No. 2465 declares that the employment of mercenaries against movements of national liberation and independence is punishable as a criminal act and also proscribes the mercenaries themselves.

No. 3103 is stated to contain fundamental principles of the legal statute of fighters against colonial and foreign domination and against racist regimes. It reaffirms resolutions stating that the employment of mercenaries against liberation movements

constitutes a criminal act. It restates the principle and goes on to say that the mercenaries themselves must also be condemned as criminals.

The argument in support of the legality of the crime of being a mercenary is that the above quoted declarations form part of the common body of international law, the Common International Law, as it may be termed. Angola, by an act of sovereignty, then incorporated that law into its own internal law when it became independent on the 11th of November, 1975.

The difficulty with this line of reasoning is that Angola is not a member of the United Nations nor is there any internal law which evidences the desire of the State to incorporate the crime of being a mercenary into its own laws.

In my opinion the crime of being a mercenary did not exist in Angolan law and the defendants therefore were unjustly convicted on that count.

## 10. COMMENT ON THE WRITTEN JUDGMENT

The written judgment, a seventeen page document, refers extensively to the case, that is the evidence assembled by way of a preliminary investigation. I am not sufficiently familiar with civil law procedure to know whether the case is incorporated in its entirety into the trial record. From my limited observation of the Danish system in operation, and from what I know of the French and the German systems, I feel reasonably sure that such a practice is not followed. If it were, there would surely be no point in holding a trial except as a political exercise. It must, of course, be recognized that the trial of the mercenaries, whilst it was reasonably fair in a procedural sense, was, in the main, a political trial.

The first part of the judgment consists of a condemnation of the recruiters in England and America and a condemnation of the policies of those countries in support of the factions opposed to the present Government of Angola. There was some evidence of such support and government complicity; however, this is a political question. The Government of Angola, in inviting the Commissioners of Enquiry to comment on the fairness of the procedure and the legality of the charges, chose its own ground. It invited a legal not a political assessment and it is on that basis that this report is made.

The judgment recognizes "that penal responsibility must be individualized in terms of guilt". It goes on to say that all of the defendants put on uniforms and carried weapons to fight the legitimate government of a free and sovereign foreign country, that they deliberately violated the border and took part in

combat actions within the national territory, and, further, that they were conscious that they were part of a stable and organized group which was on the fringe of the law. The judgment then states that the defendants constituted a conspiracy contrary to Article 263 of the Penal Code. This finding is surprising on two grounds. Firstly, the defendants were not charged with a conspiracy in the indictment (According to Article 10 (c) of the Procedural Code and indictment must specify an indication of the laws infringed); secondly, Article 263 does not appear in the consolidation of Revolutionary Penal Legislation.

The judgment then deals with the defendants separately. The murders committed by Callan and McKenzie are specified. All that is said about Barker is that he was the head of the military garrison at San Antonio de Zaire. Gearhart is said to have offered himself as a mercenary in an advertisement in an American magazine and is said to be a highly dangerous character. For the rest of them, the defendants are said to have behaved with malice.

It is conceded that the mining of bridges and roads and destruction of property and equipment came within the concept of military operations and that they could not in themselves be characterized as crimes against peace.

As regards the holding under duress of the farmer and his wife, the only comments are that the offering of money diminishes malice, an essential element in the crime of private detention, and further, that since the episode happened in the disorder of military retreat, the defendants could have used the excuse of necessity.

Those are the only facts outlined in the judgment.

The applicable law is then discussed, particularly the principal charge, namely the crime of being a mercenary. That part of the judgment dealing with what is called mercenarism is confused and not easy to follow. It starts off by saying:

> "Mercenarism was not unknown in traditional penal law, where it was always dealt with in relation to homicide"

and it goes on to speak of mercenary homicide which it says was known as assassination. At this point the court seems to be saying that the use of the term "mercenarism" is a matter of semantics and that, in fact, one should look beyond the term and at the common crimes that it encompasses such as murder, rape, robbery and so on. This view was advanced in one of the plenary sessions by the commissioner from Holland, a retired professor of law from Leden University and Vice-President of the International Association of Criminology. This approach was simi-

lar to my own, which was that whilst it would undoubtedly be difficult to argue convincingly that the crime of being a mercenary was part of the law of Angola, the defendants could properly be tried for common crimes that are universally recognized and defined in every national penal system. To justify a conviction for such crimes there must, of course, be sufficient evidence.

The judgment, however, then goes further and seems to equate the general with the specific:

> "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."

I am not sure that I understand the phrase "the mercenary crime lost all autonomous existence and was seen as a common crime". Something may have been lost in translation. However, it does appear to categorize "the mercenary crime" as a common crime and the judgment goes on to say that mercenarism is therefore provided for in Article 20, no. 4 of the Penal Code in force. This Article does not appear in the consolidation supplied to the Commissioners.

This section of the judgment concludes with the following statement:

> "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!"

With this statement it appears that the court comes full circle and is in fact saying that the crime of mercenarism includes or consists of specific crimes known to all penal systems. On this interpretation only Callan and McKenzie were justly convicted.

Reference is made to the United Nations resolutions on mercenaries and the statements of the Organization of African Unity with a comment that mercenarism is considered a crime in the view of nations.

Finally there is reference to the Code of Discipline of the Combatants. This authority seems to be relied on in part as justification for the substantive finding that the crime of being a mercenary existed in Angolan law and also for the sentences. The Law of Discipline, as it is called, was passed on the 10th of July, 1966. It is claimed to be incorporated in Angolan law by virtue of Article 58 of the Constitutional Law which states that

laws and regulations in force on the 11th of November, 1975, the date of national independence, shall be applicable unless repealed or amended and so long as they do not conflict with the spirit of the present law.

The Code of Discipline deals with rewards, decorations and penalties. By its terms it was designed principally for the then existing Angolan army. Under the heading *OFFENCES* it states, among other things:

> Offences are classified in the following way:
>
> (a) Offence with regard to laws, authorities and people;

Under *CATEGORY OF PENALTIES* it states, in part:

> The various kinds of penalties are as follows:
>
> (b) Death penalty by firing squad. To be decided under special law.

In a schedule of punishments there are the following categories, among others: severe imprisonment and the death penalty. Severe imprisonment is said to be directed to "Everyone and deserters or disarmed enemies". The death penalty is said to be directed to "Everyone and enemies".

The relevant part of the judgment reads:

> "Furthermore the Code of Discipline of the Combatant states expressly that capital punishment is applicable to "enemies". And mercenaries are uncontestably enemies".

This kind of reasoning, in my view, does not merit serious consideration.

In the result the defendants were found guilty of the crimes of mercenarism and conspiracy. The defendants Callan and McKenzie, in addition to those crimes, were found guilty of homicide. It was stated that having had a military command constitutes an aggravating circumstance.

The sentences were as follows;

The defendants Nammock, Acker and McIntyre — sixteen years imprisonment;

The defendants Lawlor, Evans and Fortuin — twenty-four years imprisonment;

The defendants Wiseman, Marchant and Grillo — thirty years;

The defendants McKenzie, Barker, Gearhart, and Costas Georgiou, known as Callan — the death penalty.

It follows from what I have said that in my view Callan and McKenzie were properly convicted of murder and that the convictions of the rest of the defendants were unjustified. I feel

compelled to say that to pass sentence of death on Barker and Gearhart was to make a mockery of justice.

11. APPEALS

By Article 27 of the Procedural Code there is no appeal to a higher court from the decisions of this tribunal. This in itself merits criticism. A competent appellate court unfettered by political considerations would surely have something to say about the legality of the charges. This, however, is an ideal which it is unrealistic to expect under the prevailing conditions in the country.

Service Order dated September 12th, 1970 and signed by Dr. Agostinho Neto, President of MPLA states:

> "In future, no death penalty by firing squad can be carried out unless it has previously been confirmed by the President of MPLA".

I expected the conviction of Callan and McKenzie. I did not believe the death sentences would be carried out. I gathered from speaking to other Commissioners that they shared this view and that many of them were philosophically opposed to the imposition and carrying out of death penalties as am I. We agreed, therefore, that should death penalties be imposed, we would send telegrams to the President seeking clemency. Appeals for clemency were not heeded and the death sentences were duly executed. It is a sad irony that when Amnesty International was founded in London in 1961 to seek to liberate prisoners of conscience, one of the first adopted prisoners was Agostinho Neto who was then imprisoned by the Portuguese Government for his opposition to colonial rule. Agostinho Neto, a doctor by profession, a poet by inspiration, was unwilling or unable to accord clemency to the condemned men similar in kind to that which he himself once received.

Attempts must now be made to seek the release and repatriation of the remaining prisoners.

12. CONCLUSION

What then was the object of the exercise?

In all fairness credit must be given to the Angolan Government for drawing the attention of the world to the problem of what are predominantly white mercenaries in black Africa and for trying to do something positive towards dealing with the problem.

I regarded my task as a Commissioner as being to make an objective assessment of the trial within the stated terms of reference. This I have done and my conclusions are set out above.

The trial drew the attention of the world to an endemic problem. Beyond this, a draft convention on the prevention and suppression of mercenarism was made. This has been forwarded to the Government of Angola, to the Organization of African Unity and to the United Nations. It is only a beginning.

It was recognized by the Commissioners that more work remains to be done and that realistically it may take many years for the United Nations to adopt the convention, let alone for member states to ratify it. In all such matters, however, a first step must be taken; that first step was taken in Luanda in June 1976.