

# THE STATUS OF MERCENARIES IN INTERNATIONAL LAW†

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The activities of white mercenaries during the Congolese and Angolan civil wars, the trial of a number of them at Luanda after the establishment of an independent Angolan government, and the inclusion of a special article denying them combatant status in *Protocol I Additional to the Geneva Conventions of 1949 relating to the Protection of Victims of International Armed Conflicts*<sup>1</sup> have focused attention on what has long been a reality in so far as the armed forces of a number of countries are concerned. The uproar that these events caused might well lead one to assume that the problem is new. To adopt such an attitude, however, not only indicates a lack of historical knowledge, but also an ignorance of classical international law.

## The Classical View of Mercenaries

While modern writers on the law of war have not drawn any distinction between the status of mercenaries and others and have not seen any need to make any specific reference to their existence, many of the classical writers were concerned since princes often made use of foreign troops to fight their wars,<sup>2</sup> even it would seem against their own sovereign. Thus, Bynkershoek records that

at the beginning of the second English war when the States-General gave permission to some Scotch mercenaries to depart if they did not wish to serve in the Netherlands, some remained in the service of the States-General, ready to serve against any and every enemy, even the English. Charles II, however, issued an edict proscribing these men as traitors. But when peace was made with England the men requested the States-General to use their influence with the English King to have the edict repealed so that they might again acquire property in England by right of inheritance and by the other customary practices in vogue in England. The States-General did as requested on October 24, 1688. . . .<sup>3</sup>

It is true that Ayala was of opinion that "sovereigns should be urged to employ as soldiers in war natives rather than foreigners, for the latter serve for pay rather than glory."<sup>4</sup> His reason for arguing thus did not depend on any doubt as to the right of a foreigner to be a soldier, but he feared that such foreigners might not be easy to disband at the end of hostilities, and he cites the instance of

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1. Art. 47 in (1977), 16 Int'l. Legal Materials 1391.

2. See e.g., A. Mockler, *The Mercenaries* (1969), ch. 2-5; C.C. Bayley, *Mercenaries for the Crimea* (1977).

3. Bynkershoek, *Quaestionum Juris Publici* (1737) found in Bk. II ch. XXV, s. vi, J. B. Scott (ed.), *Carnegie Endowment for International Peace* (T. Frank trans. 1930) 279-80.

4. Ayala, *De Jure et Officiis Bellicis et Disciplina Militari* (1582) found in Bk. III, ch. 4, s. 16, J. B. Scott (ed.), *Carnegie Institute of Washington* (J. Bate trans. 1912) 188.

the Emperor of Constantinople [who having] no forces of his own, . . . summoned Turkish auxiliaries to protect him from his neighbours; but he could not get rid of them at the end of the war; and that is how the whole of Greece fell under the rule of Turkey.

I, therefore, do not approve of the policy of Cyprus, who declared that soldiers should not be selected out of citizens, but be brought from afar like the best horses, nor of that ancient custom of the Alexandrians, who would not allow of any but foreign soldiers.<sup>5</sup>

Ayala, thus, pays no attention to the justness of the cause or the motive of the alien soldier, but is merely concerned with the ultimate safety of the prince in whose service he is.

Others among the classicists were more concerned with the justness of the cause than in the safety of the country of enlistment or the status or nationality of any of the soldiers who enlisted. They also tended to be more condemnatory of the alien than of the liege national who might be involved in an unjust cause. Thus Vitoria was prepared to argue that

if it is evident that the war is unjust, or if this is known to be the case, or if the subjects are conscious that the war is unjust, they may not fight, even when the prince exercises compulsion upon them. The reason for this is that such a prince is committing a mortal sin, and one must obey God rather than him. . . . I also maintain that those who are prepared to go forth to every war, who have no care as to whether or not a war is just, but follow him who provides the more pay, and who are, moreover, not subjects, commit a mortal sin, not only when they actually go to battle, but whenever they are thus willing. I further contend that, when the case is doubtful, allies . . . may not, when they themselves are subjects, furnish aid to the other side. However, it should be observed in this connection that there may exist a doubt as to the right of the matter — as to whether a particular city belongs to France. But *let us suppose the city is in the possession of our king; it is then indubitable that the war in which the city is defended by the Spanish king, is a just war; and accordingly, any person whosoever may offer aid to the Spanish king.*<sup>6</sup>

Grotius, too, condemned any ally who fought without regard to the justice of the cause and since

those Alliances which are entered into, with the Design and Promise of Assistance in any War, without regarding the Merit of the Cause, are altogether unlawful; so there is no Course of Life more abominable and to be detested, than that of mercenary Soldiers, who without ever considering the Justice of what they are undertaking, fight for the Pay; who *By their Wages the Goodness of the Cause compute.* . . . The Case of a Soldier . . . is really a miserable one, *Who to support his Life to Death resorts.* . . . Did they sell only their own Lives it were no great Matter: but they sell also the Lives of many an harmless inoffensive Creature: . . . by how much it is worse to kill without a Reason, than with one. . . . Phillip of Macedon said of that sort of Men, *who got their Livelihood by fighting, that War was Peace to them, and Peace War.* . . . *To bear Arms is . . . no Crime, but to bear Arms on the account of Booty is Wickedness with a Witness.* Nay, it is so to fight for Pay, if that be the sole and principal View; tho' it is otherwise very justifiable to receive Pay, for *who ever goes to War at his own Cost?*<sup>7</sup>

5. *Id.*, 188-89; see also Mockler, *Supra* n. 2, at 181 *et seq* in reference to the mercenary revolt in the Congo.
6. *De Bello*, Art. I, para. 8, in J. B. Scott, *Francisco de Vitoria and His Law of Nations* (1934), App. F., cxviii, cxix-cxx.
7. Grotius, *De Jure Belli ac Pacis* (1625), found in Bk. II, ch. XXV, ss. ix,x. (Eng. trans. 1738). In his notes, Barbeyrac disagrees with the interpretation Grotius gives to the classical authorities he cites. J. B. Scott (ed.), *Carnegie Endowment for International Peace* (F. Kelsey trans. 1930) 585-86.

It has been said that Suarez developed the law of nations as elaborated at Salamanca by Vitoria out of the teachings of Aquinas.<sup>8</sup> While he believes that the cause should be just, he is somewhat more charitable than either Vitoria, his predecessor, or Grotius, his Protestant successor, towards the individual soldier.<sup>9</sup> Thus, he asserts that

common soldiers, as subjects of princes, are in no wise bound to make diligent investigation, but rather may go to war when summoned to do so, provided it is not clear to them that the war is unjust. This conclusion may be proved by the following arguments: first, when the injustice of the war is not evident to these soldiers, the united opinion of the prince and of the realm is sufficient to move them to this action; secondly, subjects when in doubt . . . are bound to obey their superiors.

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8. J. B. Scott, *The Catholic Conception of International Law* (1934), 128-30.  
 9. F. Suarez, *De Triplici Virtute Theologica* (1621) found in Disp. XIII: On War, s. vi, para. 8, J. B. Scott (ed.), *Carnegie Endowment for International Peace, Suarez: Selections from Three Works* (G. Williams and others trans. 1944) 832.  
 10. *Id.*, paras. 10, 11, 12, at 833-36. He goes on to say:

A greater difficulty arises with soldiers who are not subjects and who are called mercenaries. The opinion commonly held seems to be that these soldiers are bound to inquire into the justice of a war, before they enlist. . . . However, such an opinion comes into conflict with the following difficulties.

First, it would be necessary for each individual mercenary soldier to inquire into the cause of the war. But such an investigation is contrary to all custom, and humanly speaking, is impossible; for . . . the reason for the war cannot be explained to all, nor are all capable of appreciating that explanation.

Secondly, (if the opinion in question were valid,) even soldiers who were subjects could not take part in a doubtful war without examining the cause, save when they were under strict orders of such sort that they would be disobedient in not going; for in that case their obedience would alone excuse them. But as long as they were not under orders, it would be (morally) safer not to fight. However, this consequence is contrary to all custom, and that obligation (to investigate the cause of war) would be harmful to the state.

Thirdly, if permanent mercenaries could, previously to a war, bind themselves to fight even in doubtful cases by giving their consciences into the keeping of the prince's conscience, why could not those mercenaries do the same who enlist at the outbreak of a war? For, from a moral standpoint, the same principle is involved in the performance of an action and in binding oneself to perform it.

The confirmation of this argument lies in the fact that just as one is not allowed to proceed to an unjust war, neither is he allowed to undertake the obligation of serving in such a war, nor even in any war indiscriminately, whether just or unjust; and the reason for these restrictions is that to fight in an unjust war is to act unjustly. Therefore, conversely, if one is permitted to bind himself to service in a doubtful war, the obligation involved in such a case is not wicked; and therefore, it would be permissible so to bind oneself for pay, here and now, although no previous obligation exists. Nor does it seem to be of much importance that a given (mercenary) was already regarded as a subject before the war, by reason of his pay. For one might say the same thing . . . of a contract made on the eve of the outbreak of the war, since, at such a time also, soldiers bind themselves to obedience in all matters in which obedience is legitimate; so that it makes no difference from the standpoint of justice, whether this contract was made before the war, or whether it is made now, (at the moment when the conflict begins).

Fourthly, in a similar doubtful situation, any person is permitted to sell arms to these princes and to the soldiers; nevertheless, if they do so, the same danger is present, namely, that the act may contribute to the injury of innocent persons, if by any chance, the war is in fact unjust. The antecedent is commonly accepted as true. The proof of the consequent is, that both kinds of co-operation are very pertinent to actual wars; and although soldiers seem . . . to co-operate more immediately, nevertheless the persons who furnish arms are ordinarily able to do more harm. . . .

Lastly, . . . the first and essential element is that one who is not a subject, submits himself to another for the sake of payment, and in so doing, inflicts no injury

Another early writer who was concerned with the justness of a war, and particularly with the safety of the soul of the soldier participating in an unjust war, whether as a mercenary or otherwise, was Belli, who although among the classicists of international law, is not normally regarded as one of the great writers thereon. Writing earlier than any of those already mentioned, Belli proclaimed that

Volunteers . . . should beware . . . of putting themselves in jeopardy . . . because of peril to their souls; for . . . it is not lawful to serve in an unjust war. . . .

Furthermore, the mercenary soldiers, too, should have a care — who, . . . the instant they hear the mention and tumult of war, rush to the clinking coin, with never a thought about justice or injustice. For such . . . are manifestly doomed to endless perdition, if they do not reform. . . . [S]uch soldiers should not be absolved, unless they renounce their calling, or at any rate return to the service of justice.<sup>11</sup>

Having expressed his concern for the soul of a serviceman engaged in an unjust war, Belli reaffirms that distinctions cannot be drawn between the volunteer and the hired man, for both are soldiers.<sup>12</sup> He is, unlike Ayala, not concerned that they may be difficult to disband when hostilities cease, but rather with the fear that they may desert and so cause the defeat of their employer. He cites in this connection the defeat of Scipio the Elder by Hasdrubal and “almost in our times, [the case of] Ludovico Sforza, [who] . . . through the defection of the Swiss lost Milan, and [in 1500] fell into the hands of Louis XII, King of France.”<sup>13</sup>

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upon any person; neither, generally speaking, does he expose himself to the danger of any wrongdoing. And for the rest, he is . . . exercising his right, when he sells his own property or his own labour, a right of which he . . . is not bound to deprive himself to his own detriment. With regard to these (mercenary) soldiers, there is, in addition, a special argument; for each of them has the authority of the prince and that of the whole state to support him, a fact which involves a great probability (that their conduct is just).

Hence, all the circumstances being weighed, it would by no means seem that mercenaries who serve in that contingency (when there is great probability that the war is just), are choosing the course that is (morally) less safe.

These arguments are clearly convincing; nor do I find any difference in actual fact between subjects and non-subjects. So it is that Vitoria, . . . too, speaks simply of ‘soldiers’, without distinction . . . [I]f the doubt (as to the justice of a war) is purely negative, it is probable that the soldiers in question may . . . take part in that war without having made any examination of the question, all responsibility being thrown upon the prince to whom they are subject.

. . . If, however, the doubt is positive . . . , then . . . (those who are about to enlist) should make an inquiry into the truth of the matter. If they are unable to ascertain the truth, they will be bound to follow the course of action which is more probably just, and to aid him who is more probably in the right . . . Finally, if the arguments on both sides contain an equal . . . probability, the soldiers may under such circumstances conduct themselves as if the doubt were purely negative; for the balance is . . . equal, and the authority of the prince turns the scale.

11. Belli, *De Re Militari et Bello Tractatus* (1563) found in Pt. II, ch. II, ss. 4-5, J.B. Scott (ed.), *Carnegie Endowment for International Peace* (H. Nutting trans. 1936), 64.
12. *Id.*, Pt. III, ch. 1, s. 12, at 106.
13. *Id.*, Pt. VIII, ch. 1, ss. 28-29, at 228; see also Mockler *Supra* n.2, at 96-98, who points out that both parties were aided by Swiss mercenaries.

It is often pointed out that the Peace of Westphalia, 1648,<sup>14</sup> marks a watershed in the European law of nations. It is interesting to note therefore that Pufendorf, writing some 25 years later in 1672, had nothing detrimental to say of the use of mercenaries. He comments that it is frequently said, in respect of the use in war of the help of any persons whose support may be secured, "that a distinction should be drawn between traitors to and deserters from their masters, who voluntarily offer their services, and those who are led by promises or rewards to break their faith," and confesses that he does not understand the reason why the former is considered legitimate, but not the latter, for "when I am permitted to kill a man with an iron lance, why may I not attack him as well with one of silver?"<sup>15</sup> He reminds us, however, that he who has once shown perfidy towards his liege lord cannot be expected to remain completely faithful to his new master. It is perhaps of interest that he does not deal with the problem of mercenaries from a third state, although it would appear that he is fully aware of their existence, for when discussing who may take booty under a declaration to this effect, he states that this relates only to citizens, for "mercenary troops are owed nothing beyond their pay, unless it be the desire to use them generously, or to reward them for some distinguished service, or to incite them to great fortitude."<sup>16</sup>

A somewhat different approach — perhaps more practical and less philosophical — is to be found in the writings of the eighteenth century. Wolff, almost foretelling German views on expansionism, pointed out that

[T]he greater its power for resisting foreign attack, the more powerful the nation is. And since for resisting foreign attack, . . . or even for obtaining by force its own right from another nation which refuses to concede it, both a number of soldiers . . . and enormous expenditures are required . . . the power of a nation depends upon the number of men who can perform military service, and upon its wealth. And since it is just the same whether the soldiers are natives or foreigners hired for a price, a nation is still rated as powerful, if it is rich enough to hire for a price as many foreign soldiers as it needs.<sup>17</sup>

Perhaps the country which is best known as a source of mercenaries is Switzerland. It is interesting, therefore, to note the views of Vattel on the subject, and one cannot but be impressed by the chauvinism which underlies much of his comments:

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14. See e.g., L. Gross, "The Peace of Westphalia 1648-1948" (1948), 42 Am. J. Int'l. Law 20.  
 15. Pufendorf, *De Jure Naturae et Gentium* (1688) found in Bk. VIII, ch. VI, ss. 18, 20 J. B. Scott (ed.), *Carnegie Endowment for International Peace* (C. Oldfather and W. Oldfather trans. 1934) 1308.  
 16. *Id.*, at 1311.  
 17. Wolff, *Jus Gentium Methodo Scientifica Pertractatum* (1764) Ch. I, s.69, found in J. B. Scott (ed.), *Carnegie Endowment for International Peace* (J. Drake trans. 1934) 41.

Mercenary soldiers are foreigners who voluntarily enter into the service of the State for a stipulated pay. As they are not subjects of the sovereign they owe him no service in that capacity, and consequently the pay he offers them is the motive of their service. By their contract they bind themselves to serve him, and the Prince on his part agrees to certain conditions set down in the terms of enlistment. These terms are the rule and measure of the respective rights and obligations of the contracting parties, and they should be scrupulously observed. . . . [Vattel then takes issue with French commentators who have criticised Swiss mercenaries for having left their employment on the employing prince's failure to pay.] But . . . the Swiss . . . have never quit service at the first payment overdue; and when they have found a sovereign sincerely desirous to pay them, but actually unable to do so, their patience and their zeal have always kept them faithful to him. Henry IV owed them immense sums, but they never forsook him in his greatest necessity, and that brave man found the Swiss Nation as generous as it was courageous.<sup>18</sup>

Vattel's reference to Swiss whom he describes as "auxiliaries," since they serve with permission of their sovereign by virtue of alliances, typified the situation prevailing in Europe up until the Crimean War. It has already been pointed out that Swiss mercenaries served on both sides during the conflict between Louis XII and Sforza, and, during the years immediately following, enabled the Confederacy almost to create a powerful central European state, "but as always with the Swiss, their mercenary spirit ruined their

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18. E. de Vattel, *Le Droit des Gens, ou Principes de la Loi Naturelle* (1758) found in Bk. III, ch. II, ss. 13-14, J. B. Scott (ed.), *Carnegie Institute of Washington Translation* (C. Fenwick trans. 1916) 239-40. Vattel then goes on to state:

I mention the Swiss in this connection because, in fact, they were often mere mercenaries. But troops of that sort are not to be confused with the Swiss who at the present day serve various powers with the permission of their sovereign and in virtue of alliances existing between those powers and the Swiss Confederation or some individual canton. These latter troops are real auxiliaries, although paid by the sovereign whom they serve.

The question has been much discussed whether the profession of a mercenary soldier be legitimate or not, whether individuals may, for money or other rewards, engage as soldiers in the service of a foreign prince? The question does not seem to me very difficult of solution. Those who enter into such contracts without the express or implied consent of their sovereign are wanting in their duty as citizens. But when the sovereign leaves them at liberty to follow their inclination for the profession of arms, they become free in that respect. Now, every free man may join whatever society pleases him best and seems most to his advantage, and may make common cause with it and take up its quarrels. He becomes in some measure, at least for a time, a citizen of the State into whose service he enters; and as ordinarily an officer is free to leave the service when he thinks fit, and a private soldier at the expiration of his term, if that State should enter upon a war that is manifestly unjust, the foreigner may leave its service. *Such mercenary soldiers, by learning the art of war, will render themselves more capable of serving their country, if ever it has need of them.* This last consideration furnishes us the answer to a question proposed at this point: Can the sovereign properly allow his subjects to serve foreign powers indiscriminately as mercenaries? He can, and for this simple reason — that in this way his subjects learn an art the knowledge of which is both useful and necessary. *The tranquility, the profound peace which Switzerland has so long enjoyed in the midst of wars which have agitated Europe, would soon become disastrous to her if her citizens did not enter into the service of foreign princes and thereby train themselves in the art of war and keep alive their martial spirit.*

Mercenary soldiers enlist freely. A sovereign . . . should not even resort to deceit or stratagem to lead [foreigners] to enter into a contract which, like every other, should be founded upon good faith.

political enterprises.”<sup>19</sup> By virtue of the *Perpetual Peace of 1516*<sup>20</sup> Switzerland became virtually a mercenary recruiting ground for France, with the Swiss agreeing never to supply mercenaries to the enemies of France, although Swiss regiments did serve in the armies of Savoy, Holland, Spain, Austria, and England. However, the French connection remained supreme until the massacre of the Swiss Guard during the French Revolution and Napoleon’s intervention in Swiss affairs at the time of the Helvetic Republic. Now, in accordance with the Swiss Constitution,<sup>21</sup> military capitulations, that is to say agreements for the supply of mercenary troops to foreign countries, may not be concluded. While, if Vattel’s views are accepted, only alien volunteers should be used as mercenary troops, by the time of the American War of Independence, England, at least, was arranging with the various German princes for the wholesale employment of entire regiments, for “many of the small princes depended for almost their entire revenue upon hiring out their subjects at exorbitant prices.”<sup>22</sup> Despite the fact that George II complained that “this giving commissions to German officers to get men . . . in plain English amounts to making me a kidnapper which I cannot think a very honourable occupation,”<sup>23</sup> German troops were in fact employed against the American rebels, when the United Provinces refused to make its Scots Brigade available.<sup>24</sup>

### National Experiences

#### *The European View — England and France*

The English traditionally were opposed to a standing army on British soil and it was always difficult to secure sufficient local recruits. It therefore became necessary to recruit abroad and in 1695 “approximately ¼ of the grand total was made up of Dutch, Danish, and Hanoverians and by the end of the century this proportion had risen to one half . . . , while by the middle of the Seven Years’ War the national army of 97,000 was supplemented by some 60,000 foreign troops.”<sup>25</sup> The English attitude is well expressed by Lord Egremont in 1756: “I shall never be for carrying a war upon the continent of Europe by a large body of national troops, because we can always get foreign troops to hire. This should be our adopted method in any war on the continent of Europe.”<sup>26</sup>

19. Mockler, *Supra* n.2, at 102.

20. 4 Dumont, *Corps Universel Diplomatique*, Pt. 1, cxi, 248.

21. Constitution of Switzerland, Art. 11.

22. Mockler, *Supra* n. 2, at 115.

23. *Id.* See Ch. 5 for a full discussion.

24. *Id.*, at 114; see also Bayley, *Supra* n. 2, at 5.

25. Bayley, *Supra* n. 2, at 4-5.

26. W. Cobbett, *Parliamentary History* (1753) XIV, col. 1283; Bayley, *Supra* n.2, at 4.

Typical of the period is the treaty of 1776 between George III and the Landgrave of Hesse-Cassel<sup>27</sup>, whereby

His Brittanic Majesty, being desirous of employing in his service a body of 12,000 men, of the troops of his most serene highness the reigning landgrave of Hesse Cassel; and that prince, full of attachment for his Majesty, desiring nothing more than to give him proofs of it. . . .<sup>28</sup>

it was agreed that fully equipped troops of fit men should be made available immediately for "there is no time to be lost,"<sup>29</sup> and

this body of troops shall not be separated, unless reasons of war require it, but shall remain under the orders of the general, to whom his most serene highness has entrusted the command. . . .<sup>30</sup>

While George III undertook to pay to the Landgrave a fixed sum in respect of every man supplied, together with certain additional items, as well as an annual subsidy,

with regard to the pay and treatment, as well ordinary as extraordinary, of the said troops, they shall be put on the same foot in all respects with the national British troops, and his Majesty's department of war shall deliver, without delay, to that of his most serene highness, an exact and faithful state of the pay and treatment enjoyed by those troops.<sup>31</sup>

The treaty was not popular with Parliament, both on account of its expense and in view of the unpopularity of the American war. Perhaps it is enough to cite the comments of the Duke of Manchester, comments which have a familiar ring today:

Let us consider the means we have to prosecute this war. The British troops, we find, fail not, my Lords, in point of courage, but they show an honest backwardness to engage . . . their fellow citizens. To Germany we have recourse for assistance: 17,000 German mercenaries [— he clearly made no distinction, as did Vattel, between individual hirelings and 'auxiliaries' obtained under treaty —] are at last obtained; with these and a small British army, many of whose regiments consist entirely of recruits some of whom are of the worst description — for I have been told that even the prisons have been ransacked to augment their numbers — is this country to engage a nation who are enthusiastic in their case, have no hopes but in success, are united in every tie, have every stimulative to courage that shame or ambition can give an army of brothers? . . . The mercenaries we employ, . . . for they may be justly called so since that man must be deemed a mercenary soldier who fights for pay in the cause in which he has no concern, are a motley barrel of various nations who are yet in Germany, are yet to be conveyed across the Atlantic; some will perish on the way, some desert, but I will suppose the remnant landed on the American shore. Will conquest immediately follow? Impossible to expect it.<sup>32</sup>

It hardly needs mentioning that the presence of the German mercenaries ultimately made no difference to the result of the war.

27. 46 C. Parry (ed.), *Consolidated Treaty Series (C.T.S.)* 1127; see Mockler *Supra* n.2, at 292 for translation. See also, Treaty with Brunswick for 3964 men (46 C.T.S. 119) and with Hesse-Hanau for 668 men (46 C.T.S. 163).

28. Mockler, *Supra* n. 2, at 292.

29. *Id.*, at 293.

30. *Ibid.*

31. *Id.*, at 294.

32. *Id.*, at 122-23.



During the Crimean War, in view of the difficulty in securing allies, Britain considered the advisability of raising a foreign legion. This had been done under the authority of statute during the Napoleonic wars, although then, it could be argued, the Germanic Legion was fighting for the liberation of its own soil, since George III was a Germanic king *vis-à-vis* Hanover. *The Foreign Enlistment Act of 1854*<sup>33</sup> authorized the enlistment of foreign volunteers in separate regiments, not to be employed in the United Kingdom other than during the period of training. The number in the United Kingdom was not to exceed 10,000; they were not to be billeted in private households; and they were to be amenable to the British articles of war. Problems arose, since some European countries, for example, Switzerland and the German *Bund*, fearing for their neutrality, had made recruitment by foreign powers within their territory a criminal act. Nevertheless, British-German, British-Swiss and British-Italian Legions of 9682, 3294, and 3581 officers and men respectively were ultimately raised and saw service under the British flag.<sup>34</sup> While the British Army continued to employ foreign units, *e.g.* the Gurkha Regiments, as part of its regular armed forces, this was the last occasion on which governmental efforts were directed at securing the services of mercenary units.

In so far as France was concerned, the need to make use of mercenaries was not the same, since general conscription provided a much larger solid core of trained personnel. For foreign service, particularly in colonial territories, the Foreign Legion, comprised of foreign personnel serving under French authority and on personal contract, had been available from 1831. While by an extended application of the definition both the Gurkhas and the Foreign Legion might be considered as mercenaries — and this term has even been applied by one writer to the International Brigade in Spain as well as British officers seconded to the Arab Legion<sup>35</sup> — they would hardly fall within the term as currently used, or perhaps even as used by the classicists, for they were serving as embodied personnel within the regular forces of those under whose flag they served. However, at times it would appear that even today the Foreign Legion is being used almost as a traditional mercenary unit, although not for the purpose of a foreign war but for suppressing a rebellion. Thus, in April 1978, some 300 Foreign Legion troops were sent by France to assist Chad in combatting Chad National Liberation Front rebels.<sup>36</sup> This

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33. *The Foreign Enlistment Act (1854)* 18 & 19 Vict., c.2 (U.K.).

34. House of Commons Sessional Papers, xxvii, 151; found in Bayley *Supra* n.2, at 149.

35. Mockler, *Supra* n. 2, at 14.

36. *The Times* (London), Apr. 21, 1978, at 6, col. 8. In May, the Legion went to Zaire to rescue Europeans and suppress a rebellion.

may perhaps be compared with the actions of Louis-Philippe who, in 1835, during the Carlist war hired the Legion to Queen Cristina.<sup>37</sup> However, there is no evidence of any hire arrangement with Chad, merely the provision of aid by an ally.

The Crimean War seems to have proved a watershed in both the doctrinal writing and state practice with regard to the service of non-nationals in conflict situations. In his *Institutes of the Law of Nations*, Lorimer proposed some rules concerning the enlistment of neutrals based on the distinction "between the position of the neutral State in its corporate capacity, and when viewed as an aggregate of private persons."<sup>38</sup> This distinction is now becoming more and more disregarded, not only as regards the problem of state trading, but also more generally,<sup>39</sup> and particularly in the attitude of third world countries when assessing the activities of nationals of the first world. Lorimer saw nothing wrong in a neutral national's enlisting in belligerent forces and was of the opinion that by so doing he abandoned all claim to protection by his own nation, being regarded from the moment of enlistment as a citizen of the belligerent State concerned.<sup>40</sup> In his view there was to be no distinction between volunteering and enlisting, so that presumably both were to be treated alike. Moreover, enlistment was to be permitted even within the neutral State, and it was not to be considered a breach of neutrality that the State in question permitted the enlistee to retain his domicile and enjoy any private rights resulting therefrom. Calvo, too, seemed to see nothing wrong in the employment of foreign mercenaries, whom he regarded as being entitled to full rights under international law.<sup>41</sup>

The general view of nineteenth century writers seems to have been that the use and enlistment of foreign volunteers was legitimate, and there was a tendency to accept that the provision of such personnel under an agreement made between a non-belligerent sovereign and a country at war, or about to enter into war, was not incompatible with neutrality. It was, of course, open to the belligerent against whom such 'treaty' mercenaries were operating to regard the arrangement as an unneutral act amounting to a *casus belli* authorizing warlike acts against the *soi-disant* neutral.

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37. Mockler, *Supra* n. 2, at 135.

38. 2 J. Lorimer, *Institutes of the Law of Nations* (1884) 179-80.

39. See e.g., M. Garcia-Mora, *International Responsibility for Hostile Acts by Private Persons against Foreign States* (1962) 68.

40. See e.g., 1 G. Schwarzenberger, *International Law*, (3d ed. 1957) 593.

41. 1 *Derecho Internacional* (1868), s.387, at 483.

### *The American View*

Whether nationals would be allowed to serve in a foreign army depended, in the absence of specific treaty<sup>42</sup> between two states seeking to protect themselves, not on the requirements of international law but on the provisions of municipal law. A good many countries, concerned about the danger of the presence of foreign troops upon their own territory, had passed legislation forbidding the stationing within the territory of such personnel, if enlisted.<sup>43</sup> Some countries went further and forbade their nationals from enlisting in alien armies and alien causes. Thus, as early as 1794,<sup>44</sup> the United States Congress enacted, and this is still law today<sup>45</sup>:

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

In practice, it would seem that this Act was primarily concerned with the fitting out of raiding naval vessels,<sup>46</sup> a matter which was eventually dealt with by the *Declaration of Paris, 1856*,<sup>47</sup> having over centuries been regarded as an act of extreme infamy and akin to piracy.<sup>48</sup>

The present law of the United States is wider than that originally enacted, for it now forbids anyone in the United States, regardless of nationality, from recruiting or enlisting or leaving the United States to serve "any foreign prince, state, colony, district or people as a soldier or as a marine or seaman,"<sup>49</sup> but there is no reference to the service being in a campaign against a state with which the United States is at peace. There are certain exceptions. The ban does not apply to nationals of a belligerent allied to the United States, unless he "shall hire or solicit a citizen of the United States to enlist or go beyond the jurisdiction of the United States with intent to enlist or

42. See, e.g., *Jay Treaty* (1794), United States — Great Britain, Art. 21; in 52 *C.T.S.*, *Supra* n. 27, at 243,260. See also *General Treaty of Peace and Amity of the Central American States* (1923), Art. 14, in 2 *M. Hudson Int'l. Leg.*, 901, 906; *Habana Convention on Duties and Rights of State in the Event of Civil Strife* (1928), Art. 1, in 4 *M. Hudson Int'l. Leg.*, 2416, 2418; *Habana Convention on Maritime Neutrality* (1928), Art. 23, in 4 *M. Hudson Int'l. Leg.*, 2401, 2410:

Neutral States shall not oppose the voluntary departure of nationals of belligerent states *even though they leave simultaneously in great numbers*; but they may oppose the voluntary departure of their own nationals going to enlist in the armed forces." (italics added).

43. See, *The Foreign Enlistment Act (1854)*, 18 & 19 Vict., c.2. (U.K.).

44. 2nd Cong., 1st Sess., c. 50, s. 3.

45. 18 U.S.C.A. s. 958 (1976).

46. See e.g., *The Charming Betsy* 6 U.S. (2 Cranch) 64, 2 L. Ed. 208 (1804) See also, *The Alabama Arbitration* (1872), 1 J.B. Moore *Int'l. Arbitrations* (1898) 653, in which Great Britain was held liable for having allowed such fitting out.

47. D. Schindler and J. Roman, *The Laws of Armed Conflicts* (1973), 567.

48. Sir Geoffrey Butler and S. Maccoby, *The Development of International Law* (1928) 165.

49. 18 U.S.C.A. s. 959(a), (1976).

enter the service of a foreign country."<sup>50</sup> Equally no offence is committed by

any subject or citizen of any foreign prince, state, colony, district, or people who is transiently within the United States and enlists or enters himself on board any vessel of war, letter of marque, or privateer, which at the time of its arrival within the United States was fitted and equipped as such, or hires or retains another subject or citizen of the same foreign prince, state, colony, district, or people who is transiently within the United States to enlist or enter himself to serve such foreign prince, state, colony, district, or people on board such vessel of war, letter of marque, or privateer, if the United States shall then be at peace with such foreign prince, state, colony, district, or people.<sup>51</sup>

This would suggest that it might be possible for the subjects of a belligerent with which the United States is at peace to time their arrival in the United States to coincide with that of a vessel visiting the United States with the sole purpose of enlisting such nationals, and it would appear not to matter that the United States might be at peace with the state against which the enlistment is directed.

Finally, an offence is committed by

Whoever, within the United States, knowingly begins or sets on foot or provides or prepares a means for or furnishes the money for, or takes part in, any military or naval expedition or enterprise to be carried on from thence against the territory or dominion of any foreign prince or state, or of any colony, district, or people with whom the United States is at peace . . .<sup>52</sup>

This would seem to cover the advertising for and recruiting of mercenaries to serve in such places as the Congo or Angola<sup>53</sup> subject to the question of whether the liberation movement against which they were operating could be considered as a district or people with whom the United States was at peace.

Perhaps more important than the fine or imprisonment envisaged by these provisions, at least in the case of United States citizens, is the provision in the 1952 *Immigration and Nationality Act*,<sup>54</sup> providing for the loss of nationality by any United States national, whether by birth or naturalization, who enters or serves in the armed forces of a foreign state without the prior written authorization of the Secretary of State and Secretary of Defense.

In practice, the United States has appeared hesitant to apply the penal clauses referred to. During the First World War before the United States became a belligerent, United States citizens formed the Escadrille Américaine, which became the Escadrille Lafayette after

50. 18 U.S.C.A. s. 959(b), (1976).

51. 18 U.S.C.A. s. 959(c), (1976).

52. 18 U.S.C.A. s. 960, (1976).

53. See e.g., W. Burchett and D. Roebuck, *The Whores of War, Mercenaries Today* (1977), ch. 6 and 10; see also, *The Times* (London), May 9, 1978, at 9, col. 2-5, citing J. Stockwell, *In Search of Enemies: A CIA Story* (1978).

54. 8 U.S.C.A. s. 1481(a) (3) (1976).

German protests at the presence of an American squadron with the French air force. No action was taken against these "citoyens Américains volontaires pour la durée de la guerre,"<sup>55</sup> and after the United States joined the Allies, the Lafayette Squadron became 103rd Pursuit Squadron U.S. Air Service.<sup>56</sup> There was a similar group of American airmen with the R.A.F, the Eagle Squadron, prior to Pearl Harbour, while Chennault's Flying Tigers became part of the U.S.A.A.F. only in the summer of 1942.<sup>58</sup>

During the Middle East crisis of 1956, when it was known that American Jews were joining the Israeli forces, the Department of State pointed out that no authorization had been issued "in any individual case and there is no intention of departing from this policy."<sup>59</sup> There is, however, no record of any prosecution. A somewhat different attitude has been adopted towards service in revolutionary forces. After the victory of the Castro forces in Cuba the United States Embassy stated that while citizens who fought with the Revolutionary Forces would not necessarily be expatriated, "such persons who continue voluntarily to serve with these forces, if and when they become an integral part of the armed forces of the Republic of Cuba" are so liable, and this was reiterated by the State Department shortly thereafter. "Thus, a distinction was made between serving in the revolutionary forces of Castro and serving in the armed forces of a foreign State."<sup>60</sup> The significance of this became clear in *Marks v. Esperdy*<sup>61</sup> in which an equally divided Supreme Court<sup>62</sup> upheld a decision expatriating Marks by reason of his service in the Cuban armed forces after the conclusion of the revolution and the establishment of the Castro Government. It would seem, however, that since *Afroyim v. Rusk*<sup>63</sup> this would no longer be the case, for the Supreme Court held that non-voluntary expatriation was unconstitutional. While this decision arose out of the exercise of the franchise by a citizen during a foreign election, it seemingly is of general application<sup>64</sup> and would indicate that *Marks* would not be followed.

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55. J. M. Spaight, *Air Power and War Rights* (3d ed, 1947) 463.

56. *Ibid.*

57. *Id.*, at 463-64.

58. *Id.*, at 465.

59. 8 M. Whiteman, *Digest of International Law* (1967) 171.

60. *Id.*, at 174.

61. (1964), 377 U.S. 214; aff'g. (1963), 315 F. 2d 673 (2d Cir.).

62. Four votes to four, Mr. Justice Brennan not participating.

63. (1967), 387 U.S. 253.

64. [1975] *Digest of United States Practice in International Law*, 817.

### *Modern English Legislation*

Twenty-five years after the American precedent, and as a result of activities on behalf of the rebellious Spanish American colonies,<sup>65</sup> England passed its first Act "to prevent the enlisting or engagement of His Majesty's subjects to serve in Foreign Service, and the fitting out or equipping, in His Majesty's Dominions, vessels for warlike purposes, without His Majesty's licence."<sup>66</sup> The Preamble declared that such action

in or against the Dominions or Territories of any foreign prince, state, potentate, or persons exercising or assuming to exercise the powers of government in or over any foreign country, colony, province or part of any province, or against the ships, goods, or merchandise of any foreign prince, state, potentate or persons as aforesaid, or their subjects, may be prejudicial to and endanger the peace and welfare of this Kingdom.<sup>67</sup>

This being so, the Act repealed previous legislation, such as the *Act of 1754*<sup>68</sup> forbidding service as officers in the French forces and that of 1769<sup>69</sup> requiring British subjects accepting commission in the "Scotch Brigade in the Service of the States General of the United Provinces" to take the oath of allegiance. To take such service as was proscribed by the *Act* without royal licence was made a misdemeanor, punishable by fine and/or imprisonment at the discretion of the Court. The *Act* was not made retroactive so that persons already serving were able to continue. The *Act* further provided that any vessel at a British port with such persons aboard might be detained, while any vessel fitted out in British territory for this purpose was made liable to forfeiture, and any person who added to or changed the military equipment of any warship was equally guilty of a misdemeanor. The *Act* made no reference to any requirement that the foreign ruler be at peace with England, and clearly forbade enlistment in foreign service whether the ruler concerned was at peace or war. *Prima facie*, the wording of the *Act* was such that it would apply to any government *de facto* or *de jure* and to any band of rebels describing itself as a government provided it controlled some territory, and it would appear that recognition by England was irrelevant.

65. 2 Lord McNair, *International Law Opinions* (1956) 328 ff.

66. *Foreign Enlistment Act*, 1819, 59 Geo. 3, c. 69 (U.K.).

67. *Ibid.*

68. *Foreign Enlistment Act*, 1754, 29 Geo. 2, c. 17 (U.K.). The full name of this statute is:

"An act to prevent His Majesty's Subjects from serving under the French King and for better enforcing an act passed in the Ninth year of His present Majesty's Reign to prevent the enlisting His Majesty's Subjects to serve as soldiers without His Majesty's licence and for obliging such of His Majesty's Subject as shall accept commissions in the Scotch Brigade in the service of the States General of the United Provinces, to take the oaths of Allegiance and Abjuration."

69. *The Militia Act*, 1769, 9 Geo. 3, c. 42 (U.K.).

Problems affecting the *Act* arose during the American Civil War, particularly with regard to the fitting out of ships for the Confederacy, culminating in *The Alabama Arbitration*.<sup>70</sup> To some extent the award could not have been completely unexpected, for in a Report by the Law Officers of August 11, 1862, it is stated:

[I]n the event of war breaking out, an act prohibited by the Foreign Enlistment Act would be illegal, and would be punishable by the law of this country, even though it might be done in fulfilment of some contract entered into before the breaking out of war: and it might probably be the duty of Her Majesty's Government, either of its own accord or on the requisition of either belligerent, to exercise the powers given to them by that statute, in order to prevent and to punish any such act. And we must add, that we think it hardly probable that a contract with a foreign Government, for building in this country an armour-plated ship could be completed, after the breaking out of war between that Government and another foreign State, without some acts amounting to an 'equipping, furnishing, fitting-out, or arming', within the meaning of the 7th section of the Foreign Enlistment Act, and therefore punishable by the laws of this country.<sup>71</sup>

It was partly as a result of the experience of the American Civil War that a new *Foreign Enlistment Act* was passed in 1870<sup>72</sup> and it is still the law of Great Britain on this matter. It should be pointed out, however, that

[T]he Foreign Enlistment Act is no measure of the international obligations of Great Britain. It goes far beyond them, and its extreme stringency is presumably designed to arm Her Majesty's Government with power to interpose in possible contingencies which it would be difficult to anticipate . . .<sup>73</sup>

By virtue of the new *Act*, it is a misdemeanor punishable at the discretion of the court by fine and/or imprisonment, to a maximum of two years, for

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

. . .<sup>74</sup>

The *Act* then contains a number of detailed provisions with regard to the use of ships for this purpose, including the obligation to remove immediately any illegally enlisted persons who shall not be allowed to return to the ship. If a ship is built to the order of a belligerent state at war with a friendly state or is delivered to the order of such state or its agent and is employed in the military or naval service of such state, it shall, until the contrary is proved, be deemed to have been built for

70. See *Supra* n. 46; 3 Lord McNair, *International Law Opinions* (1956) 171 ff.

71. *Id.*, at 224-25.

72. *Foreign Enlistment Act, 1870*, 33 & 34 Vict., c. 90 (U.K.).

73. See McNair *Supra* n. 70, at 170 (Law Officers' Report, February 12, 1895).

74. *Foreign Enlistment Act, 1870*, 33 & 34 Vict., c. 90, s. 4 (U.K.).

that purpose and the burden of proof is upon the builder. Perhaps more important at the present time is the provision that forbids in British territory the preparation or fitting out of "any naval or military expedition to proceed against the dominions of any friendly state . . . [and] every person engaged in such preparation or fitting out, or assisting therein, or employed in any capacity in such expedition . . ." <sup>75</sup> equally commits an offence. This wording is probably wide enough to cover any British subject volunteering in any capacity as a member of a force engaged in hostilities against a foreign friendly state, while any ship, arms or munitions used in or forming part of such an expedition is forfeit to the Crown. Reflecting the embarrassment of the British government over the *Alabama*, if the Secretary of State is satisfied that a ship is being built, commissioned or equipped contrary to the *Act*, and is to be taken out of the jurisdiction he may order the ship to be seized, detained and searched, and if the suspicions are justified then it may be detained until its release is ordered. The *Act* does not apply to any commissioned ship of any foreign state, which is in accord with the view expressed by the Law Officers in 1866 that

the Peruvian warship *Independencia*, supposing that she had violated the Foreign Enlistment Act of 1819 in recruiting British subjects within British jurisdiction and taking on board arms and ammunition within British jurisdiction, with a view to warlike operations against Spain, would, if she returned within British jurisdiction under a regular commission from the Peruvian Government, be entitled to the immunity of a foreign public armed ship.<sup>76</sup>

It might be possible to argue, however, that if such a ship had in fact recruited British nationals while lying in British waters she had abused her status by exercising a sovereign act in Britain without the consent of the Crown, and had therefore subjected herself to the same sort of treatment as had been threatened against the Chinese Embassy in 1896 when Sun Yat Sen was wrongly detained.<sup>77</sup> It is also possible that such a ship would not be granted permission to return to British waters, at least for some time.

The most important section of the *Act* is Section 30, the interpretation section:

'foreign state' includes any foreign prince, colony, province, or part of any province or people, or any person or persons exercising or assuming to exercise the powers of government in or over any foreign country, colony, province, or part of any province or people.

In the opinion of the Law Officers as reported on December 7, 1877, this definition would include rebels as "a foreign state at peace with

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75. *Foreign Enlistment Act, 1870*, 33 & 34 Vict., c. 90, s. 11 (U.K.).

76. 1 Lord McNair, *International Law Opinions* (1956) 103.

77. E. Satow, *Guide to Diplomatic Practice* (N. Bland ed., 1957) 218; see also *ibid.* for incident affecting Soviet embassy in Paris in 1929.



Her Majesty,"<sup>78</sup> so as to make it an offence for a British ship to be employed in the military or naval service of the Peruvian Government for the purpose of suppressing a rebellion. In the instant case, the Commander of the British Pacific Station had cautioned the ship which he had found in Peruvian waters, as the master and crew "were engaged in the commission of a breach of neutrality, [and] Admiral de Horsey would, on the high seas, have been justified in stopping the vessel and preventing her proceeding on her voyage whilst the Peruvian troops remained on board."<sup>79</sup> It would also seem to be the case that rebels would be regarded as a foreign friendly state even though there had been no recognition of insurgency or belligerency, and the Law Officers doubted whether a British ship, "fitted out as a privateer and to be used in the service of an unrecognized nationality, could be dealt with as a piratical vessel."<sup>80</sup> The Law Officers also pointed out that for the purposes of the *Foreign Enlistment Act*, a protectorate, engaged in hostilities against the protecting state, is a friendly foreign state, so that "when a state of hostilities exists between two such states, and they are recognized by Her Majesty's Government as belligerents, the Foreign Enlistment Act would apply to either."<sup>81</sup> They considered, however, that since British interests had not yet been affected by the instant hostilities there was no obligation upon Britain to apply the *Act*. They did not say that recognition of belligerency was a prerequisite, but they did interpret the 1877 Report concerning the Peruvian rebellion:

It would seem that the term 'rebels' was probably meant only to cover such 'rebels' as by establishing a more or less stable Government, and, by obtaining general recognition as belligerents, might fairly be said to have constituted themselves into a separate 'State' within the meaning of that expression as generally employed.<sup>82</sup>

The other definition which is of importance in Section 30 is that of "military service," for this includes "any employment whatever, in or in connection with any military operation." This definition is wide enough to include service in an air force, but the *Act* only refers to military and naval forces and expeditions and "as a penal statute falls to be construed with strict regard to the statutory language used. It is not permissible for courts of law to extend the definitions of statutory offences by analogy in order to deal with new situations which they regard as equally reprehensible."<sup>83</sup>

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78. H. Lauterpacht, *Recognition in International Law* (1947) 267.

79. *Id.*, at 268.

80. *Supra* n. 65, at 368.

81. *Supra* n. 76, at 61. In this case, Madagascar was fighting against France.

82. *Id.*, at 60.

83. *Report of the Committee of Privy Councillors appointed to inquire into the Recruitment of Mercenaries*, Cmnd. 6569 (1976), para. 25 (hereinafter referred to as the Diplock Report).

While the Reports of the Law Officers of the Crown are important and may affect government policy in a particular case, their significance must not be exaggerated. True, a Report may serve as a precedent or guideline or give an indication of what the government considers the law to be, and may well be followed in the future. It is not, however, an authoritative and binding interpretation of the law, while its contents are, generally speaking, not even known to the general public. For such a definitive statement, reference must be made to the courts but the judgments in both the United Kingdom and the United States are somewhat sparse, at least in so far as individual volunteers or the preparation and equipping of a military expedition are concerned. What decisions there have been, have for the most part related to ships.<sup>84</sup> The unwillingness to prosecute is brought home quite clearly by the experience of the Spanish Civil War. While British volunteers served on both sides, and while Britain pursued a policy of non-intervention and the Foreign Office issued a public warning that the *Act* applied,<sup>85</sup> no volunteer was ever prosecuted. The English case which does deal with an armed expedition is *R. v. Jameson*<sup>86</sup> arising out of the Jameson Raid against the South African Republic. Although the judgment was concerned with technical details affecting the validity of the indictment rather than the substance of the charge, Jameson was subsequently sentenced to fifteen months in jail, although he only served six.

#### *The Commonwealth View*

It is, of course, not only the United Kingdom and the United States which have legislation directed against foreign enlistment. In so far as Commonwealth countries are concerned, the British *Act* was extended to most of them and still prevails. Some, however, have enacted their own legislation. For example, Ghana has made it a felony punishable by life imprisonment "to accept or induce any engagement in the military service of any other country."<sup>87</sup> The Canadian *Act* is very similar to its English forebear, the definition of "foreign state" in whose service enlistment may be forbidden being identical.<sup>88</sup> Unlike the English *Act* of 1870, the Canadian *Act* makes no reference to a state at peace with Canada, but uses instead the phrase "a friendly foreign state" which is clearly a synonym, and the *Act* provides that it is an offence for any Canadian, wherever he may happen to be, to accept an engagement in the armed forces of "any

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84. For a list of cases, see Burchett and Roebuck, *Supra* n. 53, at 184 n. 10.

85. *Supra* n. 78, at 273 (The warning was issued January 10, 1937, before any recognition of the Nationalists.)

86. [1896] 2 Q.B. 425.

87. *Foreign Enlistment Act*, (Ghana) 1961.

88. *Foreign Enlistment Act*, R.S.C. 1970, c.F-29, s. 2.

foreign state at war with any friendly foreign state.” Any person in Canada, regardless of nationality, who induces another to leave with such intent equally commits an offence.<sup>89</sup> The *Act* likewise forbids any Canadian from leaving Canada for this purpose<sup>90</sup> and also forbids any person within Canada from fitting out any army, naval or air expedition to proceed against the dominions of any friendly state.<sup>91</sup> The *Act* thus reflects the development since 1870 of war in the third dimension. As regards recruiting, this is forbidden within Canada in so far as it relates to the “armed forces of any foreign state or other armed forces operating in such a state.”<sup>92</sup> It is clear, therefore, that there can be no doubt as to the application of the *Act* as regards rebels, whether recognized or not, and whether a state of belligerency is recognized.

Moreover, since the *Act* relates to operations by “other armed forces operating in a state,”<sup>93</sup> it would appear that it would operate in an area where the governing power, *e.g.* a foreign ruler, had withdrawn and fighting was being conducted between a variety of forces each describing itself as a national liberation movement. This interpretation finds support in the provision that the Governor General in Council may by order or regulation provide for the application of the *Act* “to any case in which there is a state of armed conflict, civil or otherwise, either within a foreign country or between foreign countries.”<sup>94</sup> It should be noticed that the *Act* again recognizes modernity, in that it uses the generic term “armed conflict” rather than the technical term “war.” The Governor General is also authorized to provide for the requirement of consent before any prosecution is launched, and may, in addition to the normal punishment of fine and/or two years imprisonment, provide for the restriction, cancellation or impounding of passports, whether within Canada or elsewhere, should that be considered necessary.<sup>95</sup> Such a provision, of course, is rather more formal than real. Strictly speaking, there is nothing to stop a Canadian from leaving Canada without a passport, and it depends on foreign not Canadian law whether any country will admit him if he has no passport. It is hardly likely that the authorities in whose service he is seeking to enlist will be unduly worried as to whether he does or does not carry a passport.

The Penal Codes of Belgium, France and Sweden all forbid recruiting for foreign service, while Sweden and Belgium both

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89. *Foreign Enlistment Act*, R.S.C. 1970, c.F-29, s. 3.

90. *Foreign Enlistment Act*, R.S.C. 1970, c.F-29, s. 4.

91. *Foreign Enlistment Act*, R.S.C. 1970, c.F-29, s. 10.

92. *Foreign Enlistment Act*, R.S.C. 1970, c.F-29, s. 11.

93. *Foreign Enlistment Act*, R.S.C. 1970, c.F-29, s. 11.

94. *Foreign Enlistment Act*, R.S.C. 1970, c.F-29, s. 19(a).

95. *Foreign Enlistment Act*, R.S.C. 1970, c.F-29, s. 19(e).

enacted special legislation during the Spanish Civil War. Perhaps not surprisingly in view of her special relationship to the area, Belgium passed no such legislation during the Congo Civil War<sup>96</sup> when a number of Belgian nationals, both *colons*<sup>97</sup> and others, played a significant role, sometimes as specially enlisted mercenaries.<sup>98</sup> However, all these national enactments are of local significance only and do not as such have any importance in international law unless there is some rule of the latter which would be infringed if the states in question failed to enforce their criminal law in this regard.

### International Law

In assessing whether international law has any bearing in this regard it is necessary to avoid political assessments or subjective analysis. International law applies universally and not on an eclectic basis. Moreover, in examining the activities of mercenaries nothing is to be gained by the use of such language as would imply that those on the "wrong" side were fighting for loot and reward, while those who were on the "right" side were motivated by some higher ideal. Thus, we read in one violent attack on mercenaries that as "whores of war" they were "hijacking a country,"<sup>99</sup> with "economic power. . . abused to hire human bodies with the specific intentions of avoiding public association with them and responsibility for their welfare, and using money to exploit moral weakness."<sup>100</sup> What does one say of the validity of a work which attempts to discriminate among the whites who were fighting for the various nationalist movements in Angola in 1976:

[T]here were plenty of white Angolans fighting with the MPLA, which led the mercenaries to assume that they were often confronted by Cubans when they were not . . . [These] fought for what they believed in: true independence, an end to colonialist oppression and exploitation. . . . If [the blacks with the FNLA] . . . went back to their villages or rallied to the MPLA, it was because their sympathies were with those who really fought to end oppression and exploitation.<sup>101</sup>

It is equally difficult to accept as objective comment anything written by those who can say of two mercenaries charged at the Luanda trial,<sup>102</sup> one of whom testified that he had probably killed FAPLA personnel, while the other had not, that the former "succeeded in

96. Burchett and Roebuck, *Supra* n. 53, at 220-23.

97. Mockler *Supra*, n. 2, at 177. Mockler condemns as mercenary, Schramme who, in 1964 and 1966, "was pacifying the area where he owned plantations. . ." and who regarded himself as ". . . a planter and administrator, in uniform only through force of circumstances." *Id.*, at 206.

98. *Id.*, ch. 8.

99. Burchett and Roebuck, *Supra* n. 53, at 37.

100. *Id.*, at 6.

101. *Id.*, at 117.

102. *Id.*, at 74-75.

convincing the Tribunal that he sincerely regretted what he had done and recognized the enormity of the use of mercenaries," and was sentenced to thirty years, while the latter's "demeanour, if not his actual words, betrayed regret that his efforts had not succeeded. He never displayed any regret for his own activities" and was executed. The former was "a money-motivated mercenary," the other "a political mercenary"<sup>103</sup> but he believed in the wrong politics.

### *Traditional Views*

What does international law say of those who enlist in foreign service? Does it regard such persons as committing any illegality and does their country of origin carry any liability? As we have seen, the "fathers of international law" were somewhat divided in their views. So, also, were some countries which were affected by mercenary activities. For example, in 1818 before the passage of the first British *Foreign Enlistment Act*, the Law Officers were called upon to advise on the status of British nationals serving the Spanish-American colonial insurgents. Spain intimated that it intended treating any such aliens they might capture as insurgents. According to the Report of July 21, 1818:

The Spanish Government has undoubtedly the Right of War against such Persons, and the letter of the Spanish Minister describes 'the Foreigners as *waging War against His Majesty*', but the ordinary laws of War would not justify severity in the nature of punishment, which appears to be the measure in the contemplation of the Spanish Government. It is certain also, that Foreigners may be guilty of Treason, against the Sovereign of a State in which they have only an occasional residence. But cases of that kind have usually been very distinguishable in principle from the present case, which is merely that of Individuals joining the Forces of Persons exercising the powers of Government, in Provinces, that have been in a state of Revolt, asserting their Independence for some Years.<sup>104</sup>

A somewhat similar problem arose, after the enactment of the modern *Act*, when it was learned in 1895 that the French military authorities engaged in fighting a civil war in Madagascar considered themselves "justified in treating as 'condottieri' the British subjects who have taken service with the Hovas, and, if captured, in at once shooting them," while apparently not intending to treat captured Hovas in the same way. In their Report of April 16, 1895, the Law Officers stated

[T]he French authorities are *not* entitled to discriminate between British subjects serving in the armed forces of the Malagasy Government and Hovas in the like service to the prejudice of the former.

[T]he French authorities are *not* entitled to shoot British subjects serving in the Hova forces whom they may take prisoners in open fight during the pendency of the present hostilities in Madagascar. We assume that the British subjects are regularly incorporated in the regular forces of the Hovas.

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103. *Ibid.*

104. *Supra* n. 65, at 335.

[I]t is open to, and . . . desirable, for Her Majesty's Government to communicate with the French Government upon the subject . . . with a view to preventing what . . . would be a violation of international law.

[I]f the fighting now in progress between the French and the Hovas were merely a civil brawl, or a local popular tumult, the French might legitimately treat persons who take part in it as rioters and murderers. Or, if British subjects took part in hostilities against the French without being incorporated in any regular forces, they might be treated as private individuals unwarrantably engaged in lawless warfare . . . .

[B]ut . . . a state of war does exist between France and Madagascar. Her Majesty's Government, as a neutral Power, have not thought fit to recognize belligerency. . . . But the duties imposed upon belligerents by international law are in no sense dependent upon, and have no relation to the action of, neutral Powers which is dictated by their policy and interests. If a state of war exists as distinguishable from a civil brawl, the authorized soldiers of one belligerent when captured by the other belligerent must be treated as prisoners of war to whatever nationality they belong, subject always to the risk of such reprisals as are recognized by international law, in case the Government they serve has violated the law.<sup>105</sup>

While the activities and attitudes of neutral powers are "dictated by their policy and interests," by the end of the nineteenth century the European powers were involved in codifying the international law regarding neutrality. As to the practice almost immediately prior to this, perhaps one might refer to the Swiss decision in 1870 at the time of the Franco-German War to allow French and German nationals to traverse Switzerland in order to join their units so long as they were in civilian clothing and unarmed. She would not, however, permit France to open an office for the purpose of sending Alsatian volunteers through Switzerland to the south of France.<sup>106</sup> By the end of the century

[t]he majority of writers maintained that the duty of impartiality must prevent a neutral from allowing the levy of troops. . . . if the levy and passage of troops . . . must be prevented by a neutral he is all the more required to prevent the organisation of a hostile expedition from his territory against either belligerent. This takes place when a band of men combine under a commander for the purpose of starting from the neutral territory and joining the belligerent forces. Different however, is the case in which a number of individuals, not organized into a body under a commander, start in company from a neutral State for the purpose of enlisting with one of the belligerents. Thus in 1870, during the Franco-German War, 1200 Frenchmen started from New York in two French steamers [the *Lafayette* and the *Ville de Paris*] for the purpose of joining the French Army. Although the vessels carried also 96,000 rifles and 11,000,000 cartridges, the United States did not interfere, since the men were not organized in a body, and since, on the other hand, the arms and ammunition were carried in the way of ordinary commerce.<sup>107</sup>

That Oppenheim's view was, broadly speaking, an expression of the by then generally accepted view of international law is shown by

105. *Id.*, at 371.

106. 2 *Oppenheim's International Law* (H. Lauterpacht, ed.) (7th ed. 1952) 704, reproducing 1st ed. 1906, 352-53.

107. *Id.*, (1st ed. 1906) 353; (7th ed. 1952), at 703-04. *But see Wiborg v. U.S.* (1896), 163 U.S. 632, at 654, in which it was held that "the elements of the expedition . . . were combined or in process of combination; there was a concert of action. . . ."

the terms of *Hague Convention V respecting the Rights and Duties of Neutral Powers and Persons in War on Land*:

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.<sup>108</sup>

There is no clarification in the *Convention* as to the meaning of the word "separately" or how many individuals may be allowed to cross at any one time. Presumably so long as they do not constitute an organized corps of combatants no liability on the part of the neutral state concerned could arise. As to any individual who does cross and enlist, Article 17 confirms the views of the British Law Officers:

Art. 17. A neutral cannot avail himself of his neutrality . . . particularly if he voluntarily enlists in the ranks of the armed force of the parties. 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.<sup>109</sup>

Thus, such a "neutral" national enjoys all the rights of a normal combatant, including those of a prisoner of war. In so far as the fitting out of ships to assist belligerents is concerned, *Hague Convention XIII concerning the Rights and Duties of Neutral Powers in Naval War*<sup>110</sup> reflects the limitations and restrictions of the foreign enlistment enactments of the United States and the United Kingdom, but it makes no reference to criminal liability. The neutral state is required "to employ the means at its disposal to prevent the fitting out . . . [and] to display the same vigilance to prevent" departure.<sup>111</sup> Apparently, since failure to take such steps would constitute a breach of neutrality, a belligerent whose rights had been adversely affected would be entitled to regard such failure as a *casus belli*.

As has already been pointed out, no action was taken against those who volunteered during the Spanish Civil War, regardless of whether they joined the International Brigade supporting the government or served with the rebels. This was probably due to the fact that the Republic and the Nationalist authorities represented a political cleavage that crossed frontiers and found some support in most of the countries from which the foreign fighters — be they called volunteers, mercenaries or conscripts — originated. Again, as has been seen, in the case of the Eagle Squadron between 1939 and 1941, or the volunteers serving with Israel in the Middle East, no authority, private individual, or organ of the media seemed unduly worried by such activists or their doings.

108. See *Supra* n. 47, at 715.

109. *Id.*, at 717.

110. *Id.*, at 721.

111. *Id.*, at 723, Art. 8.

### *A Change in Attitude*

It was only when white settlers struggling against the activities of local rebels, described as National Liberation Movements, became involved, by assisting one of the local rebel movements, usually the less radical, that the problem took on a new aspect. The term "mercenary" suddenly acquired an obscene flavour, and 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.

The first intimation of this change in attitude came during the struggle for independence in the Belgian Congo, the United Nations having decided in 1960 to take steps to provide the Republic with such military assistance as it might require and calling upon third States to do nothing to impede the government's efforts to restore order, while urging Belgium to withdraw its forces as speedily as possible. While the United Nations Force was operating, an attempt was made by the Province of Katanga to secede, which automatically raised the possibility of United Nations military involvement in an internal armed conflict. The Katangese secessionists were assisted by foreign mercenaries, some of whom were in fact Belgian local landowners,<sup>112</sup> but a number of African states strongly objected to their presence, contending that they were interfering with the activities of the United Nations force; were unlawfully interfering in the internal affairs of an African country; were using the activities of the Katangese as a cover for a possible return of European imperialism; and, probably more importantly, because many of them feared possible secessionist activities by tribal minorities within their own countries.

In its resolution of February 21, 1961, the U.N. Security Council, with France and the Soviet Union abstaining, reiterated its concern at the situation in the Congo, and urged "that measures be taken for the immediate withdrawal and evacuation from the Congo of all Belgian and other paramilitary personnel and political advisers not under the United Nations command, and mercenaries."<sup>113</sup> By November, not much having been done to this end, and with the General Assembly having resolved<sup>114</sup> that the "central factor" was the continued presence of Belgian and other foreign military and paramilitary personnel, political advisers and mercenaries, the Security Council, with France and the United Kingdom abstaining, resolved "to secure the immediate withdrawal and evacuation from the Congo of all foreign military, paramilitary and advisory person-

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112. *Supra* n. 97.

113. S/4741, 1.

114. A/Res/1599 (XV) (adopted by vote of 61-5-33).



nel not under the United Nations Command, and all mercenaries," deprecated "the secessionist activities illegally carried out by the provincial administration of Katanga, with the aid of external resources and manned by foreign mercenaries," and authorized the Secretary-General "to take vigorous action, including the use of requisite measures of force, if necessary, for the immediate apprehension, detention pending legal action and/or deportation of all foreign military and paramilitary personnel and political advisers not under the United Nations command, and mercenaries . . . [and] prevent the entry or return of such elements under whatever guise. . ."<sup>115</sup>

It is essential to note that in these Resolutions the Security Council was not concerned with the status of mercenaries and in fact was treating them in exactly the same way as any other foreign military personnel in the Congo other than as part of the United Nations command. The main thrust of the resolutions was the prevention of Katangese secession and the termination of the civil war, with the concomitant consolidation of the power and authority of the Republic. The Council's condemnation of the mercenaries, as of other foreign military personnel, was solely on the basis that they formed one of the resources being employed to secure Katanga's secession and thus to thwart the resolutions of the Council and the purpose for which its Force had been sent to the Congo. Any attempt to use these Resolutions as a ground for condemning mercenaries or their employment *per se* is fraudulent misrepresentation of the activities and objectives of the Security Council. It was not until the beginning of 1963, after military confrontations between the mercenaries and the United Nations forces, that the United Nations was able to declare that the Katanga revolt was over.<sup>116</sup> In 1964, however, a further revolt took place against the authority of the Republican Government and the mercenaries were back again. This culminated in 1966 in a further attempt by the Katangese to secede, although on this occasion it appeared that the mercenaries were prepared to serve on either side.<sup>117</sup> In 1967, there was a revolt by the mercenaries themselves which appeared likely to overthrow President Mobutu. The Security Council's resolution was again non-committal in so far as the mercenaries as such were concerned. Having 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, [called] . . . upon

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115. S/5002.

116. Mockler, *Supra* n. 2, at 168-71.

117. *Id.*, at 171-93.

Governments 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.

The council decided to remain seized of the question and requested the Secretary-General to "follow closely the implementation of this Resolution,"<sup>118</sup> which was hardly one that could be implemented in any way that the United Nations could inspire or control. What the Security Council meant by implementation became a little clearer by the end of the year. It had been known for some time that the mercenaries were using the Portuguese colony of Angola as their marshalling area and the base from which attacks against the Congo were being launched. In November 1967, without a vote, the Security Council condemned the failure of Portugal to prevent the mercenaries from using Angola in this way, and 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."<sup>119</sup> 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 as prisoners 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. In other words, the most that can be said of the action of the Security Council at this time is that it called upon members to enforce their foreign enlistment legislation.

The General Assembly too had passed resolutions concerning the Congo, but these are of less significance than those of the Security Council. There is no need at this juncture to consider how far such resolutions, even if constantly reiterated, are binding in law. What is more important is that, with the presence of the United Nations force in the Congo, and the constant consideration of the problem by the Security Council, the role of the Assembly was somewhat reduced. Moreover, attempts to condemn the mercenaries as such failed to secure the requisite two-thirds majority in the Assembly. Further, to some extent the African members of the United Nations were able to express their views through the Organization of African Unity where they were free of western pressures and could give vent to their ideological concerns for national liberation. It soon became clear that from the point of view of this Organization, whatever be the actual issue that led the members to pass a condemnatory resolution,

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118. S/Res/239 (1967) 1.

119. S/Res/241 (1967) 1.

they were really only concerned with those mercenaries who were engaged in hostilities against forces that the Organization regarded as struggling for their self-determination and national liberation.

From 1964 until 1971 the Organization passed a series of resolutions condemning the recruitment and use of mercenaries, and by 1971 had resolved that it was time to draft a convention condemning mercenarism as a crime, especially when directed against African Liberation movements.<sup>120</sup> While these resolutions and proposals may have had some moral effect upon the members of the Organization, they were of course completely irrelevant as regards any state not such a member, even though that state might itself promote the recruitment of mercenaries for service in Africa.

Both the Organization of African Unity and the United Nations became concerned with the problem again during the civil war in Angola. As early as 1966, problems had arisen between Portugal and the Congo, with the latter accusing Portugal of allowing mercenaries to operate from its colonial territories against the Congo. Portugal stated that there were no mercenaries in Angola and no camps for operations against the Congo. The Security Council, having called upon all states not to interfere in the domestic affairs of the Congo, simply urged Portugal "not to allow foreign mercenaries" to use Angola as a base.<sup>121</sup> A further resolution pretty well to the same effect was passed in 1967 when the Council 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."<sup>122</sup> More substantively, it condemned Portugal, for having failed in violation of earlier resolutions, to prevent the mercenaries from using the territory of Angola under its administration as a base for operations against the Congo.

Within a year the scene of activity had shifted. The military operations were now being carried on in Portugal's colonial territories and the scene of international concern was the General Assembly. Thus, in 1968, having condemned the Portuguese failure to grant independence to "territories under Portuguese domination," and "the collaboration between Portugal, the minority racist regime of South Africa and the illegal racist minority regime in Southern Rhodesia, which is designed to perpetuate colonialism and oppression in Southern Africa,"<sup>123</sup> the General Assembly called upon all states as a matter of urgency "to take all measures to pre-

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120. Burchett and Roebuck, *Supra* n. 53, at 233-34.

121. S/Res/226 (1966).

122. *Supra* n. 119.

123. A/Res/2395 (XXIII) 2.

vent 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.”<sup>124</sup> The Resolution, continuing with its anti-colonial bias, deplored the Portuguese policy of settling “foreign immigrants” in the colonial territories.

In addition, there was one new feature in the Resolution. Traditionally, colonial powers have been allowed to treat their dependent territories as “private property” and what they have done therein has been regarded as falling within the reserved domain of domestic jurisdiction. This has, of course, been affected on the political level by the series of General Assembly resolutions, and in some cases conventions, on human rights and independence for non-self-governing territories, but these did not introduce any rules of international law regulating the conduct of internal conflicts. The *Geneva Conventions of 1949* relating to humanitarian principles in armed conflict made only the slightest inroads into this position by including in each of them, what is known as Common Article 3. This is to apply in the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, and which is binding on all parties to the conflict. By its Resolution, the General Assembly called upon Portugal to observe the provisions of the *Prisoners of War Convention*.<sup>125</sup> It should be pointed out that this merely imposes observance of the minimal conditions of humanity and requires reciprocal application. There is, however, nothing to indicate that the rebels applied its provisions to their prisoners. Moreover, the Assembly completely ignored the fact that when Portugal ratified the Conventions she made a reservation concerning Article 3, to which no opposition appears to have been expressed:

As there is no actual definition of what is meant by a conflict not of an international character, and as, in case this term is intended to refer solely to civil war, it is not clearly laid down at what moment an armed rebellion within a country should be considered as having become a civil war, Portugal reserves the right not to apply the provisions of Article 3, in so far as they may be contrary to the provisions of Portuguese law, in all territories subject to her sovereignty in any part of the world.<sup>126</sup>

Again it should be noted that the resolution is not general in character and does not condemn mercenarism as such nor the use of mercenaries. It is only concerned with their use by Portugal in its African territories and against African States. The same is true of the 1973 resolution concerning Guinea: “The use of mercenaries by colonial and racist regimes against the national liberation movements

124. *Ibid.*

125. See *Supra* n. 47, at 345 (for Art. 3, at 352.).

126. *Id.*, at 500-01.

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.”<sup>127</sup>

It must not be thought that the General Assembly always looked at the problem of mercenaries in the context of a particular struggle. In 1965, when considering the need for a condemnation of intervention in the affairs of third states, the Assembly may be considered to have dealt with the problem in a somewhat indirect fashion, when it stated that “no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the overthrow of the régime of another State, or interfere in civil strife in another State.”<sup>128</sup> The ideological background for this is to be seen in the Preamble which reaffirms

the principle of non-intervention, proclaimed in the charters of the Organization of American States, the League of Arab States and the Organization of African Unity and affirmed at the conferences held at Montevideo, Buenos Aires, Chapultepec and Bogotá, as well as in the decisions of the Asian-African Conference at Bandung, the First Conference of Heads of State or Government of Non-Aligned Countries at Belgrade, in the Programme for Peace and International Co-operation adopted at the end of the Second Conference of Heads of State or Government of Non-Aligned Countries at Cairo, and in the declaration on subversion adopted at Accra by the Heads of State and Government of the African States.<sup>129</sup>

That this resolution was not regarded with excessive seriousness by some members of the United Nations, even though it had been adopted by 109 to 1, with only the United Kingdom abstaining, became clear when it was reaffirmed a year later by 114 to 0, with 2 abstentions.<sup>130</sup> Then, in 1969, by 78 to 5 with 16 abstentions, the Assembly reaffirmed<sup>131</sup> its *Declaration on the Granting of Independence to Colonial Countries and Peoples*,<sup>132</sup> which by its very title indicates that its provisions are not of general application, but solely concerned with colonial independence. Within this context the Assembly found it possible to state in general terms, that is to say not in relation to any particular conflict, 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.<sup>133</sup>

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127. A/Res/3103 (XXVIII) 3.

128. A/Res/2131 (XX).

129. *Ibid.*

130. A/Res/2225 (XXI).

131. See A/Res/2548 (XXIV).

132. A/Res/1514 (XV).

133. A/Res/2548 (XXIV).

While the Resolution condemns mercenaries as outlaws, this is only true if they are opposing national liberation and independence. In addition, the Assembly, aware that its Resolutions are only *voeux* did no more than call upon states to make recruitment and enlistment of mercenaries for such campaigns criminal offences. 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. Without the will to act, a mere affirmation is as empty as the original resolution, and in 1970 to mark the tenth anniversary of the adoption of the aforesaid *Declaration*, the Assembly, after deploring the fact that the colonial powers, particularly Portugal, South Africa and Southern Rhodesia were still "colonial" or racist rulers, and noting with grave concern that many territories were still under "colonial domination and racist regimes," reiterated its declaration that

the practice of using mercenaries against national liberation movements in the colonial Territories constitutes a criminal act and the Assembly calls upon all States to take the necessary measures to prevent the recruitment, financing and training of mercenaries in their territory and to prohibit their nationals from serving as mercenaries.<sup>134</sup>

Could anything be clearer that the General Assembly is not concerned in mercenarism or mercenaries as such, but only when they are employed against national liberation movements in colonial territories? On this basis, presumably, the General Assembly is not concerned with mercenaries who may be serving on behalf of a national liberation movement — seemingly it agrees with the view that such persons have the right ideological approach<sup>135</sup> — nor if they are serving on one or both sides in a traditional type of armed conflict. Here it should be remembered, however, that the General Assembly's definition of colonialism, imperialism, foreign rule, racism, and the like, is highly subjective, so that since 1975, when it was decided<sup>136</sup> by the barest majority (72 to 35, and 32 abstaining) that Zionism is racism it would seem that Jewish and other non-Israelis going to fight for Israel would be "criminal" mercenaries, while non-Palestinians fighting in the Palestinian cause would be looked upon as fighters in the twentieth century version of a just war.

The somewhat jaundiced attitude of the United Nations towards issues when it might be possible to argue that national liberation is in question, is to be seen also in the definition of aggression.<sup>137</sup> Among the acts in Article 3 described as constituting aggression is "the

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134. A/Res/2707 (XXV).

135. See Burchett and Roebuck, *Supra* n. 53, at 117.

136. A/Res/3379 (XXX).

137. A/Res/3314 (XXIX).

sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State."<sup>138</sup> However,

[n]othing 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 régimes or other forms of alien domination; nor the right of these peoples to struggle to that end and to seek and receive support.<sup>139</sup>

It is clear, therefore, that a people allegedly engaged in or supporting a struggle for national liberation would be able to argue that, far from acting as an aggressor by employing mercenaries, it was in fact acting in a perfectly lawful fashion, while the mercenaries and the countries from which they were coming, were carrying out obligations imposed upon them by the United Nations.

While the members of the United Nations were not prepared to carry any of these resolutions into effect so as to make mercenarism a crime, the same end was reached in some countries in so far as Rhodesia was concerned, by reason of legislation consequent upon resolutions condemning the white régime in that country — Zimbabwe — whereby nationals were forbidden from having relations with that régime, but such measures do not refer to mercenaries specifically and have to be read in the context of the Zimbabwe issue.<sup>140</sup>

### *The Angolan Civil War*

Matters took a new turn in 1976 because of the events connected with the Angolan civil war. In November, the General Assembly, reflecting the emotions occasioned by Angola, carried its prejudicial discrimination to its logical conclusion, for it now bluntly declared not only "that the practice of using mercenaries against movements for national liberation and independence constitutes a crime [but also] that the mercenaries are criminals."<sup>141</sup> If one recalls the number of members of the Organization of African Unity which are in the United Nations it is only surprising that such a declaration had not been made much earlier. In 1972, the Organization had prepared a

138. *Ibid.*

139. *Id.*, at Art. 7.

140. See e.g., statement by Prime Minister Callaghan in British House of Commons, March 10, 1976, ("Political aspirations of Africans in Rhodesia must be met if there is to be peaceful progress" *The Times* (London), March 11, 1976, at 4, col. 1); proceedings under the *Southern Rhodesia Act 1956* and the 1968 Order in Council (U.N. Sanctions Order No. 2) against Roy Dovaston for advertising for 'emigrants.' ("Anti-Communist on Rhodesia Charges" *The Times* (London), Apr. 14, 1977, at 3, col. 7 and " 'Emigrate to Rhodesia' campaigner cleared" *The Times* (London), Apr. 16, 1977, at 3, col. 4); and the report of Rhodesian Commission of Justice and Peace (summarized by Louis Herin, "Breaking the Rhodesian Spiral of Violence" *The Times* (London), Apr. 23, 1977, at 14, col. 1).

141. Res. 31/34 [G.A.O.R. Supp. 39 (A/31/39), 93].

draft *Convention for the Elimination of Mercenaries in Africa*. In so far as the draft condemns the employment of aliens to overthrow the government of any Member State or undermine its independence there is perhaps nothing with which to quarrel. But the definition goes on to include any such person who

is employed, enrolls or links himself willingly to a person, group or organization whose aim is . . . to block by any means the activities of any liberation movement recognized by the Organization of African Unity . . . [and] the actions of [such] a mercenary . . . constitute offences considered as crimes against the peace and security of Africa and punishable as such.<sup>142</sup>

The clear meaning of this is that such persons will not be regarded as legitimate combatants or, in so far as they are, would be liable to trial for crimes against peace. Such a policy is clearly discriminatory and runs counter to the whole trend of international humanitarian law which regards all combatants, regardless of nationality, as entitled to equal treatment when captured.<sup>143</sup> That this was also the effect of the General Assembly's 1976 resolution becomes clear from the statement made by the United States representative in Committee III:

[The] paragraph . . . is contrary to the 1949 Geneva Conventions and general international law in suggesting that individual combatants can be treated as 'criminals' solely on the basis of the political acceptability of the cause for which they are fighting or the fact that they may be regarded as 'mercenaries' by other parties to the issue in question.<sup>144</sup>

Others must have had similar views, for the resolution, while carried by 109 to 4, had 24 abstentions.

It is time now to refer to the events in Angola.

By the time the Portuguese announced their intention to withdraw from Angola, there were three distinct liberation movements and fighting soon broke out among them for the reins of power. The MPLA (Popular Movement for the Liberation of Angola) proclaimed a government and this received recognition from the majority of the members of the Organization of African Unity, but the FNLA (National Front for the Liberation of Angola) and UNITA (National Unity for the Total Independence of Angola) continued the struggle.<sup>145</sup> The two movements opposed to the MPLA recruited a number of non-African 'white' mercenaries who were promised high wages and were organized in a separate unit under their own command, and apparently with their own disciplinary code. It was reported that these mercenaries had committed a

142. O.A.U., Doc. CM/433/Rev. L, Annex 1 found in Burchett and Roebuck *Supra* n. 53, at 234.

143. See *Supra* n. 65, at 370.

144. [1976] *Digest of United States Practice in International Law* 13.

145. It is perhaps worth pointing out here that both the FNLA and MPLA had been admitted to the first two sessions of the Geneva Conference on Humanitarian Law 1974 and 1975, as fully recognized national liberation movements.



number of atrocities against Angolan citizens on both sides, and also that their commander had killed or ordered the killing of a number of his own men who had refused to fight. Some of these mercenaries were captured and the Government of Angola brought ten British and three United States nationals to trial for the crime of mercenarism, crimes against peace, murder, brutality, looting and the like. The trial was held in accordance with Angolan law, namely, the 1966 Code of Discipline of the MPLA which had become Angolan law by the Constitution of November 1975. It is hard to see how the accused were subject to this law, although it is possible that in so far as murder and the like were involved, even the Angolan government might have been able to try them for war crimes.

From our point of view what is important is the charge concerning mercenarism. According to the indictment, this was based on declarations by the heads of state and governments of the Organization of African Unity, and on General Assembly resolutions, most of which, as we have seen, referred to the employment of mercenaries in specific conflicts. None of these resolutions or declarations created law. The introductory paragraphs of the Organization of African Unity's draft *Convention* itself suggested that existing laws do not really cover the specific problem of mercenarism.<sup>146</sup> The judgment of the court states:

Mercenarism was not unknown in traditional penal law, where it was always dealt with in relation to homicide. . . . 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. . . .<sup>147</sup>

The judgment then states that mercenarism is therefore provided for in Article 20(4) of the Penal Code:

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!<sup>148</sup>

This would seem to imply that if mercenarism is a crime it can only be so if another common crime has also been committed to which it can be associated as an inherent part. This does not seem to have been possible in the case of Gearhart, the American executed for mercenarism, and this led American spokesmen to comment on this execution in the light of the legal status of mercenarism. Then Secretary of State Kissinger stated:

146. *Supra* n. 142.

147. G. H. Lockwood, Q.C., "Report on the Trial of Mercenaries: Luanda, Angola, June 1976" (1977), 7 *Man. L. J.* 183, at 198-99.

148. *Id.*, at 199.

[T]here is absolutely no basis in national or international law for the action now taken by the Angolan authorities. The 'law' under which Mr. Gearhart was executed was nothing more than an internal ordinance of the MPLA issued in 1966, when the MPLA was only one of many guerrilla groups operating in Angola. Furthermore, no evidence whatsoever was produced during the trial of Mr. Gearhart in Luanda that he had even fired a shot during the few days he was in Angola before his capture.<sup>149</sup>

Somewhat similar arguments were put forward by Assistant Secretary of State Schaufele in testimony before the House International Relations Committee's Special Subcommittee on Investigations:

The recruitment of mercenaries within the territory of the United States to serve in the armed forces of a foreign country is an offense under our Neutrality Laws.<sup>150</sup> . . . [A] legally accepted definition of what constitutes a mercenary does not exist in international law. Nor is the act of serving as a mercenary a crime in international law, not to mention Angolan law where the Angolan authorities were forced to use a set of guidelines for their combatants the MPLA issued in 1966. The general international practice appears to consider mercenaries in the same status as other combatants and therefore to be treated as such under the terms of the Geneva Convention of 1949 [on Prisoners of War]. This has certainly been American practice back to the Revolutionary War and was reflected in our treatment of captured Hessian troops. This was also the case in the Civil War when there had been combatants on both sides who fought for hire, adventure, or beliefs and who could be considered by some as mercenaries. . . . [T]he act of being a mercenary is not a crime in international law and mercenaries were entitled to the same status and protection as other combatants under the 1949 Geneva Conventions and the rules of warfare. Mr. Gearhart was not charged with any other specific crime. No evidence was presented that he had harmed anyone during the few days he was in Angola before his capture.<sup>151</sup>

Even authors who have condemned the use of mercenaries, especially in Angola, treating them as below contempt, and condemning Gearhart as a monetary mercenary, have tended to agree that his sole crime was that of mercenarism, aggravated by a refusal to express humility at this fact.<sup>152</sup>

### *The Diplock Report*

It was not only in the United States that the reports of mercenary activities in Angola and the trial in Luanda had repercussions, generally condemning mercenaries and those who acted as recruiting agents. Almost simultaneously with the opening of the trial, a Labour Member of the British Parliament was given leave by 184 votes to 89 to introduce the *Advertisement for the Recruitment of Mercenaries (Prohibition) Bill*,<sup>153</sup> with the aim of ending mercenary recruitment in Britain, although it did not forbid Britons from going as mercenaries, even though Mr. Hughes had described the trade of

149. *Supra* n. 144, at 714.

150. *See text Supra* n. 44.

151. *Supra* n. 144, at 714-15.

152. *See* Burchett and Roebuck, *Supra* n. 53, at 74-75.

153. "Labour MP's Bill aims to ban advertising for mercenaries" *The Times* (London), June 16, 1976, at 7, col. 3.

mercenary as "obscene. It reduces man below the level of beasts, for animals do not kill without purpose or reason, as a mercenary does. We owe a duty to end this despicable trade."<sup>154</sup>

The House of Commons was saved the need of further consideration of this Bill by reason of the fact that the Diplock Committee established in February delivered its report in August, 1976.<sup>155</sup> The Commission defined "mercenaries" in the "broad sense" as "persons who serve voluntarily for pay in armed forces other than the regular forces of their own country," and recognized that this was wide enough to include the Gurkha Regiments in the British Army, the International Brigade, the Eagle Squadron, British Jews in the Israeli Army, as well as the *condottiere* of Renaissance Italy.<sup>156</sup> The Committee pointed out that mercenaries were motivated by a variety of reasons, not always monetary, for they might include

[a] conscientious conviction that the merits of [the] cause are so great as to justify his sacrificing his own life if need be in order to ensure that it will triumph. The soldier of conscience may be found fighting side by side with the soldier of fortune — in the same ranks and for the same rate of pay. . . .

[A]ny 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. . . . To serve as a mercenary is not an offence under international law. Under the Geneva Conventions . . . a mercenary serving as a member of an organised armed force of one party to a conflict which would be recognised in international law as involving a 'state of war' between the parties to it, is entitled to the same treatment as a combatant and as a prisoner of war as any other member of that force. . . .

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

. . . No administrative action can stop a United Kingdom citizen from volunteering for service as a mercenary once he is abroad, but his journey from this country to a foreign destination, though it cannot be prevented, can be hindered and made more difficult for him by his not possessing a valid passport.

At common law, . . . a citizen of the United Kingdom has the right to leave this country and to return to it unhindered and at his own free will. A similar right in every human being is recognised by Article 13(2) of the Universal Declaration of Human Rights. . . . A passport. . . . merely makes it easier for him to exercise that right. . . . [and] if he establishes his identity by other means, an immigration officer has no legal power to prevent his embarkation.<sup>157</sup>

Since there is no legal right in a person to receive a passport and, since when granted it remains the property of the Crown, it may be refused or withdrawn. In fact, passports were withdrawn from 8 per-

154. *Ibid.*

155. *Supra* n. 83.

156. *Id.*, para. 5.

157. *Id.*, paras. 6, 7, and 17.

sons who had served as mercenaries in the Congo in 1961, from three who served there in 1967-68, four who served in Nigeria in 1968, and 54 who served in Angola, but in each case "the stable door was shut after the horse had gone," and there was nothing to stop the person involved from leaving again, especially as "an applicant for a passport is not required to state why he wants it."<sup>158</sup>

As has already been pointed out, the Diplock Report emphasized that as the *Foreign Enlistment Act* was a penal statute it had to be interpreted narrowly, and

[T]he statutory language used in the Act . . . is adapted to conditions as they existed in 1870 as respects relations between sovereign states, the kinds of armed conflict that had taken place in foreign territory during the previous decades and the means of transport and of waging war that were then available. The immense changes in those conditions which have taken place in the last hundred years and particularly since World War II have resulted in there being important omissions from the Act and a number of obscurities in the statutory language affecting most of the ingredients of the offences. These make the application of the Act to United Kingdom citizens who participate in a particular internal conflict in a foreign state a matter of grave legal doubt and the commission of an offence almost incapable of satisfactory proof.<sup>159</sup>

The Committee pointed out that the *Act* referred to foreign enlistment, and therefore could have no application to enlistment in the forces of a Commonwealth country, even though that country might be at war. Equally, since by the *Ireland Act*<sup>160</sup> the Republic of Ireland is not a "foreign state", the *Act* would not apply in that case either. It then stated that "A *fortiori* the *Act* would have no application to service in the army or air force of the régime in Southern Rhodesia, since this still remains, *de jure*, a Crown colony."<sup>161</sup> One cannot refrain from enquiring why the Report fails to mention that enlistment in these forces would therefore amount to treason.<sup>162</sup>

One of the problems that arose in connection with Angola, as it has and will in similar cases, related to the status of the parties to the conflict, a question which concerned the Legal Officers of the Crown on earlier occasions.<sup>163</sup> On this matter the Report was rather full and tended to illustrate a continuity in the official interpretation:

The expanded definition of 'foreign state' prevents its being confined to a government that is recognised by HM Government as the *de jure* sovereign government over a particular area. It is . . . broad enough to make it an offence to enlist in armed forces raised by rival governments . . . or forces . . . raised by insurgents . . . in their . . . struggles for independence. But the questions of whether and, . . . when, the Act becomes applicable to particular cases of internal struggles for power between rival forces within a state in the varied circumstances in

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158. *Id.*, para. 20.

159. *Id.*, para. 26.

160. 12, 13 & 14 Geo. 6, c. 41, s. 2 (U.K.).

161. *Supra* n. 83, para. 32.

162. See e.g., L. C. Green, "Southern Rhodesian Independence" (1969), 14 *Archiv des Völkerrechts* 155.

163. See *Supra* n. 80-82.

which such struggles may arise today, are capable of raising so many doubts as to make this part of the Act unsuitable . . . to continue to be used as a penal statute. The expanded definition . . . is capable of including within its ambit armed forces raised by groups of persons who are *de facto* exercising governmental powers over a particular identifiable area even though their right to do so *de jure* is recognized neither by Her Majesty's Government nor by any other sovereign state. But the description of the offences requires that the persons on whose behalf the force is raised should also constitute an entity possessed of characteristics which in international law entitle it to recognition as being 'at war' with another state and so enable it to exercise belligerent rights vis-à-vis neutral states. . . . [T]his requires not only that the persons controlling the force should be claiming to be entitled to act as an independent sovereign government but that they should also have been actually exercising effectively and with some degree of permanence exclusive governmental powers over an identifiable part of the territory to which they lay claim; and their opponents must either be a government which is recognised *de jure* by Her Majesty's Government or must also satisfy the same criteria as a *de facto* government,<sup>164</sup>

and it is extremely doubtful whether these conditions were in fact satisfied at the time of the Angola situation. In fact, the Committee commented that

[U]ntil the status in international law of each of the parties to the struggle in Angola was clear, the United Kingdom Government had no power in law to stop the enlistment or recruitment of mercenaries for service on behalf of any of those parties.

[Further,] it would be necessary to prove that Her Majesty's Government had recognised the persons on whose behalf the armed force was raised and the persons against whom they were fighting as being *de facto* or *de jure* at the time that the accused enlisted. So in practice no offence can be committed until Her Majesty's Government . . . is prepared to accord that recognition formally [— a view that does not appear to tally with earlier interpretations]; and it would be a breach of the United Kingdom's own obligations under international law to grant this recognition to a *de facto* government before the criteria were satisfied.<sup>165</sup>

Since, in its practice, the United Kingdom tends to base its recognition policy on political rather than legal criteria, and since there is no record of any country ever having been held liable for premature recognition, it is perhaps unfortunate that the Committee did not give any indication of the basis for this last assertion.

Many of the recent conflicts, particularly in Africa, have been fought between, or have involved the use of guerrilla forces, and in the light of its above comments the Diplock Committee considered it

doubtful whether the Act could ever apply to enlistment in guerrilla forces or in security forces engaged in their suppression if the guerrillas were not purporting to act as the regular government of a particular part of the state's territory but were seeking to bring down the existing régime throughout the territory by force of arms.<sup>166</sup>

In the light of this statement it would appear that the *Foreign Enlistment Act* could probably not be invoked against any mercenaries participating in the activities of SWAPO (South West African

164. *Supra* n. 83, paras. 34-36.

165. *Id.*, paras. 39 & 35.

166. *Id.*, para. 36.

People's Organisation) or the ANC or PAC (African National and Panafricanist Congress) against South Africa.

[Moreover], since the offence consists of enlistment and not a continuing offence of service as a mercenary the applicability of the Act to a particular mercenary might depend upon the stage that had been reached in an internal struggle between rival factions at the time he enlisted. A mercenary who had enlisted before the group on whose behalf the force was raised had won and exercised control over an identifiable area of the disputed territory and had been formally recognised . . . as a *de facto* government would have committed no offence, while his comrade-in-arms who had enlisted in the same force after that event would be liable to conviction.<sup>167</sup>

It is highly probable that however carefully legislation was worded, the same practical difficulties would exist and the same loopholes present themselves. This led the Committee to the conclusion that it would not be

practicable or just to try to define an offence of enlisting as a mercenary in such a way that guilt would depend upon proof . . . of a particular motive as activating the accused to do so. . . . [A] penal prohibition sought to be imposed by the State upon what an individual does abroad involves a restriction on the liberty of the individual which can only be justified on compelling grounds of public interest. . . . Accordingly we would *recommend the abolition of any statutory offence by a United Kingdom citizen of enlisting as a mercenary while abroad or of leaving the United Kingdom in order to do so. . . . [W]e see no advantage in retaining a statutory offence of enlisting in the United Kingdom for service as a mercenary abroad. . . . We do not think that it can be justified . . . to impose a general prohibition on United Kingdom citizens from serving . . . in the armed forces of a foreign state at a time when there are no hostilities in which that force is engaged. To make it a criminal offence . . . for him not to desert that force as soon as it became involved in external or internal conflict, to which the United Kingdom was not itself a party, would . . . be an impermissible affront to the sovereignty of the foreign state concerned*<sup>168</sup>

and the Committee was, therefore, opposed to the idea of making mercenarism criminal. On the other hand, it was opposed to recruitment and advertising therefor, so that

any fresh legislation creating . . . new offences in relation to recruitment . . . should take the form of an enabling Act empowering Her Majesty's Government . . . by Order in Council . . . requiring affirmative resolutions by both Houses of Parliament to apply the provisions of the Act to the armed forces specified in the Order. . . . The description of proscribed forces need not necessarily be by reference to the name that they bore; it could be by reference to the area in which they were operating. . . .<sup>169</sup>

If such an Act were passed, the concept that service would need to be on behalf of a 'foreign' state would end, for the proscribed forces could be operating equally in a Commonwealth country or a colony.

As yet, there is no indication that the British Government has accepted the recommendations in the Diplock Report. Equally, there

167. *Id.*, para. 36.

168. *Id.*, paras. 42 & 44.

169. *Id.*, para. 49.

has been no official indication of any intent to pass legislation making enlistment as a mercenary illegal or taking any steps to forbid recruitment or advertising. In Australia, on the other hand, the government itself introduced legislation<sup>170</sup> forbidding recruitment and advertisement for service with the armed forces of a foreign country, as well as the preparing for or engaging in incursions into foreign countries. But it does not prohibit enlistment of mercenaries outside Australia.

### The "International Commission of Enquiry on Mercenaries"

While third states were considering the problems arising from the employment of their nationals in Angola, other developments on an international level were taking place. In an effort to give credibility to their show trial, the Government of Angola invited 51 'Commissioners' from 37 countries to attend the proceedings and draft an international convention on the suppression of mercenarism, prepare a general declaration on the subject and report on the fairness of the trial. Some of the members of the Commission were appointed by governments friendly to the MPLA, some were nominated by political parties, while some were personal invitees known for their sympathy for left-wing political movements.

What is important is that this so-called 'International Commission of Enquiry on Mercenaries' had no official international status, cannot be regarded as a normal international body representing any countries or learned bodies, and has about as much credibility as the so-called Russell Trial of Lyndon Johnson.<sup>171</sup> In the normal way, one would be able to ignore it as a pure propaganda effort, despite the fact that some of its members may truly have been imposed-upon 'innocents abroad.' However, some politicians from the third world have given its findings almost an official status.

The only thing that need be said of the relation between the Commission and the trial is that the former produced its general declaration and the draft convention before the judgment was delivered. Despite the comment that the trial was fair<sup>172</sup> one cannot but feel that its condemnation of mercenarism as such must have contributed to the attitude of a tribunal which did not consist solely of trained judges or lawyers. In its Declaration<sup>173</sup> the Commission ac-

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170. *Crimes (Foreign Incursions and Recruitment) Act*, in *Commonwealth of Australia Acts* (1978), no. 13.

171. J. Duffet (ed.), *Against the Crime of Silence* (1968).

172. *Supra* n. 147, at 193. Mr. Lockwood here states that he is commenting from a purely procedural point of view; it could hardly have been otherwise, since his Committee on 'fairness' started 3 days after the trial opened and he left before it concluded.

173. Original French text supplied by Dr. Al-Faluji, Head, Iraqi Delegation, Geneva Conference on Humanitarian Law in Armed Conflict.

cepted as truth the allegations made against the mercenaries at their trial, accepting the Angolan government's propaganda statement that the recruitment, despatch and equipment of the mercenaries could not have been effected without the tacit approval of the countries where they had been recruited or equipped, and Great Britain and the United States were specifically mentioned — allegations which both governments vehemently denied. It then proceeded to allege that mercenaries were being recruited all over the world, in defiance of international public opinion, and to confront liberation movements as part of an imperialistic counter-offensive against the progress of freedom and world peace. Since it was considered that Namibia and Zimbabwe were in imminent danger of mercenary activities the Commission called upon the world, its organisations, its governments and its people to adopt without delay the proposed Convention making mercenarism criminal. The draft taking as its basis the variety of resolutions and declarations concerning Africa already referred to, which were regarded as "indicative of the development of new rules on international law making mercenarism an international crime," declares that

The crime of mercenarism is committed by the individual, group or association, representatives of states and the State itself which, with the aim of opposing by armed violence a process of self-determination, practises any of the following acts:

(a) organises, 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 enrol in the said forces;

(c) allows the activities mentioned in paragraph (a) to be carried out in any territory under its jurisdiction or in any place under its control or affords facilities for transit, transport or other operation of the above mentioned forces.<sup>174</sup>

This makes no reference to increased pay as an inducement to enlistment, so that an alien serving in a regular armed force only becomes a mercenary if that armed force is engaged in activities against the "process of self-determination," and no attempt is made to indicate how one decides that the operations against which such forces are sent are in fact in aid of this process.

Since, at present, no state recognizes the existence of Rhodesia, it is probably true to say that there is no Rhodesian nationality, so that its military forces consist of people who do not possess the nationality of the country where they are acting, namely Zimbabwe, and since it would appear that the African countries at least recognize the 'Popular Front' as engaged in the 'process of self-determination' logically every member of the Rhodesian forces is guilty of the crime

174. Original French text supplied by Dr. Al-Faluji; English translation found in Burchett and Roebuck, *Supra* n. 53, at 237-40.



of mercenarism. Since a number of countries in the Third World have equated the Palestine Liberation Organization with a popular liberation movement and having secured the passing of a General Assembly resolution equating Zionism with imperialism,<sup>175</sup> one is compelled to assume that the same would be considered true of all members of the Israel armed forces, at least those of them fighting against the P.L.O., for it might be possible to argue that Israeli forces engaged against Egyptian forces in, for example, Sinai, are engaged in a regular armed conflict, even though there is little doubt that in such circumstances Egypt and its Arab and African friends would maintain that it was fulfilling its obligations as a member of the United Nations on behalf of self-determination.

Perhaps the most striking feature of the definition is that it includes states and declares that they, too, if their governments allow the recruitment of mercenaries, are guilty of crime — a somewhat new development in international law, and probably one that could only have been invented by a body not terribly concerned with, or competent in, the realities of international law and politics. When a state representative becomes a criminal under this definition, he is to be punished for his acts or omissions. As to the state, “any other State may invoke such responsibility: (a) in its relations with the State responsible, and (b) before competent international organisations.” At present, it is somewhat doubtful whether the International Court of Justice would be willing to take on this jurisdictional responsibility, and whether there would be mutual declarations under the ‘Optional Clause’ to grant jurisdiction. The draft makes no provision for a competent tribunal to be established, merely providing that in the event of a dispute as to interpretation or application the issue shall be settled by negotiation or a competent international tribunal or arbitrator acceptable to all parties — does this include the national liberation movement involved?

Assuming one is prepared to accept the view that mercenarism is a crime in itself, there could be little quarrel with the provision that the individual concerned is personally responsible for all other criminal acts he may have committed, nor perhaps with the principle that the maxim *aut punire aut dedere* is to operate. While one might agree that war crimes and other common crimes are not to be regarded as political offences,<sup>176</sup> this becomes more difficult to accept when mercenarism within this wide definition is equally regarded as a common crime. The position is made even more unacceptable by Ar-

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175. See *Supra* n. 136.

176. See L. C. Green, “Political Offences, War Crimes and Extradition” (1962), 11 *Int. & Comp. Law Q.* 329.

ticle 4 which postulates that "mercenaries are not lawful combatants. If captured they are not entitled to prisoner of war status." Not only does this discriminate among those engaged in armed conflict, but it means that until such time as the conflict becomes one opposed to self-determination the individual soldier is a protected combatant. After the conflict changes its character, any legitimate act of war committed by him becomes illegal and he may find himself on trial, not merely for mercenarism but for murder in respect of any member of the national liberation movement concerned that he may have killed in the course of battle.

The only thing that may be said in favour of this draft is that, since it is tied in with the concept of self-determination, it may be short-lived, for, hopefully, it will not be long before all peoples have achieved this, and this twentieth century version of a political "Sermon on the Mount" will have dropped from the vocabulary of international law. Unfortunately, however, the concept is subjective and every revolutionary movement, and its supporters, claim to be engaged in a struggle for self-determination and national liberation, as has been made clear by the Soviet reaction in June 1978 to the possible creation of a Pan-African Peacekeeping Force supported by the western powers and directed to preserving some, at least, of the African governments against foreign subversion and incursions.

At one time it appeared as if this draft might be peddled at the Geneva Conference on Humanitarian Law in Armed Conflict. However, general support was given to a more modified version put forward by Nigeria which omitted the objectionable ideological features of the Luanda draft. It is true that Article 47 of Protocol I additional to the *Geneva Conventions of 1949*, relating to the *Protection of Victims of International Armed Conflicts, 1977*,<sup>177</sup> retains the undesirable discriminatory provision denying a mercenary his status as a combatant or a prisoner of war. However, the definition of a mercenary is less objectionable. The most important change from Luanda lies in the fact that the definition is now general in scope and no longer has any reference to struggles for national liberation, even though these by Article 1 have been elevated to the level of international armed conflicts.<sup>178</sup> What is perhaps of great significance is that there is no provision on mercenaries in Protocol II<sup>179</sup> concerning non-international conflicts. While this may clarify some of the issues with regard to internal conflict and guerrilla activities mentioned in the Diplock Report<sup>180</sup> the matter remains confused in that the

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177. *Supra* n. 1.

178. See L. C. Green, "The New Law of Armed Conflict" (1977), 15 *Can. Y. B. Int'l. Law* 3.

179. *Supra* n. 177, at 1442.

180. See *Supra* n. 164.

borderline between a Protocol I and a Protocol II situation is not clear, and all one dare say is that if the movement concerned is not in control of part of the national territory, and not operating from outside, Protocol I might not apply — this fact was seemingly not sufficiently appreciated by some of the third world countries at Geneva, and would probably have excluded many of the incidents in which mercenaries were engaged in Africa between 1960 and 1977. According to Article 47

A mercenary is a person who:

- (a) is specially recruited locally or abroad in order to fight in an armed conflict;
- (b) does, in fact, take a direct part in the hostilities;
- (c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
- (d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
- (e) is not a member of the armed forces to the conflict, and
- (f) has not been sent by a State which is not a Party to the conflict on official duty as a member of the armed forces.<sup>181</sup>

Perhaps the most notable aspect of the article is that it no longer describes the mercenary as a criminal, although it does lay him open to proceedings as an unprivileged person taking part in hostilities when he is not granted the status of combatant. There is no suggestion that the state involved in any way in his recruitment is itself criminally liable. Nor does it require the parties to the Protocol to make mercenarism a crime or forbid enlistment within their territory.

In addition, the segments of the definition are cumulative, so that embodiment of the mercenaries within the armed forces of a party to the conflict would remove from those persons the slur of mercenarism, subject to the contention, of course, that they only enlisted for reasons of reward and were paid on a higher scale than nationals holding the same rank and performing the same task. It is probable, however, that mercenaries enlisted into technical units may well hold the same rank and be described as performing the same tasks, but since they hold abilities not possessed by the locals their pay might in fact be higher. Since the mercenary is one who takes a direct part in the hostilities and has been specially recruited for this purpose, 'advisers' would not fall within the condemning rubric. However, Polisario — the national liberation movement in the Sahara — has announced its intention to treat French technicians captured in Mauretania as mercenaries, an announcement that was bitterly condemned by France.<sup>182</sup> Equally exempt are members of the

181. *Supra* n. 177.

182. "Le Polisario traite en 'mercenaires' les Techniciens français de Mauritanie" *Le Monde*, May 24-25, 1977, at 1, col. 3-5.

armed forces sent by their government, even if they are described — as were the German and Italian supporters of Franco's Nationalists in Spain — as volunteers. Thus, Cubans in Angola or Ethiopia would not be mercenaries, nor for that matter would be the 'traditional mercenary' of the critics, namely the French Foreign Legion operating on behalf of the Government of Zaire in 1978. Nor would it include the Gurkha units of the British Army, or officers seconded to, or on contract as members of, foreign units. Since residents are not regarded as mercenaries even though they are specially recruited and receive a higher pay than the regular servicemen, it would seem that, for example, non-Israelis wishing to serve in the Israeli forces would merely be required to take up residence for such period of time as is prescribed by Israeli law in order to become lawful combatants. The same is not true for the Rhodesians, for the Protocol definition still involves nationality considerations. Their situation is not helped by the decision of the World Council of Churches, seeking apparently to plug the loophole in the Protocol concerning punishment, at least in so far as Rhodesia is concerned, calling on member-churches "to urge their government to treat enlistment in the armed forces of Rhodesia regime as a criminal offence, to punish offenders accordingly, and to outlaw any recruitment for this purpose."<sup>183</sup>

While the Protocol definition may have omitted some of the most unpleasant parts of the Luanda formula, it retains the motive test. A mercenary "is motivated essentially by the desire for private gain," so that any non-national captured would have to be examined as to the motive which led him to enlist. His comrade, paid the same, but motivated — at least, so he says — by ideological sympathy, though this of course could not protect him in a campaign against national liberation, would not be considered a mercenary and would be a lawful combatant entitled to prisoner of war status. One should not overlook the warning of Brian C.J. in 1477, "It is common knowledge that the thought of man shall not be tried, for the Devil himself knoweth not the thought of man."<sup>184</sup> or as it has been expressed more recently "I do not see how intent can make infringement of what otherwise is not. The less legal rights depend on someone's state of mind, the better."<sup>185</sup>

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183. "Churches urged to put pressure on oil firms" *The Times* (London), Aug. 6, 1977, at 3, col. 6-7.  
184. Y. B. 17 Edw. 4, Pasch., fo. 2, cited with approval in *Brogden v. Metropolitan Ry. Co.* (1877), 2 App. Cas. 692 (H.L.) (per Lord Blackburn).  
185. *Mercoid Corp. v. Mid-Continent Investment Co.* (1944), 320 U.S. 661, at 679-80. (per Justice Jackson).

### Conclusion

The Protocol is in force only for those ratifying, while the various resolutions of the United Nations and other international organizations in this area are not law-making, and since it is of the essence of humanitarian law and of the law of war that it should be even-handed, so that even those engaged in an unlawful war remain protected by the law,<sup>186</sup> mercenaries at this moment, are still legally combatants, entitled to treatment as prisoners of war and only liable to trial for such crimes against the law of war or the criminal law that they may commit. International law, as yet, does not regard mercenarism as an offence. Moreover, since the drafting of Protocol I it has become noticeable that the African countries, the very countries that led the campaign against mercenaries, are no longer so concerned when alien troops, even so mercenary a unit as the French Foreign Legion, are engaged in keeping a recognised African government in power. True, it would seem that ideology is here important. If the proposed Pan-African Peacekeeping Force comes into existence, it may no longer be necessary for the Foreign Legion to play a part on the African stage. But will the role of such a force be any different from that of, for example, the Cubans operating on behalf of left-wing governments in Africa, ostensibly at the invitation of such governments? If the British Foreign Secretary can say at the 1978 Lord Mayor's Banquet that "[they] are like private armies in the Middle Ages, which moved around 'tilting the military balance indiscriminately at the whim of the feudal barony,'"<sup>187</sup> then the Soviet Union is equally entitled to describe the western-sponsored and supported Pan-African Peacekeeping Force as a tool of the imperialists directed at destroying the national liberation movements of Africa — it is, of course, unfortunate, as the Soviet and Cuban role in Ethiopia and Somalia illustrate, that today's idealists are yesterday's neo-colonialists, and *vice-versa*. So long as the present political temper prevails, with its rival power interests, it will matter little how the treaty text defines mercenaries.

In any case, if the Diplock Report and events in Africa since the signature of Protocol I are any indication, it may well be that Article 47 will be subject to reservation. Since there were hints at Geneva that if such a politically motivated provision were in fact reserved, the majority of third world states would not ratify the Protocol as such, it may well be the law will remain as it has always been. The

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186. See e.g., H. Lauterpacht, "Rules of Warfare in an Unlawful War," in Lipsky (ed.), *Law and Politics in the World Community* (1953) 89, at 112, and in 2 L. Oppenheim *International Law* (1952) 231, at 299; see also "The Law of Armed Conflict" 2 G. Schwarzenberger, *International Law* (1968) 98-99 and 105-06, and G. Schwarzenberger, *International Law and Order* (1971) 235.

187. "Russian role in Africa denounced by Dr. Owen" *The Times* (London), Apr. 6, 1978, at 1, col. 1-2.

new threats to independence in Africa may herald a period in which the African states themselves strengthen their Pan-African Peacekeeping Force, with a leavening of white mercenaries, leading us back to a period when the profession of arms is again like any other, open to those who wish to follow it, and made use of by those employers who require the services of such professionals. Morality, particularly when fed by propaganda and pseudo-idealism, may condemn the profession. While law should reflect the morality of those it governs, it should not be affected by the vagaries of the season, nor should it hesitate when morality runs away from justice to be the medium through which level-handed justice and humanity remain supreme.