

ABHANDLUNGEN

Mercenaries: Lawful Combatants or War Criminals?

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1. Modern Mercenarism — An African Phenomenon

A mercenary, according to a widely accepted definition, is "one who serves or acts solely for motives of personal gain . . . , particularly a soldier who offers himself for service in any army which may hire him" ¹⁾. This category existed mainly in the past, in the Middle Ages and Renaissance, when the nation States had not yet emerged and there were no regular armed forces. Later, the phenomenon practically disappeared or acquired different characteristics; thus, the Foreign Legion, created in 1831, is, in fact — despite its composition — an integral part of the French Army and its members are not mercenaries. Mercenarism reappeared — as a phenomenon of worrying dimensions — in 1960, following the downfall of colonialism and the emergence of new States. In this phase, mercenaries are to a large extent used by ex-colonial powers and, at least in some instances, by multinational companies. Some States

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Abbreviations: AJIL = American Journal of International Law; BYIL = British Year Book of International Law; CDDH = Conférence diplomatique sur le droit humanitaire; FNLA = Frente Nacional para a Libertação de Angola; OAU = Organisation of African Unity; UNYB = Yearbook of the United Nations.

¹⁾ Encyclopaedia Britannica, vol. 15. p. 264. On mercenaries in general see Le Bailly, *Une poignée de mercenaires* (Paris 1967); Mockler, *Mercenaries* (London 1969).

feel that they can no longer rely on the direct efforts of the national armed forces to subdue, or to exercise a *de facto* control over emerging countries; they consequently resort to hired soldiers. Therefore, mercenaries (almost exclusively white) are often employed against national liberation movements. Occasionally, they are also used to destabilise some developing countries in order to promote secessions or to forcefully impose the protection of foreign interests (in the latter cases, recourse to mercenaries occurs within the framework of civil wars and *coups d'Etat*). Thus, in 1960, mercenaries aided Tchombe in an attempt to separate Katanga from independent Congo²). In 1964, they helped the royalists of El Badr in the Yemen in their struggle against the republicans, who, in turn, were helped by Nasser's troops³). In 1964/65, mercenaries were used by Tchombe to suppress the revolt of the Simbas⁴). In 1967, European mercenaries, aided by dissident Katangese gendarmes, initiated military action against the central Congolese authorities⁵). Also in 1967, several mercenaries helped the Biafran rebels in their struggle against the Nigerian authorities⁶). In 1970, the Republic of Guinea was invaded by mercenary troops, organised — according to OAU — by Portugal, who had also dispatched its own regular troops⁷). It has been alleged that, in 1975, large numbers of mercenaries were organised and equipped in South Africa in order to penetrate the territories of Angola and Mozambique⁸). It is certain that,

²) Mockler, *op. cit.*, pp. 155–170. ³) Mockler, *op. cit.*, pp. 254–256.

⁴) Mockler, *op. cit.*, p. 171. According to this author, “the Simba revolt was decolonization in its purest form. Many African leaders had proclaimed that it was not enough to get rid of the colonial masters or even the neo-colonial economic powers, but none except the Simbas actually put into practice the idea of ‘the African solution’ and ‘negritude’” (*ibid.*, pp. 171–172).

⁵) Mockler, *op. cit.*, pp. 178–193. See also The Annual Register of World Events in 1967 (London 1968), pp. 330–331.

⁶) Mockler, *op. cit.*, pp. 256–275.

⁷) See The Annual Register . . . in 1970 (London 1971), pp. 180, 254, 265. See also, *infra* at note 31 the reference to the OAU resolution on Guinea.

⁸) In 1975, in the IIIrd Committee of the Geneva Diplomatic Conference on the Development of Humanitarian Law Applicable in Armed Conflicts, the delegate of Ukraine stated as follows: “There are reports that recruiting agents are seeking mercenaries for further undertakings against the Portuguese colonies which are now in the process of achieving independence. According to recent information, a detachment of mercenaries has been formed within the territory of the Republic of South Africa and that of Rhodesia which is ready to mobilize and to enter the territory of Angola and Mozambique at 72 hours’ notice. This unit numbers between 500 and 700 cut-throats equipped with secret supplies of arms. The recruiting agents are active in Western Europe, Canada, and the United States of America” (CDDH/III/SR. 33–36, Annex, p. 53, para 8. See also the summary in CDDH/III/SR. 34 para. 47). See, however, The Annual Register . . . in 1975 (London 1976), pp. 214, 220, 235–236, 339.

in 1976, white mercenaries entered from Zaire and helped FNLA to fight against the armed forces of the Angolan central government⁹). In 1977, white and coloured mercenaries – organised, according to some sources, by Morocco – tried to overthrow the government of Benin (formerly Dahomey)¹⁰). Finally, a recent instance of mercenarism is the occupation of the Comoro Islands in May 1978 and the overthrow of the legitimate government¹¹).

There is another aspect of this disturbing phenomenon which should not be neglected. In Africa, mercenaries are also frequently employed by independent States in order to strengthen their positions, generally in the security services, or to train African troops. According to a reliable source, Zaire, for example, recruited European and South African mercenaries in June 1978 with a view to forming an elite armed force for the defence of the province of Shaba¹²). This phenomenon, which clearly confirms the fragility of African States' structures and their dangerous reliance on external support, explains, amongst other things, the reluctance shown by certain African States to agree upon international rules which might eliminate mercenarism and explains also the positions taken by them in the UN and OAU.

A third aspect of mercenarism should be noted. Recently, Cuban regular troops have been operating in Angola and Ethiopia (fighting, in the latter country, both in the Ogaden, against Somali troops supporting a national liberation movement, and against the assaults of the Eritrean national liberation movements). Some States and certain of the national liberation movements against which the Cuban troops have been deployed, have begun to refer to them as "mercenaries". Indeed, on 17 March 1978, the President of the United States, discussing Soviet military intervention "in local conflicts" stated that Soviet troops operated "along with

⁹) See The Annual Register . . . in 1975, pp. 235–236, and The Annual Register . . . in 1976 (London 1977), p. 330. More generally see Valdes Vivo, Angola: Fin del mito de los mercenarios (La Habana 1976) and Burchett/Roebuck, Prostitutas de Guerra: Mercenários de Hoje (Lisboa 1977). See also *infra*, para. 5.

¹⁰) See e. g. Libyan Press Review, Tripoli, 31 January 1977, pp. 4–5. According to the International Herald Tribune of 4 March 1977 (p. 2), the king of Morocco "ordered his foreign minister, Ahmed Laraki, to walk out of an OAU foreign ministers' meeting in Lomé, Togo, last week following an allegation by Peter Onu, OAU deputy Secretary-General, that Morocco has trained white and black mercenaries for an attempted invasion of the leftist-ruled West African state of Benin, formerly Dahomey".

¹¹) See Ramaro, La saison des mercenaires, Afrique-Asie, no. 163 (1978), pp. 32–35; Newsweek, 21 August 1978, p. 8.

¹²) See Journal de Genève, 12 June 1978, p. 16.

mercenaries from other communist countries" — an unambiguous reference to Cuba¹³). Equally, in 1978, official Somali sources defined the Soviet and Cuban troops fighting in the Ogaden as "mercenaries"¹⁴). These statements evidence a growing tendency to extend the traditional notion of "mercenaries" to include regular troops fighting in other continents, not for hire, but for political or ideological reasons. This tendency remains embryonic and — as we shall see — has not been consolidated at the legislative level. It may well develop however and, in any case, it helps to explain, perhaps, certain attitudes adopted by Socialist countries in the area of international legislation aimed at controlling the phenomenon of mercenarism.

In the following pages I propose to illustrate how traditional international law provides for mercenarism¹⁵). I will attempt to ascertain whether they are considered legitimate belligerents or unlawful combatants. I will then show how the Socialist and African States have endeavoured to work out a whole strategy — at the legislative level as well — for the struggle against mercenarism and the results they have achieved.

¹³) See International Herald Tribune, 3 April 1978, p. 1.

¹⁴) See Corriere della Sera, 6 March 1978, p. 1.

¹⁵) On mercenaries in international law see: Schwarzenberger, *Terrorists, Hijackers, Guerrilleros and Mercenaries*, Current Legal Problems, vol. 24 (1971), p. 279 ff.; van Deventer, *Mercenaries at Geneva*, AJIL 1976, p. 211 ff.; Martin, *Mercenaries and the Rule of Law*, ICJ Review (The Review. International Commission of Jurists) 1976, p. 51 ff.; W. T. Mallison and S. V. Mallison, *The Juridical Status of Irregular Combatants under the International Humanitarian Law of Armed Conflicts*, Case Western Reserve University Journal of International Law 1977, p. 112 ff.; Viñal Casas, *El estatuto jurídico-internacional de los mercenarios*, Revista Española de Derecho Internacional 1977, p. 289 ff.; Tercinet, *Les mercenaires et le droit international*, Annuaire français de droit international 1977, p. 269 ff.; Cotton, *Comment: the Rights of Mercenaries as Prisoners of War*, Military Law Review 1977, p. 143 ff.; David, *Les mercenaires en droit international (Développements récents)*, Revue belge de droit international 1977, p. 197 ff.; *idem*, *Mercenaires et volontaires internationaux en droit des gens* (1978); Burmester, *The Recruitment and Use of Mercenaries in Armed Conflicts*, AJIL 1978, p. 37 ff.; Mallein, *La situation juridique des combattants dans les conflits armés non internationaux* (Thèse Grenoble 1978), p. 146 ff.; Green, *The Status of Mercenaries in International Law*, Israel Yearbook on Human Rights 1978, p. 9 ff.; Yusuf, *Mercenaries in the Law of Armed Conflict*, in: Cassese (ed.), *The New Humanitarian Law of Armed Conflict* (1979), p. 113 ff. Elias, *New Horizons in International Law* (1979), p. 199 f. — In addition, see the articles cited *infra*, at note 37.

2. *Traditional International Law*

The current international law regarding prisoners of war, articulated in the IIIrd Geneva Convention of 1949, starts from the fundamental dichotomy between international armed conflict (*i.e.* wars between States) and internal armed conflict (civil wars, national liberation wars)¹⁶. Concerning the former category, international law considers as legitimate belligerents and therefore entitled to prisoner of war treatment in the event of capture, the “armed forces of a Party to the conflict” and the “members of militias or volunteer corps forming part of such armed forces” as well as “other militias and members of other volunteer corps, including those of organised resistance movements”, on condition that they fulfil certain specific requirements¹⁷). Therefore, if mercenaries participate in an international armed conflict, fighting on behalf of one of the belligerents and if they satisfy the required conditions, they may be considered lawful combatants. If they do not meet all such requirements, they are treated as civilians participating in armed hostilities and their belligerent activity amounts to “war crimes”, that is, violations of the laws and customs of war¹⁸). By contrast, in the case of internal armed conflicts, international law does not intervene to regulate the legal status of the parties to the conflict, who remain subject to the national law of the State in whose territory the conflict takes place. Thus, if mercenaries operate on behalf of the incumbent government (as in the Congo in 1964/65), they may be treated as troops of the regular army and are therefore considered lawful belligerents, though naturally within the legal system of the established government. As far as the rebels are concerned, they are free to treat the mercenaries as they consider most convenient (*i. e.* as legitimate fighters or as common criminals). Such a situation may, therefore, give rise to conflicting definitions of the mercenaries. If, on the

¹⁶) See Baxter, *The Geneva Conventions of 1949 and Wars of National Liberation*, *Rivista di diritto internazionale* 1974, p. 193 ff.; Cassese, *Current Trends in the Development of the Law of Armed Conflict*, *Rivista trimestrale di diritto pubblico* 1975, p. 1410. For a different view see Abi-Saab, *Wars of National Liberation and the Laws of War*, *Annales d'Etudes internationales* 1972, p. 96 ff.

¹⁷) According to art. 4, *lit. A*, para. 2 of the IIIrd Geneva Convention of 1949 they must fulfil the following conditions: “(a) of being commanded by a person responsible for his subordinates; (b) of having a fixed distinctive sign recognizable at a distance; (c) of carrying arms openly; (d) of conducting their operations in accordance with the laws and customs of war”.

¹⁸) See in general Baxter, *So-called “Unprivileged Belligerency”: Spies, Guerrillas, and Saboteurs*, *BYIL* 1951, p. 338 ff.

other hand, the mercenaries operate on behalf of the rebels (as in the Congo in 1961, Biafra in 1967 and Angola in 1976), they may be considered common criminals by the authorities in power and on a par with the other fighters of the insurgent faction. Once again, one is faced with conflicting definitions. Different treatment may be granted to mercenaries (as well as to other fighters) if the dissident armed forces and the lawful government conclude an agreement — in accordance with art. 3, para. 3 of the four Geneva Conventions of 1949 — by which it is decided, amongst other things, to consider mercenaries as legitimate belligerents if they fulfil the conditions set forth by the IIIrd Geneva Convention. Such agreements are not easily reached, however, and, in fact, do not appear to have been worked out in the course of civil wars — at least in the field under consideration.

From the foregoing, it is clear, therefore, that current international law does not make provision for the phenomenon of mercenarism in its present manifestations. As was mentioned above, mercenaries participating in armed conflicts operate almost exclusively within the framework of civil wars or wars of national liberation. Current international law in fact ignores the status of those participating in such wars. It follows that mercenaries who have taken part in armed conflicts since 1960 have neither been favoured nor handicapped by traditional international law. In particular, third States are not obliged to prevent their citizens from going abroad to enrol as mercenaries (as is commonly known, international law only prevents States from opening enrolment agencies and from organising, training, equipping and drilling persons who intend to act subversively against another State)¹⁹. Therefore, international law ultimately leaves it to national law which, in turn, as has already been noted, protects mercenaries as long as they fight alongside, and on behalf of the established government, while considering them as “outlaws” and bandits if they fight on behalf of the insurgents. Consequently, in the very frequent instance of mercenaries participating in armed action against a government in order to overthrow

¹⁹) The international law governing subversive activities against foreign States is clearly stated in Oppenheim/Lauterpacht, *International Law*, vol. I (8th ed. London 1955), p. 293: “While subversive activities against foreign States on the part of private persons do not in principle engage the international responsibility of a State, such activities when emanating directly from the Government itself or indirectly from organizations receiving from it financial or other assistance or closely associated with it by virtue of the constitution of the State concerned, amount to a breach of International Law”.

or destabilise it, the outcome depends on the authority and strength of that government: legally, it may treat the mercenaries as criminals, on condition that it is capable of defeating and capturing them. Otherwise, international law does not provide States with any specific weapon against this category of belligerent.

3. Action Taken by the United Nations against Mercenaries

The United Nations had to deal with the problem of mercenaries as soon as it arose, and it did so within the framework of the peace-keeping action carried out in the Congo. In 1961, having ascertained that white mercenaries were helping Tchombe's secessionist forces, the Security Council and the General Assembly requested "the immediate withdrawal and evacuation from the Congo of mercenaries"²⁰). The Security Council countered the non-compliance with these resolutions with resolution S/5002 of 24 November 1961, wherein it authorised the Secretary-General "to take vigorous action, including the use of a requisite measure of force, if necessary, for the immediate apprehension, detention pending legal action and/or deportation of . . . mercenaries"²¹).

At this stage, therefore, the UN dealt with mercenaries only in relation to a specific case. Moreover, it did not give importance to the main problem, *i. e.* the relationship between the mercenaries and their States of origin or the States by which they are supported and equipped. The intervention of mercenaries in the Congo and Nigeria in 1967 (see *supra*, para. 1) prompted the African States to give the problem greater priority. In fact, in 1968 the General Assembly approved a resolution on the territories under Portuguese administration which, in its operative paragraph 9, reads as follows:

"Urgently appeals to all States to take all measures to prevent the recruitment or training in their territories of any persons as mercenaries for the colonial war being waged in the Territories under Portuguese domination and for violations

²⁰) See Security Council resolution S/4741 of 20-21 February 1961 and General Assembly resolution 1599 (XV) of 15 April 1961.

²¹) The Security Council also requested the Secretary-General "to take all necessary measures to prevent the entry or return of such elements under whatever guise and also of arms, equipment or other material in support of such activities" (operative para. 5).

of the territorial integrity and sovereignty of the independent African States"²²).

In this resolution the problem is thus considered from a broader point of view: what really matters is to compel States to prohibit the recruitment and training of mercenaries. It is, therefore, a matter of rendering effective a prohibition which — at least in part — is already derived from general international law (see *supra*, para. 2). This resolution, moreover, reflects the approach of the African States: they are worried by mercenarism not only in relation to anti-colonial wars but also because mercenaries may be used to threaten their independence and territorial integrity; they do not, however, wish to condemn the use of mercenaries by African governments to guarantee their own internal security and to strengthen and train their armed forces.

A resolution adopted by the same body in the same year reflects a different approach, though in relation to the more general question of the implementation of the Declaration on the Independence of Colonial Peoples. The Socialist countries, together with the Yemen, proposed an amendment which was approved — though without a large majority²³) — and thus became the operative paragraph 8, which runs:

²²) General Assembly resolution 2395 (XXIII), adopted on 29 November 1968 by a vote of 85 to 3 (Brazil, Portugal, South Africa), with 15 abstentions. The draft had been submitted to the Fourth Committee by 54 States (Afro-Asian, plus Yugoslavia: for the list of the sponsors see UNYB 1968, p. 798). In the Fourth Committee several speakers, including Cameroon, the Democratic Republic of the Congo, Hungary and Ukraine, had expressed concern at Portugal's use of mercenaries. The delegate of Hungary had stressed that the General Assembly should call upon member States to take measures to stop the recruitment and training of their nationals as mercenaries (*ibid.*, p. 796).

²³) The amendment was submitted by Bulgaria, the Byelorussian SSR, Czechoslovakia, Hungary, Mongolia, Poland, Rumania, the Ukrainian SSR, the USSR and Yemen (Doc. A/L. 561 and Add. 1). It was adopted on 20 December 1968 by 53 votes to 8, with 43 abstentions. The whole draft resolution was adopted by 87 votes to 7, with 17 abstentions (see UNYB 1968, p. 718). In explanation of the vote the representative of Italy said that he had no objection to the last part of the amendment, but the meaning of the word "outlaw" in the first part of the amendment was not clear; no one could be outside the law, he said. The representative of Ireland pointed out that the use of mercenaries was particularly abhorrent to his country, but the amendment raised important constitutional issues and Ireland could not support it. Greece voted against the paragraph relating to mercenaries because in its view it was out of line with the rest of the resolution. The representative of Belgium said that mercenaries were prohibited in his country; however, Belgium had abstained from the vote on the draft resolution because of the questionable wording of the paragraph (see *ibid.*, p. 718).

“Declares 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”²⁴⁾.

This resolution — which was confirmed in subsequent years²⁵⁾ — even though it follows in the wake of the previous one, reflects the approach of the Socialist countries more than that of the African States. First, emphasis is placed only on the use of mercenaries against national liberation movements. Second, it develops the definition of mercenaries as outlaws. Third, States are asked not only to prevent the recruitment, financing and training of mercenaries, but also to prohibit their nationals’ enrolment as mercenaries — a prohibition which is not provided under international law at this moment.

After what may be deemed an intermezzo in 1970 — when the Security Council condemned the use of mercenaries against the Republic of Guinea²⁶⁾ and the General Assembly included within the Declaration on Friendly Relations a brief paragraph on mercenaries²⁷⁾ which related, however, only to the use of mercenaries in the relations among States — the General Assembly returned to the problem in 1973, but from a different angle. It no longer considered mercenaries within the framework of the implementation of the Declaration on the Independence of Colonial Peoples, but in the context of the problem of the “legal status of the combatants struggling against colonial and alien domination and racist regimes”. Thus the problem assumed a relatively new dimension which, moreover, was accompanied by a strengthening of the Socialist countries’ approach.

The General Assembly started from the premise that wars of national liberation are to be considered as international armed conflicts and

²⁴⁾ Resolution 2465 (XXIII) of 20 December 1968.

²⁵⁾ See resolution 2548 (XXIV) of 11 December 1969 and 2708 (XXV) of 14 December 1970. In the latter resolution it is no longer said that mercenaries are “outlaws”.

²⁶⁾ Security Council resolution 289 (1970) of 23 November 1970. In operative para. 2 the Council demanded “the immediate withdrawal of all external armed forces and mercenaries, together with the military equipment used in the armed attack against the territory of the Republic of Guinea”.

²⁷⁾ Resolution 2625 (XXV) of 24 October 1970, Principle I, para. 8 (“Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State”).

therefore those who fight in such wars are lawful belligerents and, if captured, entitled to prisoner-of-war status. On the strength of this premise, the General Assembly declared that mercenaries taking part in such wars and therefore fighting against national liberation movements, even if they satisfy the requirements set forth by international law for "irregulars", shall not be considered as lawful combatants but as common criminals²⁸). In this phase then, rather than reconfirming the prohibition of States' recruiting and training mercenaries, the UN focuses on the problem of what treatment to give mercenaries in the course of armed conflicts and specifies that they are to be treated as criminals.

Obviously, as they stand, the resolutions in question could not modify the rules of the IIIrd Geneva Convention of 1949. Nor does international practice following their adoption suggest that they led to uniform behaviour by States, or groups of States, sufficient to allow the conviction that a customary rule was gradually evolved by modifying the provisions of existing international law. For which reason, these resolutions may only be seen as an authoritative expression of the intention to modify the existing law by creating a favourable position for national liberation movement fighters (who, on the basis of the current law could not be treated as lawful combatants) and an unfavourable position for mercenaries employed by colonial or racist powers. It may be added — as we shall shortly see — that the Geneva Diplomatic Conference on the Development of Humanitarian Law of Armed Conflicts (1974–1977) decided at the outset to win approval for international legislation on mercenaries, even though the matter was still being considered within the UN²⁹). This confirms the fact that the majority behind the UN resolutions was not convinced that existing law would be modified merely by adopting these resolutions.

²⁸) In resolution 3314 (XXIX) on the definition of aggression, adopted on 14 December 1974, the General Assembly stated that one of the acts qualifying as aggression is "the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein" (art. 3, *lit. g*). In a resolution on Southern Africa adopted on 1 March 1976 (6-XXXII), the Commission on Human Rights *inter alia* called upon States "to prohibit the recruitment of mercenaries in their territory" (operative para. 4, *lit. b*). In the same year the General Assembly adopted a resolution (31/34, of 30 November 1974) in which it reiterated its condemnation of mercenaries (operative para. 6).

²⁹) Resolution 3103 (XXVIII) of 12 December 1973. Operative para. 5 states that "the use of mercenaries by colonial and racist regimes against the national liberation movements struggling for their freedom and independence from the yoke of colonialism

Despite the unsuitability of the UN resolutions for modifying the existing law, they undoubtedly occupy a position of great importance in the context of political strategy and the gradual development of international standards. First, the Socialist and African States succeeded to some extent in harmonising their respective positions with regard to mercenaries; furthermore, they managed to gain acceptance of their view from numerous other States. As a result of their action, the international community has come to pass a negative verdict on mercenaries — or, more precisely, not on mercenaries as such (African States feel that they may legitimately continue to employ mercenaries in their security services as instructors, etc.), but on those mercenaries who fight against national liberation movements or attack the integrity and independence of sovereign States. In addition, those two groups of States have spelled out the consequences which each State should draw from the condemnation of mercenaries, in its own domestic legal system. In short, in this manner, the foundations have been laid for an adequate modification of the international law dealing with this matter.

4. The Action of OAU

OAU began to take an interest in the problem of mercenarism in 1964. Like the UN, this organisation too considered a specific problem at the outset — that of the Congo — but from a point of view contrary to that of the UN in 1961; to wit, the employment of mercenaries by the Congolese government against rebels. In a resolution adopted by the Council of Ministers of the Organisation on 10 September 1964, the OAU, while emphasizing that “the use of mercenaries has unfortunate effects . . . on the struggle for national liberation in Angola, Southern Rhodesia, Mozambique and the other territories in the regions which are still under colonial domination”, considered the problem of mercenaries from the point of view of security in the African continent³⁰). Moreover,

and alien domination is considered to be a criminal act and the mercenaries should accordingly be punished as criminals”. The draft resolution had been submitted to the Vth Committee of the General Assembly (A/C.6/L.969); it had been introduced by the delegate of Madagascar (A/C.6/SR.1452, p. 7 ff. See for the result of the vote A/C.6/SR.1454, pp. 14–15). In the Assembly the resolution was adopted by 83 votes to 13, with 19 abstentions.

³⁰) The Council of Ministers pointed out that the use of mercenaries in the Democratic Republic of Congo constituted “a serious threat to peace in the African continent” (Doc. ECM/Res. 5-III of 10 September 1964).

it did not concern itself with the treatment to be meted out to mercenaries, but limited itself to appealing to the Congolese government "to stop immediately the recruitment of mercenaries and to expel as soon as possible all mercenaries, of whatever origin, who are already in the Congo". This approach was taken up, in its substance, in some of the resolutions that followed³¹⁾.

Broadly speaking, the OAU's action emphasized two points: first, the threat that mercenaries pose to peace, stability, political independence and the territorial integrity of the African States; second, the necessity for strict cooperation by all African States against mercenaries in prohibiting their recruitment, financing and training, in forbidding their nationals to enrol as mercenaries, in preventing the passage of mercenaries through their territory and finally, in the seeking out and punishing of mercenaries. The OAU did not, therefore, particularly concern itself with the juridical definition of mercenaries taking part in armed conflicts, nor did it dwell on the use of mercenaries in wars of national liberation. The OAU preferred to focus upon two things: the use of mercenaries against established States (implicitly excluding their use by sovereign States in their security services, for training their armed forces, for the use of sophisticated weapons, etc.) and the international context of the phenomenon of mercenarism, in particular, the political consequences of the use of mercenaries on the one hand, and the international action necessary to eradicate the phenomenon in Africa, on the other hand.

Although OAU and UN strategy was dissimilar in terms of content and specific objectives, both strategies are alike in the absence of immediate legislative results. The OAU promoted the drafting of an international

³¹⁾ See the following resolutions: AHG/resolution 49-IV of 14 September 1967, adopted by the Assembly of Heads of State and Government; ECM/resolution 17-VII adopted in December 1970 by the Council of Ministers; the OAU Declaration on the Activities of Mercenaries in Africa, adopted on 23 June 1971 by the Heads of State and Government of Member States of the OAU, CM/St. 6-XVII.

The preamble to the 1967 Resolution (concerning "the aggression of the mercenaries against the Democratic Republic of the Congo") deserves to be quoted. It states: "The Assembly of the Heads of State and Government . . . *Determined* to safeguard and ensure respect for the integrity and sovereignty of Member States; *Considering* that the existence of mercenaries constitutes a serious threat to the security of Member States; *Recognizing* their sacred and solemn responsibilities to spare present and future generations the scourge of racial hatred and conflict; *Conscious* of the danger that the presence of mercenaries would inevitably arouse strong and destructive feelings and

convention on this subject but, as yet, the draft hammered out in 1972 has not even been signed by the African States³²). For this reason, even the members of OAU who were strongly in favour of a ban

put in jeopardy the lives of foreigners in the continent". — The same resolution also speaks of "the criminal acts perpetrated" by the mercenaries (operative para. 3) and characterises the use of mercenaries as "illegal and immoral practices" (operative para. 4).

In the 1970 Resolution, concerning the "premeditated aggression by Portugal against the Republic of Guinea", the Council of Ministers of OAU *inter alia*

"8. *Calls* upon all Member States of the Organization of African Unity to prevent the entry, passage or any activity by any mercenary or by organizations and individuals who use them against African States; 9. *Requests* all Member States to immediately outlaw, arrest and hand over all mercenaries to the country against which they are active; . . . 13. *Requests* the Administrative Secretary-General to prepare a draft convention outlawing the recruitment, training, equipping and use of mercenaries as well as prohibiting the passage of such mercenaries and their equipment in all countries for consideration by the Council of Ministers at its seventeenth session; 14. *Instructs* the Administrative Secretary-General of the OAU to take special measures with a view to unmasking the activities of the mercenaries in Africa and to advise Member States in order to enable the Organization to take appropriate measures towards the total elimination of mercenaries from Africa".

The most elaborate resolution of the OAU on mercenaries is the Declaration of 1971 of the Heads of State and Government of Member States of the OAU. In this declaration the Heads of State and Government *inter alia*

"6. *Draw* the attention of world opinion to the serious threat that the subversive activities of mercenaries in Africa represent to the OAU Member States; 7. *Reiterate* the appeal made to Member States to apply both in spirit and letter, Resolution ECM/Res. 17 (VII) of the Seventh Extraordinary Session of the Council of Ministers held in Lagos in December 1970, and consequently invite them: (i) to take appropriate steps to ensure that their territories are not used for the recruitment, drilling and training of mercenaries, or for the passage of equipment intended for mercenaries and (ii) to hand over mercenaries present in their countries to the States against which they carry out their subversive activities. 8. *Invite* all States which had pledged not to tolerate the recruitment, training and equipping of mercenaries on their territory and to forbid their nationals to serve in the ranks of the mercenaries, to fulfil their undertakings, Also invite other non-African States not to allow mercenaries, be they their nationals or not, to pursue their activities on their territory; 9. *Request* the Chairman of the Assembly of Heads of State and Government to do everything possible to mobilize world opinion so as to ensure the adoption of appropriate measures for the eradication of mercenaries from Africa, once and for all; 10. *Appeal* to all Member States to increase their assistance in all fields to freedom fighters in order to accelerate the liberation of African territories still under foreign domination, as this is an essential factor in the final eradication of mercenaries from the African continent".

³² See OAU Doc. CM/1/33/Rev. 1 of June 1972 (Report of the OAU Committee of Experts charged with drafting the Convention on Mercenaries, in consequence of the Decision of the Council of Ministers CM/Dec.-158-XVII) and the Draft Convention (OAU Doc. CM/433/Rev. 1, Annex 1).

on mercenaries, ended by following the line of conduct which also prevailed within the UN, *i. e.* to concentrate normative efforts within the Geneva Diplomatic Conference (1974–1977). There — as will be shortly shown — a draft submitted by Nigeria constituted the starting point and the basis for discussion.

5. *The 1976 Judgment of the People's Revolutionary Tribunal of Luanda*

Before examining the works of the Geneva Diplomatic Conference, let us see whether the judgment handed down on 28 June 1976 by the People's Revolutionary Tribunal on thirteen Anglo-American mercenaries sheds some light on the way in which international law has been applied. This is an important judicial decision if only because, up to the present, it is the sole one made with regard to the status of mercenaries under international law³³).

The facts are well-known. On 11 November 1975 Angolan independence was declared³⁴). This occurred after the MPLA (Popular Movement for the Liberation of Angola), headed by Agostinho Neto, had scored various substantial victories over the other two national liberation movements (FNLA and UNITA) which, together with the former movement, had contested the field while the Portuguese forces were withdrawing. But the armed conflict between what could be considered the "legitimate" government of the Angolan Republic³⁵) and FNLA and UNITA did not cease

³³) The only other case relating to mercenaries is the *Steiner* case, decided by a Court-Martial of the Sudan in 1971. In that case, however, only domestic law was applied, in particular the Sudanese Penal Code (Mr. F. E. Steiner, a citizen of the Federal Republic of Germany, after crossing the border of the southern part of the Sudan, had joined the insurgents and aided them in waging war against the established Government. While on his way to Uganda, he was arrested by Ugandan authorities and handed over to the Sudan, where he stood trial before a Court-Martial). See the summing up of the case by the Judge-Advocate in *The Sudan Law Journal and Reports* 1971, p. 147 ff.

³⁴) For an accurate account of events see *The Annual Register . . . in 1975*, pp. 234–237, *The Annual Register . . . in 1976*, pp. 241–242; R. P., *Angola: L'indépendance bicéphale, L'année politique africaine* (ed. by P. Biarnès [*e. a.*]) 1975 part V, pp. 37–41; R. L., *Angola: D'immenses difficultés, ibid.* 1976 part V, pp. 41–48.

³⁵) "Nigeria recognized the MPLA Government on 25 November 1975, as did Tanzania on 5 December; by the end of the year nearly half the OAU membership had done so, while none had recognized its opponents" (*The Annual Register . . . in 1975*, p. 237). "On 29 January 1976 recognition of the MPLA Government was given by Sierra

immediately. In January 1976, about one hundred white mercenaries in the ranks of the FNLA entered Angolan territory from Zaire and commenced military action against the forces of the central government which were, in turn, supported by Cuban troops. After a few days, many mercenaries were killed or succeeded in fleeing the country; thirteen were captured (ten British and three Americans) and tried before an Angolan Tribunal which, according to its institutive law, had, amongst other things, jurisdiction over "war crimes and crimes against humanity"³⁶). The Tribunal found all the defendants guilty of various crimes and condemned four of them to death and the remainder to prison sentences of varying durations³⁷).

The Tribunal's reasoning may be summarised as follows³⁸). It pointed out that the mercenaries had illegally crossed the border of the Angolan Republic and had taken part in armed action against the Angolan armed forces; they had been, therefore, party to an *associação de malféitores* which was punishable according to art. 263 of the Penal Code³⁹). The

Leone; . . . on 11 February Angola was officially admitted to the OAU. British recognition came on 11 February and that of Portugal on 22 February" (The Annual Register . . . in 1976, p. 241).

It is worth mentioning that on 12 July 1976 the British Foreign Minister said in the House of Commons that "the Angolan Government is a sovereign Government of that country" (The Times, 13 July 1976, p. 10).

³⁶) Art. 3, para. 1 of the Law no. 7/76 adopted by the Council of the Revolution on 1 May 1976.

³⁷) On this judgment see Martin, *op. cit.* (note 15), pp. 54-56; Hoover, The Laws of War and the Angolan Trial of Mercenaries: Death to the Dogs of War, Case Western Reserve Journal of International Law 1977, p. 323 ff.; Cesner/Brant, Law of the Mercenary: an International Dilemma, Capital University Law Review 1977, p. 339 ff.; Elias, *op. cit.* (note 15), pp. 202-204.

³⁸) The text of the judgment was published, in Portuguese, in *Jornal de Angola*, no. 16.400, 29 June 1976. The English translation that I shall quote in this paper was issued as a separate document by the Angolan authorities in September 1976.

³⁹) Art. 263 of the Portuguese Penal Code, applicable in Angola by virtue of art. 58 of the Constitution ("The laws and regulations at present in force shall be applicable unless repealed or amended and only so long as they do not conflict with the spirit of the present law or the Angolan revolutionary process"), provides:

«Aqueles que fizerem parte de qualquer associação formada para cometer crimes, e cuja organização ou existência se manifeste por convenção ou por quaisquer outros factos, serão condenados à pena de prisão maior celular de dois a oito anos, ou, em alternativa, à pena de degredo temporário, salvo se foram autores da associação ou nela exercerem direcção ou comando, aos quais será aplicada a pena de dois a oito anos de prisão maior celular, ou, em alternativa, a de prisão maior temporária.

Tribunal observed that the defendants were, moreover, guilty of the crime of "mercenarism" which, in its opinion, was covered by art. 20 no. 4 of the Penal Code⁴⁰). Furthermore, the Tribunal considered that two of the defendants were also guilty of murder⁴¹).

§ unico. Serão punidos como cúmplices os que, a estas associações ou quaisquer divisões delas fornecerem ciente e voluntariamente armas, munições, instrumentos do crime, guarida ou lugar para a reunido».

⁴⁰) It is worth reproducing the reasoning of the Tribunal on this crucial point:

"Mercenarism was not unknown in traditional penal law, where it was always dealt with in relation to homicide. It was said, in a brief definition, that a mercenary was an agent who committed a crime for wages (*por mercê*). The prime motive for the crime was therefore always the feeling of greed, which is moreover the reason for the severe moral condemnation this type of crime has always incurred. And mercenary homicide, then known as assassination, was treated as a special crime in some legislation, while in others it was seen as a form of premeditated homicide. In all cases, however, severe punishment was always attached to mercenary homicide. And certainly throughout the 19th century, there was much debate on whether the most serious penalty should fall on the head of the mercenary, that is on he who carried out the crime, or on that of the person interested in the carrying out of the crime, that is, on he who paid for it to be committed. The debate ended in parity. In fact, the view prevailed that the moral author of the crime was as responsible as the physical author.

Therefore, this Tribunal does not heed the note often struck by the defence that it was not the defendants who were those most responsible for the crimes they committed, but governments and organisations which, for pecuniary compensation, made them commit such offenses.

Yet it is important that in modern penal law, and in the field of comparative law, the mercenary crime (*o crime mercenário*) lost all autonomous existence and was seen as a common crime (*crime comum*), generally speaking aggravated by the profit motive which prompts it. And this mercenary crime, which is known today as 'paid crime to order' (*crime por mandato remunerado*), comes within the laws on criminal complicity (*comparticipação criminosa*), it being through them that the responsibility of he who orders (*mandante*) and he who is ordered (*mandatario*) is evaluated.

In our case, mercenarism is provided for in art. 20 no. 4 of the Penal Code in force.

This annuls the objection of the defence that the crime of mercenarism has not been defined and that there is no penalty for it. It is in fact provided for with penalty in most evolved penal systems. As a material crime (*crime de resultado*), of course"! (Jornal de Angola, *cit.* [note 38], p. 2).

Art. 20 no. 4 of the Penal Code, relating to the "authors of a crime", provides that «Sao autores . . . os que aconselharam ou instigaram outro a cometer o crime nos casos em que, sem esse conselho ou instigação, nao tivesse sido cometido». For the Portuguese case-law relating to this provision see Duarte Faveiro, *Codigo penal português anotado* (Coimbra 1952), p. 70 ff. To my regret, I have not been able to find any Angolan case-law relating to the same provision.

⁴¹) According to the judgment, one of the defendants, Callan, shot another mercenary and ordered the execution of a further thirteen; he also "killed two Angolans,

It would appear from this that the Tribunal's approach to the problem of mercenarism was based exclusively on Angolan criminal law. However, the Tribunal also approached the problem from the vantage point of international law, but without drawing a clear-cut distinction between the two levels. First, the Tribunal, whilst enumerating the criminal actions of the defendants, pointed out that some of them constituted military actions, and in this connection stated the following:

"Some of the defendants also mined bridges and roads and destroyed property and equipment. It is understood, however, that such acts come within the concept of military operations (*acções de guerra*), so that they are not in themselves sufficient to characterise or fulfil the legal provisions for a crime against peace"⁴²).

Second, after stating that "mercenarism" is a crime provided for by the Angolan Penal Code, the Tribunal pointed out that:

"Mercenarism is considered a crime in the view of nations (*Refere-se finalmente que o mercenarismo é considerado crime pela inteligencia das nações*), and is expressly stated to be one in resolutions 2395 (XXIII), 2465 (XXIII), 2548 (XXIV) and 3103 (XXVII) of the General Assembly of the United Nations Organisation, and OAU statements (Kinshasa 1967 and Addis Ababa 1971)"⁴³).

Finally, after having pointed out that the defendants were guilty of the various crimes listed above, the Tribunal stated that they were not entitled to prisoner of war status:

"It should be pointed out that the defendants cannot claim the status of prisoners of war, for the definitive reason that they are irregular members of an army (*pela razao definitiva de que são elementos irregulares dum exército*). And it is already on record that in UN resolutions a mercenary is regarded as a common criminal (*como criminoso comum*)"⁴⁴).

Generally speaking, the judgment may be criticised for three reasons: first, because the manner in which Angolan law was applied is hardly convincing; secondly, because the Tribunal confused the two levels (*i. e.* national criminal law and international law), and thirdly because of its misapplication of international law. Leaving aside the application

both of them prisoners and . . . killed a third, with a shot in the mouth, for having committed rape" (*Jornal de Angola, cit.* [note 38], p. 2). Another defendant, McKenzie, "took an active part in the massacre of the British mercenaries . . . He is also guilty of threatening and beating civilians" (*ibid.*).

⁴²) *Jornal de Angola*, p. 2.

⁴³) *Jornal de Angola*, p. 7.

⁴⁴) *Ibid.*

of Angolan law⁴⁵), it may be observed that the Tribunal did not pose the international law problem in sufficiently rigorous terms. It should have pointed out at the beginning of the proceedings that the armed activity of the mercenaries did not take place within the framework

⁴⁵) To say the least, it is indeed questionable whether the provision of the Penal Code applied by the Tribunal (art. 20 no. 4) regards as a crime the mere fact of being a mercenary. It would seem that that provision rather concerns those who order, advise or instigate the commission of crimes provided for in other rules of the same penal code.

Furthermore, capital punishment was meted out to four defendants on the basis of a law («Lei de disciplina do combatente») enacted on 10 July 1966 by the MPLA authorities. On the face of it, this law applied to Angolan combatants and was intended to provide for rewards, decorations and penalties for acts committed by those combatants (Chapter III, art. 1 of that law provides that "Rewards and penalties are intended not only to reinforce the means which discipline and education give to those with responsibility in the directions of their subordinates. but also to give effect to equitable justice . . . Penalties regulate conduct, combat and prevent lapses in duty and law"). Although Chapter III art. 10 provides that the death penalty can also be meted out to "enemies" (this point was expressly stressed by the Tribunal, *Jornal de Angola, cit.* [note 38], p. 7), it seems that under that law the death penalty can only be applied to enemies for breaches of the same law, not for violations of other laws or regulations.

It should be pointed out that the "International Commission on Enquiry on Mercenaries" set up by the President of the Republic of Angola in May 1976 *inter alia* to watch the Luanda trial (and consisting of 45 independent persons from many countries) adopted on 12 June 1976 a Declaration stating that the trial had been "fair". The Commission was not able to evaluate the reasoning of the Tribunal, because the judgment was published after it dissolved; it had therefore to confine itself to pronouncing upon the Indictment. Concerning the application of the principle *nulla poena sine lege* the Commission held that this principle "is respected by the indictment presented in the present case as it is based on internal law and on the norms and principles of international law that the People's Republic of Angola, as a sovereign State, decided to make its own" (Comissão internacional de Inquérito sobre os Mercenários, Documentos, Luanda 1976, p. 63). A further Declaration was adopted on 19 June 1976, at the end of the trial (*ibid.*, p. 64); it simply stated that it had been "fair and conducted with dignity and solemnity". The adoption of the former Declaration was not unanimous: three members of the Commission (one of them being the present writer, the other two the British experts) abstained. They stated that although they were convinced that the actual conduct of the trial had been procedurally fair, they had serious misgivings on one point: the substantive law applicable to the crimes of which the defendants had been charged (those three members were not in Luanda when the latter Declaration was adopted).

Criticisms of the fairness of the trial and the law applied were voiced by the U.S. Secretary of State (AJIL 1977, p. 139) and by the British Foreign Minister (The Times, 13 July 1976, p. 10).

of an international armed conflict between States, nor even within the context of a war of national liberation, but that it constituted an armed insurrection against a lawful government⁴⁶). Therefore the actions of the mercenaries came under Angolan criminal law exclusively, with the exception of the rules of humanitarian international law applicable to the case (art. 3 common to the 1949 Geneva Conventions, concerning internal armed conflicts) — rules which did not, however, affect the status and legal definition of the mercenaries. Consequently, the Tribunal should have applied only Angolan criminal law. Instead, it referred to international law and did so in erroneous terms. In fact, when the Tribunal states that the various armed actions of the mercenaries constituted “military operations”, it implies that such actions, apart from not constituting a “crime against peace” (as the Public Prosecutor had stated in his Indictment⁴⁷), did not even constitute criminal activity under the Angolan criminal code. The Tribunal did not realise that, in stating the above, it was defining the action of the mercenaries as an act of war and was, therefore, considering the conflict as an international armed conflict — in which case, reference to an *associação de malfeteiros* would have been meaningless since the armed actions of the mercenaries would have to be defined as lawful belligerent activity.

The Tribunal falls into the same contradiction when it states that the mercenaries did not have the right to the status and treatment accorded to prisoners of war because they were “irregular members of an army”. In fact the Tribunal should have denied them this status and its consequent treatment for the simple reason that the conflict in Angola was an internal armed conflict. In its reasoning, however, the Tribunal showed that it was giving thought to the idea of an international armed conflict and demonstrated, moreover, itself to be unaware that in the course of a conflict of this type “irregular members” of a Party to the conflict may be considered lawful belligerents (and have the right, if captured, to prisoner-of-war treatment) if they meet the requirements laid down in

⁴⁶ See on the Angolan conflict the apposite observations of Bothe, *Völkerrechtliche Aspekte des Angola-Konflikts*, ZaöRV vol. 37 (1977), p. 592 ff.

⁴⁷ The Indictment stated that “the facts described in the first part of this indictment in addition to being a part of a war of aggression promoted by imperialism against the People’s Republic of Angola also constitute crimes against peace, as described in the Statute of the Nuremberg International Military Tribunal and confirmed by UN Resolution 95 (I) of 11 December 1946 and by the UN General Assembly resolution of 1974 [*sic*]” (Indictment, p. 31).

the IIIrd Geneva Convention of 1949⁴⁸⁾ — requirements which, at least in part, the mercenaries in this case fulfilled⁴⁹⁾. In fact, the Tribunal, having taken the — erroneous — view that the Angolan struggle might be regarded as an international armed conflict, might have gone so far as to state that the mercenaries, even had they satisfied the conditions of the Geneva Conventions mentioned above, were not to be considered lawful belligerents. Indeed, the argument could have been made that several resolutions of the UN and the OAU authorize member States to treat mercenaries as common criminals (or, more precisely, as war criminals)⁵⁰⁾. Instead, the Tribunal limited itself to referring to the UN and OAU resolutions without having previously pointed out that, because of the existence of such resolutions, the fact that the mercenaries satisfied the requirements laid down by the IIIrd Geneva Convention was of little importance.

In conclusion, one might say that the Tribunal's intention to label "mercenarism" as a crime in itself encouraged its various and erroneous references to international law. Since Angolan law offered no adequate support for such a definition, the Tribunal fell back on UN and OAU resolutions. These, however, as we have shown above (*supra*, para. 4), aim to deprive mercenaries of legitimate belligerent status and to include them in the broad category of war criminals, rather than aiming to define mercenarism as a crime in itself. Be that as it may, and whatever may have been the Tribunal's motives in attempting to apply international law, the errors in that application mean that the Tribunal's decision may not be taken as a valid contribution to solving the problem of the international legal definition of mercenaries. However, it should be added that, even though this judgment sheds no particular light on the interpretation and application of existing international law, it is interesting for two reasons. First, despite the fragility of the reasoning on which it is based, the judgment constitutes a case-law precedent, in as much as mercenaries (who fight against the integrity of an African State) are to be considered criminals. In fact, the judgment

⁴⁸⁾ See *supra*, note 17.

⁴⁹⁾ The Tribunal states in its judgment that the defendants, when they operated in the Angolan territory, wore a uniform and carried weapons (Jornal de Angola, *cit.* [note 38], p. 2).

⁵⁰⁾ Although, as stated above, UN resolutions *per se* cannot change existing law, they might be regarded by "progressive" domestic courts as indicative of new trends emerging in the international community. Domestic courts' decisions might, on their turn, contribute to the crystallisation of new international rules.

translates into legal terms the political attitude adopted by the overwhelming majority of African States (supported by Socialist countries) within the UN. As such, it constitutes a useful step towards the gradual evolution of a general rule on mercenaries. Second, the judgment caused definite positions to be taken up by two States who felt that they should give their views on the problem of mercenarism, manifesting in this way, their juridical opinion on the subject. The most articulate reaction was expressed by the USA. In a declaration made on 9 August 1976 before the Special Sub-Committee on Investigations of the House Committee on International Relations, the Assistant-Secretary for African Affairs stated:

“A key point is that 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 . . . 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 Conventions of 1949. 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 were combatants on both sides who fought for hire, adventure, or beliefs and who could be considered by some as mercenaries”⁵¹).

Such a declaration is certainly significant on a general level because it reflects the juridical position of a major power on the problem of mercenaries. Even this declaration, however, appears to be invalidated by an error of perspective if considered in relation to the particular case in question. In fact, it appeals to the rules of the IIIrd Geneva Convention of 1949 on the categories of lawful belligerents, while such rules could not be applied to the Angolan conflict because it was simply an internal armed conflict, as stated above. For this reason, even the State Department's declaration did not particularly contribute to the clarification of the juridical position of mercenaries involved in internal armed conflicts.

The same considerations apply, to a large extent, to the declaration made on the same subject by the British Foreign Secretary to the House of Commons. Amongst otherthings, he pointed out that

“Although all the defendants were accused and found guilty of the crime of being a mercenary, we do not accept that it has been established that being a mercenary is a crime having a basis in international law”⁵²).

⁵¹) Department of State Bulletin, 13 September 1976, pp. 342-343.

⁵²) The Times, 13 July 1976, p. 10.

6. *The New International Law*

As was noted above, since 1975 Socialist and African States have considered it worthwhile to concentrate their efforts towards the creation of a new law at the Geneva Diplomatic Conference on Humanitarian Law Applicable in Armed Conflicts. The problem was raised in 1975 in the IIIrd Committee of the Conference, within the framework of the First Additional Protocol to the Geneva Conventions of 1949 on International Armed Conflicts. For obvious reasons, the problem was posed on the occasion of the discussion on the new categories of lawful combatant.

In 1974, it had been agreed to regard wars of national liberation as international armed conflicts: to these wars were to be applied, from then onwards, the rules of the international law on war, with the consequence, *inter alia*, that those who fight in such conflicts are to be considered lawful belligerents if they fulfil the requisite conditions. Furthermore, there was the intention to extend the status of lawful belligerents even to "irregular combatants" taking part in such conflicts (or in inter-State wars). From all this the inference might have been made that mercenaries who fight in the context of a war of national liberation (usually against national liberation movements) should enjoy the status of lawful combatants. In 1975, various Socialist and Afro-Asian States⁵³) and a Western State⁵⁴) pronounced themselves against such a possible consequence and asked that mercenaries should be explicitly deprived of the status of lawful combatants. It should be noted that at this stage, as was the case with subsequent phases, the Socialist countries insisted on referring to "mercenaries fighting against a national liberation movement" whilst the other States were strongly against mercenaries *tout court*, without exception. In fact, they intended to extend their opposition even to the practice of employing mercenaries for attacking the territorial integrity and political independence of sovereign States. After a period of stalemate in 1976⁵⁵) the negotiations intensified. As may be understood

⁵³) Ukraine (CDDH/III/SR.33-36, Annex, pp. 53-54) Byelorussia (*ibid.*, p. 67), Democratic Republic of Vietnam (*ibid.*, p. 73), India (*ibid.*, p. 86), Nigeria (*ibid.*, p. 88), Madagascar (*ibid.*, p. 98). Cf. also the statement of the observer for the Zimbabwe African People's Union (*ibid.*, p. 109).

⁵⁴) Norway (CDDH/III/SR.33-36, Annex, p. 104).

⁵⁵) See the Report of Committee III to the Conference, CDDH/236/Rev.1 (31 December 1976), pp. 32-35.

from the Geneva debates, negotiation — on the basis of a proposal presented by Nigeria previously⁵⁶⁾ — took place mainly between the head of the Nigerian delegation and the head of the US delegation who was also the Rapporteur for the IIIrd Committee. It was thus possible to achieve conclusive results during the IVth and last session of the Conference, which approved, by consensus, a rule (art. 47) which reads:

“1. A mercenary shall not have the right to be a combatant or a prisoner of war.

2. A mercenary is any person who:

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

The most striking aspect of this provision is that it considers mercenaries in general terms and does not take into account whether or not they fight against a national liberation movement (even if, at present, the most frequent use of mercenaries is against those movements). This rule leaves aside, therefore, the definition advocated by the Socialist countries. On the basis of art. 47, all mercenaries involved in an international armed conflict are deprived of the status of legitimate belligerents, regardless of whether it is an inter-State or a national liberation war, and whatever the Party to the conflict for which they are fighting. Thus, it is implicitly foreseen that mercenaries may be used not only by States (fighting against other States or national liberation movements) but also by groups who, appealing to the principle of self-determination of people, declare that their struggle against the government of a sovereign State constitutes a war of national liberation⁵⁷⁾.

This might imply that the rule in question, by condemning mercenaries as such, aims at condemning the phenomenon of mercenarism in all

⁵⁶⁾ CDDH/III/GT/82.

⁵⁷⁾ For the list of the wars of national liberation to which Protocol I applies see art. 1 para. 4 of the Protocol. The conditions for the applicability of Protocol I to such wars are set forth in art. 96 para. 3.

its manifestations. If this were the case, a qualitative leap forward would have occurred with respect to the previous declarations of the UN and the OAU: these organisations, as we have seen, did not condemn every category of mercenary, but only such mercenaries as were fighting against national liberation movements or sovereign States. Thus, mercenaries employed by sovereign States for security services, the training of their armed forces and for the use of sophisticated weapons etc., were excluded from the ban. In fact the rule in question is not different from the doctrine of UN and OAU in its approach, notwithstanding its apparently indiscriminate ban on mercenaries. Indeed, art. 47 sub-para. 2 (e) allows African States to avoid having to apply the rule to mercenaries used by such States in the above-mentioned fashion: to this end, it is sufficient for such States to include the mercenaries in the ranks of their armed forces. There exists, therefore, a substantial *continuum* between the attitude of the majority of the States within the UN and the OAU and the attitude which prevailed at the Geneva Diplomatic Conference.

Nevertheless, it may be worth adding that art. 47 does display a novel element which — as one is led to understand — was inserted primarily on the initiative of the Western countries. As may be deduced from the normative context into which the rule was inserted⁵⁸⁾ and from a series of declarations made by States after its adoption⁵⁹⁾, mercenaries, even if not entitled to the status of legitimate belligerents, still come under the protection of the fundamental humanitarian rules contained in art. 75 of Protocol I which concern, amongst other things, the prosecution of persons indicted for war crimes. Thus, even though it pronounces itself against mercenaries, Protocol I secures those fundamental humanitarian guarantees which should be safeguarded with regard to any person, whatever the gravity of their criminal acts.

⁵⁸⁾ See the eloquent wording of art. 75, on the fundamental guarantees to be secured to all those persons who are in the power of a party to the armed conflict and who do not benefit from more favourable treatment under the 1949 Conventions or under the Protocol.

⁵⁹⁾ That mercenaries should at any event benefit from the humanitarian guarantees set forth in art. 65 (present art. 75) was stressed in the Report of the Working Group to Committee III (CDDH/III/369, p. 3), by many delegates in Committee III (Nigeria, CDDH/III/SR.57, p. 5, Italy, *ibid.*, p. 6, United Kingdom, *ibid.*, p. 7, Australia, *ibid.*, p. 7, USA, *ibid.*, p. 11, Ireland, *ibid.*, p. 11, Canada, *ibid.*, p. 14, Sweden, *ibid.*, p. 14), in the Report of Committee III to the Conference (CDDH/407, p. 10), as well as by several States in the Conference itself (Nigeria, CDDH/SR. 41, p. 23, Italy, *ibid.*, p. 25, Portugal, *ibid.*, p. 26, Canada, *ibid.*, p. 26, Australia, *ibid.*, Annex, p. 2, Mexico, *ibid.*, Annex, p. 10, Netherlands, *ibid.*, Annex, p. 13, Sweden, *ibid.*, Annex, p. 20).

This said, it should also be emphasised that the rule has limitations. First, it does not face the central problem of mercenarism; to wit, the need to forbid States to permit the training and recruitment of mercenaries and the necessity of compelling States to prohibit their nationals from enrolling as mercenaries in foreign countries. Even if such a ban and prohibition — favoured by several Socialist and African countries⁶⁰ — should, perhaps, have found a *locus materiae* other than art. 47, once adopted by national legislation they would certainly have enabled the eradication of mercenarism.

Second, the definition of mercenaries in art. 47, para. 2 is open to several criticisms. The emphasis, in para. 2 (c), on the mercenary's motivations is open to debate because it introduces a psychological element which, in general, should remain outside the humanitarian law of armed conflict⁶¹). Equally questionable is the requirement that the mercenary be "promised material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions". As was rightly pointed out after adoption of the rule, such a condition is very hard to prove and consequently the clause itself may turn out to be inapplicable or may even lead to abuses⁶²). The requirement in para. 2 (d) that the mercenary be "neither a national of a Party to the

⁶⁰) Cuba (CDDH/III/SR.57, p. 8), Democratic Yemen (*ibid.*, p. 9), Czechoslovakia (*ibid.*, p. 10), Switzerland (*ibid.*, p. 11), Mali (*ibid.*, p. 13), Uganda (CDDH/SR.41, p. 25), Zaire (*ibid.*, p. 27), Libya (CDDH/SR.41, Annex, p. 9), Mozambique (*ibid.*, p. 11), Senegal (*ibid.*, p. 20), USSR (*ibid.*, p. 22).

⁶¹) Cf. the statement of Netherlands, CDDH/SR.41, Annex, p. 12.

⁶²) The delegate of Zaire pointed out that sub-paragraph 2 (c) "would open the door to abuse and provide an alibi for mercenaries. A Party to a conflict would be hard put to it to prove generous remuneration, since mercenaries' wages were paid either in their own countries or into bank accounts in other countries. No evidence existed in the form of pay-slips or remittance orders and, even if it did, it could only be held by the Party which made use of the mercenaries' services, so that the adverse Party had small chance of obtaining the necessary evidence under paragraph 2 (c). Further, the paragraph as presently worded would encourage a new kind of ideologically-motivated mercenary of which his country had had experience in the shape of many individuals who had fought alongside the rebels in the cause of disarray and bloodshed" (CDDH/III/SR.57, p. 6).

The delegate of Mauritania made a statement along the same lines, pointing out that "with regard to paragraph 2 (c), his delegation was sceptical concerning the possibility of producing material proof of the fact that a mercenary had been promised material compensation substantially in excess of that paid to regular combatants, especially in view of the ultra-secret character of the contracts covering the engagement of mercenaries" (CDDH/III/SR.57, p. 7).

conflict nor a resident of territory controlled by a Party to the conflict" — however justified it may appear in general terms — leaves open a dangerous loophole. It allows nationals or residents of a State to enrol as mercenaries on behalf of another State or national liberation movement fighting against the State of which they are nationals or residents. Clearly, the loophole consists in that such persons are not legally treated as mercenaries under this rule, although in actual fact they are mercenaries.

The rule's most crucial inadequacy is to be found in para. 2 (e) where "a member of the armed forces of a Party to the conflict" is not considered to be a mercenary. It follows that, *inter alia*, mercenaries may easily circumvent art. 47 by formally enrolling into the armed forces of the State or insurrectional group on whose behalf they are fighting, with the consequence that they are to be defined as lawful belligerents.

These limitations notwithstanding, the agreement at the international level on a definition of "mercenarism" is a positive fact. Although art. 47 is unsatisfactory with regard to the most serious aspects of "mercenarism" (recruitment, etc.), it may acquire a meaning that exceeds its specific provisions. This article is the first expression, at the legislative level, of the international community's disapproval of mercenarism. This unambiguous condemnation may gradually spread to include other activities not covered by art. 47 and, in any case, may cause States to enact legislation aimed at prohibiting — apart from recruitment and training of mercenaries — their citizens from going abroad to enrol as mercenaries. This had been the hope of many delegates at the Geneva Diplomatic Conference⁶³). Art. 47 may, therefore, exhibit a tendency to gradually extend the scope of its specific provisions.

See also what was said by the delegates of the Democratic People's Republic of Korea (*ibid.*, p. 4), of Syria (*ibid.*, p. 9), Qatar (*ibid.*, p. 9), Madagascar (*ibid.*, p. 12), Mozambique (*ibid.*, p. 13), Ivory Coast (*ibid.*, p. 13), Cameroon (CDDH/SR.41, p. 22), Zaire (*ibid.*, p. 27), Afghanistan (CDDH/SR.41, Annex, p. 1), Cuba (*ibid.*, p. 2).

⁶³) The delegate of Nigeria said in the Plenary that after the adoption of the provision on mercenaries "even the countries where those despicable criminals were normally recruited, trained and financed seemed to be in agreement that it was time to put an end to such activities. The Governments of Africa expected that henceforth all Governments would cooperate in punishing the recruitment and employment of mercenaries" (CDDH/SR.41, p. 23). The representative of Libya pointed out that "the new article might be regarded as an appeal to the countries which recruited mercenaries to include in their national legislation provisions prohibiting such recruitment; his delegation supported that appeal" (CDDH/III/SR.57, p. 10). In his turn, the delegate of Hungary said that "his delegation trusted that the new article would encourage Governments which had not yet prepared rules of criminal law

However, certain authorities have deemed art. 47 unfortunate on the grounds that it runs counter to the tendency of modern humanitarian law of war which is to give belligerents increased international protection. "Legitimate belligerent" comes to include ever broader categories of persons participating in armed struggles. It would be contradictory, therefore, to treat guerillas, on the one hand, as "lawful combatants" (and as prisoners of war, should they be captured), whilst denying this status and treatment to mercenaries, on the other hand⁶⁴). A view akin to this last opinion suggests that art. 47:

"Runs counter to the basic rule that, in principle, all those who take an active part in hostilities should be treated equally and without discrimination on the basis of their motives for joining in the fighting"⁶⁵).

Various objections may be levelled at these positions. First and foremost, the contention that international law is currently tending to define all combatants as "legitimate belligerents" is not accurate. At present, in fact, the broadest and most important category of combatant — persons pitting themselves against a central government within the framework of a civil war which may not be, and is not, defined as a war of national liberation — has not been promoted by international law to the rank of "lawful combatant", but remains within the scope of the criminal law of the State being rebelled against. The consequence of this is that such persons are treated as traitors and "outlaws". It would be more precise to say that the current tendency in international humanitarian law is towards an amplification of the humanitarian protection shown to combatants. That is to say, it tends towards a guaranteed, minimum, humanitarian safeguarding of the individual. The rule on mercenaries under consideration should be viewed as part and parcel of this tendency, since — as was shown above — it implicitly secures the humanitarian guarantees envisaged in art. 75 of Protocol I for mercenaries. Against the background of this broad trend, then, the humanitarian law of war favours some combatants — guerrillas — by promoting them to the

prohibiting the recruitment, training, formation and commitment of mercenaries to take the necessary legislative action in order to eliminate completely the crime of the mercenary system from the field of international relations" (CDDH/III/SR.57 Corr. 1). — See also the statement of Argentina (CDDH/III/SR.57, p. 14).

⁶⁴) See Burmester, *op. cit.* (note 15), pp. 55–56. See also Schwarzenberger, *op. cit.* (note 15), pp. 281–282.

⁶⁵) Kalshoven, *Reaffirmation and Development of International Law on Humanitarian Law Applicable in Armed Conflicts*, Netherlands Yearbook of International Law 1977, p. 135.

category of "legitimate belligerents" and degrades others — mercenaries — by reducing them to the status of war criminals merely on the grounds of their acting as mercenaries. It is evident that political considerations colour such choices: at present, the majority of States do not feel that all combatants should enjoy the same legal standing. This may be criticised from political and moral standpoints, but it does not seem to go against the aforementioned tendency of the humanitarian law of war; on the contrary, it appears to be a typical and significant manifestation thereof.

7. Conclusions

Traditional international law (the IIIrd Geneva Convention of 1949) does not make effective provision for modern mercenarism (a phenomenon which mainly manifests itself in civil wars and wars of national liberation in Africa). Consequently, mercenaries are neither favoured nor handicapped under that law. In 1977, pressure from Socialist and African countries led to the adoption of new rules within the framework of the 1st Additional Protocol to the 1949 Geneva Conventions. These rules — despite major concessions to Western views — embody the Socialist and African intention to put mercenaries at a disadvantage by equating them with war criminals. Within the spectrum of majority views were the positions of the Socialist countries — concerned above all to control the use of mercenaries against national liberation movements — and the African countries — extending the condemnation of mercenaries to cases where they are used to attack the political independence or territorial integrity of sovereign States; of these two, the second prevailed.

Certain general considerations emerge from this development of new international regulations. First, such a development is a very significant illustration of the manner in which the international community evolves new rules. When it became clear that existing international law was no longer sufficient for the times, the UN and OAU strove to work out new principles. Their commitment served to focus attention on the need for a prompt revision of international law and for the hammering out of new standards, which, it was hoped, the international community would adopt. The two Organisations, however, neither could nor wanted to create a new set of rules. This task was referred to a more appropriate and competent forum, namely, the Geneva Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts. The two Organisations' intervention was,

however, an essential step towards the crystallization of the interests and perspectives — rather heterogeneous at the outset — of the Afro-Socialist majority, the achievement of a common denominator in the matter and the formulation of lines of common action.

The transition from the level of policy to the strictly normative level made it necessary to take into account the interests and demands of another section of the international community — namely the Western States — in order to achieve a consensus on the new regulation. This is another characteristic and exemplary aspect of the way in which international law is formed at present. Thus, the majority had to take into account both the — well-founded — Western request that mercenaries be granted a minimum of humanitarian treatment (*supra*, para. 6) and the advisability of not obliging States to specifically and rigorously prohibit the recruitment, training and financing of mercenaries. Having to balance contrasting points of view and demands enfeebled the definition of mercenarism, so much so that it appears inadequate on several counts. In short, the above evolution of international law is a step forward with respect to traditional law, which was updated in the manner urged by the “progressive” majority. The updating was not radical, however, because the innovatory process stopped halfway. Incompleteness, reticence, ambiguity — this is the price that must be paid by forward-looking States to the forces in favour of the *status quo* and the protection of vested interests.

It was the inadequacies of the new regulations which induced the African States to repropose the problem in a political forum. In December 1977 — that is, after the approval of the Ist Geneva Protocol — they caused the UN General Assembly to adopt a resolution reopening the problem of the ban on mercenaries and, above all, calling on Member States to enact legislation against the recruitment, etc. of mercenaries in their territory⁶⁶). Thus, from a normative forum States returned

⁶⁶) On 7 November 1977 the General Assembly adopted, by 113 votes to 3 (France, Israel, United States), with 18 abstentions, a resolution on the rights of peoples to self-determination (res. 32/14), operative para. 6 of which states: “Reaffirms that the practice of using mercenaries against national liberation movements and sovereign States constitutes a criminal act and that the mercenaries themselves are criminals, and calls upon the Governments of all countries to enact legislation declaring the recruitment, financing and training of mercenaries in their territory and the transit of mercenaries through their territory to be punishable offences and prohibiting their nationals from serving as mercenaries, and to report on such legislation to the Secretary-General”. The draft resolution had been submitted to the Third Committee by a number of African States (A/C.3/32/L.8) subsequently joined by several other

to a political forum, with the evident intention of gradually laying down the fundamental premises for the elaboration of a new international regulation (probably a specific treaty on the matter) intended to cover the issues that the Geneva Protocol had to disregard⁶⁷). This “coming and going” between different fora is also typical of the present stage of international law’s evolution. Equally typical is the importance assumed by the “intermediary” stage — the political and pre-normative one — in the development of that law.

African countries and various socialist States (see A/32/318, p. 2). The draft resolution was introduced in the Third Committee by the representative of Tunisia on 20 October 1977 (A/C.3/32/SR.26, pp. 18–19). After the vote, the representative of Belgium, speaking on behalf of the nine States members of the European Community, said that “although they categorically rejected the use of mercenaries, the implementation of paragraph 6 would raise legal and practical difficulties for them” (A/C.3/32/SR.28, p. 7, para. 31). The reservations made by several other States did not specifically relate to the paragraph concerning mercenaries.

⁶⁷) On 14 December 1979 the General Assembly adopted a resolution (A/34/L.58) inviting Member States both to take effective measures designed to prohibit the recruitment, training, enrolment, transit and utilization of mercenaries on their territory, and to comment before the 35th session of the General Assembly on the advisability of urgently drafting an international convention on the matter.