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I. INTRODUCTION

Although the problem of mercenaries is as old as history itself, very little legal analysis of the phenomenon exists today. History books recount the exploits of mercenaries from ancient Egypt through Swiss mercantile mercenarism to modern mercenarism, as exemplified in the Congo. Lawyers, however, have generally refrained from analyzing the issues in a sufficient manner, and until recently, a legal definition of a mercenary did not exist.

Mercenary activity has taken on a new dimension since the second half of the twentieth century. Hitherto, mercenaries were employed by governments and factions in civil wars. Since the 1960s, however, mercenaries have been increasingly employed and paid by foreigners either to influence the outcome of a conflict in their favor, such as in Angola (1975-76),[1] or to initiate a situation which would protect their interest,

* This Article is a revised version of part of the unpublished Ph.D. thesis "The Development of International Law in Relation to the Legal Status of Mercenaries" submitted to the University of London in November 1986. Supervisor was Professor Rosalyn Higgins, Professor of International Law at the London School of Economics and Political Science, who also kindly read through this Article.

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1. Ebinger, *External Intervention in Internal War: The Politics and Diplomacy of the*

such as the invasions of Guinea (1970) or Benin (1977).[2] The problem was less prominent in the 1980s but has by no means disappeared, and concrete legal analysis of the subject should be taken more seriously.

The mercenary phenomenon can be controlled by developing international standards through multilateral conventions, and by enacting effective state legislation to control the activities of mercenaries. This Article examines United States legislation, a major supplier of mercenaries, and will demonstrate that this legislation is ineffective in controlling mercenary activity. The United States legislation is ineffective for two reasons. First, it was enacted at a time when neutrality of states in foreign internal armed conflict became a norm in international law. Thus, the legislation was designed to restrict the freedom of United States citizens to enlist in the military or naval services of foreign states. Second, a new form of mercenary activity appeared on the international scene by the 1960s. Mercenaries were no longer recruited by states into national armies, but by individuals and interest groups who sought to influence the outcome of an internal conflict or to instigate such a conflict. Recruitment of mercenaries by individuals was clearly not envisaged by the draftsmen of the United States legislation, which does not even refer to the term "mercenary."

Given the lack of a reference to mercenaries in its legislation, the United States has become unable to prevent its citizens from joining mercenary groups fighting in Africa. For example, in 1976, matters came to a head in Angola where some British mercenaries were massacred by their fellow mercenaries who, in turn, were captured by the Angolan Government.[3] They were tried for engaging in mercenary activities, massacring their fellow mercenaries and murdering Angolan soldiers and civilians. All were found guilty.[4] Among those sentenced to death was a United States citizen; two others received long prison sentences.[5]

This Article will focus on two major issues pertaining to the United States treatment of mercenary activity. First, it will analyze whether the United States legislation is adequate enough to deal with modern manifestations of mercenary activity and whether this legislation adequately comports with emerging international norms on the subject.

Angolan Civil War, 20 ORBIS 669, 691 (1976); Marcum, *Lessons of Angola*, 54 FOREIGN AFF. 407, 417 (1976).

2. Cassese, *Mercenaries: Lawful Combatants or War Criminals?*, 40 ZaoRV 1, 2-3 (1980); *Complaints by Guinea against Portugal*, 1970 U.N.Y.B. 187, U.N. Sales No. E.72.I.1.

3. N.Y. Times, Feb. 10, 1976, at A1, col. 6.

4. Peter, *Mercenaries and International Humanitarian Law*, 24 INDIAN J. INT'L L. 373, 387-88 (1984); Note, *The Laws of War and the Angolan Trial of Mercenaries: Death to the Dogs of War*, 9 CASE W. RES. J. INT'L L. 323, 328 (1977).

5. Cesner & Brant, *Law of the Mercenary: An International Dilemma*, 6 CAP. U.L. REV. 339 (1977); Statement by Secretary of State Kissinger, DEP'T ST. BULL. (July 10, 1976).

Second, it will analyze the interpretation of United States legislation by its courts, specifically whether it is necessary to recognize belligerents in order for the legislation to apply.

II. THE DEFINITION OF MERCENARIES

Although United States legislation does not mention the term "mercenary," it includes activity which, for modern purposes, is considered mercenary activity.[6] A particular difficulty with this legislation arises with the treatment of enlistment. Although the United States legislation appears to prohibit enlistment inside and out of the United States, the courts hold that only enlistment within United States territory is within their jurisdiction. United States citizens who have enlisted abroad have escaped penal sanction under the law.

Few other countries define the term "mercenary" in their domestic laws. Thus, it is helpful to highlight a definition of the term on the international level. Article 47(2) of Protocol I Additional to the 1949 Geneva Conventions contains a compromise definition.[7] Under article 47(2), a mercenary is a person who:

> (a) is especially recruited locally or abroad in order to take part in an armed conflict in a country other than his own;
> (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 the recruiting party;
> (d) is neither a national nor a resident of the State in which he operates;
> (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.[8]

This definition is highly controversial, and prompted the United Nations to establish a committee in 1979 to draft an international convention against the recruitment, use, financing, and training of mer-

6. 18 U.S.C. § 959(a) (1988).

7. 16 I.L.M. 1412 (1977).

8. *Id.* (emphasis added).

cenaries.[9] The definition espoused by the Geneva Convention, however, remains an important guide to the identification of a mercenary.

III. THE DEVELOPMENT OF UNITED STATES NEUTRALITY LEGISLATION

A. Historical Roots

The United States has had a long tradition of legislation controlling foreign recruitment and enlistment of its own nationals in foreign forces. Earlier laws were inspired by a pragmatic decision to keep the newly established republic out of the struggles in Europe. In addition, a general antipathy existed toward the use of mercenaries, due to the unpleasant experiences the United States had with the Hessian and Hanoverian soldiers (mercenaries) who fought for the British during the American Revolutionary War.

Early in its history, the United States addressed the issue of hostile military expeditions by passing the Neutrality Act of 1794 (the "1794 Act").[10] This law was enacted under President George Washington and regulated the enlistment of citizens of one country into the army of another in an effort to ensure sound international relations. Section 1 of the 1794 Act prohibited the enlistment of United States citizens in foreign armies,[11] and a misdemeanor was committed

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9. *Ad Hoc Committee on the Drafting of an International Convention Against Activities of Mercenaries,* G.A. Res. 34/140, 34 U.N. GAOR Supp. (No. 46) at 42, U.N. Doc. A/34/46 (1979), *reprinted in* [1979] 33 U.N.Y.B. 1152, U.N. Sales No. E.82.I.1. The *Ad Hoc* Committee is still in the process of drafting this international convention. For details on its work, see its annual reports: 36 U.N. GAOR Supp. (No. 43), U.N. Doc. A/36/43 (1981); 37 U.N. GAOR Supp. (No. 43), U.N. Doc. A/37/43 (1982); 38 U.N. GAOR Supp. (No. 43), U.N. Doc. A/38/43 (1983); 39 U.N. GAOR Supp. (No. 43), U.N. Doc. A/39/43 (1984); 40 U.N. GAOR Supp. (No. 43), U.N. Doc. A/40/43 (1985); 41 U.N. GAOR Supp. (No. 43), U.N. Doc. A/41/43 (1986); 42 U.N. GAOR Supp. (No. 43), U.N. Doc. A/42/43 (1987).

10. Act of June 5, 1794, ch. 50, § 1, 1 Stat. 381, 381-82. The immediate objective of the Neutrality Act was to prevent United States citizens from enlisting in the French army during the Anglo-French War. The United States believed that a neutral state had a duty to prevent its subjects from enlisting in the service of a belligerent. This legislation was enacted, however, following the involvement of United States citizens in this war. In 1793, Gideon Henfield, a United States citizen, took service on board a French privateer and arrived at Philadelphia as a prizemaster of a British ship captured in battle. He was indicted under common law, and Mr. Justice Wilson charged the jury that Henfield was bound to take no part in any act which could injure his country. Therefore, he was bound to keep the peace towards all nations at peace with the United States. Henfield's Case, 11 F. Cas. 1099 (C.C.D. Pa. 1793) (No. 6,360). Similarly, another United States citizen, Mr. Isaac Williams, was convicted for accepting a commission under the French Republic, and, under its authority, committing acts of hostility against Great Britain which was at amity with the United States. Williams' Case, 29 F. Cas. 1330 (C.C.D. Conn. 1799) (No. 17,708).

11. Act of June 5, 1794, ch. 50, § 1, 1 Stat. 381. The subsequent United States practice confirmed the territorial character of this legislation.

> if any citizen of the United States . . . *within the territory or jurisdiction* of the same, accepted and exercised a commission to serve a foreign prince or state in war by land or sea, the person so offending shall be deemed guilty of a high misdemeanor, and shall be fined not more than two thousand dollars, and shall be imprisoned not exceeding three years.[12]

Section 5 of the 1794 Act further provided that it was a high misdemeanor for any person within the territory or jurisdiction of the United States to "begin or set on foot or provide or prepare the means for any military expedition or enterprise to be carried on from thence against the territory or dominions of any foreign prince or state with whom the United States are at peace. . . ."[13]

In *Gelston v. Hoyt*,[14] the Court held that the 1794 Act did not apply to the fitting out of a vessel to cruise against a new state which had not been recognized by the United States.[15] Although the 1794 Act was initially passed as a temporary measure, due to difficulties experienced by the United States in maintaining strict neutrality in the wars of the French Revolution, it was perpetuated by the Neutrality Act of April 24, 1800 (the "1800 Act").[16] The 1800 Act, however, did not solve the mercenary problem. Consequently, subsequent laws broadening the scope of the 1794 and 1800 Acts were passed. In subsequent legislation, broader terms were used so that wars of insurrection received the same treatment as wars between recognized states. For instance, in 1817 the words "colony, district or people" were added to the expression "any foreign prince or state" to describe parties in whose service vessels might not be used, or against whom hostilities might not be committed.[17] Following the outbreak of the Spanish American wars of independence and with the increased emphasis upon neutral duties arising out of the Napoleonic wars in Europe, however, the prohibition of military expeditions was incorporated into a more effective neutrality law enacted in 1818 (the "1818 Act").[18] Under section 6 of the 1818 Act, a crime was committed

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12. *Id.* (emphasis added).

13. *Id.* § 5.

14. 16 U.S. (6 Wheat.) 246 (1818).

15. *Id.* at 324-25.

16. Act of Apr. 24, 1800, ch. 35, 2 Stat. 54.

17. Act of Mar. 3, 1817, ch. 58, 3 Stat. 370.

18. Act of Apr. 20, 1818, ch. 88, 3 Stat. 447. This Act codified and consolidated previous Acts, namely the Act of June 5, 1794, ch. 50, 1 Stat. 381 and, the Act of Mar. 3, 1817, ch. 58, 3 Stat. 370.

> if any person shall, within the territory or jurisdiction of the United States, begin or set on foot, or provide or prepare the means for, any military expedition or enterprise, to be carried on from thence against the territory or dominions of any foreign prince or state, or of any *colony*, *district* or *people*, with whom the United States are at peace . . . .[19]

This provision was subsequently incorporated into the Revised Statutes[20] in substantially similar form. In *United States v. The Steamer Three Friends,*[21] the Court stated that section 5286 of the Revised Statutes

> covers all phases of hostile undertakings set on foot in [the United States] by the fitting out of ships, by military expeditions, by enlistments, or by commissions. This section 5286 is applicable in time of peace as well as in time of war, in time of recognized war as well as in time of unrecognized war, and it must be admitted embraces the whole field of hostile operations. It makes it a crime against the laws of the United States to begin on our soil such hostile operations or to carry them on from hence.[22]

The provisions of the statute were incorporated into the codification, revision, and amendment of the Criminal Code in 1909[23] and amendments to the Criminal Code in 1917.[24] The Criminal Code was amended by

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19. Act of Apr. 20, 1818 § 6, 3 Stat. 447 (emphasis added). This Act also prohibits the following activities: acceptance and exercising of foreign commissions by United States citizens within the United States, *id.* § 1; enlisting or hiring others to enlist or leave the country with intent to be enlisted, *id.* § 2; fitting out or arming vessels to be employed in the service of any foreign prince or State or of any colony, district or people, to cruise or commit hostilities against the subjects, citizens or property of any foreign prince or State or of any colony, district or people with which the United States are at peace. *Id.* § 3.

20. Title 67 of the Revised Statutes, headed "Neutrality," § 5286 (1878). This section creates two offenses. Firstly, the setting on foot, within the United States, of a military expedition, to be carried on against any power (prince, state, colony, district, or people), with whom the United States are at peace. Secondly, providing the means for such an expedition. The text of this section is reprinted in Wiborg v. United States, 163 U.S. 632, 647 (1896).

21. 166 U.S. 1 (1897).

22. *Id.* at 16.

23. Act of Mar. 4, 1909, ch. 321, § 13, 35 Stat. 1090.

24. Act of June 15, 1917, ch. 30, tit. 5, § 8, 40 Stat. 223. Chapter 11 of the Act of May 7, 1917, amended section 10 of the Criminal Code to permit enlistment within the United States of nationals of a country engaged in war with a country with which the United States is at war, unless such citizen or subject of such foreign country shall hire or solicit a citizen of the United States to enlist or go beyond the jurisdiction of the United Sates with intent to enlist or enter the service of a foreign country.

adding to the punishable acts, the preparation and furnishing of money for military or naval expeditions.[25] In addition, the Criminal Code provided that the penalties of fine and imprisonment may be imposed concurrently.[26]

B. Current Legislation: The Foreign Relations Act

As exemplified above, the Criminal Code historically prohibited and punished violations of the Neutrality Act. Today, acts likely to prejudice the United States in its international relations are prohibited and punished in the Foreign Relations Act.[27] Section 959, entitled "Enlistment in foreign service,"[28] represents the standard treatment of foreign military enlistments or expeditions. The statute prohibits anyone in the United States regardless of nationality, from enlisting, recruiting or leaving the United States in order to serve any foreign prince, state, colony, district or people whether as a soldier, marine or seaman.[29] Section 959 of the Foreign Relations Act provides:

> Whoever, *within* the United States, enlists or enters himself, or hires or retains another to enlist or enter himself, or *to go beyond* the jurisdiction of the United States with intent to be enlisted or entered in the service of any foreign prince, State, colony, district, or people as a *soldier* or as a *marine* or *seaman* on board any vessel of war, letter of marque, or privateer, shall be fined not more than $1,000 or imprisoned not more than three years, or both.[30]

Under section 959, the essential elements of the crime are the enlistment or recruitment within the United States territory or jurisdiction of any resident person for service in the armed forces of a foreign state or nation.[31] In addition, section 959 creates an offence for departing from the United States with the intent to enlist in a foreign army.[32]

The crime of departing from the United States with the intent to

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25. Act of Mar. 4, 1909, ch. 321, § 9, 35 Stat 1089.

26. Act of May 7, 1917, ch. 11, § 10, 40 Stat. 39.

27. Foreign Relations Act, 18 U.S.C §§ 956-60 (1988).

28. 18 U.S.C. § 959 (1988).

29. *Id.*

30. *Id.* § 959(a) (emphasis added). This provision is based on 18 U.S.C § 22 (1940). For application of this section, see 7 G. HACKWORTH, DIG. INT'L L. 404-13 (1943).

31. 18 U.S.C. § 959(a) (1988).

32. *Id.*

enlist in a foreign army has posed problems of interpretation for the United States courts. In *Wiborg v. United States,* the Court held that the government had no power to prevent its citizens from joining foreign armies if they did so outside the United States jurisdiction.[33] In other words, it was not an offence against the laws of the United States for a citizen or other person (resident alien), to go to a foreign country for the purpose of joining in military operations carried on between other countries or between different parties in the same country.[34] The district court judge in *Wiborg* expressed this position in the following jury instruction:

> [I]t was not a crime or offence against the United States under the neutrality laws of this country for individuals to leave this country with intent to enlist in foreign military service, nor was it an offence against the United States to transport persons out of this country and to land them in foreign countries when such persons had an intent to enlist in foreign armies . . . .[35]

The Court's rationale for its decision in *Wiborg* was based on where the actual act of enlistment occurred. To the same effect, the legal adviser of the State Department, in trying to justify the presence of United States ex-servicemen fighting on the side of Allied forces during World War II, wrote in 1940, "Our law does not prohibit an American citizen outside the United States from enlisting in the military forces of a foreign belligerent. If an official of the government serving in a foreign country should resign his office, he would then be in the same position as a private citizen."[36] As a result, the United States, has in the past not only failed to prosecute returning United States mercenaries, but also has aided in their repatriation and has strongly protested against

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33. 163 U.S. 632, 655-56 (1896).

34. *Id.*

35. *Id.* at 653; *cf.* United States v. The Steamer Three Friends, 166 U.S. 1 (1897) (It is an offense for any insurgent group, although not yet recognized as belligerent, to act together to equip a vessel to cruise against and to conduct hostilities against a foreign state that is at peace with the United States.); United States v. O'Brien, 75 F. 900 (C.C.S.D.N.Y. 1896) (One is prohibited, while within the United States, from enlisting as or recruiting others to enlist as a soldier of a foreign power, but is free to travel outside the United States to do so.); United States v. Nunez, 82 F. 599 (C.C.S.D.N.Y. 1896) (Although their ultimate use may be military, the transportation of goods and the carriage of persons is not prohibited, provided such transportation is without military features, such features being the organization of men to act together, the presence of weapons, and some form of leadership.).

36. Memorandum from Legal Advisor, Hackworth, United States Department of State to the United States Secretary of State, Hull (June 22, 1940), *quoted in* 11 M. WHITEMAN, DIG. INT'L L. 242-43 (1968).

their maltreatment by the victim countries' courts.[37]

Commentators have suggested, however, that the objective of the United States neutrality laws is to prevent the foreign enlistment and recruitment of American citizens solely within the United States borders, rather than to prohibit an individual from leaving the United States to enlist in such a force overseas.[38] Furthermore, although it would be possible to restrictively interpret the term "soldier," put forth in section 959(a) of the Foreign Relations Act, to exclude "civilian advisers," American citizens found in Angola and Rhodesia (now Zimbabwe) were certainly considered mercenaries. And in *Gayon v. McCarthy*,[39] the Court held that even an informal engagement with no more than the prospect of advancement of funds or payment in the future was sufficient to violate the United States neutrality laws.[40]

Exceptions to the enlistment prohibition contained in section 959(a) do exist. Under section 959(b), the ban does not apply to nationals of a belligerent allied to the United States:

> This section shall not apply to citizens or subjects of any country engaged in war with a country with which the United States is at war, unless such citizen or subject of such foreign country

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37. The State Department sought the release of Orton W. Hoover, an United States aviator, arrested in 1930 while aiding Brazilian Government forces against the Vargas Revolution, and arrested again in 1932 while helping the Sao Paulo militia in an abortive rebellion against Vargas. *See* N.Y. Times, Nov. 6, 1930, at A9, col. 3; *id.*, Nov. 7, 1930, at A8, col. 2; *id.*, Nov. 13, 1930, at A2, col. 4; *id.*, Oct. 21, 1932, at A7, col. 4. The State Department also attempted to prevent the death penalty from being carried out against Harold B. Dahl, an United States pilot being arrested by the Franco fascist forces in 1937. *See id.*, Sept. 3, 1937, at A3, col. 7; *id.*, Sept. 4, 1937, at A4, col. 4; *see also* Borchard, *The Power to Punish Neutral Volunteers in Enemy Armies*, 32 AM. J. INT'L L. 535, 536-37 & n.5 (1938).

To the best of the author's knowledge, no attempts have been made to arrest, let alone prosecute, returning mercenaries who fought in Angola, although the Federal Bureau of Investigation ("FBI") had investigated the matter. On the contrary, the then Secretary of State, Henry Kissinger, at a press conference, strongly criticized the execution on July 10, 1976 of Daniel Gearhardt, an United States citizen convicted of mercenary activities by an Angolan court. *See* 75 DEP'T ST. BULL. 163 (1976); *Mercenaries in Africa: Hearings Before the Special Subcomm. on Investigations, of House Comm. on International Relations*, 94th Cong. 2d Sess. 3-4 (1976) (statement of William E. Schaufele, Jr., Assistant Secretary of State for African Affairs) [hereinafter *Mercenaries Hearings*], *reprinted in* McDowell, *Contemporary Practice of the United States Relating to International Law*, 71 AM. J. INT'L L. 133, 140 (1977).

38. *See, e.g.*, Hinds, *The Legal Status of Mercenaries: A Concept in International Humanitarian Law*, 52 PHIL. L.J. 395, 408 (1977); Cesner & Brant, *supra* note 5, at 358.

39. 252 U.S. 171 (1920) (involving the recruitment of a sailor, recently retired from the United States Navy and unemployed, in the force raised by Felix Diaz against the government of Mexico).

40. *Id.* at 177-78.

> 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 enter the service of a foreign country.[41]

The enlistment prohibition contained in section 959(a) is also qualified by a proviso that friendly ships of war or privateers, which at the time of their arrival in the United States were fitted and equipped as such, may enlist persons of their own nationality for service on board.[42] These ships are considered to be "transiently" within the United States and thus fall under the exemption set forth in section 959(c) as follows:

> This section and sections 960 and 961 of this title shall not apply to 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 . . . .[43]

Other sections of the Foreign Relations Act deal with similar matters relevant to neutrality and good relations with foreign states. Under Section 956, entitled "Conspiracy to injure property of foreign government,"[44] subsection (a) proscribes conspiracy within the jurisdiction of the United States to injure or destroy the property of a foreign government with which it is at peace:

> If two or more persons within the jurisdiction of the United States conspire to injure or destroy specific property *situated within a foreign country* and belonging to a foreign government or to any political subdivision thereof with which the United States is at peace, or any railroad, canal, bridge or other public utility so situated, and if one or more such persons commits an act within the jurisdiction of the United States to effect the object of the conspiracy, each of the parties to the conspiracy shall be fined not more than $5,000 or imprisoned not more than three years, or both.[45]

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41. 18 U.S.C. § 959(b) (1988).

42. *Id.* § 959(c).

43. *Id.*

44. *Id.* § 956.

45. *Id.* (emphasis added). In United States v. Elliott, 266 F. Supp. 318 (S.D.N.Y. 1967) where the section was enforced, the defendants were charged with conspiring within the United States to destroy a railroad bridge in Zambia and committing several acts in furtherance of that conspiracy within the United States. The destruction of this bridge would have effectively halted the supply of Zambian copper to the world market. Hence,

Moreover, section 957 makes it an offence to possess "property or papers used, designed, or intended for use in violating any penal statute, or any of the rights or obligations of the United States under any treaty or the law of nations."[46]

Prosecution of mercenaries is also possible under section 958 which makes it an offence for any citizen of the United States to accept and exercise a commission to serve a foreign state which is at war with a state currently at peace with the United States.[47] A key issue pertaining to this provision is whether recruitment of mercenaries including, *inter alia*, the offering of enlistments, can be interpreted as the constructive acceptance and exercise of a "commission" from someone, even in the absence of evidence of express acceptance.

Section 960 addresses expeditions against foreign friendly nations.[48] It expressly prohibits the launching of a military or naval expedition from the United States against any nation with which it is at peace:

> 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, shall be fined not more than $3,000 or imprisoned not more than three years, or both.[49]

In interpreting this provision, the essential features of military operations are characterized as "concert of action, unity of action, by a body organized and acting together, acting by means of weapons of some kind, acting under command, leadership."[50] As to the meaning of the phrase "at peace" under section 960, in *United States v. Elliott*,[51] the court held that the phrase is to be interpreted as it is commonly understood.[52] For purposes of this section, it would then appear that the United States was "at peace" with, for example, Angola and Rhodesia during their struggle for independence in the 1970s.

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the defendants expected to profit economically from the ensuing copper shortage.

46. 18 U.S.C. § 957 (1988).

47. *Id.* § 958.

48. *Id.* § 960.

49. *Id.* (emphasis added).

50. United States v. Nunez, 82 F. 599, 601 (C.C.S.D.N.Y. 1896).

51. 266 F. Supp. 318 (1967).

52. *Id.* at 322.

C. The Immigration and Neutrality Act & The Foreign Agents Registration Act

Perhaps more important than the fines or imprisonment terms proscribed by the Foreign Relations Act, is the provision in 8 U.S.C. § 1481 which calls for the loss of nationality by a United States citizen who voluntarily performs acts in violation of § 1481(a) with the intention of relinquishing United States nationality.[53] Such acts include "entering, or serving in, the armed forces of a foreign state if (A) such armed forces are engaged in hostilities against the United States, or (B) such persons serve as a commissioned or noncommissioned officer."[54]

Another United States statute pertaining to mercenary activity is the Foreign Agents Registration Act.[55] It concerns the activities of any foreign agent who may be involved in the enlistment or recruitment of individuals within the United States. For example, a registered agent who willfully fails to report an activity such as recruitment or enlistment is subject to criminal penalties.[56] During the Crimean War (1854-56), Attorney General Cushing took vigorous steps against British recruitment in the United States.[57] He maintained that such recruitment was a violation of the sovereignty and rights of the United States under international law, even though infractions of the municipal law of the United States were ingeniously avoided.[58] The Foreign Agents Registration Act also provides that it is a criminal offense for any individual, including an American citizen, to dispense any money within the United States for or in the interest of a foreign agent.[59] Finally, any person who

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53. 8 U.S.C. § 1481(a) (1988). This statute replaces the Immigration and Neutrality Act of 1952, Pub. L. No. 414, § 349(a)(3), 66 Stat. 267, 268 (1952) (codified as amended 8 U.S.C. § 1481(a)(3) (1988)). The 1952 Act and the previous § 1481(a)(3) provided for the loss of nationality by a United States national who was found guilty of entering, or serving in, the armed forces of a foreign state without the prior express written authorization from both the Secretary of State and the Secretary of Defense. *Id.* The *voluntary* relinquishment requirement of the current § 1481(a)(3) was added to the statute subsequent to the Supreme Court's decision in Afroyim v. Rusk, 387 U.S. 253 (1967). In *Afroyim*, the Court held that because United States citizenship is an absolute constitutional right, an act of Congress may not forcibly deprive a person of his citizenship unless the citizen himself voluntarily abandons it. *Id.* For a detailed discussion of this case, see *infra* notes 180-87 and accompanying text.

54. 8 U.S.C. § 1481(a)(3) (1988).

55. 22 U.S.C. §§ 611-21 (1988).

56. *Id.* § 618(a)(2).

57. Dumbauld, *Neutrality Laws of the United States*, 31 AM. J. INT'L L. 258, 264 n.37 (1937) (quoting S. EXEC. DOC. No. 35, 34th Cong., 1st Sess. 1 (1855)).

58. *Id.* at 268-69.

59. 22 U.S.C. § 611(c)(1)(iii) (1988).

represents the interests of a foreign principal breaches this provision.[60]

In general, persons doing any of the prohibited acts described above are also subject to criminal liability for conspiring to commit offenses or to defraud the United States under 18 U.S.C. § 371.[61] Violation of this statute can result in a fine of up to $10,000 or imprisonment of up to five years, or both.[62]

IV. INTERPRETING UNITED STATES NEUTRALITY LEGISLATION

The original objective of United States neutrality laws was to prevent the recruitment and enlistment of American citizens for service in foreign countries. This, in turn, would prevent the United States from unwillingly participating in foreign conflicts. In *United States v. Nunez*,[63] the court stated that the reason behind the neutrality laws was

> to prevent entanglements between [the United States] and foreign powers, by prohibiting expeditions from this country interfering with beligerents, or with the relations between a mother country and its insurgent people, in such a way as to entangle [the United States], and become justly a subject of contention, and in that way, if not checked, liable to lead [the United States], into serious complications.[64]

The real purpose of these neutrality laws, is to prohibit the commission of unauthorized acts of war by private United States citizens because these unauthorized acts may lead to acts of reprisals against the whole nation, as well as to civil disunion.[65] In *United States v. Henfield*,[66] the court's jury charge articulated this concern:

> If one citizen of the United States may take part in the [Anglo-French War], ten thousand may. If they may take part on one side, they may take part on the other; and thus thousands of our fellow-citizens may associate themselves with different belligerent powers, destroying not only those with whom we have no

60. *Id.* § 611(c)(1)(iv).

61. 18 U.S.C. § 371 (1988).

62. *Id.*

63. 82 F. 599 (1896).

64. *Id.* at 599-600. For a discussion on the policy behind the United States Neutrality Laws, see Lobel, *The Rise and Decline of the Neutrality Act: Sovereignty and Congressional War Powers in United States Foreign Policy*, 24 HARV. INT'L L.J. 1 (1983).

65. Henfield's Case, 11 F. Cas. 1099, 1119 (C.C.D. Pa. 1793) (No. 6,360).

66. *Id.* (Iredell, J., Peters, J., concurring).

> hostility, but destroying each other. . . . As a citizen of the United States, [Gideon Henfield] was bound to act no part which could injure the nation; he was bound to keep the peace in regard to all nations with whom we are at peace.[67]

In *Three Friends*, the Court emphasized that "no nation can permit unauthorized acts of war within its territory in infraction of its sovereignty, while good faith towards friendly nations requires their prevention."[68] The same view was taken in *United States v. Arjona,*[69] a decade earlier, where the Court declared that "[t]he law of nations requires every national government to use 'due diligence' to prevent a wrong being done within its own dominion to another nation with which it is at peace, or to the people thereof . . . ."[70]

In *United States v. O'Sullivan,*[71] the court stated that "[t]he rule is founded on the impropriety and danger of allowing individuals to make war on their own authority, or, by mingling themselves in the belligerent operations of other nations, to run the hazard of counteracting the policy or embroiling the relations of their own government . . . ."[72] Moreover, Assistant Attorney General Charles Warren stressed that if the United States is to remain a truly neutral party by avoiding controversies with belligerents regarding interference with neutral rights, it must be prepared to impose greater restrictions upon the activities of its citizens.[73]

> [I]n order to keep out of war, it will be necessary . . . for the United States to do far more than merely comply with its legal obligations of neutrality. In order to avoid friction and complications with the belligerent, it must be prepared to impose upon the actions of its citizens greater restrictions than international law requires. It must also be prepared to relinquish many rights

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67. *Id.* at 1119-20.

68. United States v. The Steamer Three Friends, 166 U.S. 1, 52 (1897).

69. 120 U.S. 479 (1887), *quoted in* SS Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 88 (Sept. 27) (Moore, J., dissenting) ("It is well settled that a State is bound to use due diligence to prevent the commission within its dominion of criminal acts against another nation or its people.").

70. *Arjona*, 120 U.S. at 484.

71. 27 F. Cas. 367 (C.C.S.D.N.Y. 1851) (No. 15,974).

72. *Id.* at 376. Similarly, Secretary of State Jefferson declared: "No citizen has a right to go to war of his own authority; and for what he does without right, he ought to be punished. Indeed nothing can be more obviously absurd, than to say that all citizens may be at war, and yet the nation at peace." Jefferson to Mr. Morris, Minister Plenipotentiary of the United States with the Republic of France, Aug. 16, 1793, *reprinted in* 7 J. MOORE, A DIGEST OF INTERNATIONAL LAW 917 (1906). For further details, see Dumbauld, *supra* note 57, at 258-70, 261 n.19.

73. Warren, *Troubles of a Neutral*, 12 FOREIGN AFF. 377, 378 (1933).

which it has heretofore claimed and asserted . . . .[74]

One of the most acute problems with the United States neutrality legislation is to determine what type of activity falls within the ambit of the statutes. During the conflict in Angola (1975-76),[75] the recruitment of United States citizens to fight as mercenaries against the Popular Movement for the Liberation of Angola ("MPLA"), prompted an examination of the legal concept of "military or naval expedition or enterprise."[76] It is unclear whether the concept applies only to an *organized* fighting force departing from the United States territory to fight against a nation with which the United States is at peace, or whether it also applies to the "voluntary" departure of people from the United States in a *less organized* group, to fight for a faction in the internal conflict of a foreign country. In other words, the issue is whether the United States recognition of belligerency is a necessary element for the application of its laws and statutes.

A. Military Expeditions and Military Enterprises

The legal difference between a military expedition and a military enterprise is very subtle. Nevertheless, the two terms constitute different offenses.[77] A military expedition is comprised of two basic factors. An association or organization must exist within the territory of the United States, and it must have hostile intentions toward a foreign country.

In *Wiborg*, the Court defined a military expedition as "a journey or voyage by a company or body of persons, having the position or character of soldiers, for a specific warlike purpose . . . ."[78] Similarly, Secretary of State Marcy emphasized that

> what have been called expeditions organized within our limits for foreign service have been only the departure of unassociated individuals. Such a departure, though several may go at the same time, constitutes no infringement of our neutrality laws, no violation of neutral obligations, and furnishes no ground for the arraignment of this Government by any foreign power.[79]

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74. *Id.*

75. *See supra* note 1.

76. 18 U.S.C. § 960 (1988).

77. For a discussion of the difference between military expeditions and military enterprises, see 7 G. HACKWORTH, *supra* note 30, at 398-99.

78. Wiborg v. United States, 163 U.S. 632, 650 (1896).

79. Note from Secretary of State Marcy to Mr. Escalante (May 8, 1856), *reprinted in* 7 J. MOORE, *supra* note 72, at 927.

The condition that individuals be unassociated when departing from the United States for foreign service assumes that unless an actual organization of a military character is in operation, a potential injury to a foreign state or people may hardly be deemed to exist.[80] Behind this condition, there is the further assumption that an individual acting alone may not seriously threaten the peace and security of a foreign state.[81] Therefore, the departure of individuals or of unorganized groups for the purpose of joining the forces of the belligerent country is not a violation of the law, and a duty of prevention need not be acknowledged.[82] This concept was tested during the revolutionary years, when the Mexican Government complained of military expeditions allegedly formed in the United States with the purpose of overthrowing the existing regime. The State Department called attention to the distinction

> on the one hand between the passage of men singly and in small groups across our frontier and into another country, or the sailing of individuals or small groups in the ordinary course of events from one of our ports, and on the other hand the departure from our territory of organized groups of men avowing the purpose of undertaking belligerent activities in foreign territory.[83]

Consequently, the United States Government vigorously asserted that a duty of prevention only existed in the case of the departure of organized

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80. United States v. Tauscher, 233 F. 597, 599 (S.D.N.Y. 1916), wherein the court quoted, with apparent approval, Judge Judson's charge to the jury in *O'Sullivan* that before a jury could convict "it must be proved to their satisfaction that the expedition or enterprise was in its character military; or in other words, it must have been shown by competent proof that the design, the end, the aim, and the purpose of the expedition, or enterprise, was some military service, some attack or invasion of another people or country, State or colony as a military force." United States v. O'Sullivan, 27 F. Cas. 367, 381 (C.C.S.D.N.Y. 1851) (No. 15,974); *see also Wiborg*, 163 U.S. at 650.

81. *But see* United States v. Ram Chandra, 254 F. 635, 636 (N.D. Cal. 1917) ("I see no reason, however, why a single individual may not begin or set on foot a military expedition, or enterprise, and more especially why a single individual may not well provide or prepare the means for such an expedition or enterprise.").

82. Memorandum from Lansing, Counselor for the United States Department of State to Count von Bernstroff (Oct. 6, 1914), *quoted in* 7 G. HACKWORTH, *supra* note 30, at 412.

83. Note of the Secretary of State Knox to the Mexican Ambassador Señor de Zamacona (June 7, 1911), 7 G. HACKWORTH, *supra* note 30, at 410-11. It is also well known that in 1870, during the Franco-German War, 1200 Frenchmen were allowed to depart from New York in two French steamers for the purpose of joining the French army. Although the vessels also carried 96,000 rifles and 11,000,000 cartridges, the United States did not interfere, because the men were not organized in a body, and the arms and ammunition were carried in the way of ordinary commerce. 2 L. OPPENHEIM, INTERNATIONAL LAW, A TREATISE 704-05 n.4 (7th ed., H. Lauterpacht ed. 1952).

groups from its territory.

This distinction between the departure of organized and unorganized groups from United States territory has formed the basis of the United States law on the subject and has been applied with consistency. As early as 1793, Secretary of State Thomas Jefferson addressed a note to the Minister of France forcibly stating that "the government of the United States will not at the request of a foreign government intervene to prevent the transit to the country of the latter of persons objectionable to it unless they form part of a hostile military expedition."[84]

More than a century later, the court in *United States v. Pena*,[85] interpreted the purpose of section 5286 of the Revised Statutes as follows:

> This section of the neutrality act does not prohibit the shipping of arms, or ammunition or of military equipments to a foreign country, nor does it even forbid one or more individuals, singly or in unarmed associations, from leaving the United States for the purpose of joining in any military operations which are being carried on between other countries, or between different parties in the same country.[86]

In 1911, the distinction between organized and unorganized groups was still alive. Replying to complaints from the Mexican Embassy in Washington alleging that plots were being roused along the Mexican side of the United States-Mexican border with the intent to launch attacks on Mexican territory, United States Secretary of State Knox declared to Mexican Ambassador Señor DeZamacona:

> In this connection I must again repeat to Your Excellency that not only is there no rule of international law requiring, and no local Federal statute that would permit, the Federal officials of this Government to prevent the passage into foreign territory of unarmed and unorganized men either singly or in groups, but, on the contrary, it is an express provision of international law that the responsibility of a neutral power is not engaged even in time of recognized war by the fact of persons crossing the frontier separately to offer their services to one of the belligerent; and as to the mandates of municipal law, the courts of the United States have repeatedly declared that our neutrality statutes do

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84. Note from the Secretary of State, Jefferson, to the Minister of France, Morris (Nov. 30, 1793), *reprinted in* 7 J. MOORE, *supra* note 72, at 917.

85. 69 F. 983 (D. Del. 1895).

86. Id. at 984-85.

> not forbid one or more individuals singly or in unarmed, unorganized groups from leaving the United States for the purpose of joining in any military operations which are being carried on between other countries or between different parties in the same country.[87]

Thus, the responsibility of neutral states is not engaged if a number of individuals, not organized into a body under a commander, start in company from their territory for the purpose of enlisting with the belligerent country. This rule was reflected in the classical law of nations manifested by the practice of states and was recognized by the United States, a country which imposes no duty of prevention upon a neutral state. As one commentator stated in 1915:

> No act . . . could be more clearly unneutral than that of a citizen of a neutral country in going abroad and enlisting in the military or naval service of a belligerent; and yet this is an act which a neutral government is not obliged to prevent, and neutral governments do not in fact undertake to prevent it.[88]

The assumptions upon which the United States law was based were

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87. *Reprinted in* 7 G. HACKWORTH, *supra* note 30, at 410-11; *cf.* Havana Convention on Maritime Neutrality, Feb. 20, 1928, 47 Stat. 1989, T.S. 845, *reprinted in* 2 C. BEVANS, TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA 1776-1944, 727 (1969). "Neutral States shall not oppose the voluntary departure of nationals of belligerent states even though they may leave simultaneously in great numbers; but they may oppose the voluntary departure of their own nationals going to enlist in the armed forces." *Id.* The War Department Rules of Land Warfare, Nos. 372, 373, of 1940 declared that individuals crossing the frontier singly or in small bands that are unorganized, create no obligation on the part of a neutral state, and that nationals of a belligerent are permitted freely to leave neutral territory to join the armies of their country. It may be observed that by the Declaration of Panama of Oct. 3, 1939, those Republics resolved to prevent the enlistment for service abroad within their own territory, declaring that they "shall prevent, in accordance with their internal legislations, the inhabitants of their territories from engaging in activities capable of affecting the neutral status of the American Republics." *Id.* at 608. On Feb. 20, 1928, a convention was adopted which generally prohibited intervention in the internal affairs of another state. Article 1 of the Convention on the Duties and Rights of States in the Event of Civil Strife goes further, obliging the contracting states: "To use all means at their disposal to prevent the inhabitants of their territory, nationals or aliens, from participating in, gathering elements, crossing the boundary or sailing from their territory for the purpose of starting or promoting civil strife." Convention on the Duties and Rights of States in the Event of Civil Strife, Feb. 20, 1928, 46 Stat. 2749, T.S. 814, 134 L.N.T.S. 45, 51, *reprinted in* 5 M. WHITEMAN, DIG. INT'L L. 272 (1965).

88. Letter from John Bassett Moore to Hon. Benjamin Strong, Jr., Governor, Federal Reserve Bank, New York City, Aug. 26, 1915, *reprinted in Munitions Industry Hearing before Special Comm. of the Senate Investigating the Munitions Industry*, 74th Cong., 2d Sess. 25, Exhibit 2141.

faithfully reflected in the Second Hague Convention in 1907,[89] which states, "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."[90] An *argumentum a contrario* supports the conclusion that a neutral party is actually involved when it allows men to cross its frontier in a body in order to enlist in the forces of a belligerent.

To appreciate the full impact of article 6, it must be compared with article 4 of the Convention which provides, "Corps of combatants cannot be formed nor recruiting agencies opened on the territory of a neutral Power to assist the belligerents."[91] When these two provisions are viewed together, the neutral state must prevent its frontier from being crossed by corps or bands which have already been organized on its territory, but may remain indifferent with respect to individuals acting in an isolated manner.[92] In other words, two different situations must be considered when dealing with subversive activities against foreign states. One situation arises when these subversive activities are committed by private individuals. The other arises when the activities are committed by organized persons, for example, by a concerted, armed, and hostile expedition.

Although a state does not have a duty to prevent and suppress the commission of acts injurious to foreign states that are perpetrated by unorganized private persons within its territory, a state is under an obligation to prevent these injurious acts when they are committed by organized groups.[93] The prevailing international law governing subversive activities against foreign states provides:

> States are under a duty to prevent and suppress such subversive activity against foreign Governments as assumes the form of armed hostile expeditions or attempts to commit common crimes against life or property. Moreover, 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 Constitu-

89. 1907 Hague Convention Number V, Respecting the Rights & Duties of Neutral Powers and Persons in Case of War on Land, *opened for ratification* Oct. 18, 1907, T.S. 537, 36 Stat. 2310 [hereinafter Second Hague Convention], *reprinted in* 2 W. MALLOY, TREATIES 2290 (1910); 2 AM. J. INT'L L. 117 (1908).

90. Second Hague Convention *supra* note 89, art. 6.

91. *Id.* art. 4.

92. *Id.*

93. 1 OPPENHEIM, *supra* note 83, at 292-93 (8th ed. 1955).

> tion of the State concerned, *amount to a breach of international law.*[94]

It is acknowledged that neutral states have long recognized the principle that it is their duty as well as their right to prevent the commission, within their territories, of acts injurious to foreign states or peoples with whom they are at peace. The duty of prevention, however, has a wide scope of application. Broadly speaking, it applies to attempts to commission, hire, retain or induce on neutral soil, others of any nationality to enter into belligerent service. It is likewise applicable to the retaining, hiring or inducing of others to go outside of neutral territories with the intent to enlist or enter into such service, as well as to the case of enticement of others by false representations to go outside the jurisdiction of a neutral territory with the intent that such persons may while there, through inducement or otherwise, enlist or enter into the belligerent service. Indifference by a neutral power, that is, not exercising due diligence to prevent its citizens or foreigners residing thereof from committing injurious acts to friendly foreign states or peoples, would serve to cause its territory to become a direct means of injuring a state or people with which friendly relations are maintained. In other words, neutral tolerance necessarily signifies connivance, and hence, governmental participation in the conflict:

> But when viewed positively, the wrongful act of the State appears to consist in complicity in hostile attacks on friendly States. The authorized and direct complicity of the government in the expedition itself has been excluded as actual war. The negligence and carelessness of the State, however, in the prevention of such enterprises amounts to virtual complicity in the undertaking. If there is such an attitude on the part of the government as indicates a disregard of its international obligation, it may be considered as having consented to the attack which is to be made; it may even be regarded as assisting in the hostilities by protecting the persons engaged, and allowing them its territory as a base for organization. If the sovereign has knowingly suffered the harm to be done to another State, it may be said to be an accomplice in the act itself.[95]

Thus, the curious paradox of not compromising a state's responsibility

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94. *Id.* (emphasis added); *cf.* 3 J. SCOTT, THE PROCEEDINGS OF THE HAGUE PEACE CONFERENCE 51-52 (1921).

95. Curtis, *The Law of Hostile Military Expeditions as Applied by the United States*, 8 AM. J. INT'L L. 1, 36 (1914).

even if its territory and resources are being used as a base for organizations, operations, and training of "unorganized" individuals, can only be understood in light of *laissez passer, laissez faire* conceptions of pre-war international law.

The second factor necessary for the existence of a military expedition is the presence of a common design of hostile operation against a friendly foreign state.[96] This condition would seem to follow logically for if a hostile criminal intent is lacking, no injury to the foreign state in question may be said to exist. Generally speaking, under the relevant statutes and case law, if these two factors are not present, the United States is unwilling to recognize the existence of a military expedition and consequently, a duty of prevention does not arise. As the Supreme Court stated in *Wiborg*, "A military expedition or enterprise does not exist unless there is a military organization of some kind . . . officered and equipped for active hostile operations."[97]

In marked contrast to a military expedition, a military enterprise is more comprehensive in scope. In *Wiborg*, the Court defined a military enterprise as "a martial undertaking, involving the idea of a bold, arduous and hazardous attempt."[98] Clearly then, while a military expedition might conceivably be included in this definition, the concept of a military enterprise gives a broader scope to the statute than just its application to military expeditions. Moreover, a military enterprise may consequently include various undertakings not only by a number of persons, but also by a single individual,[99] provided the existence of an organization of a strictly military character is absent.

B. Belligerency

In recognition of the preceding considerations, the United States has enforced its neutrality laws, which include the prohibition of military expeditions in cases of insurgency where recognition of belligerency *has not* been granted. Thus, on June 12, 1895, President Cleveland of the United States issued a formal proclamation informing United States citizens that the island of Cuba was "the seat of serious civil disturbances accompanied by armed resistance to the authority of the established government of Spain, a power with which the United States are and desire to remain on terms of peace and amity."[100] This proclamation further declared:

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96. Wiborg v. United States, 163 U.S. 632, 653 (1896).

97. *Id.* at 650.

98. *Id.*

99. United States v. Sander, 241 F. 417 (S.D.N.Y. 1917).

100. *Quoted in* United States v. The Steamer Three Friends, 166 U.S. 1, 64-65 (1897).

> [T]he laws of the United States prohibit their citizens, as well as all others being within and subject to their jurisdiction, from taking part in such disturbances adversely to such established government, by accepting or exercising commissions for warlike service against it, by enlistment or procuring others to enlist for such service . . . and by setting on foot or providing or preparing the means for military enterprises to be carried on from the United States against the territory of such government . . . .[101]

In President Cleveland's annual message of December 2, 1895, he warned all persons within the jurisdiction of the United States to refrain from forming or taking part in military expeditions in violation of the neutrality laws.[102] The President issued another proclamation on July 27, 1896, and gave an extended review of the continuing insurrection in Cuba during his annual message on December 7, 1896.[103] American courts considered these proclamations as sufficiently authoritative sources for interpreting the United States neutrality laws. For example, the validity of the President's proclamations was upheld in the *Three Friends* case.[104] In this case, however, the Court sustained the seizure of a vessel that had been supplied and armed for the purpose of aiding the Cuban insurgents against the Spanish colonial regime.[105] In analyzing the seizure, the Court applied the statutory section prohibiting the fitting-out of ships to cruise or commit hostilities to a state of insurgency not recognized as belligerency, which was war in a material sense though not in a legal sense.

In delivering the opinion of the Court, Chief Justice Fuller stated, "We see no justification for importing into section 5283 [of the Revised Statutes] words which it does not contain and which would make its operation depend upon the recognition of belligerency . . . ."[106] The Court declared that the United States Government was in a state of peace with Spain and that the political department of the United States Government had recognized the existence of insurrectionary war between Spain and her colonists in Cuba.[107] Thus, the Court stated:

> We are thus judicially informed of the existence of an actual

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101. *Id.* at 64.
102. *Id.* at 65.
103. *Id.*
104. *Id.* at 64-65.
105. *Id.* at 68.
106. *Id.* at 66.
107. *Id.* at 65.

> conflict of arms in resistance of the authority of a government with which the United States are on terms of peace and amity, although acknowledgement of the insurgents as belligerents by the political department has not taken place; and it cannot be doubted that, this being so, the [neutrality] act in question is applicable.[108]

Furthermore, the legal significance of these proclamations lies in the fact that the prohibition of hostile military expeditions was regarded as a duty stemming from accepted principles of international law. These principles of international law undoubtedly stipulate that a neutral state must maintain an attitude of strict impartiality towards a belligerent in the event of a war.[109] Included in this obligation is the duty of a neutral state not only to abstain from participating in the conflict, but also to refuse the use of its *territory and resources* for the organization of military expeditions against friendly foreign states.[110]

In the *Santissima Trinidad* case, the Court held that a colony, not recognized as a state by the United States, but involved in a civil war with Spain, had the status of a belligerent nation, and that its vessels of war were vested with the character of ships of state.[111] As Justice Story stated:

> The government of the United States has recognized the existence of a civil war between Spain and her colonies, and has avowed a determination to remain neutral between the parties, and to allow to each the same rights of asylum, and hospitality and intercourse. Each party is, therefore, deemed by us a belligerent nation, having, so far as concerns us, the sovereign rights of war, and entitled to be respected in the exercise of those rights. We cannot interfere to the prejudice of either belligerent without making ourselves a party to the contest, and departing from the posture of neutrality.[112]

With respect to a civil war, the law is founded on the obligation of every state to respect, in peace and in war, the independence, territorial

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108. *Id.* at 65-66. A similar proclamation was issued on Mar. 2, 1912 with respect to the Mexican Civil War. 2 DEAK & JESSUP, A COLLECTION OF NEUTRALITY LAWS, REGULATIONS, AND TREATIES OF VARIOUS COUNTRIES 1200 (1939).

109. 7 G. HACKWORTH, *supra* note 30, at 372-79.

110. *Id.*

111. The Santissima Trinidad, 20 U.S. (7 Wheat.) 283, 336-37 (1822).

112. *Id.* at 337.

integrity, and inviolability of other nations.[113] In the event of inter-state war, the obligation of a neutral state is one of impartiality. As applied to a civil war, the obligation is one of non-interference in the conflict regardless of whether a status of belligerency is recognized.[114] Whether the state is confronted with a duty of impartiality or with one of non-interference, the obligation to prevent hostile military expeditions from departing from its jurisdiction remains the same. Hence, the prohibition of hostile military expeditions is of a permanent character not exclusively dependent upon the existence of an international war. The duty involved, however, has been characterized as one of prevention, and it proceeds largely upon the well-established theory that international law confers upon every state a power of exclusive control over its territorial domain. Concurrent with this obligation is the correlative duty to protect within a territory the rights of other states, specifically, their right to integrity and inviolability in peace and in war.[115] Therefore, the reasonableness of the claim of a state that respect be paid to its supremacy within its own domain, as well as to its political independence and its territorial integrity, depends upon its success in satisfying the full measure of its obligations resulting from activities within its territory which may have a direct effect upon foreign states and their nationals.

C. The Impact of International Law

The eminent question which arises is whether and to what extent international law imposes upon a territorial sovereign the duty, within its jurisdiction or within territories under its control, to endeavor to restrain activities, which if unrestrained are bound to result in damage to foreign states within their own territories or outside of the country where such activities are initiated. States are therefore bound by well-recognized principles of international law. These principles include non-intervention in the internal affairs of other states, non-use of force in international relations, and peaceful settlement of international disputes in order to prevent a state's own citizens or any other persons from making use of their territories or resources for hostile operations against any government with which they are at peace and amity. In other words, there are some activities or forms of conduct which a state should feel obliged to endeavor to repress when the direct objective is the territorial integrity, political independence or *ordre public* of a foreign state or people. As

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113. *Id.* at 337-38.

114. *Id.*

115. *See* Arbitrator Huber's opinion in Island of Palmas Case (Neth. v. U.S.), 2 R. Int'l Arb. Awards 829, 839 (1928); *see also* S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 88 (Sept. 27) (Moore, J., dissenting).

was declared by the Council of the League of Nations, in a resolution of December 10, 1934, it is

> the duty of every State neither to encourage nor tolerate in its territory any terrorist activity with a political purpose; that every State must do all in its power to prevent and repress acts of this nature and must for this purpose lend its assistance to Governments which requested it.[116]

V. UNITED STATES ENFORCEMENT

The United States Government has long pursued a policy of non-enforcement with regard to its neutrality laws. This is evident by the mercenary activities engaged in by United States citizens in such conflicts as World War I, the Spanish civil war, World War II, the Cuban crisis, and the Angolan conflict.

A. World War I

The nominal deterrent of mercenary activity provided under the early neutrality laws of United States was further undermined during World War I. During this period, the United States Government modified its neutrality laws, and in many instances simply failed to enforce them, because great numbers of young United States citizens had volunteered to fight for the Allied Powers prior to the United States entry into the conflict. Thus, before the United States became a belligerent, its citizens (or rather aviators) formed the "*Escadrille Américaine*" commanded by French officers.[117]

Subsequently, as a result of German Count Bernstorff's protests against the presence of an United States squadron in the French air force, the name was changed, first to that of the "*Escadrille des Volontaires*" and soon after (November 1916) to "*Escadrille Lafayette.*"[118] Nothing was changed, however, save the name, and the squadron under its new title continued to serve under the French flag until, upon the United States declaration of war, it became the 103rd Pursuit Squadron of the United States Air Service.[119] Because these United States "volunteers" did not take an oath of allegiance to France, they did not

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116. 15 LEAGUE OF NATIONS O.J. 1759 (1934). This statement was inspired by the assassination of the King of Yugoslavia in Marseilles in 1934, by terrorists who, it was asserted, had been active on Hungarian soil.

117. J. SPAIGHT, AIR POWER AND WAR RIGHTS 462-63 (3d ed. 1947).

118. *Id.* at 463.

119. *Id.*

lose their American citizenship.[120] No action was taken, however, to punish these "citoyens Américains engagés au service de la France," or "citoyens Américains volontaires pour la durée de la guerre."[121]

Following the conclusion of World War I, the United States Government once again attempted to enforce its neutrality laws. In 1920, a United States citizen was offered a commission to fight in the revolutionary forces of Felix Diaz against the legally constituted Mexican Government by a Mexican residing in the United States.[122] In *Gayon v. McCarthy*, the Court affirmed Gayon's conviction for violating the neutrality laws of the United States, reasoning that the act of recruiting a United States citizen to join revolutionary forces in Mexico by promising a commission was clearly a violation of the laws.[123]

B. The Spanish Civil War

A significant reformulation of the United States neutrality laws occurred as a result of the substantial involvement of United States civilians in the Spanish Civil War (1936-39). In response to the recruitment and enlistment of several thousand United States citizens to serve in the Abraham Lincoln Battalion of the International Brigade during this war, Congress passed a new Neutrality Act[124] in November 1939. The Act reaffirmed the prohibition against leaving the United States to enlist in foreign armed services.[125] These young volunteers, mostly members of the Communist or Socialist parties of the United States, served in the Republican army of the Spanish Government to prevent a Fascist takeover in that country.[126] The Roosevelt Administration did not openly support such enlistment. Although there were often passport irregularities,[127] no violators were arrested, and United States Customs Officers made no serious attempts to stop the exodus of these

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120. *Id.*

121. *Id.*

122. Gayon v. McCarthy, 252 U.S. 171 (1920).

123. *Id.* at 177-78. This decision is consistent with United States v. The Steamer Friends, 166 U.S. 1 (1896).

124. Current version at 18 U.S.C. § 959(a) (1988) (concerning enlistment in foreign service).

125. During the Spanish Civil War (1936-39), the requirement of the non-intervention principle led many states to complete their national legislation in order to prevent their nationals from participating therein. *See generally* R. ROSENSTONE, CRUSADE OF THE LEFT: THE LINCOLN BATTALION IN THE SPANISH CIVIL WAR 84-96 (1969).

126. *Id.* at 116.

127. *Id.* at 89-90. From 1936 to 1939, three thousand American leftists served in the International Brigade; they came from every state in the United States, but their point of departure in almost every instance was New York. *Id.* at 97-121.

recruits as they embarked from New York, because the authorities had previously done nothing to prevent United States citizens fighting on the Fascist side.

C. World War II

Likewise, the United States Government did not take action against those Americans who, before United States involvement, chose to join armies who were fighting against the Axis powers in World War II.[128] Thus, the Lafayette squadron of World War I reappeared in World War II. Long before the United States became an active belligerent, after the attack of Pearl Harbor in December 1941, United States citizens served in three squadrons of the Royal Air Force ("RAF") as pilots.[129] They were called the "Eagle Squadrons."[130] These pilots were then transferred to the United States Army Air Force ("USAAF") in September 1942.[131]

The exploits of the Eagle Squadrons in Western Europe were rivalled by those of Colonel Chennault's Flying Tigers on the Chinese side against Japan.[132] Those who volunteered retained not only their United States citizenship, but also the right to rejoin the service of their choice without loss of rank when reabsorbed into the United States armed forces.[133] This was accomplished with as little publicity as possible. "'Chennault stressed the necessity for secrecy, pointing out the ticklish international situation and the fact that the nation was at peace with Japan.'"[134] Like the Eagle Squadrons, Chennault's Flying Tigers were absorbed in the USAAF in the Summer of 1942.[135]

D. The Cuban Crisis

Generally speaking, the United States position of not prosecuting or preventing its citizens within United States territory from enlisting or recruiting in the service of foreign states, or from leaving the country with the intent to do so, has not changed since World War II. The United States response to mercenary activity during the Cuban crisis in the 1960s serves as an illustration of this trend.

Following the abortive action in April 1961, against the newly

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128. J. SPAIGHT, *supra* note 117, at 463-64.

129. *Id.*

130. *Id.*

131. *Id.* at 464.

132. *Id.*

133. *Id.*

134. *Id.* at 465 (quoting R. WHELAN, THE FLYING TIGERS 20 (1942)).

135. *Id.*

established Socialist Republic of Cuba by mercenaries who were supported by Cuban refugees residing in the United States, Attorney General Robert F. Kennedy, commenting on the "Bay of Pigs" invasion, made a public statement on the applicability of the United States neutrality laws:[136]

> There have been a number of inquiries from the press about our present neutrality laws and the possibility of their application in connection with the struggle for freedom in Cuba. . . . First, may I say that the neutrality laws are among the oldest laws in our statute books. Most of the provisions date from the first years of our independence and, with only minor revisions, have continued in force since the 18th century. Clearly they were not designed for the kind of situation which exists in the world today. . . . Second, the neutrality laws were never designed to prevent individuals from leaving the United States to fight for a cause in which they believed. There is nothing in the neutrality laws which prevents refugees from Cuba from returning to that country to engage in the fight for freedom. Nor is an individual prohibited from departing from the United States, with others of like belief, to join still others in a second country for an expedition against a third country. . . . There is nothing criminal in an individual leaving the United States with the intent of joining an insurgent group. There is nothing criminal in his urging others to do so. There is nothing criminal in several persons departing at the same time. . . . What the law does prohibit is a group organized as a military expedition from departing from the United States to take action as a military force against a nation with whom the United States is at peace. . . . There are also provisions of early origin forbidding foreign States to recruit mercenaries in this country. No activities engaged in by Cuban patriots which have been brought to our attention appear to be violations of our neutrality laws.[137]

A somewhat different attitude was adopted towards service in revolutionary forces. After the Castro regime came to power in Cuba in early January 1959, the American Embassy in Havana stated that while United States citizens who fought as volunteers with the Cuban Revolutionary Forces would not necessarily lose their United States citizenship, "such persons who continue voluntarily to serve with these forces, if or

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136. Attorney General Robert F. Kennedy, Press Release (Apr. 20, 1961), *reprinted in* 5 WHITEMAN, *supra* note 87, at 275-76 (1965).

137. *Id.*

when they become an integral part of the armed forces of the Republic of Cuba, are liable to expatriation under the provisions of" section 349(a)(3) and (4) of the Immigration and Nationality Act of 1952.[138] This was reiterated by the State Department shortly thereafter, on April 24, 1959, when it stated:

> American citizens who served in the Cuban armed forces or the Cuban Police Force, even though no oath of allegiance was required, or who served in any other branch of the Cuban Government for which service on oath of allegiance was required, were subject to the loss of United States citizenship.[139]

Thus, a distinction was made between serving in the revolutionary forces of Castro and serving in the post-revolutionary Cuban army.[140] Serving in the Cuban rebel army before Castro's rise to power had no expatriatory consequences because the rebel army was at that time merely a revolutionary force with no official status.[141] Serving in Cuba's post-revolutionary army was considered service in the armed force of a foreign state, and resulted in expatriation.

The significance of this became clear in *United States v. Esperdy*,[142] where an equally divided Court upheld a decision of the Second Circuit expatriating Herman F. Marks by reason of his service in the Cuban armed forces after the successful conclusion of the revolution and the establishment of the Castro government.[143] Marks was a United States citizen by birth.[144] He went to Cuba in January 1958 to join Fidel Castro's revolutionary forces fighting in the Sierra Maestra Mountains to overthrow the government of Fulgencio Batista.[145] After the victory in January 1959, Marks continued to serve as a Captain in charge of La Cabana, a military prison and fortress in Havana, from January 1959 to May 1960.[146] During these periods, the United States Government was not yet hostile to the Castro Government. Following his disagreements

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138. 8 WHITEMAN, DIG. INT'L L. 164, 173 (1967).

139. *Id.* at 173-74.

140. United States *ex rel.* Marks v. Esperdy, 203 F. Supp. 389, 394 (S.D.N.Y. 1962), *aff'd in part, rev'd in part*, 315 F.2d 673 (2d Cir. 1963), *cert. granted*, 375 U.S. 810 (1963), *aff'd*, 377 U.S. 214 (1964), *reh'g denied*, 377 U.S. 1010 (1964).

141. *Esperdy*, 203 F. Supp. at 394.

142. 377 U.S. 214 (1964).

143. The Court was divided equally four to four, with Justice Brennan not participating in the decision. *Id.*

144. *Esperdy*, 315 F.2d at 674.

145. *Id.*

146. *Esperdy*, 203 F. Supp. at 393.

with the Cuban authorities, Marks returned to the United States in July 1960. In January 1961, he was arrested and charged with unlawfully attempting to enter the United States as an illegal immigrant.[147] It was alleged that he was an alien who had lost his citizenship under 8 U.S.C. § 1481(a)(3)[148] due to his service in the armed forces of Cuba without prior written authorization from the Secretaries of State and Defense after the successful conclusion of the Castro revolution and the establishment of the Castro regime as the government of Cuba. Consequently, Marks became an alien at the time of such service.[149] Counsel for Marks argued that section 1481(a)(3) of the Immigration and Nationality Act, under which he was deprived of his United States citizenship, was unconstitutional because it imposes *cruel and inhuman* punishment in violation of the eighth amendment and is thereby beyond the legislative power of Congress.[150]

In answering this argument, the Second Circuit stated, "Although we find great force in the constitutional arguments presented by relator's counsel, we are constrained by the superior authority of *Perez v. Brownell* . . . to affirm the determination of alienage . . . ."[151] This is consistent with the position of the United States during the Suez crisis (October 1956) concerning the implementation of section 349(a)(3) of the Immigration and Nationality Act of 1952.[152] Following the discovery of Americans fighting on the side of the Israeli armed forces during the 1956 Suez crisis, the State Department issued a press release on

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147. *Esperdy*, 315 F.2d at 674.

148. *Id.*

149. *Id.*

150. *Id.* at 675.

151. *Id.* at 675 (citation omitted). In this case, the district court stated:

> The activity covered by section 349(a)(3) has a direct bearing upon foreign affairs and international relations. Congress' enactment of the section is a *legitimate and reasonable* exercise of its power to regulate the relations of the United States with foreign countries. In *Perez v. Brownwell* . . . it was held by the Supreme Court that the power of Congress to regulate foreign relations may reasonably be deemed to include a power to deal with voting by American citizens in foreign political elections, since Congress could find that such activities, because they might give rise to serious international embarrassment, relate to the conduct of foreign relations. . . . Experience amply attests that in this day of extensive international travel, rapid communication and widespread use of propaganda, the activities of the citizens of one nation when in another country can easily cause serious embarrassments to the government of their own country as well as to their fellow citizens.

Esperdy, 203 F. Supp. at 395 (emphasis added).

152. 35 DEPT. ST. BULL. No. 908 (Nov. 19, 1956), *reprinted in* 8 WHITEMAN, *supra* note 138, at 171 (1967).

November 10, 1956 stating:

> In view of the current situation in the Near East the Department of State desires to bring to the attention of all American citizens the provisions of section 349(a)(3) of the Immigration and Nationality Act of 1952. . . . This section of the Act provides that American citizens shall lose their citizenship by entering or serving in the armed forces of a foreign state unless, prior to such entry or service, the entry or service is specifically authorized in writing by the Secretary of State and the Secretary of Defense. Authorization has not so far been granted in any individual case and there is no intention of departing from this policy.[153]

E. The Angolan Conflict

The applicability of the United States neutrality laws does not depend on official recognition by the United States of a state of belligerency or insurgency; these laws expressly apply to entities other than states.[154] For example, at the time of the recruitment or enlistment inside the territory of the United States of mercenaries to fight against the MPLA forces, the United States Government had not recognized the People's Republic of Angola as a sovereign state. Nevertheless, this fact should not remove the statute's application to those persons because the express terms of sections 959(a) and 960 of the Foreign Relations Act apply to enlistment and recruitment in the service of "any foreign prince, state, colony, district, or people."[155]

While choosing not to prosecute mercenaries, United States officials continuously argued that they had no specific evidence of United States mercenary activity in Angola. And without such evidence, the United States Government could not enforce the neutrality laws.[156] The United States appeared hesitant to apply the penal clauses of the neutrality laws

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153. *Id.*

154. In interpreting the neutrality statutes in the case of The Three Friends, the Supreme Court stated, "[w]e see no justification for importing into section 5283 [of the Revised Statutes] words which it does not contain and which would make its operation depend upon the recognition of belligerency." United States v. The Steamer Three Friends, 166 U.S. 1, 66 (1897).

155. 18 U.S.C. §§ 959, 960 (1988).

156. "Regardless of what conduct is alleged to result in expatriation, whenever the issue of voluntariness is put in issue, the Government must in each case prove voluntary conduct by clear, convincing and unequivocal evidence." Nishikawa v. Dulles, 356 U.S. 129 (1958).

and regulations. Enforcement was, at best, selective. Officials chose to prosecute only when circumstances made such action particularly advantageous to United States foreign policy goals.

A non-enforcement policy was pursued even though United States recruiters publicly admitted that they were enlisting, recruiting, organizing, training, and paying Americans to provide medical assistance and to fight as combatants with forces opposed to the MPLA in Angola.[157] Moreover, although returning American citizens also publicly admitted to customs officials and the mass media that they were fighting as mercenaries on the side of the National Front for the Liberation of Angola ("FNLA") and the National Union for the Total Independence of Angola ("UNITA") forces against the MPLA, they were not prosecuted due to a lack of material evidence.[158]

In a statement before the House International Relations Special Sub-Committee on Investigations on August 9, 1976, describing United States law relating to the recruitment or enlistment of mercenaries, Deputy Assistant Attorney General Robert L. Keuch stated "that in general it is not unlawful for a citizen or other person in the United States to leave the country with the intent to enlist abroad in a foreign military service."[159] Thus, if a person goes abroad and enlists in a foreign force, he will not be subject to prosecution in the United States. It is the retention and enlistment within the United States that constitutes a crime. Under the present applicable law, the government is required to prove that there was a retention and enlistment of an individual before a recruiter who initiated the enlistment may be prosecuted.[160] In many instances, however, the evidence necessary to convict a recruiter leaves the country with the mercenary.

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157. *Disaster Assistance in Angola: Hearings on H.R. 461-53 Before the Subcomm. on Int'l Resources, Food and Energy of the House Comm. on Int'l Relations*, 49th Cong., 2nd Sess. 129-131 (1976) (Statement of Robert L. Keuch, Acting Deputy Assistant Attorney General, Criminal Division, Department of Justice) [hereinafter *Disaster Assistance in Angola*].

158. *Id.*

159. *Id.; cf.* Assistant Secretary of State, William E. Schaufele, Jr., made the following statement regarding the United States' position towards the mercenaries in Angola:

> 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. . . . [N]o Americans were recruited directly or indirectly by the U.S. Government to fight in Angola. Those men were there on their own, without our advance knowledge or approval. We attempted to discourage Americans from going to Angola as mercenaries. Anyone who called us on the subject was given that message clearly and distinctly.

Mercenaries Hearings, supra note 37, at 2 (statement of William Schaufele, Jr., Assistant Secretary of State for African Affairs).

160. 18 U.S.C. § 959(a) (1988).

F. Constitutional Implications

In *Perez v. Brownell*,[161] the Court upheld the constitutionality of section 401(e) of the Nationality Act of 1940[162] containing the provision that a person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by "[v]oting in a political election in a foreign state or participating in an election or plebiscite to determine the sovereignty over foreign territory . . . ."[163] Affirming the lower court's decision that Perez expatriated himself by voting in a foreign political election, the Court stated, "It cannot be said . . . that Congress acted without warrant when, pursuant to its power to regulate the relations of the United States with foreign countries, it provided that anyone who votes in a foreign election of significance politically in the life of another country shall lose his American citizenship."[164] The Court clearly rejected the notion that the power of Congress to terminate citizenship depends upon the citizen's assent, and based its decision on separation of powers concerns. "To deny the power of Congress to enact the legislation challenged here would be to disregard the constitutional allocation of governmental functions that it is this Court's solemn duty to guard."[165] The decision of the Court in this case is consistent with the doctrine that expatriation results from acts which unequivocally manifest an intent to renounce allegiance.[166] Writing for the majority, Justice Frankfurter stated that "it would be a mockery of this Court's decisions to suggest that a person, in order to lose his citizenship, must intend or desire to do so."[167]

In a lengthy dissenting opinion, Chief Justice Warren, joined by Justices Black and Douglas, asserted that section 401(e) was unconstitutional on two grounds.[168] First, the Constitution mandates that Congress

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161. 356 U.S. 44, 46 (1958). The petitioner was born in Texas in 1909, and in 1919 or 1920 he moved to Mexico with his parents, where he lived apparently without interruption until 1943; he also voted in a political election in Mexico. *Id.* at 46. In 1928, he was informed that he had been born in Texas. He voted in a political election in Mexico. *Id.*

162. Nationality Act of 1940, ch. 876, § 401(a)-(j), 54 Stat. 1137, 1168-69 (codified as amended at 8 U.S.C. § 1481 (1964)).

163. *Id.* § 401(e) (codified as amended at 8 U.S.C. § 1481(a)(5) (1964)).

164. *Perez*, 356 U.S. at 62; *cf.* Trop v. Dulles, 356 U.S. 86 (1958) (Court held that denationalization as a punishment was barred by the eighth amendment to the Constitution, and therefore unconstitutional.). The *Perez* Court did not view Congress's action in that case as inflicting a punishment, but rather as a means of "regulating the relations of the United States with foreign countries" and avoiding embarrassment with regard to such relations. *Perez*, 356 U.S. at 62.

165. *Id.*

166. *Id.* at 61.

167. *Id.*

168. *See infra* notes 169-71.

lacks the power to take away the citizenship of lawfully naturalized and native born citizens.[169] Second, as an exercise of that power, section 401(e) fails because it describes conduct which does not invariably involve a dilution of undivided allegiance sufficient to show a voluntary abandonment of citizenship.[170] Justice Douglas stated:

> What the Constitution grants the Constitution can take away. But there is not a word in that document that covers expatriation. The numerous legislative powers granted by Art. I, § 8, do not mention it. I do not know of any legislative power large enough and powerful enough to modify or wipe out rights granted or created by § 1, cl. 1, of the Fourteenth Amendment. . . . Our decisions have never held that expatriation can be imposed. To the contrary, they have assumed that expatriation was a voluntary relinquishment of loyalty to one country and attachment to another.[171]

Perez v. Brownell and *Marks v. Esperdy* were overruled in *Afroyim v. Rusk*.[172] In *Afroyim*, the Court held that citizenship conferred by the fourteenth amendment to the Constitution is absolutely vested and not subject to divestment by any branch of government unless the individual "voluntarily relinquishes that citizenship."[173] In *Afroyim*, the Court adopted the positions taken by the dissenters in *Perez v. Brownell*,[174] ten

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169. *Perez*, 356 U.S. at 65 (Warren, C.J., dissenting).

170. *Id.* at 75-77.

171. *Id.* at 79-80 (Douglas, J., dissenting). The constitutionality of the 1907 Expatriation Act was challenged unsuccessfully in MacKenzie v. Hare, 239 U.S. 299 (1915). In that case, the Supreme Court, while admitting that the Constitution does not *expressly* give Congress the power to deprive a native American of his nationality, said, for the first time, that it was an *implied* power necessary to avoid embarrassment and dual allegiance problems in the conduct of foreign affairs. Justice McKenna, however, while carefully avoiding to hold that Congress could denationalize a person without at least a presumption of an intent on the part of the individual to surrender his citizenship, conceded that "a change of citizenship cannot be arbitrarily imposed, that is, imposed without the concurrence of the citizen." *Id.* at 311. In Perkins v. Elg, 307 U.S. 325 (1939), expatriation was clearly defined by Chief Justice Hughes as "[t]he voluntary renunciation or abandonment of nationality and allegiance." *Id.* at 334. To the same effect, see Savorgnan v. United States, 338 U.S. 491 (1950).

172. 387 U.S. 253 (1967).

173. *Id.* at 268. This ruling, however, was weakened by the Court's subsequent ruling in Rogers v. Bellei, 401 U.S. 815 (1971), where the Court permitted Congress to strip Bellei, who was naturalized overseas, of his citizenship because he did not satisfy the conditions set forth in § 301(b) of the Immigration and Nationality Act. The unanswered question which remains, however, is whether enrollment in a military service other than that of United States, and the swearing of an oath of allegiance, constitutes an express waiver.

174. 356 U.S. 44, 62 (1958).

years earlier.

Beys Afroyim was born in Poland in 1893, emigrated to the United States in 1912, and became a naturalized citizen in 1926.[175] After living abroad, Afroyim went to Israel in 1950, where he voluntarily voted in an election for the Israeli legislative body (the Knesset).[176] In 1960, Afroyim's request for a renewal of his American passport was denied by the State Department because, consistent with the Court's holding in *Perez*, he had lost his citizenship by voting in a foreign political election in violation of section 401(e) of the Nationality Act of 1940.[177] Afroyim then sought a declaration that the statute under which his citizenship was revoked was unconstitutional because it violated his due process rights.[178] This argument was rejected by both the district court and the Second Circuit which affirmed *Perez* and upheld the constitutionality of section 349(a)(5).[179] On appeal to the Supreme Court, however, Afroyim's argument prevailed.[180] By a bare majority of five to four, the Court repudiated *Perez* and denied Congress's power, express or implied, to expatriate an American national without his concurrence, and subscribed to the view advocated by Chief Justice Warren in his dissenting opinion in *Perez*.[181] Writing for the majority, Justice Black rejected the view espoused by the majority in *Perez* that

> Congress has any general power, express or implied, to take away an American citizen's citizenship without his assent. This power cannot, as *Perez* indicated, be sustained as an implied attribute of sovereignty possessed by all nations. . . . In our country the people are sovereign and the Government cannot sever its relationship to the people by taking away their citizenship.[182]

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175. *Afroyim*, 387 U.S. at 254.

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.* at 255.

180. *Id.* at 268.

181. *Id.* at 267.

182. *Id.* at 257; *cf.* Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963) (Court held that § 401(j) of the Nationality Act of 1940, as amended, and § 349(a)(10) of the Immigration and Nationality Act of 1952 were invalid because Congress was given the power to employ a sanction of deprivation of nationality as a punishment without affording the procedural safeguards guaranteed by the fifth and sixth amendments.); Vance v. Terrazas, 444 U.S. 252 (1980) (Court held that Congress does not have any general power to take away an United States citizen's citizenship without his assent, which means an intent to relinquish citizenship, whether the intent is expressed in words or is found as a fair inference from his conduct.).

Thus, the Court found an act of Congress, which made voting in a foreign election punishable by divestiture of citizenship, to be unconstitutional under the fourteenth amendment.[183] By overruling *Perez* and *Marks*, the Court in *Afroyim* subordinates the foreign relations power of the executive and legislative branches of the government, to the absolute grant of citizenship contained in the fourteenth amendment.[184] Thus, the Court has effectively authorized United States citizens to serve in the armed forces of foreign states not engaged in hostilities with the United States without losing their citizenship unless they clearly intend to relinquish it.

This trend to authorize mercenary activity was expressed in a United States Deputy Assistant Attorney-General Robert L. Keuch's statement in 1976, interpreting the *Afroyim* decision.[185] Keuch indicated that an American citizen could not be stripped of his citizenship by serving in a foreign army unless he took an oath of allegiance to a foreign government.[186] In Keuch's opinion, a declaration of intent going beyond a mere enlistment in a foreign army must be made before there is an effective renunciation of citizenship.[187]

In accordance with Keuch's interpretation, United States citizenship has not been divested from American citizens fighting in the 1967 Arab-Israeli war, notwithstanding complaints from Arab states characterizing the United States as a belligerent for refusing to deny such people their citizenship.[188] Similarly, in *United States v. Dane,*[189] the Ninth Circuit went so far as to suggest that involvement in mercenary activities outside United States jurisdiction does not constitute criminal activity and therefore could not lead to automatic expatriation.[190]

In 1980, the Supreme Court followed its decision in *Afroyim* in *Vance*

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183. *Afroyim*, 387 U.S. at 268.

184. *See id.*

185. *Disaster Assistance in Angola, supra* note 157, at 131.

186. *Id.*

187. *Id.*

188. *See Afroyim*, 387 U.S. at 253. *See generally Disaster Assistance in Angola, supra* note 157, at 131.

189. 570 F.2d 840 (9th Cir. 1977), *cert. denied*, 436 U.S. 959 (1978).

190. *Id.* at 842. John Andrew Dane, a British national, pleaded guilty to a charge of possessing illegal firearms. *Id.* He was later arrested for violating a special condition of his parole not to trade, possess, or carry weapons, firearms, or explosives. *Id.* at 845. The Court characterized his actions — handling guns in Mexico, having his personal weapons shipped to him from the United States, and engaging in armed instructions in Rhodesia and handling arms there — as evidence of the accused's return to mercenary life. *Id.* The Court noted, however, that the acts in themselves were not alleged to violate United States law. *Id.* at 844.

v. Terrazas.[191] The Court stated that

> the intent of the fourteenth amendment, among other things was to define citizenship; and as interpreted in Afroyim, that definition cannot coexist with a congressional power to specify acts that work a renunciation of citizenship even absent an intent to renounce. In the last analysis, expatriation depends on the will of the citizen rather than on the will of Congress and its assessment of his conduct.[192]

In *Afroyim* and *Vance*, the Court clearly departed from the long-standing judicial maxim that nationality rights are only relative. Therefore, their exercise and enjoyment may be affected by government's restrictive policies in order to prevent dual nationality or divided allegiance. And in the expatriation cases of *Mackenzie v. Hare*,[193] *Savorgnan v. United States*,[194] and *Perez v. Brownell*,[195] severe sanctions were limited to those individuals whose actions were most likely to create dual allegiance problems, expose the state to a declaration of war, or imperil its citizens.[196] Because the decisions in *Afroyim* and *Vance* permit or facilitate dual nationality or divided allegiance, it appears inconsistent with long-established United States policy and multilateral efforts to discourage or limit dual nationality under international law. As a result of these decisions, it seems that American citizens can easily manipulate citizenship laws as they wish. As one commentator stated, "Americans are now in the unique position of being able to turn citizenship on and off as easily as they operate a water tap."[197]

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191. 444 U.S. 252 (1980).

192. *Id.* at 260. The deference toward the will of the individual citizen can clearly be seen in Congress's enactment of 8 U.S.C. § 1481(a) (1988). Section 1481(a) calls for loss of nationality only if the individual performs an act in violation of the statute, with the intention of relinquishing United States citizenship. *Id.*

193. 239 U.S. 299 (1915).

194. 338 U.S. 491 (1950).

195. 356 U.S. 44 (1958).

196. *See supra* notes 92-173 and accompanying text.

197. Dionisopoulos, *Afroyim v. Rusk: The Evolution, Uncertainty and Implications of a Constitutional Principle*, 55 MINN. L. REV. 235, 251 (1970); *see also* Duvall, *Expatriation Under United States Law, Perez to Afroyim: The Search for a Philosophy of American Citizenship*, 56 VA. L. REV. 408, 431-56 (1970); Note, *Constitutional Law — Congress May Provide for Expatriation as a Consequence of Service in the Armed Forces of a Foreign State*, 31 FORDHAM L. REV. 373, (1962); Comment, *Constitutional Law — Expatriation for Wartime Draft Evasion Is Punishment Requiring Fifth and Sixth Amendment Safeguards; Expatriation for Service in Foreign Armed Forces Is Regulation*, 112 U. PA. L. REV. 761 (1964).

VI. CONCLUSION

The lack of prosecutions of United States citizens who have served as mercenaries is attributable to the position held by United States authorities that not enough specific material evidence exists to pursue these cases. This official position was clarified by Congressman Donald Fraser, in a statement before the Fourth Committee of the United Nations General Assembly on October 9, 1975.[198] In the statement, he reiterated that under United States law, any citizen enlisting in the armed forces of a foreign country runs the risk of losing his United States citizenship and being subjected to criminal prosecution under existing United States laws,[199] which provide for fines and imprisonment if found guilty.[200] In responding to the statements made by the Committee to the effect that some United States citizens were fighting as mercenaries in the Rhodesian Army, Mr. Fraser said that he would welcome "detailed information" so that appropriate legal action could be taken as prescribed by the law.[201]

While the United States position is acceptable and understandable, it appears that the authorities have done very little to gather the necessary evidence. Moreover, the lack of prosecution in this area is due to the fact that American citizens normally participate in conflicts for which the United States does not recognize belligerency, thereby making it difficult for United States laws to apply. As the incident on the Island of Dominica illustrates, however, prosecution is certain to take place[202] when the interests of the United States are clearly at stake.[203]

In the specific laws preventing United States citizens from enlisting in foreign fighting units, exceptions and loopholes exist. First, citizens of the United States may enlist in the army of any ally of the United States in times of war. Second, citizens of foreign states transiently in the United States may also enlist. Third, enlistment in the service of a

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198. *Provisional Summary Record of the 2143rd Meeting*, [1975] GAOR, U.N. Doc. A/C.4/SR.2143 1975 [hereinafter *Provisional Summary Record*].

199. *Id.* at 3.

200. Note, *Leashing the Dogs of War: Outlawing the Recruitment and Use of Mercenaries*, 22 VA. J. INT'L L. 589, 596-97 (1982) (quoting 18 U.S.C. § 959(a) (1976)).

201. *Provisional Summary Record, supra* note 198.

202. *See* Note, *supra* note 200.

203. In that case, American citizens who attempted to overthrow the government of Prime Minister Mary Eugenua Charles were prosecuted. N.Y. Times, June 18, 1981, at A9, col. 1. In 1981, United States authorities, in cooperation with Canadian authorities, prevented and subsequently prosecuted a mercenary expedition aimed at overthrowing the Government of Dominica. The operation was planned, financed and launched from within United States territory. *Id.*; *see also id.*, Apr. 29, 1981 at A5, col. 2. The operation included Canadian and United States mercenaries and "members of the Ku Klux Klan and neo-Nazi groups." *Id.*, May 17, 1981, at A4, col. 1.

foreign force or the hiring of others to do such act must take place within the United States territory in order to infringe the law. Finally, if United States citizens do engage in mercenary activity, they must do so with the intent of relinquishing their citizenship; if not, they are permitted to retain dual citizenship status.

The inevitable conclusion to be drawn from the preceding discussion is that the United States neutrality laws are aimed at protecting the country during times of weakness and do not lay down a general principle to be followed. These laws do not prevent or deter American citizens from enlisting, within or outside the jurisdiction of the United States, as mercenaries to fight in Third World conflicts because it is not in the interest of the United States to do so. The time has come for the United States to review its policies regarding these issues give effect to its laws to better respect the interests of other countries.