MYTHS, MERCENARIES AND CONTEMPORARY INTERNATIONAL LAW

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Mercenaries have played an important role in warfare throughout most of Western history. From the Teutonic tribesmen who served in Roman legions to the Hessian and Hanoverian soldiers who fought under the British flag in the American Revolutionary War, mercenaries have played an integral role in many armies.[1] In the period before the French Revolution many governments routinely hired non-national professionals. Experienced professional officers commanded a high price for their services. Mercenaries formed the reliable core of many armies because conscripts and other recruits, out of necessity, came from otherwise non-productive echelons of the country's population.[2]

The rise of nationalism and the citizen-soldier has caused the large scale use of mercenaries to decline. Yet the activities of soldiers of fortune have nevertheless surfaced as an issue of international concern. This has been due primarily to the continuing participation of mercenaries in internal armed conflicts in Africa and elsewhere.[3] In describing the perspective of many black African States, Burchett

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1. C. BAYLEY, MERCENARIES FOR THE CRIMEA: THE GERMAN, SWISS AND ITALIAN LEGIONS IN BRITISH SERVICE, 1854-1856 (1977); M. MALLETT, MERCENARIES AND THEIR MASTERS: WARFARE IN RENAISSANCE ITALY (1974); G. GRIFF, THE MERCENARIES OF THE HELLENISTIC WORLD (1968); P. SCHLIGHT, MONARCHS AND MERCENARIES: A REAPPRAISAL OF THE IMPORTANCE OF KNIGHT SERVICE IN NORMAN AND EARLY ANGEVIN ENGLAND (1968); R. PRESTON, S. WISE & H. WERNER, MEN IN ARMS (rev. ed. 1964).

2. PRESTON, WISE, & WERNER, *supra* note 1, at 92, 107.

3. *See, e.g., Mercenaries in Africa: Hearings Before the Special Subcomm. on Investigations of the House Comm. on International Relations*, 94th Cong., 2d Sess (1976) [hereinafter cited as *Hearings*]; W. BURCHETT & D. ROEBUCK, THE WHORES OF WAR: MERCENARIES TODAY (1977); A. MOCKLER, THE MERCENARIES (1969); S-J.CLARKE, THE CONGO MERCENARY (1968); Burmester, *The Recruitment and Use of Mercenaries in Armed Conflicts*, 72 AM. J. INT'L L. 37 (1978); Gerassi, *The French Foreign Legion*, 5 GEO 42 (1983); Note, *Leashing the Dogs of War: Outlawing the Recruitment and Use of Mercenaries*, 22 VA. J. INT'L L. 589 (1982) [hereinafter cited as *Leashing the Dogs of War*]; Note, *The Laws of War and the Angolan Trial of Mercenaries: Death to the Dogs of War*, 9 CASE W. RES. J. INT'L L. 323 (1977) [hereinafter cited as *The Laws of War*].

and Roebuck remark that "They (mercenaries) were neo-colonialism's last card. . .a faceless and bottomless reserve of cannon fodder, not identifiable with governments and their policies, immune to public criticism and debate. The perfect substitute for the expeditionary force."[4] This reaction seems to derive more from a perception of the mercenary as a symbol of racism and colonial domination than from the actual substance of mercenary accomplishments. Nonetheless, the movement to regulate the use of mercenaries has had considerable strength.

This article will discuss the role of mercenaries in conflicts that have occured over the past twenty years. It will then focus on identifying the current law that may effectuate the control of mercenary activities. Finally, the article will examine the strengths and weaknesses of current proposals for regulation.

I. MERCENARIES AND MYTHS

Mercenaries have historically generated attitudes of mistrust, distaste and fear.[5] Curiously, the modern literature on mercenaries is sparse. Moreover, the analyses that exist do not justify the intensity of the present reaction against mercenary activities. This reaction may, in part, be a response to the mercenary aided coup in the Comoros in May 1978,[6] and the claim that mercenaries were involved in the Vanuatu Civil War of August 1980.[7] In addition, the attempted coup by mercenaries on the Seychelles in November, 1981, may have also provided additional impetus to the effort to legislate prohibitions upon their recruitment and use.[8] However, a careful ex-

4. BURCHETT & ROEBUCK, *supra* note 3, at 17.

5. As to the Foreign Legion, Gerassi notes that "while their exploits made them heroes to Hollywood, they were villains to the local populations in places such as Morocco, the Sahara, Algeria, Tunisia, Syria and Lebanon, where they enforced the colonial rule they had already spearheaded." Gerassi, *supra* note 3, at 46.

6. In May of 1978, a small force of mercenaries led by Bob Denard, who had fought earlier in the Congo, engineered a coup to restore a regime previously ousted in 1975. N.Y. Times, May 14, 1978, at 8, col. 4. The OAU entertained a motion to expel the new government from participation in the organization because of its use of mercenaries. N. Y. Times, July 14, 1978, at 6, col. 4. Subsequently, the government dismissed Denard from his position. N.Y. Times, September 28, 1978, at 41, col. 1.

7. When the former Anglo-French colony of New Hebrides received its independence a secessionist movement arose. The ECONOMIST noted that ". . .foreign funds and *white* men of several nationalities were involved in the secessionist rebellion. . ." ECONOMIST, Dec. 5, 1981, at 45; *see also* N.Y. Times, Aug. 20, 1980, at 4, col. 1; N.Y. Times, Aug. 4, 1980, at 5, col. 6.

8. In late 1981, an expedition of mercenaries attempted to overthrow the socialist government of the Seychelle Islands. The mercenaries were in favor of ex-President James Mancham, who had previously been deposed by a coup in 1977. The coup d'etat failed, and

amination of the role of mercenaries in various conflicts over the past twenty years demonstrates that the attention given to mercenaries is directed toward a symbol that represents something quite apart from the substantive role they have played.

The modern concern with mercenaries began in the early 1960's as a result of their use by various political factions fighting for control of the Congo. Perhaps the most notable instance of their use was by the secessionist government of Katanga Province, which was led by Moise Tshombe.[9] After the secessionist movement in the Katanga province was quashed, the central government employed mercenaries to assist in suppressing the Simba revolt. Again in 1966 mercenaries were employed by the Mobutu government to quell another revolt in Katanga.[10] Subsequently, in 1967 two groups of mercenaries conducted an unsuccessful series of operations against the central government in an effort to bring Moise Tshombe back into power.[11]

The apprehension generated by mercenary troops is understandable. In the Congo mercenaries were utilized not only to support a secessionist movement, but were also used by the central government to put down a challenge by an extremist faction. In addition, they were employed in an attempt to overthrow the central government itself. The concern becomes even more understandable considering the fact that many of the same mercenaries played parts in all three operations.[12] Moreover, both the Federal Government of Nigeria and the secessionists in Biafra employed mercenaries, and in Angola both the National Union for the Total Independence of Angola (UNITA) and the National Front for the Liberation of Angola (FNLA) utilized mercenary help.[13]

The mere reversal in loyalty, however, does not totally explain the antipathy towards mercenary involvement. Neither does an ob-

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forty-four of those involved hijacked an Indian airliner and fled to South Africa. The South African government eventually brought charges for hijacking against those who participated in the operation. *See* ECONOMIST, Dec. 5, 1981, at 47; N.Y. Times, Jan. 6, 1982, at A9, col. 1.

9. G. HEMPSTONE, REBELS, MERCENARIES AND DIVIDENDS: THE KATANGA STORY (1962). *See generally* CLARKE, *supra* note 3; MOCKLER, *supra* note 3, at 155-171. For United Nations operations, see E. LEFEVER, CRISIS IN THE CONGO: A UNITED NATIONS FORCE IN ACTION (1968).

10. CLARKE, *supra* note 3, at 68.

11. ECONOMIST, Aug. 26, 1967, at 713-714; ECONOMIST Sept. 30, 1967, at 1179-1180; ECONOMIST, July 22, 1967, at 309-310.

12. *See generally* MOCKLER, *supra* note 3.

13. Marcum, *Lessons of Angola*, 54 FOREIGN AFF. 407 (1976); BURCHETT & ROEBUCK, *supra* note 3; *Hearings*, *supra* note 3.

jective account of their overall military effectiveness. The mercenaries enjoyed success in the politically fragmented Congo because of superior training, organization and weaponry. Under these conditions they often had remarkable success even though they were significantly outnumbered. However, as the training and efficiency of the Congolese army improved, the ablity of mercenary troops to affect outcomes declined accordingly. After Mobutu demobilized the mercenary companies, the Armee Nationale Congolaise (ANC), "the black army with the lowest reputation on the African continent," succeeded in dealing a decisive defeat to those troops involved in the "mercenary's revolt."[14]

Casualties among the mercenary forces in the Congo were quite high. The mercenary performance in the Nigerian civil war should "make all potential employers suspicious of even their professional capabilites."[15] In other conflicts, mercenary effectiveness generally derived from their technical knowledge of advanced weapons and tactics; they served primarily as training officers and seldom as distinct and separate fighting units.[16]

Whatever their actual effectiveness in individual conflicts, the mercenary has become the symbol of racism and neocolonialism within the Afro-Asian bloc. No matter who the mercenaries served the scenario has always been the same: white soldiers of fortune fighting black natives. The fact that white South Africans have contributed large numbers to mercenary forces has given credence to this perception. This perception is also supported by the intervention in southern Angola by regular South African troops accompanied by "Portuguese and assorted mercenaries."[17] Moreover, the United States' good faith in controlling mercenary activity has also become suspect as a substantial number of Americans fought in the Rhodesian army.

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14. MOCKLER, *supra* note 3, at 278.

15. *Id.* at 275.

16. J. DE ST. JORRE, THE NIGERIAN CIVIL WAR (1972).

17. Marcum, *supra* note 13, at 417. The United States policy regarding this mercenary involvement is interesting. Mockler asserts that the mercenary leaders in the Congo attempted to discourage Americans from enlisting in light of American laws and the authorities. *See generally* MOCKLER, *supra* note 3. The four hundred or so Americans serving in the Rhodesian army in the late 1970's called themselves the "Crippled Eagles," because they felt the United States government harassed them. Moore, *The Soldiers of Fortune*, N.Y. Times, July 28, 1978, at A23, col. 2.

II. TRADITIONAL VIEWS

An initial problem in controlling the use of mercenaries is the paucity of modern legal analysis and precedent concerning the problem. Some early legal writers raised moral questions regarding the practice. These concerns, however, were overridden as a result of the integral part that the use of force played in the western State system.[18] Gradually, the use of mercenaries in Europe declined as nationalism became an increasingly important factor. Outside of Europe, however, the use of mercenaries in colonial conflicts remained common. The French Foreign Legion stands as the best example of a mercenary force recruited specifically to serve as the guarantor of colonial occupation.[19]

In the period prior to 1945, some concern with mercenaries can be found in the development of the law of neutrality. For example, the use of national territory for the recruitment or enlistment of mercenaries within a national territory began to be considered an act in support of the belligerent. Such recruitment often resulted in claims for belligerent retaliation. Provisions prohibiting mercenary recruitment on national territory were therefore incorporated into the 1907 Hague Conventions.[20] The obligations, however, were limited to policing national territory and did not extend to preventing nationals from crossing the border in order to offer their services to a belligerent. Several States enacted domestic legislation to reinforce the international obligation, and a few went beyond the minimal obligations and sought to control the actions of citizens who might seek to enlist in foreign armies.[21]

The United States, for example, has a long traditon of legislation controlling foreign enlistment by its own nationals.[22] Early laws

18. Burmester, *supra* note 3, at 41-42. *See also* HINSLEY, POWER AND THE PURSUIT OF PEACE (1963).

19. *See generally* BAYLEY, *supra* note 1; PRESTON, WISE & WERNER, *supra* note 1; R. SMITH, MERCENARIES AND MANDARINS: THE EVER VICTORIOUS ARMY IN NINETEENTH CENTURY CHINA (1978).

20. Convention Respecting War on Land, Oct. 18, 1907, arts. 4-6, 205 Parry's T.S. 395. The duty regarding the control of mercenary involvement is considered part of neutral duties, particularly the neutral State's obligation to remain impartial. 2 C. HYDE, INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 703-704, 758 (1922); 2 L. OPPENHEIM, INTERNATIONAL LAW 703 (Lauterpacht 7th ed. 1952); 2 J. WESTLAKE, INTERNATIONAL LAW 210 (2d ed. 1913).

21. The extended obligation is embodied in Central and Latin American treaty law. *E.g.*, General Treaty of Peace and Amity of the Central American States, Feb. 7, 1923, art. 14, in 2 HUDSON, INTERNATIONAL LEGISLATION 901 (1932); Havana Convention on Maritime Neutrality, Feb. 10, 1928, art. 23, 47 Stat. 1989, T.S. No. 845, 135 L.N.T.S. 187.

22. *See Leashing the Dogs of War*, *supra* note 3, at 595-99.

were inspired by a pragmatic calculation regarding the strength of the new republic and a desire to remain aloof from the struggles in Europe. In addition, there existed a general antipathy toward the use of mercenaries that originated from contact with the Hessian and Hanoverian soldiers who fought for the British in the Revolutionary War.[23] These laws reflected the provisions of the customary law since they prohibited the organization of military expeditions within United States territory for use against nations at peace with the United States.

The Neutrality Act of 1917 stated that American citizens were not to take part as belligerents in foreign conflicts.[24] United States government policy was controlled prior to 1917 by *Wiborg v. United States*,[25] in which the United States Supreme Court held that the government had no power to prevent citizens from joining foreign armies if they did so outside the United States. Ineffective enforcement weakened the general thrust of the Neutrality Act, and in 1939 Congress reafffirmed the prohibition against leaving the United States to enlist in foreign armed services.[26] This restatement and revision was directed against the large numbers of volunteers who had left the United States to serve in the Abraham Lincoln Battalion in the Spanish Civil War. The Roosevelt Administration actively attempted to discourage enlistments but chose not to prosecute violators. Likewise, the Administration 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.[27]

These early laws prohibited mercenary activity by implication.

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23. *See* Dumbauld, *Neutrality Laws of the United States*, 31 AM. J. INT'L L. 258 (1937). *See also* A COLLECTION OF NEUTRALITY LAWS AND TREATIES OF VARIOUS COUNTRIES (F. Deak & P. Jessup eds. 1939).

24. 22 U.S.C. § 411 *et. seq.* (1964).

25. 163 U.S. 632 (1896).

26. 18 U.S.C. § 959(a) (1976), states:

> "Whoever, within the United States, enlists or enters himself, or hires or retains another to enlist or enter himself, or goes beyond the jurisdiction of the United States with intent to be enlisted or entered in the service of any foreign province, state, colony, district, or people as a soldier or as a marine or seamen on board any vessel of war, letter or margue, or privateer, shall be fined not more than $1,000 or imprisoned not more than three years, or both.

See H. THOMAS, THE SPANISH CIVIL WAR (1961); N. PADELFORD, INTERNATIONAL LAW AND DIPLOMACY IN THE SPANISH CIVIL STRIFE 311 (1939).

27. Despite the 1939 legislation, the Federal Government ignored the large number of United States citizens who volunteered to fight for Allied Powers prior to the United States' entry into World War II. The conflicts prior to United States entry into World War II provide an interesting prelude to the problem of "politically motivated" volunteers versus other participants. *See* R. ROSENSTONE, CRUSADE OF THE LEFT 89-90 (1969).

United States law did not distinguish between those individuals who emigrated to enlist for political or ideological purposes and those who emigrated to enlist as mercenaries. However, the one case decided in the inter-war period under the neutrality statutes did involve recruitment for mercenary puposes.[28] In 1919 the United States Supreme Court upheld the conviction of a Mexican national residing in the United States who had recruited United States nationals to fight for insurgents challenging a government of Mexico which was recognized by the United States. The recruitment activity occurred on United States territory, and as such violated the provisions against active recruitment within territorial jurisdiction.[29]

After World War II significant changes occurred in the law which regulated the use of force in international politics. However, none of the major instruments adopted by the world community expressly addressed the use and recruitment of mercenaries. Given the conflicts, ideological and otherwise, that flared immediately following the war, the regulation of mercenary activity was a minor concern. By the 1960's the appearance of mercenaries in moderately large numbers in Africa, especially in Katanga, caused the concept of mercenaries to assume importance. Even so, the response of most States since that time has been to do little more than re-affirm Article 2(4) of the UN Charter,[30] and to restate the traditional law as a logical implication.

The use of mercenaries in colonial territories against "movements for national liberation and independence" was eventually declared a criminal act by UN General Assembly Resolution 2465[31] in the late 1960's. As such, mercenaries were designated as "outlaws." This position reappears in subsequent resolutions dealing with

28. Gayon v. McCarthy, 252 U.S. 171 (1919). In 1981, U.S. authorities, in co-operation 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 United States territory. N.Y. Times, Apr. 29, 1981, at 6. col. 4. The operation included Canadian and American mercenaries and "members of the Ku Klux Klan and neo-Nazi groups. . . ." N.Y. Times, May 17, 1981, at 8, col. 1; N.Y. Times, June 18, 1981, at 12, col. 1.

29. This decision is consistent with that in the Three Friends, 166 U.S. 1 (1897), where a vessel had been supplied and armed for the purpose of aiding Cuban insurgents against Spain. The U.S. was then at peace with Spain.

30. "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." U.N. CHARTER art. 2, para. 4.

31. Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 2465, 23 U.N. GAOR Supp. (No. 18) at 4, U.N. Doc. A/7218 (1968).

colonialism, and marks an important departure from the collective liability of the traditional law toward individual criminal liability.[32] These resolutions have also called upon third party States to affirm traditional law against permitting recruitment and to pass laws which forbid nationals from engaging in mercenary activity.

The 1972 Organization of African Unity (OAU) Convention for the Elimination of Mercenaries in Africa reflects the trends found in these United Nations resolutions.[33] The OAU Convention extends State obligations regarding the control of the activities of its nationals by making States responsible for the prohibition and punishment of any activities connected with mercenaries which may occur within their jurisdiction.[34] This departure from the traditional law derives from the obligation that the OAU Convention places on individuals who meet its requirements. These individuals must either fulfill the requirements in Article One which defines the term "mercenary," or

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32. Subsequent resolutions forbade the use of mercenaries by "colonial and racist regimes" against "national liberation movements." General Assembly Resolution 3103 represents the culmination of the trends described in the text. It states in pertinent part:

> Reaffirming the declarations made in General Assembly resolutions 2548 (XXIV) of 11 December 1969 and 2708 (XXV) of 14 December 1970 that the practice of using mercenaries against national liberation movements in the Colonial Territories constitutes a criminal act . . .
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> 5. The use of mercenaries by colonial and racist regimes against the national liberation movements struggling for their freedom and independence from the yoke of colonialism and alien domination is considered to be a criminal act and the mercenaries should accordingly be punished as criminals.

Basic Principles of the Legal Status of the Combatants Struggling Against Colonial and Alien Domination and Racist Regimes, G.A. Res. 3103, 28 U.N. GAOR Supp. (No. 30) at 142, U.N. Doc. A/9030 (1973); *see also* Definition of Aggression, G.A. Res. 3314, 29 U.N. GAOR Supp (No. 31) at 142, U.N. Doc. A/9631 (1974).

One must note the difficulty of applying the operative terms of these resolutions to the situations in the Congo, Nigeria and Angola. These cases suggest that banning the employment of mercenaries has little effect other than providing additional grist for victor's justice in the event that the incumbent regime fell to the "liberation movement" or, as in Angola, that one of a number of contending groups succeeded in gaining control over other contenders. Salmon summarizes the problem:

> Aussi la premiere question a se poser est de savior si toutes les situations appelees dans le langage de la science politique 'guerre de liberation nationale' trouvent leur contrepartie dans des concepts juridiques? Ou encore, il convient tout d'abord de determiner comment le droit integre les diverses situations de guerre de liberation nationale?

Salmon, *Les Guerres De Liberation Nationale*, in A. CASSESE, THE NEW HUMANITARIAN LAW OF ARMED CONFLICT 55 (1979). A further discussion and analysis of this point applied in a different context may be found in Taulbee & Anderson, *Reprisal Redux*, 17 CASE W. RES. J. INT'L L. 337 (1984).

33. O.A.U. Convention for the Elimination of Mercenaries in Africa, O.A.U. Doc. CM/433/Rev. L., Annex 1 (1972) [hereinafter cited as OAU Convention]; BURCHETT AND ROEBUCK, *supra* note 3, at 234; *Leashing the Dogs of War*, *supra* note 3, at 613.

34. OAU Convention, *supra* note 33, art. 2.

the requirements concerning those who recruit or help mercenaries through financial aid, training, or protection from prosection. This departure also arises from the obligations assumed by contracting States to prevent their nationals from engaging in mercenary activities as defined by the OAU Convention.[35] In this regard, contracting States assume the obligation to prosecute all those within their jurisdiction, including nationals, who have been accused of mercenary activity.[36]

Despite these innovations, the OAU Convention does not explicitly forbid the employment of mercenaries. According to Article I, a government, or any other group, may not use mercenaries to defend itself from the activities of a liberation movement recognized by the OAU. However, a government may engage non-nationals to defend itself from those liberation movements which fall outside the defined category of mercenary. This anomaly was not an oversight, but the result of careful drafting which came from the African governments' desire to give support to "national liberation movements" without creating conditions which might encourage dissident groups within their own borders.[37]

The trial of thirteen foreigners in Angola in 1976 focused international attention on mercenary activity. All of the defendants were convicted of the crime of "being mercenaries."[38] Four were sentenced to death and the others to long prison sentences. The Angolan government invited a large number of outside observers to watch the trials and to participate in the drafting of a new convention. The Luanda Draft Convention on the Prevention and Suppresion of Mercenarism[39] was issued in the wake of the trials. The Luanda

35. *Id.* arts. 2,3.

36. *Id.* arts. 6,7.

37. Suter, in his discussion of the legislative history of Geneval Additional Protocol I and Geneva Additional Protocol II states:

> Nearly all Third World states, owing to the haphazard way that their frontiers were delineated by their colonizers, have problems with minorities or tribes. . . . The Third World's references to "national liberation movements" were more precise than might appear at first. These governments have sought to ensure that existing states (other than South Africa and Israel) did not develop such "movements."

SUTER, AN INTERNATIONAL LAW OF GUERRILLA WARFARE: THE GLOBAL POLITICS OF LAW MAKING 147 (1983).

38. For accounts of the trials see BURCHETT & ROEBUCK, *supra* note 3, chs. 8, 14; Cesner & Brant, *Law of the Mercenary: An International Dilemma*, 6 CAP. U.L. REV. 339 (1977) (Robert E. Cesner served as chief counsel for the American defendants in the Luanda trials).

39. Draft Convention on the Prevention and Suppression of Mercenarism, June, 1976, *reprinted in* BURCHETT & ROEBUCK, *supra* note 3, at 237 [hereinafter cited as Luanda Draft Convention]. *See also Leashing the Dogs of War*, *supra* note 3, at 615.

Draft Convention emphasized the individual responsiblity of State representatives, as well as those individuals defined as mercenaries.

Article Three of the Luanda Draft Convention explicitly made government members involved in employing, aiding or recruiting mercenaries criminally liable. The failure of a State to punish those officials who had partaken in such activity would create international responsibility on the part of the offending State.[40] Article Five of the Luanda Draft Convention reflected the attitude of the judicial panel in the Luanda trials by providing that: "A mercenary bears responsibility both for being a mercenary and for any other crime committed by him as such."[41] Perhaps the most important departure from previous attempts occurred in Article Four of the Luanda Draft Convention, which deprived mercenaries of the status of lawful combatants. As a result, captured mercenaries no would longer enjoyed the protected status of prisoners of war. This provision was subsequently incoporated into the Geneva Additional Protocols,[42] although the Geneva conferees adopted a definition of mercenary more limited in scope than that contained in the Luanda Draft Convention.

III. MERCENARY: A LEGAL DEFINITION

What defines a mercenary? Most of the work dealing with mercenaries has not addressed the question of a precise definition. The question of a legal definition first became an important issue at the 1976 and 1977 sessions of the Diplomatic Conference on Humanitarian Law.[43] These sessions drafted Additional Protocols I and II to the 1949 Geneva Convention.[44] Additionally, the establishment of

40. BURCHETT & ROEBUCK, *supra* note 3, at 237.

41. *Id.* Cesner and Brant note that this distinction was made by the Angolan Court, but had no bearing on the sentences handed out. Only two of the accused were proven to have committed crimes. Cesner & Brant, *supra* note 38, at 351.

42. Additional Protocol I to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), U.N. Doc. A/32/144 Annex 1 (1977), *reprinted in* 16 INT'L LEGAL MAT. 1391 (1977) [hereinafter cited as Additional Protocol I]; Additional Protocol I to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), U.N. Doc. A/32/144 Annex 2 (1977), *reprinted in* 16 INT'L. LEGAL MAT. 1442 (1977) [hereinafter cited as Additional Protocol II]. For an extended commentary see Green, *The New Law of Armed Conflict*, 15 CAN. Y.B. INT'L L. 11-12 (1977); Farer, *Humanitarian Law and Armed Conflict: Toward the Definition of International Armed Conflict*, 71 COLUM. L. REV. 37 (1971).

43. *See* Tercinet, *Les Mercenaires et le Droit International*, 23 ANNUAIRE FRANCAIS DE DROIT 269 (1977); Van Deventer, *Mercenaries at Geneva*, 71 AM. J. INT'L L. 811 (1976); Yusuf, *Mercenaries in the Law of Armed Conflict*, in CASSESE, *supra* note 32, at 113.

44. See Geneva Convention for the Amelioration of the Condition of the Wounded and

the Ad Hoc Committee on the Drafting of an International Convention Against the Recruitment, Use, Financing and Training of Mercenaries again focused attention on the construction of a legal definition.[45] The Committee, which has met annually since its initial authorization, has not yet agreed upon a definition.

There is a need to examine the issues connected with constructing an adequate legal definition of the term mercenary. A precise definition is absolutely essential since individuals will be deprived of important legal rights as a consequence of falling into the proscribed category. Moreover, under the evolving international law dealing with mercenaries, States will be forced to assume the obligation to control certain activities that will in large measure be determined by the scope of the definition.

As with most controversial issues, this undertaking requires an evaluation of a number of political factors. A definition must balance competing interests and must also balance precision with significance.[46] As such, it must strike a medium between requirements which provide general parameters for evaluating contextual elements, and requirements which attempt rigorous and exhaustive descriptions of persons, situations and activities. An overly detailed definition may prove too rigid and resistant to accomodate change as circumstances demand. Conversely, a simple and brief definition which permits discretion in application leaves open the possibility of abuse. If the definition is too general the interpretation of terms may be colored by ideological or political calculation.

Sick in the Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287.

45. The members of the Committee are Algeria, Angola, Bahamas, Bangladesh, Barbados, Benin, Bulgaria, Canada, Democratic Yemen, Ethiopia, France, German Democratic Republic, Federal Republic of Germany, Guyana, India, Italy, Jamaica, Japan, Mongolia, Nigeria, Portugal, Seychelles, Spain, Suriname, Togo, Turkey, Ukrainian SSR, USSR, United Kingdom, United States, Uruguay, Yugoslavia, Zaire and Sambia. The Chairman is Mohamed Sahnoun (Algeria); Vice Chairmen: Luigi Ferrari Bravo (Italy), Ernest Besley Maycock (Barbados) and Boris I. Tarasyuk (Ukrainian SSR); Rapporteur: Moritaka Hayashi (Japan). Togo replaced Senegal for the 1983 session of the Ad Hoc Committee. Cuba, Egypt, Mozambique, Nicaragua and Viet Nam have observer status.

At its initial working session in 1982 the Committee divided into two working groups. Working Group A focused on the questions concerning the definition of mercenary and individual responsibility. Working Group B addressed the questions of preventive measures, damage reparation and settlement of disputes. Additional Protocol I, *supra* note 43.

46. The classic discussion of the problems of constructing a legal definition is found in J. STONE, AGGRESSION AND WORLD ORDER (1959).

The concepts of motive and origin serve to define the term mercenary. Mercenaries are non-nationals who fight for monetary gain rather than loyalty or idealism. They are generally bands of soldiers temporarily united under leaders of strong personality who fight for pay and the spoils of war. They are usually indifferent to the claims of legality or the interests of their *native* country.[47]

By analyzing each of these two operative concepts, it becomes possible to point to the difficulty of using either concept, or both, as a definitive test in specific situations. While international law employs nationality as a parameter in helping to determine the apportionment of rights and obligations,[48] the most effective link between an individual and a specific territory may not be nationality.[49] For example, non-nationals often reside in territories where conflicts erupt. Despite their non-national status these individuals may feel they have substantial interests to protect. Moreover, they may also possess combat skills or technical expertise useful to a party to the conflict. As a result, the party is often willing to pay a premium wage to obtain such knowledge and skills. According to both the OAU Convention and the Luanda Draft Convention such individuals could be considered mercenaries. Their status depends upon which of the parties in a given conflict they decide to join. The critical test in these two early attempts at a definition arises in instances where there is opposition to movements for self-determination or liberation.[50]

The outlines of the current definitonal debate were established during deliberations over the inclusion of Article 47 in Additional Protocol I.[51] The issues related to the problem of distinguishing

47. MOCKLER, *supra* note 3, at 23.

48. In particular, nationality serves as the essential link between the individual and the protection afforded by international law. Oppenheim notes: "Such individuals as do not possess any nationality enjoy, in general, no protection whatever, and if they are aggrieved by a State they have no means of redress since there is no State which is competent to take up their case." 1 L. OPPENHEIM, INTERNATIONAL LAW 640 (Lauterpacht 8th ed. 1955).

49. Nottebohm Case (Liech. v. Guat.), 1955 I.C.J. 4.

50. BURCHETT & ROEBUCK, *supra* note 33, at 234.

51. Article 47 of the Additional Protocol I defines a mercenary as any person who:

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

"mercenaries" from other foreign "volunteers." These issues, which can be stated quite concisely, are: (1) whether a distinction should be drawn between non-resident non-nationals and resident non-nationals; (2) whether a "mercenary" includes all who meet certain operative tests, or whether some overt actions directly related to hostilities are necessary; (3) whether outside private forces and national troops should be considered different from third party States; (4) whether individuals recruited for a specific conflict should be distinguished from those recruited under other circumstances; (5) whether motive should be defined through objective tests; and (6) whether a legal distinction should be drawn between "legitimate" and "non-legitimate" movements for national liberation?[52]

The definition of mercenary in Additional Protocol I gives conservative answers to all of the above questions. This definition provides that to be considered a mercenary, one must be: (1) specifically recruited for a conflict, (2) a non-national and a non-resident of any Party to the conflict, (3) involved as a private person, (4) directly involved in hostile activities, and (5) motivated by private gain.[53] Furthermore, in order to qualify as a mercenary under this definition an individual must meet all of these tests. Those identified as mercenaries have no right to the protected status of a combatant or prisoner of war.[54] While the specific purpose of the Additional Protocols I and II is to extend protected status to those participating in struggles against "colonial domination," "racist regimes," or "alien domination," their provisions also apply to the utilization of mercenaries in general. The use of mercenaries in movements for national liberation is not singled out. In this respect, the Additional Protocol I definition does not reflect the general thrust and language of the

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Additional Protocol I, *supra* note 43, art. 47 (2).

52. For a brief discussion of the legislative history of these issues at Geneva see Yusuf, *supra* note 44.

53. *See supra* note 51.

54. Some question remains as to what deprivation of combatant status would mean for an individual. Burmester interprets the legislative history of the article to mean that "[I]t is clearly understood that a mercenary is entitled to the basic humanitarian treatment and protections provided under the Protocol for persons in the power of a party to the conflict who are not otherwise entitled to more favorable treatment." Burmester, *supra* note 3, at 55. In addition, the United States Supreme Court, in *ex parte* Quirin, declared that "Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful." 317 U.S. 1 (1942); Baxter, *So-called Unprivileged Belligerency: Spies, Guerrillas and Saboteurs*, 32 BRIT. Y.B. INT'L L. 339 (1951); *see also* Draper, *The Status of Combatants and the Question of Guerilla Warfare*, 42 BRIT. Y.B. INT'L L. 175 (1971).

United Nations resolutions or of the OAU and Luanda Draft Conventions.

Western States have criticized the Additional Protocol I definition because of its stress on motivation. The Diplock Report states that motivation cannot be an essential definitional element because motivation cannot be objectively ascertained.[55] Although motivation should not comprise the sole definitional element, any objection to the reliance on motivation as an element of a definition fails to be convincing. Domestic law regularly makes critical distinctions based upon motivation.[56]

There is also little merit in the objection to the evidence necessary to establish motivation under the test in Additional Protocol I. The contention is that it would be difficult to obtain the necessary evidence; a showing of all five elements would require access to the records of an opposing party to the conflict.[57] This difficulty, however, exists with all statutes that provide for extraterritorial jurisdiction over nationals. Moreover, the question of compensation is essential in establishing a distinction in motivation. This distinction is considered vital by African and Socialist States with regard to mercenaries who serve illegitmate regimes, and non-resident non-nationals who volunteer to aid legitimate liberation movements.

If the desire for private gain is removed from the definition of

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55. The Commission reported that "Any definition of mercenaries which required positive proof of motivation would either be unworkable, or so haphazard in its applicaion as between comparable individuals as to be unacceptable. Mercenaries, we think can only be defined by reference to what they do." *Report of the Committee of Privy Counsellors Appointed to Inquire into the Recruitment of Mercenaries*, Cmnd. 6569, para. 7 (August 1976), *cited in* Burmester, *supra* note 3, at 37. For another discussion of the report in relationship to British law see BURCHETT & ROEBUCK, *supra* note 3, ch. 13. With respect to the question of "political" versus other motivations, see Hoare's statement on the difference between the Congo mercenaries and those who fought in Rhodesia. Hoare states, "Today they are politically motivated and the money is not all that important to them." Moore, *supra* note 17, at A23. Moore spent two years in Rhodesia traveling with mercenaries. He maintains that the Americans fighting there received only the pay accorded to soldiers serving in the Rhodesian army, which was considerably less than what they could have earned in the United States Army. He claims that most Americans enlisted because they saw the Rhodesian conflict as a continuation of a fight against communist expansion. *Id.* Clearly, one goal of the African States is to prevent any similar "volunteer" effort in aid of South Africa. *Id.*

56. For example, intent is an element of conspiracy, which is defined as follows:

> A person is guilty of conspiracy in the first degree when, with the intent that conduct constituting a class A felony be performed, he agrees with one or more persons to engage in or cause the performance of such conduct.

N.Y. PENAL LAW § 105.15.

57. This element is present in many cases where laws specify certain types of extra-territorial jurisdiction. Such difficulties as collecting evidence and procuring witnesses when a crime occurs outside of territorial jurisdiction are legion.

mercenary, then the term "mercenary" as ordinarily understood becomes devoid of substantive content. "Mercenary" becomes a term which describes all non-resident non-nationals who choose to oppose a particular ideological policy preference, or which describes a group possessing the same status as other combatants. There appears to be no other alternative tests for distinguishing mercenaries from other combatants which are as adequate as the motivation test.

At the first session of the Ad Hoc Committee, the Nigerian Delegation offered a draft convention which incorporated the definition of Additional Protocol I. The Committee also added language to Article 2 from the Luanda Draft Convention. This language prohibited the use of mercenaries against legitimate movements for national liberation.[58] The Nigerian Draft Convention also incorporated the premise that the mere status as a mercenary, as opposed to participation in specific overt acts, was sufficient to establish criminal liability.[59]

The Additional Protocol I definition represented a compromise. The deliberations on the Nigerian Draft Convention gave each side the opportuntiy to re-assert their positions. The United States, United Kingdom, and other members of the Organization for Economic Cooperation and Development (OECD) steadfastly insisted that criminal liability can only come from the performance of specific acts of war.[60] Delagates from Socialist, as well as many African and

58. International Convention Against the Activities of Mercenaries, U.N. Doc. A/35/366/Add.1 at 10-16 (1980) [hereinafter cited as Nigerian Draft Convention]. At the beginning of the 1983 session France also submitted a Draft Convention for consideration. 38 U.N. GAOR Doc. Supp. (No. 31), U.N. Doc. A/AC.207/L.15 and Corr.1 (1983) [hereinafter cited as French Draft Convention]. *See also* Report of the Ad Hoc Committee on the Drafting of an International Convention Against the Recruitment, Use, Financing and Training of Mercenaries. 37 U.N. GAOR Supp. (No. 43), U.N. Doc. A/37/43 (1982) [hereinafter cited as Report 1982].

59. Article 2 of the Draft Convention which France submitted states:

> 1. The crime of mercenarism is committed when an individual group or association, or body corporate registered in that State or representative of a State or the State itself with the aim of opposing by threat or armed violence the territorial integrity of another State or the legitimate aspirations of national liberation movements jeopardizes the process of self determination or manifests by overt acts any of the following:
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> . . .
>
> (b) participates as an individual, group or association or body corporate or enlists in any force. . . .

French Draft Convention, *supra* note 58.

60. Report 82, *supra* note 58, at 10-11. The debate over this issue is summarized in paragraphs 35-43. The Western view is shown by summary statements in the Sixth Committee by Mr. Saint-Martin (Canada) and Mr. DeStoop (Australia). 38 U.N. GAOR C.6 (23d mtg.) at 58, U.N. Doc. A/C.6/38/SR. 23 (1983); 38 U.N. GAOR C.6 (25th mtg.) at 12, U.N. Doc. A/C.6/38/SR.25 (1983)(statement of Mr. Font (Spain)); 38 U.N. GAOR C.6 (61st mtg.) at 2,

Asian States, sought to broaden the definition of mercenary to include the idea that mercenary status alone, apart from overt acts, should carry criminal status.[61]

Those who advocate the more inclusive definiton argue that the voluntary act of enlistment signifies intent. Therefore, enlistment should automatically subject the individual to criminal penalities.[62] To make punishment dependent upon direct participation in overt acts would mean that determination of mercenary status carries no additional onus. The acts listed in the draft conventions and the Conference Working Papers would be punishable if committed by *any* individual, thereby supplying a necessary deterrence upon individuals.[63]

Socialist and African States have also endeavored to extend the definition to include those "mercenaries" that are not covered by the Additional Protocol I definition. Some delegations have asserted that Additional Protocol I covers only situations of international armed conflict. However, mercenary activity which is damaging to States has occurred more often in civil wars. It has been argued that any useful definition must encompass situations of intrastate violence as well as those that meet the criteria of international armed conflict. These States also contend that deterrence requires that individuals or other groups that employ, recruit and train mercenaries should be considered as principals on equal footing with those who actually participate in the hostilities, and not just as accomplices.[64]

Western delegations have accepted that the Nigerian Draft Convention should address situations outside of those covered by Addi-

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U.N. Doc. A/C.6/38/SR.61 (1983) (statement of Mr. Roucounas (Greece) who expressed the views of the Member States of the EEC).

The irony of the Western position in this instance is that neither the United States, Great Britain nor France have ratified Additional Protocol I or Additional Protocol II. As of March 1984, only thirty-one States had ratified Additional Protocol I and only twenty-five had ratified Additional Protocol II. For an analysis of the problems associated with these two instruments see SUTER, *supra* note 37, at 142-53.

61. *See* 38 U.N. GAOR C.6 (21st mtg.) at 8, U.N. Doc. A/C.6/38/SR.20 (1983) (summary statements of Mr. Khalek (Egypt)); 38 U.N. GAOR C.6 (23rd mtg.) at 6, U.N. Doc. A/C.6/38/SR.23 (1983) (statement of Mr. Stepanov (Ukranian SSR)); 38 U.N. GAOR C.6 (27th mtg. Oct.) at 3-4, U.N. Doc. A/C.6/38/SR.28 (1983) (statements of Mrs. Ahmadi (Islamic Republic of Iran) and Ms. Malamfu (Zambia)); 38 U.N. GAOR C.6 (29th mtg.) at 4, U.N. Doc. A/C.6/38/SR.29 (1983) (statement of Mr. Bernal (Bolivia)).

62. 38 U.N. GAOR C.6 (19th mtg.) at 15-16, U.N. Doc. A/C.6/38/SR.19 (1983) (summary statement of Mr. Sahnoun, Chairman of the Ad Hoc Committee).

63. Report 1982, *supra* note 58, at 6-9.

64. Summary statement of Mr. Khalek (Egypt), *supra* note 61; summary statement of Mr. Stepanov (Ukranian SSR), *supra* note 61; Report 1982, *supra* note 58, para. 34.

tional Protocol I. In this regard, these States assert two principal propositions. First, the definition in Additonal Protocol I did not apply only to situations of international armed conflict.[65] Second, the definition set out in any future convention should remain consistent with the Additional Protocol I definition in order to retain the integrity of the regime established by Additional Protocols I and II.[66] Any extension to circumstances outside of international armed conflict should be in a form consisent with the definition in Additional Protocol I. For most Western delegations the correct way of addressing the problem would be to concentrate on prohibitng certain acts and activities within a carefully specified context.[67] These delegations must widen the contingencies to which the Additional Protocol I defintion would apply, rather than expanding the classes of activities and individuals included in the definition proper.

The draft articles for future discussion submitted as part of the report of Working Group A of the Ad Hoc Committee[68] diverge somewhat from the conservative emphasis of Additional Protocol I. These articles embrace a version of the formulation advocated by African and Socialist States. However, they adopt the specific offenses approach for extending the definition to situations other than those involving international armed conflict. Under the draft articles employment, training and recruitment become equivalent to direct participation within the meaning of the provsions of Additional Protocol I. This list of prohibited activities reflects the non-Western viewpoint as well. Mercenaries may not participate in the "suppression of the struggle of a people for self-determination," nor in acts of "economic sabotage."[69] On the other hand, references to the crime of mercenarism and the criminal responsiblity of States have been eliminated under the draft articles.

Differences remain over the precise wording of several phrases, but the resolution of these clauses will not affect the general scope, structure or thrust of the proposed definition. While States may have agreed on the elements of a definition, questions regarding the extent

65. Many Western delegations argued that the definition in Additional Protocol I also covered situations of non-international conflict. *See* summary statement of Mr. Roucounas (Greece), *supra* note 60. *See also* Report 1982, *supra* note 58, paras. 73, 78. For a general discussion of the problems associated with extending regulations to non-international situations, see Dupuy & Leonetti, *La notion de conflit arme a charactere non international*, in CASSESE, *supra* note 32, at 258.

66. Summary statement of Mr. DeStoop, *supra* note 60.

67. *E.g.*, Report 1982, *supra* note 58, para. 41.

68. *See supra* note 45 and accompanying text.

69. Report 1982, *supra* note 58, para. 41.

of State liability with respect to the proscribed activities have proven less tractable.

IV. MERCENARIES AND STATE RESPONSIBLITY

Some inevitable overlap exists between the task of Working Group A and that of Working Group B. Construction of the requirement that States adopt appropriate measures to prevent the commission of prohibited activites entails important considerations relating to the nature and scope of State liability. The Nigerian Draft Convention attempted to implement new obligations with which to enforce its provisions. Article 15 stipulates that acts or omissions under the Convention will create international responsiblity on the part of the offending State.[70] Proponents of the Nigerian position have asserted that effective control of mercenary activity requires its prevention. Consequently, the primary debate has focused on the standards of performance with respect to the elimination of mercenary activity.

The idea of State responsibility has traditionally been linked to the concept of territorial sovereignty. The rights of independence and territorial integrity necessitate the obligation to respect and protect these same rights of other States.[71] A violation of international law by a State creates responsiblity if (1) loss or damage resulted from the act, and (2) the delinquency can be imputed to the State.[72] While some commentators have sought to limit the circumstances in which violations may be imputed directly to the State, few dispute the validity of these propositions.[73]

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70. Nigerian Draft Convention, *supra* note 58, art. 15, Report 1982, *supra* note 58. Contemporary texts tend to treat responsibility almost entirely in terms of "denial of justice" to aliens perhaps because these cases constitute the bulk of claims practice. *See e.g.*, L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, INTERNATIONAL LAW: CASES AND MATERIALS 685-780 (1980); J. SWEENEY, C. OLIVER & N. LEECH, THE INTERNATIONAL LEGAL SYSTEM: CASES AND MATERIALS 545-573 (2d ed. 1981).

71. Island of Palmas (U. S. v. Neth.), Hague Ct. Rep. 2d (Scott) 366 (Perm. Ct. Arb. 1928); Corfu Channel Case (U. K. v. Alb.), 1949 I.C.J. 4 (Merits); GARCIA-AMADOR, STATE RESPONSIBILITY IN THE LIGHT OF THE NEW TRENDS OF INTERNATIONAL LAW 340 (1955).

72. *See* [1969] 1 Y.B. INT'L L. COMM'N, 104-106 (statement of Mr. R. Ago); *see also* Ago, *Le delit international*, R.D.C. 451, 455, 461 (1939). Judge Huber noted: "Responsibility is the necessary corollary of a right. All rights of an international character involve international responsibility. If the obligation in question is not met, responsibility entails the duty to make reparation." Huber, *Spanish Zone in Morocco*, 2 R.I.A.A. 641 (1923). *See also* 1 C. HYDE, INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 723 (2d ed. 1943).

73. *See, e.g.*, E. BORCHARD, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD 217 (1927); Brierly, *The Theory of Implied State Complicity*, 9 BRIT. Y.B. INT'L L. 42 (1928);

Over the past fifty years the primary topic of debate has concerned the connection between the non-performance of duties and consequent liability.[74] The issue becomes ascertaining the standard of performance required by a State within its own jurisdiction in protecting the rights of other States. The argument over the standard of performance in suppression of mercenary activity constitutes only one aspect of this ongoing debate.

The concept of statehood implies certain capabilities. The assumption that the State has absolute authority over its territory raises the presumption that, at a minimum, incumbent governments have the capacity to police activities within their own borders.[75] Some contemporary authors, such as Garcia-Mora, have argued that a State which fails to prevent a harmful act against another State has violated an international obligation to preserve world order. Furthermore, even if a State has clearly used all of its means to prevent an unlawful act against a foreign State, but has not remedied the situation, it has failed to discharge its obligation and still remains liable.[76] Blum has employed the following reasoning in defending Israeli actions in Lebanon:

> Thus, when one raises the question of [sic] ability of Lebanon. . .to curb the activities of the various guerrilla organizations, this arguably might indirectly call in [sic] question the very statehood, sovereignty and independence from the viewpoint of international law. Certainly, a writer cannot be entitled simultaneously to assert the inability of a State to perform its undoubted legal obligations and its right to be immune from responsibility in re-

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Garner, *Responsibility of States for Injuries Suffered by Foreigners within their Territories on Account of Mob Violence, Riots and Insurrection*, 21 PROC. AM. SOC'Y INT'L L. 57 (1927).

74. For an extended discussion of the controversies regarding State responsibility see G. SCHWARZENBERGER, INTERNATIONAL LAW (3rd ed. 1957).

75. 1 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 241-255 (1928).

76. *See, e.g.*, M. GARCIA-MORA, INTERNATIONAL RESPONSIBILITY FOR HOSTILE ACTS OF PRIVATE PERSONS AGAINST FOREIGN STATES 109 (1962). Burmester argues that:

> Private actions of individuals can, in certain circumstances, have a major impact on interstate relations; and it no longer seems realistic not to impute responsibility to a state for the actions of persons under its jurisdiction and control in situations likely to endanger world peace and security. Such a responsibility could arise. . .from the recognition that the modern state can, and must, exercise control over its nationals so as to prevent their involvement in activities contrary to international law . . . .
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> . . . [T]he presence of foreign nationals, especially if on a large scale, can have a significant impact on any conflict and may draw into the conflict those states whose nationals are involved.

Burmester's theory is of interest because it would result in a situation of almost total open-ended liability for States. Burmester, *supra* note 3, at 45.

spect of such defaults.[77]

Both arbitral tribunals and courts, however, have been reluctant to support an absolute standard of liability. Relative standards have been the rule and traditionally embody two elements: knowledge and capacity. In the *Alabama Claims* arbitration, the Tribunal found that a State is obliged "to exercise due diligence in its own ports and waters, and, as to all persons within its jurisdiction, to prevent any violation of the foregoing obligations and duties."[78] In addition, the key issue in the *Corfu Channel* Case was whether Albania had or should have had "constructive knowledge" of the mines in the strait.[79]

Knowledge of a harmful act or a potentially damaging situation is not in and of itself sufficient to establish responsibility. Tribunals have been reluctant to hold governments responsible for damages caused by individuals and groups in situations which are beyond the State's capacity to control.[80] Traditional international law, however, requires a State to make a good faith effort to extend reasonable protection or punish offenders. If mitigating circumstances can be shown, a State may still be absolved from responsibility[81] despite the failure to prevent, punish or otherwise make reparation.[82]

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77. Blum, *The Beirut Raid and the International Double Standard*, 64 AM. J. INT'L L. 85 (1970).

78. The standard of due diligence became an issue of contention between the United States and the United Kingdom in the Alabama Claims arbitration arising out of damages claimed by the United States for the actions of the warship Alabama during the Civil War. The British argued that responsibility is limited to such care as a State usually takes in its own affairs (*diligentia quam in suis*). The Tribunal rejected the British argument, ruling that the ". . .due diligence referred to in the first and third of the rules ought to be exercised by neutral governments in exact proportion to the risk to which either of the belligerents may be exposed due to a failure to fulfill the obligations of neutrality on their part." 1 J. MOORE, INTERNATIONAL ARBITRATIONS 495, 682 (1976).

Under the Alabama Claims decision, the standard of risk to belligerent interests came close to mandating an absolute standard of responsibility because the possibility existed that a State could be held liable even though it had taken every precaution within its means to avert the damage. The 1907 Hague Convention substituted "means at its disposal" for due diligence, bringing the operative test into conformity with the with the British view. *See* Corfu Channel Case, *supra* note 71, at 22.

79. Gorfu Channel Case, *supra* note 71, at 18.

80. Huber, *supra* note 72, at 730; Home Missionary Society Arbitration (U.S. v. U.K.) 6 R. Int'l Arb. Awards 42 (1933).

81. Noues (U.S. v. Pan.), United States and Panamainian General Claims Arbitration 155, 6 R. Int'l Arb. Awards 325 (1933); Lillich & Paxman, *State Responsibility for Injuries to Aliens Caused by Terrorist Activity*, 26 AM. U.L. REV. 217 (1977).

82. Report of the International Law Commission on the Work of Its Thirty-Sixth session (May 7 - July 27, 1984), 39 U.N. GAOR Supp. (No. 10), at para. 234, U.N. Doc. A/39/10/1984.

Western States have steadfastly resisted any suggestion of absolute responsibility. They have advanced three main arguments in defense of this position. First, an explicit reference to State responsibility implies that other conventions which do not expressly mention it will not establish responsibility for wrongful acts. Second, the nature of the issues suggests that a statement which involves only one or two articles would provide only a superficial treatment of important concerns. Third, the International Law Commission (ILC) currently has undertaken the major project of drafting a comprehensive convention on State responsibility. Thus, the Ad Hoc Committee must be careful not to pre-empt the work of the ILC, particularly if such activity creates standards different from those which may be included in the ILC convention.[83]

Western States have also resisted the idea that a State which fails to prevent mercenary activity should be liable for damages to the victim of such an omission. These States have pointed out that Article 15 has no parallel in other conventions considered relevant to the work of the Committee. While no one has denied that a breach of international obligation gives rise to responsiblitity, states have argued that the question of reparation should be left to customary practice.[84]

These arguments indicate the desire to avoid precedent that may be cited in other areas. It is also clear that in practice the obligations imposed by the convention in terms of prevention of recruitment would likely apply only to Western States and South Africa, the principal sources of recruitment to date. The United States is unlikely to accept any guidelines more stringent than those embodied in current legislation so long as the Soviet Union has the option to use Cuban or other troops which are not included in the definition of a mercenary. Finally, Western States are not likely to accept an absolute standard of responsiblity when many of the States eager for such a standard reject it in other contexts.[85]

V. MERCENARIES AND UNITED STATES LAW

United States law is comparable to the customary law of neutrality. The most noteworthy aspect of the general thrust of United

83. *See, e.g.*, 38 U.N. GAOR C.6 (23d mtg.) at 5, 16, U.N. Doc. A/C.6/38/SR.23 (1983)(summary statement of Mr. Leile (Portugal)); 38 U.N. GAOR C.6 (26th mtg.) at 14, U.N. Doc. A/C.6/38/SR.26 (1983) (summary statement of Mr. Hayashi (Japan)).

84. Report 1982, *supra* note 58, para. 75, at 22.

85. For an extended discussion of this view, see Taulbee & Anderson, *supra* note 32.

States legislation regarding mercenaries is the reluctance to use nationality as a means of regulating the conduct of citizens outside United States jurisdiction. When compared to European countries the United States is extremely conservative in legislating jurisdictional claims over the extra-territorial conduct of its citizens.[86]

Current statutes prohibit activities within territory which would injure the interest of States currently at peace with the United States. Service in a foreign force,[87] conspiracy to destroy the property of a foreign State,[88] and the planning or financing of an expedition against a foreign State[89] are proscribed. The scope of each of these provisions is limited to positive acts performed within the territorial jurisdiction of the United States. In *United States v. Dane*,[90] the United States District Court for the Ninth Circuit went so far as to suggest that mercenary activities outside United States jurisdiction do not violate United States law.

The most severe of the current laws that apply to American citizens who enlist as mercenaries is 8 U.S.C. section 1481(a)(3). This statute provides that American citizens who enlist in the armed forces of a foreign State without the express written permission of the Secretary of State and the Secretary of Defense shall lose their citizenship.[91] However, no administration to date has enforced its pro-

86. The United States has extended jurisdiction through the nationality principle to crimes of treason, income tax evasion and draft evasion. HENKIN, PUGH, SCHACTER & SMIT, *supra* note 70, at 445. In comparison, French criminal law applies in almost every instance to citizens whether in France or abroad. *See* Delaume, *Jurisdiction Over Crimes Committed Abroad: French and American Law*, 21 GEO. WASH. L. REV. 173 (1952).

87. 8 U.S.C. § 958 (1976). This section provides:

> Any citizen of the United States who, within the jurisdiction thereof, accepts and exercises a commission to serve a foreign province, state, colony, district, or people, in war, against any province, state, district, colony or people, with whom the United States is at peace, shall be fined not more than $2,000 or imprisoned for not more than three years, or both.

88. 18 U.S.C. § 956(a) (1976). This section provides, in pertinent part:

> 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. . .and if one or more such persons commits an act within the jurisdiction of the United States to effect this object . . . .

89. 8 U.S.C. § 960 (1976). The statute states, in pertinent part:

> 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 an foreign province or state, or of a colony, district or people with whom the United States is at peace. . .

90. 570 F.2d 840 (9th Cir. 1977).

91. 8 U.S.C. § 1481(a)(3) (1976). According to the statute a citizen may lose nationality by "entering, or serving in, the armed forces of a foreign state unless, prior to such entry or service, such entry or service is specifically authorized in writing by the Secretary of State and the Secretary of Defense."

visions. On the basis of parallel cases, commentators have suggested that the statute may be unconstitutional as violative of due process.[92] United States courts have been extremely reluctant to strip native citizens of their rights unless the individual has expressly waived them.[93] As such, a number of the provisions of the Draft Articles run counter to historic United States policy. Others, which suppress the dissemination of information, contravene First Amendment guarantees.[94]

VI. CONCLUSION

Third World States, particularly African States, have led the drive to negotiate a multilateral convention concerning the use of mercenaries. This is not surprising, as most contemporary mercenary involvement has occurred on the African continent. The majority of recent commentaries argue that the increased use of mercenaries during the past few years necessitates the adoption and implementation of a convention.[95] However, the meaning of the ne-

92. *See* Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963); Vance v. Terrazas, 444 U.S. 252 (1980).

93. *See* Afroyim v. Rusk, 387 U.S. 253 (1967). In Afroyim, the United States Supreme Court held a provision of Section 1481 which deprived a person of citizenship if he or she voted in a foreign election to be unconstitutional. The Court agreed that U.S. citizenship could not be revoked unless an individual voluntarily renounced it. The unanswered question remains, however, whether enrollment in a military service other than that of the United States, and the swearing of an oath of allegiance constitute an express waiver? *Cf.* Vance, *supra* note 92. Earlier the U.S. Supreme Court had issued conflicting judgements. *See* Perez v. Brownell, 356 U.S. 44 (1958) (upholding the right of Congress to pass legislation "de-nationalizing American citizens who voted in foreign elections"). *Cf.* Prop v. Dulles, 356 U.S. 86, 78 (1958) (holding that de-nationalization as a punishment was barred by the Eighth Amendment, and therefore unconstitutional.) *See* Duval, *Expatriation under United States Law, Perez to Afroyim: The Search for a Philosophy of American Citizenship*, 56 VA. L. REV. 408 (1970) (Attorney General's Statement of Interpretation of Afroyim v. Rusk); 34 FED. REG. 1079 (1969).

94. The quintessential test case here involves Robert Brown, the publisher of Soldier of Fortune magazine. Brown's activities, particualarly those publicizing opportunities for "professional adventurers," have come under attack from many quarters. Attention focused on Brown after the execution in Angola of Daniel Gearhart, a mercenary who had been employed after placing an advertisement in the magazine. Despite a number of investigations into his activities, no indictments resulted. N.Y. Times, May 4, 1980, at 22, col. 1.

95. *See genrally* Burmester, *supra* note 3; *Leashing the Dogs of War*, *supra* note 3. Burmester argues that mercenaries must be controlled because violence precipitated by private action will cause governments to become inadvertantly involved in conflicts where they have little or no interest because they will feel compelled to extend protection to their nationals. Burchett and Roebuck assert that mercenary forces ought to be controlled because they offer a mechanism whereby governments may intervene "unofficially," thereby disavowing any connection if the operation fails. BURCHETT & ROEBUCK, *supra* note 3.

The expense of mercenary troops, their checkered record of performance, the antipathy by the Third World States toward their use, and the availability of official and covert military aid

gotiations is more symoblic than substantive. The current effort and concern is directed toward a phenomenon essentially transitory in nature. The reaction, when compared to the historical record, is out of proportaion to the actual threat.[96] In no recent instance have mercenary troops made a significant difference in the eventual outcome of a military conflict. In addition, the chaotic conditions associated with the rapid movement toward independence by Third World nations has lessened. Moreover, as national armies have become more skilled the incentives and opportunities for mercenaries have diminished considerably.[97] Equally important is the fact that as decolonialization has become a reality the tacit support often given by ex-colonial powers to mercenary activity in support of favored factions has run its course. In sum, the predictions of (1) increased opportunities for mercenary activity,[98] (2) fears that activities of individual mercenaries might draw their governments into unwanted conflicts,[99] and (3) the contention that mercenaries offer cheap intervention[100] have not proven accurate.

A convention may nevertheless emerge from the efforts of the Ad Hoc Committee studying the problem of mercenary activities. Whatever its final format, its reach and impact will likely remain limited. If the proposed convention retains the provisions mandating

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strongly suggest that large scale employment of soldiers of fortune was an aberration produced by a unique set of conditions which have now passed. Individuals may still find employment as technical advisers or specialists, but it is highly unlikely that legions such as Mike Hoare's "Wild Geese" in the Congo will re-appear as an important factor. Hoare received a ten year sentence for his part in organizing the Seychelles operation. TIME, Aug. 9, 1982, at 30. SUTER, *supra* note 37, at 146. Suter notes that the expectation of the Afro-Asian states in 1974 was that by the time that Additional Protocol I entered into force, "most if not all of the present wars of national liberation would have been resolved." *See also* MOCKLER, *supra* note 3, at 276-277.

96. *See supra* notes 7, 17 and accompanying text.

97. Mockler argues that in order for most men to become mercenaries the possible tangible rewards must outweigh the dangers. Mockler writes:

> Danger, however, must not outweigh the prospects of riches. The normal mercenary has always had a horror of being killed. Casualties destroy morale in a mercenary army far more quickly than in a normal army, and if the war is particularly ferocious or the enemy particularly skilled, mercenaries will take no part in it.

MOCKLER, *supra* note 3, at 276-77.

Certain individuals find that intangible motives such as the risk of death or the license to kill provide sufficient incentive, but these men constitute a very small contemporary minority. Robert Brown, the publisher of Soldier of Fortune magazine, confirms this observation. N.Y. Times, *supra* note 94. For an excellent discussion of private motives and warfare see R. TUCKER & R. OSGOOD, FORCE, ORDER AND JUSTICE (1967); J. HUIZINGA, HOMO LUDENS (1950).

98. *See generally* MOCKLER, *supra* note 3.

99. *See generally* Burmester, *supra* note 3.

100. *See generally* BURCHETT & ROEBUCK, *supra* note 3.

absolute responsiblity for failure to suppress or prevent mercenary activity by nationals outside of national territory, the United States and other key Western European governments will in all likelihood refuse to become parties. This will leave the proposed regime still-born. On the other hand, if the finished product does not provide for absolute responsiblity, the convention will do little more than restate the current international law. Many governments, including the United States, may still decline to ratify the result, preferring the flexibility of the status quo to the extended definitions in the current draft.

The regulation of mercenary involvement in international conflict is peripheral at best. The tragedy is that ideology has obscured fact and resulted in the allocation of scarce resources to a secondary task which will have little long term effect on State behavior.