LEGAL STATUS OF MERCENARIES

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Together with expropriation of property and international terrorism, there are few subjects that evoke stronger emotional reactions than the issue of mercenaries. For peoples waging wars for independence and freedom from colonial, racist, minority regimes, mercenaries are international outlaws, to be considered a special class of combatants in armed hostilities, to whom the protection of international law like the Red Cross Conventions of 1949 ought not to be extended. The execution of four mercenaries in Angola on the other hand brought forth outraged condemnations from countries of which the condemned men were nationals and from the International Commission of Jurists. It was asserted that the charging, trial and condemnation of mercenaries as such were in violation of the Rule of Law because there was no such offense of mercenarism in international law nor was it defined and penalized as a criminal offense in domestic law.

It should be pointed out that since 1968 and almost every year since then, resolutions on the Implementation of the Granting of Independence to Colonial Countries and Peoples have invariably contained statements on mercenaries. Uniformly it has been reiterated that "the practice of using mercenaries against movements for national liberation and independence is punishable as a criminal offense and mercenaries are themselves outlaws." The resolutions also call upon governments of all countries to enact legislation declaring the recruitment, financing and training of mercenaries in their territories as punishable offenses and to prohibit their nationals from acting as mercenaries. For those who may raise the issue of whether or not these resolutions have the character of law, it is significant that with the current emphasis on human rights, the Universal Declaration on Human Rights, itself only a resolution of the United Nations General Assembly, is often cited as legal basis for the assertion that human rights are protected under international law and cannot be claimed to be matters which exclusively pertain to domestic jurisdiction of each state.

Notwithstanding these resolutions, the recruitment and use of mercenaries continue for no detailed rules of international law designed to

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effectively suppress their use have been adopted. The Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts wrestled for four years with the problem of inclusion of one provision in Protocol I to the Geneva Convention of 1949. This year, the Protocol together with the provision on mercenaries was at last approved, the same to take effect after six months from the time of deposit of two instruments of ratification.

It is now law that mercenaries, as defined by Article 47 of Protocol I, are not entitled to be extended the status of combatants or prisoners of war.

This is a significant development towards the effective supression of mercenarism. But, by itself, it is not adequate to effectively enforce the international consensus that mercenarism should be stamped out. The definition of mercenaries in Article 47 should render easier the task of definitively declaring mercenarism an international offense by itself apart from other offenses that might be committed by the mercenaries in the course of the hostilities. A U.N. convention dealing with all asepcts of mercenarism along the pattern of the draft prepared by the Luanda Convention of June 1976 is in order.

There are some quarters who argue against the adoption of special rules of international law on mercenaries as such. They assert that in many of the armed conflicts in which the services of the mercenaries are utilized, the number of mercenaries is so small compared with that of the natives engaged in the war, and that therefore, their presence and participation therein are of negligible and insignificant in determining the course of war. In a word, they do not win or lose the conflict.

This argument is untenable for the following reasons:

1. There is no objective criterion by which impact in armed hostilities can be effectively gauged. The fact that one faction to the hostilities believe its need for mercenaries tends to show that their services are significant, at least to their employers. Furthermore, impact cannot be gauged by numbers alone. Mercenaries are generally veterans of earlier battles and when they enter the services of a party or group engaged in war, they bring with them special talents and expertise learned and developed in earlier encounters.

2. Simply because the number of mercenaries who have been so engaged so far can be considered as few does not mean that they cannot be engaged upon a larger scale in future wars. Especially with respect to minority racist regimes which are well-entrenched and have possession and

the power to dispose of formidable resources and which feel their way existence threatened by wars of independence, the fact of their being in the minority itself impels the hiring of a larger number of mercenaries than have heretofore been used.

3. The use of mercenaries against peoples struggling for freedom and independence is no less morally reprehensible and no less destructive of human rights than international terrorism. If there is sufficient ground in policy to adopt detailed special rules on international law to deal with international terrorists, such as the one now being undertaken by the United Nations, the argument for a similar kind of detailed rules for mercenaries is stronger. For international terrorists are often motivated by political beliefs. Mercenaries, on the other hand, are no more and no less than killers for hire.

The second argument raised against the adoption of rules that would put the mercenaries outside the protection of international law is that it would be contrary to the growing consensus to promote humaneness in war.

It is submitted that this argument is misdirected. If one were to view properly the issue of mercenaries from considerations of humanitarianism and humanity, it would be well to recall what mercenaries are being used for. It is necessary to put on balance the requirements for humanism for mercenaries and the inhumanity of the cause for their services are being used to shore up. Colonialism, minority rule, and racist regime violate and destroy on a massive scale all the human rights of large numbers of people. When one thinks of how these regimes perpetrate and perpetuate on an institutional basis the brutalization of peoples, and deny to them even the most minimum of rights without which persons from other parts of the world would feel less than human, the argument is rendered absurd.

It is therefore in order that an international convention dealing with the crime of mercenarism, setting out details for its effective implementation, be enacted. In the meantime that this convention does not exist, it is the responsibility of the various states to adopt municipal legislation defining and penalizing mercenarism as a criminal offense against the law of nations. This would vest the different countries of the world with authority to try and penalize mercenaries who may come or may be found in their jurisdictions regardless of their nationality or the place where they actually carry out their activities. The awareness that there is no place in the world they can use as sanctuary from prosecution for their offenses might effectively dampen the enthusiasm of mercenaries for the excitement of killing natives and even lucrative rewards that its contract offers.