
MERCENARIES AND THE PRIVATIZATION OF WARFARE

—DINO KRITSIOTIS—

The term "the privatization of warfare"¹ may invoke the idea of the changing nature of conflict at the close of the twentieth century—namely, the significant increase in intranational warfare that has accompanied a correspondent decline in international warfare.² Characterizing conflict in this way takes its cue from the traditional public/private dichotomy that pervades social science discourse but, more particularly, it derives from the principles of traditional international law which have drawn a sharp curtain between matters of domestic jurisdiction, the diplomatic and legal code for sovereignty, and those of international concern.³ Article 2 (7) of the 1945 United Nations Charter is usually recited as an illustrative example on such occasions, because it prohibits the organization from intervening "in matters which are essentially within the domestic jurisdiction of any state"—the wording of which suggests that it is not always easy to determine what matter falls within the public or the private realm.

In the context of organized political power and state control, however the privatization of warfare is befitting of another meaning because it captures the essence of what privatization is all about in modern political and economic thought—the contracting-out of responsibilities and services traditionally identified with or provided by the state or, more generally phrased, by the public sector. Any conventional inventory of privatized enterprises would include such items as public utilities and aspects of health and welfare systems; but this list varies greatly from nation to nation in accordance with prevailing political and economic realities as well as the ideological stamina with which such policies are followed. One thing is for certain, however, if recent experiences are anything to go by: the security and defence of states is not immune from the privatization juggernaut. Or so the recent developments in

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Papua New Guinea, Sierra Leone and Angola would have us believe.⁴ The governments of these countries have decided to put their faith, and by implication their fate, in private hands by enlisting mercenary services to preserve law and order on their sovereign territories at a time of political uncertainty, national crisis and even internal conflict.

To be sure, the rallying of mercenary support by governments does not of itself break new ground. The Nigerian government fought its 1967–1970 war against secessionist Biafra with mercenary help, as did the Zairian government in Shaba in 1978. It is well-known that the Rhodesian government enlisted the support of mercenaries after its Unilateral Declaration of Independence in 1965. Admittedly, this does not fit the type-casting of the mercenary, because more often than not mercenaries have fought *against* governments and their armed forces. But the chronicle of recent mercenary activity, especially on the African continent, reveals the increasing extent to which hired help is relied upon by governments, and even by popular and legitimate governments in some cases—perhaps because they are wary of the loyalty and discipline, or lack thereof, of their own public militaries.

In Angola, for instance, private armies were instrumental in recapturing Soyo in 1993.

These developments make a re-consideration of the mercenary enterprise appropriate, especially if the new breed of mercenary is trained to fight in a professional and disciplined way and to champion legitimate causes, such as the protection of elected governments or the defense of sovereign territory from armed attack, in the substitute role as the privatized military machine of state. Of course, the old mold of the mercenary who pursues morally questionable ends by employing morally questionable means is still with us; former President Mobutu Sese Seko of Zaire hired the services of some 300 Serbian fighters through an anonymous European agency to eke out the life of his chequered presidency.⁵ We should also recall in this regard that it was only as recently as September 1995 that Bob Denard, one of the most notorious hired hands on the African continent, sought to forcibly remove the government of the Comoros Islands and take control of the Indian Ocean nation.⁶ This, his fourth such attempt, was forestalled by the intervention of 1,000 French forces.⁷

Be this as it may, the growing dependence of various governments on mercenaries for the upkeep of law and order on sovereign soil could well anticipate the course of future security and defense developments, especially given the credible successes and track-record professionalism of certain mercenary operations of recent times. In Angola, for instance, private armies were instrumental in recapturing Soyo in 1993, as well as Uigi and the headquarters base of rebel leader Jonas Sivimbi in Huambo—so much so that the Angolan government offered them a more permanent presence in the country in a contract reported to be worth \$40 million.⁸ The nature of the military operations

of these mercenaries is also worthy of note because it stands apart from staid perceptions of mercenary mentality and behavior on the war front. Known for arranging mercenary contracts, the organization of Executive Outcomes—the army of no state, no government—is said to offer:

a wide range of security services and is capable of mounting sophisticated operations involving armor, artillery and air-power. Its soldiers have uniforms, badges of rank, and are paid well. If those men in the field fall under the definition of mercenaries....[t]hey are a new breed, qualitatively and quantitatively different from anything that Africa or the world has seen before. They have already fought in Sierra Leone and Angola, intervening on the side of the government on both occasions against rebel groups, and with devastating results.⁹

There is no reason to deny, on account of these achievements, the temptation of governments to employ mercenaries beyond the domain of national conflict and into the realm of international conflict, fighting for the security of the state—which may reflect the contemporary situation in Angola. This means a departure from the notion of standing public armies, popularized in Europe and beyond since the eighteenth century.¹⁰ It comes at a time when mercenary protection could also appeal in some way to certain non-governmental organizations, such as humanitarian relief agencies who, caught in the full heat of warfare, view the prospect of hired help as an essential shield for their supply convoys and field operations. Given the prospect of little or no meaningful United Nations protection in such cases, this consideration could well be given increasing weight by some, but by no means all, of these organizations who find themselves trapped between the need to realize their mandate and the principles of impartiality and humanitarianism which are meant to govern their *modus operandi*.

On the assumption that these new-breed mercenaries do exist, it would be dangerous to miscalculate their impact—particularly their potential impact—on conflict situations of both the public and private variety. Does this mean, then, that a distinction should be drawn between the “good” and the “bad” mercenary? From a legal vantage-point, categorizations of this sort would be patently unworkable on the battlefield and, as will be argued, erroneously conceived given the nature of the humanitarian law of armed conflict. Still less, in the political context, would this proposal receive the support of governments who on the whole have shunned mercenaries in their many manifestations. Yet, recent evidence reveals that certain governments do resort to privatized security forces—and this very fact makes mercenaries part of the reality of warfare. So what rules apply to mercenaries in war zones? Are they lawful or unlawful combatants of warfare? On what foundations or assumptions have these laws been created? It is these questions, among others, that this article will seek to address. In order to do so, it will briefly consider the record of recent mercenary history before it examines the pertinent provisions

and developments in international law. Analyzing these in some depth, the article will point out the key conceptual and practical problems that relate to these provisions, and will then conclude with an appraisal of alternative approaches to regulating mercenary activity and the difficulties that arise therefrom.

Reliving the Mood of the 1974–1977 Geneva Conference

An abiding concern for the nature and extent of mercenary involvement during the decolonization process set the context for the diplomatic negotiations on this topic at the 1974–1977 Geneva Conference, which had been convened for the conclusion of two treaties—one dealing with international and the other with non-international armed conflicts and both modernizing the humanitarian law of warfare.¹¹ Mercenaries had been hired to forestall the drive towards self-determination and independence in colonial territories particularly on the African continent, stepping in the way of national liberation movements in their struggle against foreign control. The Organization of African Unity (OAU) had rounded on mercenaries in September 1964,¹² when it censured them for being enemies of the ideals of the organization—but later appeared to change tack when it criticized mercenaries *per se*.¹³ The OAU was not alone among international institutions in this regard: as early as 1961, the Security Council had called for the withdrawal of Belgian forces and all mercenary agents from the Congo¹⁴ and, in 1968, the General Assembly declared that, “the practice of using mercenaries against movements for national liberation and independence is punishable as a criminal act and that the mercenaries themselves are outlaws.”¹⁵

The United Nations resolutions seemed to differ from the later African approach because, generally speaking, their texts did not condemn mercenaries outright; their criticism was reserved for mercenary involvement against the efforts of national liberation movements and peoples fighting for their self-determination. It was the mercenary’s fighting cause that seemed to matter to the United Nations, not the mercenary as a fighter. That said however, the robust contention by the General Assembly in its 1968 resolution that “mercenaries *themselves* are outlaws” (emphasis supplied) revealed a telling contradiction in policy terms—one that continues to recur in international law-making fora. Nevertheless, these differences of approach between and within states and institutions were temporarily overcome by the tidal wave of opinion that flowed against the mercenaries during the period of decolonization. This political momentum gathered even greater force and pace after June 1976, when news broke of the apprehension of thirteen mercenaries who had been involved in destabilizing the first government of independent Angola.¹⁶

At the Geneva Conference, the proposal to outlaw the mercenary and deprive him of all benefits associated with prisoner-of-war status was advanced by the Nigerian delegation and this was widely applauded by African, Arab and socialist countries.¹⁷ In the form in which it ultimately came to be accepted, the proposal may be criticized on conceptual and practical grounds. In

conceptual terms, responding to the complex mercenary problem in a treaty on humanitarian law was ill-founded and unfortunate: the final provision of Article 47 of the First Additional Protocol of 1977 incorporated an approach that is altogether difficult to square with the legislative history and internal logic of the very treaty in which it appears.¹⁸ Coupled with this factor are the serial difficulties that attend the exercise of defining the mercenary. Granted, the many faces of the mercenary and the range of state interests and concerns expressed at the Geneva Conference may have placed a workable legal definition out of reach, but the final result of the Conference deliberations leads us to question the effectiveness of the legal definition we now have—a definition, it should be noted, that has been adopted in subsequent treaty practice. Let us deal with each of these problems in further detail.

**Article 47 of the 1977 First Additional Protocol:
The Mercenary Question and the Humanitarian Law of Armed Conflicts**

The first paragraph of Article 47 of the First Additional Protocol declares that a mercenary “shall not have the right to be a combatant or a prisoner of war.”¹⁹ As we have seen, this law was the product of politically-charged negotiations and thinking in Geneva; it repaid wholly understandable concerns about mercenary activity during the period of decolonization—concerns which had come to demonize the typology of the mercenary in the process. But to have legislated in this manner has led to the claim by Professor Hampson of Essex University that the mercenary question was simply “mis-diagnosed” in 1977.²⁰ The reason for this is that the attempt to outlaw mercenaries by using the laws of warfare confuses the *jus ad bellum* (that part of the law of peace that regulates the use of force) with the *jus in bello* (the law that regulates hostilities once they have begun). An enduring strength of the *jus in bello*, she rightly argues, is that it has maintained a separate and independent existence from the *jus ad bellum*, so as to afford maximum humanitarian protection to the *dramatis personae* engaged in theatres of war. According to well-established and sound legal principle, the *jus in bello* applies irrespective of the position under the *jus ad bellum*:

There is no more reason to deprive the foreign fighter who qualifies for combatant status of that status than there would have been so to deprive members of the Iraqi armed forces in the [1990–1991 Gulf Conflict]. Indeed, there are strong reasons for not doing so. If a mercenary is treated according to the laws of war, he will be less tempted to shoot his way out of a situation in order to avoid capture. He is more likely to abide by his obligations as a combatant if he can also expect to benefit from the rights attached to the status. Any breach of his obligations can be punished as a breach of the laws of war.²¹

The emergence of the professional, privatized foreign fighter, hired by le-

gitimate governments to maintain a sovereign state's internal or even international security, only serves to reinforce this view. This is because it dismantles the very assumptions and even some of the prejudices upon which Article 47 was predicated. Furthermore, some countries, like Angola, may consider mercenaries an essential aspect of their self-defense machinery and one wonders whether this is precisely the kind of decision that Angola is entitled to make under its legal right of self-defense, guaranteed to all nations by Article 51 of the United Nations Charter. That is not to say, of course, that the right of self-

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defense knows no bounds,²² but the right only knows those limitations which engage the state in treaty or customary law obligations.²³ Alternatively, we may choose to characterize privatized contingents of this sort, as opposed to individual mercenary fighters, as regular—albeit foreign—armed forces and not as mercenaries. But this would fragment any attempt to formalize the definition of the mercenary in international law.

There is a further point here, and that is the built in incentive of the traditional law to promote mercenary compliance with accepted humanitarian standards and principles at a time of war. Prior to the adoption of the *lex specialis* of Article 47 on mercenaries, the legal position

on the treatment of captured mercenaries was relatively straight-forward, at least in theory. Prisoner-of-war status would be bestowed on combatants who, regardless of the motivation or perceived status, complied with the criteria set out in Article 4 (A) (2) of the 1949 Geneva (Prisoner of War) Convention (III), that is if they: (a) were commanded by a person responsible for his subordinates; (b) wore a fixed distinctive sign recognizable at a distance; (c) carried arms openly and (d) conducted their operations in accordance with the laws and customs of war.²⁴ Article 4 (A) (2) built upon its predecessor provision of Article 1 of the 1907 Hague Regulations,²⁵ but took account of the operations of irregular forces during the Second World War and sought to extend to them the cover of humanitarian protection that had, until then, been reserved for regular armed forces:

Members of other militias and members of other volunteers corps, including those of organized resistance movements, belonging to a Party to the conflict and operating within or outside their own territory, even if this territory is occupied, provided that such militias or volunteers corps, including such organized resistance movements, fulfil the [mentioned] conditions.

So mercenaries, along with "other militias," qualified as lawful combatants, and were therefore entitled to prisoner-of-war status only if they met

these conditions. For the “dogs of war”—mercenaries who fought without any regard for the laws of warfare—the message was crystal-clear: prisoner-of-war status would elude them if they did not conduct their operations in accordance with the laws and customs of war and, as a result, they could be prosecuted for their very participation in the conflict.²⁶

This formula was fundamentally revised in 1977 to take account of the increase in guerrilla warfare in the intervening period, and the new rule is expressed in Article 44 (3) of the First Additional Protocol. This requires combatants “to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack.” Where circumstances or conditions do not so permit, the combatant is required to carry his arms openly (a) during each military engagement and (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate. The rationale for this development mirrored that of 1949 in that the aspiration, once again was to make the law on participants in warfare more inclusive,²⁷ bringing within its fray as many of the belligerents as possible for the same reasons that had prevailed a generation earlier. So it is all the more curious from the legal perspective that mercenaries were treated in the way that they were in 1977 when the First Additional Protocol was more generally concerned with admitting the realities of war and seeking to broaden its spectrum of humanitarian protection in light of these realities. We can appreciate that the politics of the time goes some way in explaining this outcome but, by exempting mercenaries from this new legal framework, Article 47 equates them more with spies than with guerrillas, which is, arguably, not where they belong.²⁸

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**Article 47 of the 1977 First Additional Protocol:
An Analysis of Definition and the Limitations of the Law**

As far as the current state of the law for international warfare is therefore concerned, mercenaries do not fall under these new rules of identification; they are the subject of their own tailor-made provision in the form of Article 47 of the 1977 First Additional Protocol. Once the fate of mercenaries had been decided at the Geneva Conference, it became apparent that the devil was in the detail of deciding *who* exactly was a mercenary for the purposes of international law. The second paragraph of Article 47 sets out the six, cumulative criteria for making this determination. An appreciation of the numer-

ous and variegated policy considerations that arose at the Geneva Conference explains why this legal definition assumed such an elaborate form *in ultimo*. Principal among these was the concern that the lives of lawful combatants should not be placed at risk. It was felt that the margin of any such risk would be reduced if care was taken in drafting a formulation of sufficient detail and exactitude. Furthermore, any determination of mercenary status would result in the deprivation of certain legal rights and protections and this meant serious consequences for the individual concerned.²⁹

The result of these many factors was the tortuous contrivance that came to

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be accepted as the second paragraph of Article 47, according to which a mercenary "is motivated to take part in the hostilities essentially by the desire for private gain"—and not by patriotic fervor or sentiment or national duty, this also explains why he is "not a member of the armed forces of a party to the conflict." He must "take a direct part in hostilities,"³⁰ which excludes all forms of technical assistance and military strategists or advisers, although the extent to which this distinction is observed in practice remains a matter of some doubt.³¹ In addition, the mercenary is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict and 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.³²

The definition is also fine-tuned to exclude "members of the armed forces of a party to the conflict" so as to protect long-standing military arrangements such as the integration of the Nepalese Gurkhas in the United Kingdom armed forces, the French Foreign Legion and the Swiss Papal Guards.

In seeking to address the genuine and multifarious concerns of states voiced at the Geneva Conference, this definition of mercenaries "raises as many problems as it solves."³³ The mercenary's multiple and complex identity as well as his changing nature seem to have made him an elusive target even for the legislator. The marvelous technicality of the legal definition adopted in 1977 affords a series of openings for employer-states to slip through, if willing or creative enough, should they wish to provide maximum humanitarian protection to all of their security personnel. Mercenaries, for example, could be made members of the armed forces of the hiring state or, more riskily, be made convenient nationals of the state which hires them. If well-advised, the mercenary could insist on one, or both, of these as conditions of his contract: "any mercenary who cannot exclude himself from this definition deserves to be shot—and his lawyer with him!"³⁴ Even so, the motivation of the mercenary still needs to be proved in practice, with all the complicated evidential hurdles that this entails.³⁵

This section should conclude by noting that Article 47 only regulates mercenary activities with respect to international armed conflicts,³⁶ although the law embraces an expanded definition of this term.³⁷ This has proved a severe limitation on Article 47 meeting its objectives in denying the mercenary belligerent status since the majority of mercenaries operate in internal conflict situations.³⁸ The public/private divide is a generic problem for the international law of armed conflict; it has proved so unworkable in practice that calls for its abandonment abound.³⁹ Until these are realized, and there is no guarantee that they will be, non-international armed conflicts are governed by common Article 3 to the four Geneva Conventions of 1949 and by the Second Additional Protocol of 1977. Neither of these are as detailed as the Geneva Conventions and neither make any reference to mercenaries. Common Article 3 (1), for instance, only provides protection to "persons taking no part in the hostilities;" this rules out mercenaries *ipso facto* since the taking of a "direct part" in hostilities is an element of his legal definition. However, this phrase is stated to include "members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounded, detention, or any other case." In any event, the idea of basic humanitarian principles enshrined in Article 3 could be taken to cover befallen mercenaries.⁴⁰

Redeeming Features of the 1989 Convention Against the Recruitment, Use, Financing and Training of Mercenaries

If the stated legislative aim is to combat mercenary recruitment *per se* and phase out mercenary numbers by treaty law—notwithstanding the contrary evidence and considerations reviewed herein—then the humanitarian law of armed conflict is not the appropriate forum to take such action because it is concerned with a fundamentally different set of principles, practices and priorities. For regulation we must, instead, turn to the law of peace. In this regard, the International Convention Against the Recruitment, Use, Financing and Training of Mercenaries, adopted by the General Assembly in 1989 after nine years of deliberation,⁴¹ offers elements of a preferred regulatory approach to the mercenary problem.

The 1989 Convention is singled out for mention and analysis because it is not only tough on mercenaries but on the sources of such activity, namely the prospective employers of mercenaries.⁴² To achieve the stated objective of eradicating mercenaries, Article 2 is potentially effective because it goes to the root of the problem and declares that: "[a]ny person who recruits, uses, finances or trains mercenaries....commits an offence for the purposes of the Convention." In addition, Article 5 imposes a duty on state parties not to recruit, use, finance or train mercenaries and also obliges them to prohibit mercenary activity in accordance with the other provisions of the Convention. These offences make no exception for "good" mercenaries, and thus correspond with the definition of "mercenary" given in Article 1. This provision, which is similar but not identical to the formulation of Article 47 of the First Additional Protocol, expressly provides that a mercenary is also any person

who is specially recruited for the purpose of overthrowing a government or undermining the territorial integrity of a state.⁴³ The clear implication is that the "good" mercenary cannot be tolerated in modern practice, even though the intention behind this clause was to "give States better protection against mercenary activities, in view

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of the variety of criminal and destabilizing ends for which mercenaries are now used."⁴⁴ This all, of course, presumes that in practice states will be willing to accept that the mercenary has no redeeming features; "[t]he international community needs to determine if the group so delineated corresponds to the one whose activities it wishes to proscribe."⁴⁵

The approach of the Convention, mooted but rejected as long ago as the Second Hague Conference of 1907,⁴⁶ unpackages the problem, identifies its sources, and endeavors to correct the problem. Its virtue is that it seeks to provide proscription after diagnosis. It also regards the mercenary problem more generally than Article 47 of the First Additional Protocol, treating it outside the conflict situation, and regulating mercenary activity—still depicted as an unadulterated menace—in times of war and peace. An additional utility of the Convention is that it treats the mercenary problem in an acontextual way. That is to say, without regard for the nature of the conflict in which the mercenary finds

himself. This differs from the humanitarian law of armed conflict, which falls silent on mercenary activity in non-international armed conflicts. The regulation of mercenaries in this Convention also stands to be appreciated because it applies without prejudice to the *jus in bello* (Article 16)—a principle not embraced in the 1976 Luanda Draft Convention on the Prevention and Suppression of Mercenarism⁴⁷ or the 1977 OAU Convention for the Elimination of Mercenaries in Africa.⁴⁸ It does not, therefore, commit the same mistake as the first paragraph of Article 47 of the First Additional Protocol.

Viewed as an interventionary force on the front line, the mercenary is certain not to attract the sympathy or the support of states and the prospect of successfully treating the mercenary problem is thereby enhanced. This is the treaty's most redeeming feature and its single most important contribution to tackling the mercenary problem. However, as we have seen, this normative approach is not shared by those states who today recruit mercenaries *en masse*, for what some may regard as perfectly legitimate or appreciable reasons. There is also the question of the responsibility of the mercenary's home state, obliged under Article 9 of this treaty to make the treaty offenses punishable on its territory. This is an imperative part of the Convention's strategy; the idea is to present a united front by the home and "target" state in combating mercenary

activity. But that means that contracting states shall have to be vigilant in meeting this commitment and we wait to see how seriously it is observed by them in practice.⁴⁹ Overall, then, the Convention offers a confident and a coherent framework for action, perhaps overshadowed by the fact that it is today in need of greater support and participation.⁵⁰

The Future of International Law Regulating Mercenaries

The regulation of mercenary activity in international law has proved a Herculean task, not least of all because the term “mercenary” means different things to different people—and perhaps even different things to the same people. The complex legal standing of the mercenary makes his role an intrinsically difficult matter to legislate and argues for great precaution and a holistic understanding of the laws of warfare and peace before treaty action is taken. Mercenaries have no doubt been dogs of war in the past; their war record is by no means unassailable. They have much to account for, both in terms of their means and their end-game. Furthermore, states have only recently expressed their concern “at new unlawful international activities linking drug traffickers and mercenaries in the perpetration of violent action, which undermine the constitutional order of states,” and it is not inconceivable that this may come to be one of the themes of the modern chapters on mercenary history.⁵¹ But does this then justify an assault on the principle of equality of belligerents, one of the mainstays of the humanitarian law of armed conflict?

And what is to become of the mercenary who engages in undertakings of a radically different order, such as the protection of the work of humanitarian organizations? Or the mercenary who is hired to uphold “the constitutional order of states?” Or the mercenary who fights for the self-determination of the people? Or the sovereignty of the state that hires him? Are we confident that the broad legislative brush takes sufficient account of these subtle realities? Do we want the law to accommodate these realities? Or do all mercenaries, at base, unlawfully intervene in wars because these wars are not their own? If so, they should be prosecuted for this transgression of the *jus ad bellum* and their protection and conduct under the *jus in bello* stands to be considered as an entirely separate matter. That was the essence of the approach of the 1989 Convention Against the Recruitment, Use, Financing and Training of Mercenaries, but spoiled by the dogmatic stand taken by the first paragraph of Article 47 of the First Additional Protocol.

In truth, the mercenary is not unique in taxing the legal minds of states. In recent times, for instance, states have had to deliberate upon the lawfulness of “armed humanitarianism,” the use of force for laudable purposes in extreme

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humanitarian emergencies. This has created, in the felicitous words of Professor Farer, "philanthropy by bayonets," conducted by Professor Brownlie's "kind-hearted gunmen." Inherent in these arresting phrases is a paradox—the paradox of means and end, method and result, arms and achievement. If he exists, the new breed of mercenary, on the prowl for legitimate governments, produces precisely something of the same dilemma for states as they come to terms with the evolutionary direction of the international law on mercenaries and the possible phenomenon of privatized warfare.

Notes

1. At the outset, it should be observed that although international law doctrine, practice and scholarship regard "war" and "armed conflict" as related but distinct juridical concepts, for the sake of convenience and writing style, the terms are treated as interchangeable in this article see Ian Brownlie, *International Law and the Use of Force By States* (Oxford: Oxford University Press 1963), 398–401; and Christopher Greenwood, "The Concept of 'War' in Modern International Law" *Int'l & Comp. L.Q.* 36 (1987): 283.
2. Christopher Bellamy, "From Total War to Local War: It's A Revolution," *The Independent* (London), July 23, 1996, 14.
3. For a short but useful account of the history and modern operation of the public/private distinction and how this perpetrates a gendered approach in international law, see Hilary Charlesworth, "The Public/Private Distinction and the Right to Development in International Law" *Australian Yrbk. Int'l Law* 12 (1992): 194–204.
4. On Sierra Leone, see "We're the Good Guys these Days," *The Economist*, July 29, 1995; and on Angola, see "Angola's Uneasy Peace," *The Economist*, September 16, 1995.
5. Tom Walker, "Mobutu Recruits Serb Fighters For Zairean Civil War," *The Times* (London), March 3, 1997, 14; and Jonathan C. Randal, "Serb Troops Paid To Go To War in Zaire," *The Washington Post*, March 18, 1997, A13.
6. Lynne Duke, "French Mercenary Bob Denard Launches Fourth Coup Attempt on Tiny Comoros," *The Washington Post*, September 29, 1995, A19.
7. William Drozdiak, "French Troops Land on Comoros, Seize Control from Coup Plotters," *The Washington Post*, October 5, 1995, A31.
8. Paul Taylor, "Some Mercenaries Said to Fight Rebels," *The Washington Post*, March 2, 1993, A14.
9. Michael Ashworth, "Africa's New Enforcers," *The Independent* (London), September 16, 1996, II, 2.
10. James L. Taulbee, "Myths, Mercenaries and Contemporary International Law" *Calif. W. Int'l Law Jnl.* 15 (1985): 339.
11. Principal considerations that necessitated a modernization of conventional law were the increase in guerrilla warfare, which entailed a re-formulation of the criteria for lawful combatants and the rise in non-international armed conflicts, which required the conclusion of a separate treaty. For a concise and useful account of the background to the Conference, see the prefatory note by Adam Roberts and Richard Guelff (eds.), *Documents on the Laws of War* (Oxford: Clarendon Press 2nd ed., 1989), 387–389 and 447–448.
12. Organization of African Unity (OAU) Doc. ECM/Res. 5-III September 10, 1964.
13. OAU Doc. CM/St. 6-XVII June 23, 1971. Although, when it was concretized in legal form in 1972 in the OAU *Convention for the Elimination of Mercenaries in Africa*, the definition of "mercenary" incorporated in Article 1 includes the "aim" "(a) to overthrow by force of arms or by any other means the government of that member state of the [OAU]; (b) to undermine the independence, territorial integrity or normal work-

- ing of the institutions of the said state; (c) to block by any means the activities of any liberation movement recognized by the [OAU]." See OAU Doc. CM/433/ Rev.L, Annex I (1972). The treaty was adopted in 1977, entered into force in 1985 and is reproduced in *Virginia Jnl. Int'l Law* 22 (1982): 613.
14. UN Security Council Resolution 161, U.N. S.C.O.R. Res. and Dec. at 2, U.N. Doc. S/INF/16/REV. 1 (1961).
 15. UN General Assembly Resolution 2465, U.N. G.A.O.R., 23rd Sess., 1751st Meeting, U.N. Doc. A/L.560/ Rev. 1, A/L. 561/Add. 1, A/L/563 (1968). According to the 1970 General Assembly Resolution on the Declaration of Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, "[e]very state has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another state:" Resolution 2625, U.N. G.A.O.R., 25th Sess., 1883rd Meeting, U.N. Doc. A/8082 (1970). See, also, the General Assembly definition of aggression which includes, in Article 3 (g), "the sending by or on behalf of a State....armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against other States" in Resolution 3314, 29th Sess., 2319th Meeting, U.N. Doc. A/9890 (1974).
 16. For details of the subsequent trial and jurisprudence, see Mike J. Hoover, "The Laws of War and the Angolan Trial of Mercenaries." *Case W. Res. Jnl. Int'l Law* 9 (1977): 323; and George H. Lockwood, "Report on the Trial of Mercenaries: Luanda, Angola, June 1976," *Manitoba Law Jnl.* 7 (1976-1977): 183.
 17. Conf. Doc. CDDH/III/GT/82 (1976). See, further, Henry W. van Deventer, "Mercenaries At Geneva," *Am. Jnl. Int'l Law* 70 (1976): 811, 812.
 18. (1979) 1125 U.N.T.S. 3; reprinted in (1977) 16 I.L.M. 1391.
 19. Mercenaries are, of course, entitled to basic humanitarian protection as provided in Article 75 of the 1977 First Additional Protocol: for this interpretation in the *travaux préparatoires*, see Conf. Doc. CDDH/407/Rev. 1, paragraph 24.
 20. F.J. Hampson, "Mercenaries: Diagnosis Before Prescription," *Netherlands Yearbook Int'l Law* 22 (1991): 3, 28.
 21. *Ibid.*, 15-16. For a similar observation, see Christopher Greenwood, "The Relationship between *jus ad bellum* and *jus in bello*," *Rev. Int'l Studies* 9 (1983): 221; and Edward Kwakwa, *The International Law of Armed Conflict: Personal and Material Fields of Application* (Dordrecht/Boston/London: Kluwer Academic Publishers 1992), 108. In *United States v. List et. al.* (1948), the United States Military Tribunal accepted that Germany's aggressive wars against Greece and Yugoslavia violated the 1928 Kellogg-Briand Pact but said that it "did not follow that every act by the German occupation forces against person or property is a crime or that any or every act undertaken by the population of the occupied country against the German occupation forces thereby became legitimate defence." *Law Reports of Trials of War Criminals* 8 (1948): 34, 59.
 22. It is one of the universally accepted norms of warfare that "[t]he right of belligerents to adopt means of injuring the enemy is not unlimited," *Regulations Respecting the Laws and Customs of War on Land: Annex to the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land*, Article 22, (1907) 205 C.T.S. 227.
 23. As in the case of Article 51 of the 1945 United Nations Charter itself, or the 1989 *International Convention Against the Recruitment, Use, Financing and Training of Mercenaries*, *infra*, n. 40, or the various treaty regimes which regulate the means of warfare.
 24. (1950) 75 U.N.T.S. 135; reprinted in *Am. Jnl. Int'l Law* (Supp.) 47 (1953): 119; signed on August 12, 1949 and entered into force on October 21, 1950.
 25. The Regulations were produced as an Annex to the 1907 *Hague Convention IV Respecting the Laws and Customs of War on Land*, (1907) 205 C.T.S. 227, and laid down the qualification for (lawful) belligerents.
 26. Article 5 of the same Hague Convention, awards the benefit-of-the-doubt to belligerents who have fallen into the hands of the enemy but whose status is unclear: "such

- persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal."
27. *Ibid.* Failure to meet the requirements set forth in Article 44 (3) results in the forfeiture of the right to be treated as a prisoner of war; see Article 44 (4) of the *First Additional Protocol*; Article 44 (3), it should be further noted, shunned the traditional distinction made between regular and irregular forces.
 28. *Ibid.* In a similar vein to Article 47, Article 46 of the *First Additional Protocol* declares that "any member of the armed forces of a Party to the conflict who falls into the power of an adverse Party while engaging in espionage shall not have the right to the status of prisoner of war and may be treated as a spy:"
 29. H.C. Burmester, "The Recruitment and Use of Mercenaries in Armed Conflicts," *Am. Jnl. Int'l Law* 72 (1978): 37. The mercenary is, of course, entitled to minimum humanitarian treatment of the "fundamental guarantees" specified in Article 75 of the *First Additional Protocol: Hague Convention IV*.
 30. Article 47 (2) (b), *Hague Convention IV*.
 31. See L.C. Green, "The Status of Mercenaries in International Law," *Manitoba Law Jnl.* 9 (1979): 201, who reported (at p. 243) the intention of the Polisario Front in the Western Sahara to treat French technicians and instructors captured in Mauritania as mercenaries.
 32. See the contention by Knut Ipsen that "the rule regarding mercenaries does not amount to an exception but represents a logical consequence of the law" because there is not an appropriate nexus between the mercenary and the conflict: "[a] simple contract between an individual and a party to the conflict—fighting in exchange for payment—is not sufficient:" in Dieter Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts* (Oxford: Oxford University Press 1995), 69. This aspect of the definition of mercenaries is intended to exclude volunteers, who fight alongside an armed force for ideological (or, *quære*, religious) rather than financial motivation: see Michael Bothe, Karl Josef Partsch and Waldemar A. Solf, *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions* (The Hague/Boston/London: Martinus Nijhoff Publishers 1982), 270.
 33. Kwakwa, 109.
 34. Geoffrey Best, *Humanity in Warfare: The Modern History of the International Law of Armed Conflict* (New York: Columbia University Press 1980), 328.
 35. *United Kingdom Report of the Committee of Privy Counselors Appointed to Inquire into the Recruitment of Mercenaries*, Cmnd. 6569 (1976).
 36. Article 1 (3) of 1977 *First Additional Protocol*, referring to common Article 2 of the four Geneva Conventions of 1949 which declares that the Convention "shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them."
 37. According to Article 1 (4) of 1977 *First Additional Protocol*, the situations referred to in Article 1 (3) include "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination."
 38. Allaoua Layeb, "The Need for An International Convention Against Mercenaries and Mercenarism," *Afr. Jnl. Int'l & Comp. Law* 1 (1989): 466, 469–470. Describing this limitation as Article 47's "most crucial deficiency."
 39. See Antonio Cassese, "A Tentative Appraisal of the Old and the New Humanitarian Law of Armed Conflict," *The New Humanitarian Law of Armed Conflict* ed. Antonio Cassese (Napoli: Editoriale Scientifica 1979), 461, 461–462. The elimination of the legal distinction "has been impossible for obvious political reasons:" W. Michael Reisman and James Silk, "Which Law Applies to the Afghan Conflict," *Am. Jnl. Int'l Law* 82 (1988): 459, 465.
 40. This is the interpretation of the International Committee of the Red Cross, which

stands to reason: "in case of capture, these mercenaries undeniably benefit from the protection of Article 3 of the Conventions, and the corresponding provisions of *Protocol II*, when the latter is applicable, as well as from the provisions of international human rights legislation, when these apply. In fact, the person concerned will not normally be prosecuted on account of his mercenary status, but for endangering State security." See Yves Sandoz, et. al. (eds.), *International Committee of the Red Cross: Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987), 12.

41. U.N. Doc. A/RES/44/34 (11 December 1989), reproduced in (1990) 29 I.L.M. 89. In Resolution 34/140 (14 December 1979), the General Assembly expressed its concern at the increase in mercenary activity and decided to consider the drafting of the Convention which it adopted a decade later. The Ad Hoc Committee entrusted with the drafting of this Convention was established by the General Assembly in Resolution 35/48 (4 December 1980), adopted without a vote.
42. This is not to take the shine off previous OAU resolutions (such as the 1971 OAU *Declaration on the Activities of Mercenaries in Africa*) or treaties (such as the *Convention for the Elimination of Mercenaries in Africa*) which establish the recruitment of mercenaries as an offence of international law but also target the employers of mercenaries (see Articles 1 (2) and 5 of the *Convention for the Elimination of Mercenaries in Africa*). However, given that this law is regional in scope, the 1989 Convention has been chosen as the preferred model for analysis.
43. *Ibid.* Article 1 (2) (a) (i) and (ii).
44. U.N. E.S.C.O.R., 46th Sess., at 23-24, U.N. Doc. E/CN.4/1990/11 (1990).
45. Hampson, 6.
46. Proposed by Germany, this occurred in the context of a belligerent state's relationship with a neutral state, such that belligerent states would have been obliged *not* to accept the service of (neutral) foreigners and neutral states would have had to prohibit such a service by their subjects. The proposal was rejected because it departed from established practice and was found to 'seriously threaten' individual liberty. See Antonio S. de Bustamante, "The Hague Convention Concerning the Rights and Duties of Neutral Powers and Persons in Land Warfare," *Am. Jnl. Int'l Law* 2 (1908): 95, 100. At the 1974-77 Geneva Conference, a number of African states expressed their preference for a provision requiring states to prohibit the recruitment, training, assembly and operations of mercenaries as well as to prohibit their nationals from becoming mercenaries: Conf. Doc. CDDH/407/Rev. 1, paragraph 24. See, also, Michael Bothe, Karl Josef Partsch and Waldemar A. Solf, *supra*, n. 31, 271.
47. Draft Convention Produced by the International Commission of Inquiry on Mercenaries in Luanda, Angola in June 1976, Article 4 which provides: "Mercenaries are not lawful combatants. If captured they are not entitled to prisoner of war status." Reproduced in *Virginia Jnl. Int'l Law* 22 (1982): 615.
48. OAU *Convention for the Elimination of Mercenaries in Africa*, Article 3.
49. The Convention adopts the familiar legal principle of *aut dedere aut judicare*, that is that a state must prosecute or extradite alleged offenders (Article 12).
50. The Convention requires twenty-two ratifications of state parties (Article 19) before it enters into force, which is not yet the case. As of March 26, 1998, the Convention commands the support of 16 parties: [http://www.un.org/Depts/Treaty/final/ts2/newfiles/part_bo0/xviii00/xviii_6.html#refiNA19aOLAA]
51. Fifth preambular paragraph of the 1989 *International Convention Against the Recruitment, Use, Financing and Training of Mercenaries*.





The Caspian Sea. Aktau, Kazakhstan, December 1997. Photo by Ivan Sigal.

Aktau was founded around 30 years ago expressly for the purposes of mineral extraction. Today its primary industries are oil and plutonium.