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The Current Status of Mercenaries in the Law of Armed Conflict

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By Edward Kwakwa

I. INTRODUCTION

Although mercenaries have been involved in the conduct of war for centuries, events in recent years have raised new questions about mercenaries and their status in the law of war. The 1976 trial of thirteen mercenaries in Angola highlighted the phenomenon of mercenarism as a central world concern. As recently as December 1989, the mercenary problem was brought to the fore again as a result of mercenary activity in the Comoro Islands. Finally, in December 1989, the United Nations General Assembly adopted the International Convention Against the Recruitment, Use, Financing and Training of Mercenaries.

One of the most important events in the recent development of international law regarding mercenaries occurred in 1977. In that year, the community of states promulgated two protocols to the four 1949 Geneva Conventions relating to the protection of victims of international armed
conflicts. The debate over the import and scope of these protocols is still lively and unsettled. One of the most controversial provisions in Protocol I is article 47 regarding mercenaries. The United States has refused to ratify Protocol I because of its objections to the provisions on mercenaries and other irregular combatants.

The legal status of mercenaries raises two cognate issues. First, it raises the issue of whether a mercenary's conduct in an armed conflict can lead to an inference of an armed conflict between the mercenary's state of nationality and the state or entity against which the mercenary is fighting. The second issue, which is the focus of this Article, concerns the treatment of mercenaries who take part in armed conflict. Although more concerned with the *jus in bello*, the discussion also will show that the *jus in bello* issues relating to mercenaries are sometimes interwoven with considerations of the *jus ad bellum*.

This Article discusses the problem of defining the term mercenary, and places the problem of mercenaries in historic context. The Article also describes some of the efforts made at the domestic and international levels to tackle the mercenary problem, and analyzes current trends in the treatment of mercenaries under the *jus in bello*. This Article concludes that article 47 of Protocol I, the most recent effort at codifying a


8. *Jus in bello* denotes the rules applicable in an armed conflict.

9. *Jus ad bellum* refers to the authority to resort to force.
definition of mercenary, is inadequate in several respects, particularly in its denial of combatant and prisoner of war status to mercenaries.

Two premises form the basis of this Article. The first premise is that the underlying rationale for the international humanitarian law of war is the protection of individuals and victims of war. Humanitarianism in armed conflict should be seen as an integral and very important part of general international law. The humanitarian laws of war should be regarded as a subset of the laws of humanity, or of human rights in general. Thus, whenever the principles of military necessity and the sovereignty of states conflict with humanitarian interests, the conflict must be resolved in favor of the latter.

The second premise is that there is a need to expand protection under the laws of war to as many combatants and conflicts as possible. A basic function of the law of war is to reconcile military ends with civilian interests to enhance the safety and well-being of combatants as well as noncombatants.\(^\text{10}\) An expansive application of the laws of war will achieve this objective. A common trend in armed conflict today is the conduct of irregular warfare, mostly by non-state entities such as national liberation movements, mercenaries, and other irregular combatants. There is a need to offer incentives to such irregular movements to encourage their compliance with the laws of war. However, one of the key goals of international humanitarian law is safeguarding the civilian population from the effects of hostilities.\(^\text{11}\) Thus, there is a pressing need to draw a judicious balance between the safety of civilians and the desire to offer incentives to irregular combatants. Whenever necessary, this balancing of policies should be reconciled in favor of the civilian population, whose safety is the *raison d'ètre* of a large part of international humanitarian law.

### II. PROBLEMS OF DEFINITION

The definition of mercenary under international law is important because of the legal consequences flowing from the characterization of a combatant as a mercenary.\(^\text{12}\) The scope of the definition is critical in

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\(^{10}\) Jean Pictet explains that two fundamental aspects of the law of war are the protection of the civilian population against the effects of hostilities and the limitations on the use of certain weapons (to mitigate the horrors of war). J. PICTET, *DEVELOPMENT AND PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW* 49 (1985).

\(^{11}\) *Id.* at 72.

\(^{12}\) See Burmester, *The Recruitment and Use of Mercenaries in Armed Conflicts*, 72 AM. J. INT'L L. 37 (1978) ("A precise definition is of vital importance if such persons are to be deprived of certain legal rights and protections and if states are to be made subject to obligations with respect to them.")
determining whether a particular combatant qualifies for protection under the Third Geneva Convention. Under the Protocol I definition, whether or not a combatant is found to be a mercenary can have life or death consequences. The definition determines whether an enlistee shall be accorded the right to combatant or prisoner of war status, a status which ensures the holder several fundamental rights in wartime.

Mercenaries have publicly been referred to as “dogs of war,” “hired killers,” and “soldiers of fortune.” One of the most frequently cited definitions refers to a mercenary as a volunteer who, for monetary reward, agrees to fight for the armed forces of a foreign state or entity.\(^{13}\) This definition is problematic, as discussed below. Protocol I of 1977 defined the term in greater detail. According to article 47(2) of Protocol I, a mercenary is any person who:

a. is specially recruited locally or abroad in order to fight in an armed conflict;
b. does, in fact, take a direct part in the hostilities;
c. is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
d. is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
e. is not a member of the armed forces of a Party to the conflict; and f. has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.\(^{14}\)

Protocol I’s definition of mercenary creates as many problems as it solves.\(^{15}\) Under the definition, the mercenary must have been recruited to take part in the fighting itself.\(^{16}\) The recruitment must also have been for a particular armed conflict, and not simply on a retainer basis to be available for any conflicts that may arise subsequent to the recruitment.\(^{17}\) The requirement that the enlistee fight in an armed conflict excludes

\(^{13}\) Id.


\(^{15}\) Art. 47(2) of Protocol I is reproduced verbatim in art. 1(1) of the International Convention on Mercenaries, supra note 3. However, since the latter Convention is more concerned with the jus ad bellum, discussion in this Article will be limited to art. 47 of Protocol I, which deals with the jus in bello governing mercenaries.


technical experts such as instructors and advisers from the definition. In terms of the consequences of their actions, however, there is not much difference between the expert who advises the combatant on how to do the killing, and the combatant who does the actual killing. As stated by Mr. Allan Rosas, "[t]he distinction between an adviser and a mercenary may be a matter of taste." 

Under the Protocol I definition, to qualify as a mercenary, one must be motivated "essentially by the desire for private gain," and must have been promised "material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party." The emphasis on motive introduces a psychological element (analogous to the opinio juris requirement of a custom) which may be difficult to establish. The Report of the Drafting Committee claims the definition "provides an objective test to help determine motivations of persons serving with the armed forces of a Party to the conflict . . . ." However, the Report does not explain the objective nature of the test.

The introduction of a psychological element implies that a case-by-case examination must be done to determine the motive which led any suspected mercenary to enlist. Although the definition requires that the enlistee be motivated "essentially" by private gain, it is well-known that monetary reward is not always the primary motivation which induces foreigners to enlist in an armed conflict. For example, participants in national liberation movements "are almost always motivated in part by political convictions." Other combatants fight because of religious con-

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18. See Report of Committee III, in XV Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts [hereinafter XV Off. Recs.], CDDH/407/Rev.1, para. 25 (1978) (Article 47(2) of Protocol I "excludes mere advisers by requiring that to be a mercenary, one must in fact take a direct part in hostilities, that is, become a combatant, albeit an illegitimate one"). See also M. Bothe, K. Partsch, & W. Solf, New Rules for the Victims of Armed Conflicts 271 (1982) ("Condition (b) which involves direct participation in hostilities precludes the classification of advisers and instructors as mercenaries even if they are not on official duty under assignment by a state which is not a Party to the conflict.")

19. Recognizing that there is no distinction between combatants and advisers, the Polisario Front, which is waging an armed conflict in the Western Sahara, announced its intention to treat French technicians and instructors captured in Mauritania as mercenaries. See Green, The Status of Mercenaries in International Law, 9 Man. L.J. 201, 243 (1979).


22. Id.


victions. Such participants, regardless of their financial gain, are not mercenaries under the Protocol I definition.²⁵

The Diplock Report from the United Kingdom²⁶ recognized the inefficacy of a definition which incorporated the motives of a mercenary:

[A]ny definition of mercenaries which required positive proof of motivation would . . . either be unworkable, or so haphazard in its application as between comparable individuals as to be unacceptable. Mercenaries, we think, can only be defined by reference to what they do, and not by reference to why they do it.²⁷

The definition proposed in Protocol I excludes from the class of mercenaries nationals of a party to the conflict and residents of territory controlled by a party to the conflict.²⁸ Historically, mercenaries have almost invariably been of a different nationality than their hosts. However, there is an inherent danger in formally excluding nationals and residents of a party from the definition of mercenaries. It may encourage nationals or residents of a state which is a party to a conflict to enroll as mercenaries with the forces fighting against the state of which they are nationals or residents. Admittedly, this may be a very rare and isolated practice. However, the travaux préparatoires do not suggest that the drafters anticipated a situation where a soldier with all the other attributes of a mercenary would enroll to fight against his own state in an international conflict and thus avoid characterization as a mercenary.²⁹

Article 47(2) is open to an even more fundamental objection. It provides, in paragraph (e), that a member of the armed forces of a party to

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²⁵. Green accurately identifies a problem involved with the motive test when he states that a soldier who is paid the same amount as a mercenary, but who claims to have been motivated by ideological, rather than financial reasons, would not be considered a mercenary. See Green, supra note 19, at 244.

²⁶. REPORT OF THE COMMITTEE OF PRIVY COUNSELLORS APPOINTED TO INQUIRE INTO THE RECRUITMENT OF MERCENARIES, 1976, CMND. NO. 6569 [hereinafter REPORT]. The Diplock Committee of Privy Counsellors was set up in 1976 in the United Kingdom to inquire into the recruitment of thirteen British subjects as mercenaries in the Angolan civil war. See generally Lynch, British Subjects' Involvement in Foreign Military Clashes, 1978 CRIM. L. REV. 257.

²⁷. REPORT, supra note 26, para. 7.


²⁹. See XV OFF. RECS., supra note 18.
the conflict cannot be considered a mercenary. Therefore, a hired soldier can avoid being labeled a mercenary by enlisting in the armed forces of the party on whose behalf he is fighting. A state or entity engaging the services of mercenaries will seek to avoid the characterization of the enlistees as mercenaries by declaring that they are members of its armed forces. Britain employed this tactic during the UN Security Council debates on the attempted invasion of the Seychelles by alleged mercenaries. In response to an Argentinian protest addressed to the government of Nepal that a battalion of the Gurkha regiment was being sent to the islands, the United Kingdom representative stated:

[M]y delegation totally rejects the analogy which [Argentina] drew between the mercenaries referred to . . . and those regiments of Gurkhas who have a long and distinguished record of service with the British Crown in accordance with agreements openly and honorably arrived at with the Government of Nepal . . . . The only internationally agreed definition of who is a mercenary is to be found in Additional Protocol 1 of 1977 to the Geneva Conventions of 1949. That definition excludes anyone who is ‘a member of the armed forces of a party to a conflict.’ The Gurkhas comprise units of regular troops; they form a fully integrated part of the United Kingdom forces; they perform the same duties at home and abroad as other forces. In no way can they be classified as mercenaries.

The United Kingdom Permanent Representative put the case more forcefully: ‘From the terms [of article 47 of Protocol I of the 1977 Protocols Additional to the Geneva Conventions of 1949], it is clear that no person who took part in the recent conflict on the side of the United Kingdom could properly be described as a ‘mercenary.’”

The British position amounts to a very strict and literal, albeit accurate, interpretation of article 47 of the Protocol. Strictly interpreted, the article’s definition excludes from its purview virtually everyone who should be considered a mercenary. Geoffrey Best concludes that “[t]he definition is drawn so tight that hardly anyone, actually, will be so definable,” and “[c]ountries which have to get outside help are thus left gener-

32. Id.
ally free to do so.” As he humorously puts it: “[A]ny mercenary who cannot exclude himself from this definition deserves to be shot—and his lawyer with him!”

The definition’s limited scope may be attributed to the consequences flowing from a finding of mercenarism. As discussed later in this Article, Protocol I declared a mercenary to be an illegal combatant not entitled to prisoner of war status. Because of the legal consequences flowing from this declaration, it was important to prevent abuse of the provision. However, the denial of combatant and prisoner of war status for mercenaries is not consistent with the general thrust of emerging trends in international humanitarian law.

Despite the numerous flaws discussed above, article 47(2) is generally perceived as representing the most successful attempt, to date, in creating a legal definition of the term mercenary. The definition provided in article 47(2) has been authoritatively cited even by nations which have not joined the Protocol. For example, the United Kingdom has referred to it as “[t]he only internationally agreed definition of who is a mercenary...” Under the circumstances, it may be reasonably inferred that, despite its inadequacies, article 47(2) of Protocol I provides the most comprehensive and widely accepted definition of the term mercenary to date.

35. Id.
36. See, e.g., Nwogugu, Recent Developments in the Law Relating to Mercenaries, 20 REVUE DE DROIT PENAL MILITAIRE ET DE DROIT DE LA GUERRE [R.D.P.M.D.G.] 11, 15 (1981) (“In spite of these unsatisfactory elements, it can confidently be asserted that article 47 is a bold and progressive step in dealing with a clearly difficult problem”); Erickson, Protocol I: A Merging of the Hague and Geneva Law of Armed Conflict, 19 VA. J. INT’L L. 557, 591 (1979) (“Article 47 offers a standard for distinguishing mercenaries from lawful combatants...[and] complements the domestic laws of many States forbidding the recruitment of persons for participation in foreign armed conflicts”); cf. Roberts, supra note 24, at 139 (“[G]iven the lack of any humanitarian rationale, the potential for abuse in denying combatant status to ‘mercenaries,’ the inherent difficulties in proving motive, and the long-standing U.S. practice viewing mercenaries as legal combatants, the acceptance of article 47 as a law of war would serve few if any of the goals established by either the United States or the Diplomatic Conference.”)
37. 37 U.N. SCOR, supra note 31, para. 219. See also Letter dated 30 June, supra note 33, reprinted in part in Marston, supra note 31, at 418 (“There now exists an internationally agreed definition of [mercenaries]; it is not necessary therefore to rely upon encyclopedias. The agreed definition is contained in article 47 of Protocol I of the 1977 Protocols Additional to the Geneva Conventions of 1949.”)
III. THE PROBLEM OF MERCENARIES IN HISTORICAL CONTEXT

Mercenaries have existed since the earliest recorded armed conflict. There are published reports of the use of Numidian mercenaries by the ancient Carthaginians. The Roman Empire is also reported to have used mercenaries on a large scale, often by using one Germanic tribe to ward off other Germanic tribes from the borders of the empire. In the early fourteenth century, the Byzantium Empire employed the services of Spanish frontiersmen, and in the fifteenth century, Swiss, Italian, and German mercenaries were retained by princes and dukes to fight their wars. In the early eighteenth century, the Ruma army of Morocco was comprised primarily of Arab, Berber, Fulbe, and Tuareg mercenaries. During the United States Revolutionary War, and in the late nineteenth and early twentieth centuries the English hired Hessians. Ohafia and Abiriba mercenaries participated in wars waged in Eastern Nigeria in the late nineteenth and early part of this century.

In the twentieth century, the most extensive use of mercenaries has been on the African continent. The development of large-scale mercenarism in Africa coincided with the process of decolonization on the continent. In the latter half of this century, mercenaries have largely been used by ex-colonial powers, often against national liberation movements and sometimes against other developing countries. Other newly independent countries have also hired mercenaries to maintain internal order and prevent secessionist wars by dissident groups. Mercenaries were employed by the Katanga secessionists in the Congo from 1960 to 1963, and by the Tshombe and Mobutu governments in 1964. After the Unilateral Declaration of Independence in 1965, the Smith re-
The regime "widely resorted to the use of mercenaries in its war against the National movements of Zimbabwe."\(^{46}\) The most celebrated and reported case of the use of mercenaries occurred during the Angolan Civil War at the end of 1975, in which over 1000 mercenaries, mostly from the United Kingdom, the United States, and South Africa, were recruited to fight against the Popular Movement for the Liberation of Angola (MPLA).\(^{47}\) As recently as November 1989, about thirty French and Belgian mercenaries, under the command of "le colonel," Bob Denard, reportedly killed the President of the Comoros.\(^{48}\) As discussed below, the reaction of the international community to the recruitment and use of mercenaries has been mixed.

### IV. DOMESTIC AND INTERNATIONAL PRESCRIPTIONS

Several attempts have been made at the domestic, regional, and international levels to deal with the problem of mercenarism. A few case studies are discussed below.

#### A. Treatment of Mercenaries in Angola

After the Angolan Civil War and the subsequent establishment of the People's Republic of Angola, thirteen men, each charged with mercenarism, were put on trial in June of 1976.\(^{49}\) The thirteen defendants were charged, inter alia, with entering Angola bearing arms and participating in armed actions against the government, theft, rape, and destruction of property.\(^{50}\) One of the thirteen, an American citizen, was also alleged to have recruited other mercenaries from the United States, while another was accused of offering his services as a mercenary by advertising in newspapers and journals.\(^{51}\) The prosecutors apparently de-

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47. For details on the recruitment and use of mercenaries during the Angolan civil war, see generally 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).

48. Of Bats and Dogs, ECONOMIST, Dec. 16, 1989, at 39. Following the assassination of President Ahmed Abdallah Abderrahmane on November 24, 1989, the Comoros Islands were under the control of a mercenary army led by Bob Denard, the veteran Belgian mercenary who was also implicated in the attempted coup against President Kerekou of Benin in 1977. See *Comoros Coup*, 1989 WEST AFRICA 2079.


50. *Id.* at 342.

51. *Id.*
rived the crime of mercenarism from four international legal precedents: (1) the 1967 statements of the Heads of State and Government of the Organization of African Unity (OAU) appealing to all states to enact laws declaring the recruitment and training of mercenaries a crime;\(^{52}\) (2) UN resolutions which had condemned mercenary activity prior to the trial;\(^{53}\) (3) an OAU statement on mercenary activity adopted in 1971;\(^{54}\) and (4) the Nuremberg Charter's definition of crimes against peace.\(^{55}\)

During the trial, counsel for the defendants argued that the Geneva Conventions did not contain any provisions authorizing prosecution of combatants solely on the basis of their status as mercenaries, and that the defendants should therefore be classified as prisoners of war entitled to the protections of the Geneva Conventions.\(^{56}\) However, the tribunal held that the thirteen defendants were illegal combatants outside the protections of the Geneva Conventions. Accordingly, they were all declared to be mercenaries and found guilty.\(^{57}\)

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

55. Charter of the International Military Tribunal, in Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, Aug. 8, 1945, 82 U.N.T.S. 279, 284, 59 Stat. 1544, 1546, E.A.S. No. 472. Article 6(9) of the Charter defined crimes against peace as "planning, preparation, initiation, or waging of a war of aggression, or a war in violation of International Treaties, Agreements, or Assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing." Id. art. 6, para. 9, at 288, 59 Stat. at 1547.
57. Id. at 349. Five mercenaries were executed and nine were imprisoned. Id. at 339.

In reaction to the death sentence, then Secretary of State Henry Kissinger asserted that "there is absolutely no basis in national or international law for the action now taken by the Angolan authorities. The 'law [under which the defendants were executed] was nothing more than an internal ordinance of the MPLA . . . issued in 1966, when the MPLA was only one of
At the time, Angolan law did not provide specifically for the crime of mercenarism. Even the OAU's Draft Convention stated that existing laws did not address the problem of mercenarism. The court seems to have relied on what it referred to as "modern penal law," coming within what it described as "the laws of criminal complicity." The court stated:

Mercenarism was not unknown in traditional penal law, where it was always dealt with in relation to homicide. Yet it is important that in modern penal law, and in the field of comparative law, the mercenary crime lost all autonomous existence and was seen as a common crime, generally speaking aggravated by the profit motive which prompts it. And this mercenary crime, which is known today as "paid crime to order," comes within the laws of criminal complicity, it being through them that the responsibility of he who orders and he who is ordered is evaluated.

The outcome of the Angolan trial was severe and unprecedented. It was the first time that mercenaries had been made to account for their activity before a legal tribunal. The trial had the effect of encouraging further inquiry into the mercenary problem. Its most immediate impact was the drafting of the Luanda Convention on the Prevention and Suppression of Mercenarism.

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60. Id. at 199.

61. The court concluded with a dismissal of defense arguments: “This annuls the objection of the defence that the crime of mercenarism has not been defined and that there is no penalty for it. It is in fact provided for with penalty in most evolved penal systems. As a material crime, of course.” Id. at 198-99.

62. This Convention was prepared and unanimously adopted by the members of the International Commission of Inquiry on Mercenaries which had been invited by the Angolan government to observe the trial of the mercenaries and to ensure that justice and due process requirements were satisfied. For text of the Luanda Convention, Documents from the International Commission of Inquiry on Mercenarism, Luanda, Angola, June 1976, see Hinds, The Legal Status of Mercenaries: A Concept in International Humanitarian Law, 52 PHIL. L.J. 395 app. at 419 (1977). For a discussion of the International Commission's findings, see Mercenary Trial in Angola, 60 AFRICA 17 (1976).
B. The United States Neutrality Act

Almost two hundred years ago, in 1794, the United States enacted the Neutrality Act. This Act provided that "if any person shall within the territory or jurisdiction of the United States begin or set on foot or provide or prepare the means for any military expedition or enterprise . . . against the territory or dominions of any foreign prince or state with whom the United States are at peace," that person would be guilty of a misdemeanor. As a result of substantial involvement by U.S. citizens in the Spanish Civil War, Congress promulgated a new Neutrality Act, now codified as Title 18 U.S.C. sections 958-967. Section 959(a) of the Act provides:

Whatever, within the United States, enlists or enters himself, or hires or retains another to enlist or enter himself, or to go beyond the jurisdiction of the United States with intent to be enlisted or entered in the service of any foreign prince, state, colony, district, or people as a soldier . . . shall be fined not more than $1000 or imprisoned not more than three years, or both.

Section 958 of the Act prohibits service in a foreign force against a state at peace with the United States, while section 960 prohibits the planning of expeditions against a friendly nation. In contrast to the laws of the United Kingdom discussed below, the U.S. statutes apply only to acts occurring within the United States. It is widely perceived

64. Id. § 5, 1 Stat. at 384.
67. Section 958 provides:
Any citizen of the United States who, within the jurisdiction thereof, accepts and exercises a commission to serve a foreign prince, state, colony, district, or people, in war, against a prince, state, colony, district, or people, with whom the United States is at peace, shall be fined not more than $2000 or imprisoned not more than 3 years, or both.
68. Section 960 provides:
Whoever, within the United States, knowingly begins or sets on foot or provides or prepares a means for or furnishes the money for, or takes part in, any military or naval expedition or enterprise to be carried on from thence against the territory or dominion of any foreign prince or state, or of any colony, district, or people with whom the United States is at peace, shall be fined not more than $3000 or imprisoned not more than three years, or both.
that the objective of these statutory provisions is to prevent the foreign recruitment and enlistment of American citizens within the United States.69 Thus, the U.S. Supreme Court held in Wiborg v. United States70 that merely leaving the United States to serve as a mercenary abroad is sufficient to avoid prosecution. This policy was articulated by then Attorney General Robert Kennedy in the context of the Cuban "Bay of Pigs" invasion:

The neutrality laws were never designed to prevent individuals from leaving the United States to fight for a cause in which they believed. Nor is an individual prohibited from departing from the United States, with others of like belief, to join still others in a second country for an expedition against a third country.71

The U.S. position on neutrality was neatly summed up by Assistant Secretary of State William Schaufele, Jr., in testimony before the House International Relations Committee Special Subcommittee on Investigations:

The recruitment of mercenaries within the territory of the United States to serve in the armed forces of a foreign country is an offense under our Neutrality Law . . . . A legally accepted definition of what constitutes a mercenary does not exist in international law. Nor is the act of serving as a mercenary a crime in international law . . . . The general international practice appears to consider mercenaries in the same status as other combatants and therefore to be treated as such under the terms of the Geneva Convention of 1949. This has certainly been reflected in our treatment of captured Hessian troops. This was also the case in the Civil War when there were combatants on both sides who fought for hire, adventure or beliefs and who could be considered by some as mercenaries . . . . The act of being a mercenary is not a crime in international law and mercenaries were entitled to the same status and protection as other combatants under the 1949 Geneva Conventions and the rules of warfare.72

The U.S. neutrality policy differs significantly from the United Kingdom's policy, which is detailed below.73

70. 163 U.S. 632 (1896).
73. The position in the United States is similar to that in Australia. Under the Australian Crimes (Foreign Incursions and Recruitment) Act of 1977, it is an offense to recruit, advertise, facilitate, or promote recruitment of mercenaries to serve in the armed forces of another country. However, the Act does not prohibit enlistment of mercenaries outside Australia. Thus, as
C. The United Kingdom's Foreign Enlistment Act

The U.K.'s Foreign Enlistment Act of 1870 (Act) states *inter alia*:

If any person, without the licence of Her Majesty, being a British sub-
ject, within or without her Majesty's dominions, accepts or agrees to
accept any commission or engagement in the military or naval service
of any foreign state at war with any foreign state at peace with Her
Majesty . . . [h]e shall be guilty of an offence against this Act, and shall
be punishable by fine and imprisonment or, either of such punishments
. . . .

The Foreign Enlistment Act of 1870 is still in force. In contrast to
the U.S. legislation, this Act applies to acts both inside and outside the
territory of the United Kingdom. Whether the U.K.'s Act applies to
enlistment in a guerrilla force is unclear. Section 30 of the Act defines
"foreign state" to include "any foreign prince, colony, province or part of
any province or people . . . assuming to exercise the powers of govern-
ment in or over any foreign country, colony, province or part of any
province . . . ." Implicit in this definition is the requirement of actual
control or governance of a territory. Thus, whether the Act applies to
enlistment in a guerrilla force which controls no territory is unclear be-
cause the Act applies only to enlistment in the military or naval service
of a "foreign state."

The growing involvement of British citizens in the Angolan conflict
led directly to an inquiry by the Diplock Committee, whose report was
published in August 1976. The Diplock Report concluded that the
Foreign Enlistment Act was unsatisfactory and unrealistic. The Com-
mittee took the view that mercenarism per se should not be made a crime
in the United Kingdom partly because there was no satisfactory defini-
tion for the term "mercenary." The Committee recommended that the
recruitment in the United Kingdom of persons as mercenaries in order to

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74. Foreign Enlistment Act, 1870, 33 & 34 Vict., ch. 90, § 4.
75. For an analysis of the Foreign Enlistment Act of 1870, see generally Layeb, *United
Kingdom Legislative Control of Mercenary Activity—Its Effectiveness*, 27 R.D.P.M.D.G. 45-81
(1988); Morris, *The Foreign Enlistment Act, 1870: When Will It Be Abolished?*, 130 SOLIC. J.
271 (1986).
76. Foreign Enlistment Act, 1870, 33 & 34 Vict., ch. 90, § 30.
77. *See* Burmester, *supra* note 12, at 50 ("The Act is applicable to internal civil conflicts
only if the insurgents *supra* note 12, at 50 ("The Act is applicable to internal civil conflicts
only if the insurgents exercise some regular control over part of the territory of a state.
78. *See supra* note 27.
79. REPORT, *supra* note 27.
80. *Id.* at 8.
81. *Id.* at 12.
take part in foreign armed conflicts, and not mercenarism itself, should be made a criminal offense.\textsuperscript{82} To date, no legislation has been passed to implement the Diplock Committee's Report. However, the Report was concerned more with problems of domestic law enforcement than with the broader question of mercenarism in its global context. The British statements accepting the definition of mercenary provided in article 47(2) of Protocol I\textsuperscript{83} are a more recent and probably more authoritative interpretation of the British position on mercenarism at the international level.

D. The OAU and UN Efforts to Deal with Mercenaries

Since its inception in 1960, the OAU has on numerous occasions tried to grapple with the problem of mercenaries in Africa. Mercenarism has been a peculiarly African problem in the last four decades. Mercenaries have been used extensively by ex-colonial powers, often against national liberation movements. As a result, "the mercenary is seen as the representative of colonialism and of racist oppression."\textsuperscript{84} There are many historical incidents of mercenarism in Africa. It was in the context of the Congolese Civil War that international concern regarding mercenary activities in Africa first arose. In a 1961 resolution, the UN Security Council called for the immediate withdrawal of all Belgian and other foreign mercenaries, and urged all states to take immediate measures to prevent the departure of mercenaries for the Congo from their territories.\textsuperscript{85} The OAU also appealed to the Republic of Congo to refrain from recruitment of foreign mercenaries and to expel those who still remained within its borders.\textsuperscript{86}

In 1968, the UN General Assembly adopted Resolution 2465 on the implementation of the Declaration of Independence to Colonial Countries and Peoples. In paragraph 8 of the Resolution, the General Assembly declared:

\begin{itemize}
\item \textsuperscript{82} For reaction to the Diplock Committee's proposals, see generally Legum, \textit{Why Britain Must Keep Mercenaries Out of Rhodesia}, The Observer (London), Aug. 8, 1976, at 8, col. 2.
\item \textsuperscript{83} See supra note 38 and accompanying text.
\item \textsuperscript{84} T. Elias, \textit{The International Court of Justice and Some Contemporary Problems} 159 (1983).
\item \textsuperscript{85} S.C. Res. 161, 16 U.N. SCOR Res. & Dec. at 2, U.N. Doc. S/INF/16/Rev. 1 (1961). It has been argued that this resolution was passed by the Security Council pursuant to "its powers to prevent a breach of the peace and related only to the situation in the Congo." Burmester, \textit{supra} note 12, at 49. To that extent, the resolution "did not reflect a general norm of international law." \textit{Id.}
\item \textsuperscript{86} O.A.U. Doc. ECM/Res. 55 (III) (1964), \textit{reprinted in} Cesner & Brant, \textit{supra} note 49, app. III at 364.
\end{itemize}
The practice of using mercenaries against movements for national liberation and independence is punishable as a criminal act and that the mercenaries themselves are outlaws, and called upon the Governments of all countries to enact legislation declaring the recruitment, financing and training of mercenaries in their territory to be a punishable offence and prohibiting their nationals from serving as mercenaries . . . .

The General Assembly also discussed the mercenary problem in colonized territories in resolution 3103 by 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 . . . ." The General Assembly also declared that "[t]he use of mercenaries by colonial and racist régimes 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." The UN resolution was significant in that it was the first time the practice of using mercenaries was declared punishable as a criminal act. However, the legal effect of this resolution is limited. First, it is subject to the limitations which apply to all General Assembly resolutions. Second, its ambit was only meant to extend to colonial situations involving colonized territories, and it was apparently adopted with the African continent in mind. Nevertheless, the more authoritative UN Security

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88. Basic Principles on the Legal Status of the Combatants Struggling Against Colonial and Alien Domination and Racist Régimes, supra note 53, at 142.
89. Id. at 143.
90. Several authors argue that General Assembly resolutions and declarations do not have any legally binding force. See, e.g., Jenks, The Scope of International Law, 1954 BRIT. Y.B. INT'L L. 1; Onuf, Professor Falk on the Quasi-Legislative Competence of the General Assembly, 64 AM. J. INT'L L. 349-55 (1970).

Admittedly, such resolutions are not a formal source of law within the formulation of article 38(1) of the Statute of the International Court of Justice. Under the UN Charter, the Assembly does not have the legal competence to legislate or to adopt legally binding decisions except those regarding certain organizational matters such as regulations for the Secretariat and other procedural rules.

However, despite their formally non-binding character, "even within the conservative framework of article 38 of the statute, legal effect may be given to the collective pronouncements of the General Assembly." Schachter, The Evolving International Law of Development, 15 COLUM. J. TRANSNAT'L L. 1, 5 (1976).
Council also passed several resolutions on the mercenary issue.\textsuperscript{91}

In 1972, the OAU Committee of Experts, charged with drafting a convention on mercenaries, presented its report, part of which was the OAU Convention for the Elimination of Mercenaries in Africa,\textsuperscript{92} to the OAU. This Convention was the first major attempt to extend the issue of sanctions for mercenarism to an international level. However, the Convention was specifically aimed at the problem in Africa, and not at the problem in other parts of the globe. The continued practice of mercenarism made it clear to the OAU and to the international community that the numerous resolutions being produced were not having any discernible impact on the mercenary problem. For example, the resolutions did not prevent the extensive use of mercenaries in the Angolan conflict of 1975. It became clear that, given the nature of the problem, any efforts at curbing the practice of mercenarism had to take the form of a multilateral convention.

Efforts to deal with the problem of mercenarism were extended to the global level at the United Nations. In 1980, an ad hoc Committee on the Drafting of an International Convention against the Recruitment, Use, Financing and Training of Mercenaries was set up by the General Assembly to draft a Convention.\textsuperscript{93} This was a clear signal to the world community of the importance given by the United Nations to the problem of mercenaries. The thirty-five member Committee began its deliberations in 1981, and its draft Convention was adopted by the General Assembly in 1989.\textsuperscript{94} The Convention covers all mercenaries, irrespective

\textsuperscript{91} For example, after deliberations on the 1977 invasion of Benin, the Security Council adopted the following:

The Security Council . . .

. . . 3. \textit{Reaffirms} its Resolution 239 (1967) . . . which, \textit{inter alia}, . . . condemns any State which persists in permitting or tolerating the recruitment of mercenaries and the provision of facilities to them, with the objective of overthrowing the Governments of Member States.

4. \textit{Calls upon} all states to exercise the utmost vigilance against the danger posed by international mercenaries and to ensure that their territory and other territories under their control, as well as their nationals, are not used for the planning of subversion and recruitment, training and transit of mercenaries designed to overthrow the Government of any Member State;

5. \textit{Further calls upon} all states to consider taking necessary measures to prohibit, under their respective domestic laws, the recruitment, training and transit of mercenaries on their territory and other territories under their control . . .


\textsuperscript{94} See International Convention on Mercenaries, \textit{supra} note 3.
of the internal or international nature of the armed conflict in which they are engaged.\textsuperscript{55} The Convention is very comprehensive; it covers even mercenaries outside the framework of an armed conflict.\textsuperscript{56} However, it is important to note that when the Convention finally comes into effect, it will be binding only on the states which agree to be party to it. The Committee's terms of reference also suggest that the Convention is more concerned with the \textit{jus ad bellum} than with the \textit{jus in bello}.\textsuperscript{57}

V. TRENDS IN THE TREATMENT OF MERCENARIES UNDER THE \textit{JUS IN BELLO}: AN ASSESSMENT

Traditionally, mercenaries were treated as prisoners of war when captured, and there is no indication that they were ever treated any differently than enemy nationals.\textsuperscript{58} For example, during the American Revolution, the Hessian mercenaries who fought against American colonists and were captured were treated as prisoners of war.\textsuperscript{59} Foreign volunteers fighting for the Boers were similarly treated as prisoners of war when captured.\textsuperscript{60} It has even been suggested that mercenaries were sometimes treated better than enemy nationals.\textsuperscript{61}

\textsuperscript{55} Article 1, para. 2 describes mercenarism as the act of participating in "a concerted act of violence aimed at . . . [o]verthrowing a Government or otherwise undermining the constitutional order of a state . . . ." Id. art. 1, para. 2, \textit{reprinted in} \textit{29 I.L.M.} 89, 92 (1990). Thus, one could arguably be guilty of mercenarism in a civil or internal armed conflict, as well as in an international armed conflict.

\textsuperscript{56} In addition to the definition of mercenary discussed above, article 1, section 2 of the International Convention on Mercenaries provides:

A Mercenary is also any person who, \textit{in any other situation}: (a) Is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at:

(i) Overthrowing a Government or otherwise undermining the constitutional order of a State; or

(ii) Undermining the territorial integrity of a state

(b) Is motivated to take part therein essentially by the desire for significant private gain and is prompted by the promise or payment of material compensation;

(c) Is neither a national nor a resident of the State against which such an act is directed;

(d) Has not been sent by a State on official duty; and

(e) Is not a member of the armed forces of the State on whose territory the act is undertaken.


\textsuperscript{58} H. Fooks, \textit{Prisoners of War} 28-29 (1924).

\textsuperscript{59} \textit{Id.} at 28. \textit{See also} Comment, \textit{supra} note 24, at 154.

\textsuperscript{60} \textit{See} H. Fooks, \textit{supra} note 98, at 29.

\textsuperscript{61} \textit{See}, e.g., Comment, \textit{supra} note 24, at 151 n.44 ("In fact at times mercenaries have been treated better than enemy nationals, as in the Boer War when Americans fighting for the
The question of mercenarism is dealt with indirectly in the Hague Convention of 1907 which contains principles pertaining to neutrality and hostile military expeditions. Article 4 of Hague Convention No. V provides that "[c]orps of combatants cannot be formed nor recruiting agencies opened on the territory of a neutral power to assist the belligerents." However, the Convention also absolves a neutral power of responsibility if persons (nationals or foreigners) cross its borders on their own initiative to offer their services to one of the belligerents. The most relevant provision of the Hague Convention, for our purposes, can be found in article 17:

A neutral cannot avail himself of his neutrality:

a) If he commits hostile acts against a belligerent
b) If he commits acts in favor of a belligerent, particularly if he voluntarily enlists in the ranks of the armed force of one of the parties.

In such a case, the neutral shall not be more severely treated by the belligerent as against whom he has abandoned his neutrality than a national of the other belligerent state could be for the same act.

Although mercenarism is not directly regulated by the Hague Convention, article 17 suggests that the Convention's provisions could be deemed applicable to mercenaries. Those who forfeit their neutral status by enlisting on the side of either belligerent would be treated as legitimate combatants entitled to the same treatment accorded other belligerents.

The Geneva Conventions of 1949 do not provide expressis verbis for mercenaries. However, article 4(A) of the Third Geneva Convention is authority for the proposition that mercenaries are protected as prisoners of war. Article 4(A) of the Third Convention regards as legitimate combatants "armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces . . .," as well as "other militias and members of other volunteer corps, including those of organized resistance movements," provided they meet certain requisite conditions. This suggests that mercenaries who participate

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Boers against England were not sent to the inhospitable climate of Ceylon as other prisoners were."

103. Id. art. 6, reprinted in Bustamante, supra note 102, at 105.
104. Id. art. 17, reprinted in Bustamante, supra note 102, at 118.
107. These conditions are easily satisfied by mercenaries. See Comment, supra note 24, at
on behalf of one of the belligerents in an international conflict, and who satisfy the conditions, could be considered legitimate belligerents, and therefore, would be entitled to prisoner of war treatment in the event of capture. The difficulty with this argument is that the mercenaries in question would have to be certified as members of the armed forces or resistance group concerned. Some authorities have concluded that the private character of mercenaries distinguishes them from the public nature of armed forces, and "[a]lthough mercenaries fight alongside such armed forces, and are sometimes integrated into their ranks, the fact that they are acting for private ends keeps them apart from the rest of the members of an armed force." Other authors disagree with this interpretation. Mr. John Cotton, for example, relies on other provisions of the Geneva Conventions to come to the conclusion that mercenaries are legitimate and protected combatants. He construes article 16, which requires equal treatment by the detaining power "without any adverse distinction based on race, nationality, religious belief or political opinions," as precluding a distinction in the treatment of mercenaries.

Interpreted one way or the other, it is apparent that the Geneva Conventions did not expressly prescribe the treatment to be accorded mercenaries. Protocol I is the first convention expressly dealing with the legal status of mercenaries in the law of war. Paragraph 1 of article

157 ("As required by Article 4, [mercenaries] are habitually uniformed, serving under a commander, carrying arms openly and normally conducting their operations in accordance with the laws and customs of war.")


Mallison and Mallison also refute the argument that mercenaries are protected by the laws of war, stating that:

Neither Art. 9 of the Brussels Declaration, nor Art. 1 of the Hague Regulations, nor Art. 4 of the 1949 Conventions provides legal authority for armed bands of marauders or pirates acting principally for private purposes as opposed to public ones. Even if such bands used an internal military-like discipline, they could not meet the Brussels-Hague-Geneva criteria.


109. See Comment, supra note 24, at 158. See also A. Rosas, supra note 20, at 400 ("[H]ad the drafters of the 1949 Geneva Conventions been called upon to take issue on this question one might surmise that a clear majority would have included mercenaries among the categories of prisoners of war.")


111. Comment, supra note 24, at 158.

112. Cassese, supra note 44, at 6-7 ("[I]t is clear, therefore, that current international law does not make provision for the phenomenon of mercenarism in its present manifestations .... [I]nternational law does not provide States with any specific weapon against this category of belligerent.")
47 provides that "a mercenary shall not have the right to be a combatant or a prisoner of war."¹¹³ Unlike the earlier UN and OAU prescriptions, article 47 considers the use of mercenaries in general, irrespective of their involvement against national liberation movements or against sovereign states. Article 47 seeks to deprive all mercenaries involved in interstate and national liberation wars of the status of legitimate combatants, regardless of the party to the conflict for which they are fighting. One may reasonably conclude that this was an attempt by the drafters to address the use of mercenaries both for and against national liberation movements.¹¹⁴

The drafters of article 47 may have had good reason for seeking to regulate mercenarism in armed conflicts. Third World countries in particular have suffered considerably as a result of the activities of mercenaries. The few examples given above explain the intensity of feeling and opprobrium attached to mercenarism in its modern day manifestations. However, the drafters of article 47 went overboard in their well-intentioned efforts to regulate and mitigate the incidence of mercenarism. In providing that a mercenary shall not have the right to be a combatant or prisoner of war, it is obvious that mercenaries are being penalized for the fact of being mercenaries and nothing else. On its face, article 47 expressly denies mercenaries any legitimacy, irrespective of how well they comply with the laws of war.

Mr. Guy Roberts argues that article 47(1) "violates the basic principle underlying Protocol I that individuals who take an active part in hostilities should not be discriminated against on the basis of their motives for joining in the combat."¹¹⁵ What he forgets to add, however, is that the preamble which he cites alludes to nondiscrimination between "all persons who are protected by those instruments."¹¹⁶ Therefore, it is arguable that, by virtue of article 47(1), mercenaries are not persons who are protected by the Protocol in the manner contemplated.

Nevertheless, a more fundamental objection may be made to article 47(1). There is a need to expand protection under the laws of war to as many combatants and conflicts as possible. It seems counter-intuitive and contradictory to deprive mercenaries of combatant and prisoner of

¹¹⁴. See also Cassese, supra note 44, at 23 ("Thus, it is implicitly foreseen that mercenaries may be used not only by States (fighting against other States or national liberation movements) but also by groups who, appealing to the principle of self-determination of people, declare that their struggle against the government of a sovereign State constitutes a war of national liberation.")
¹¹⁵. Roberts, supra note 24, at 134.
war status while extending these protections to guerrillas and national liberation fighters. 117 Article 47(1) stands out as an incongruous provision in a document designed to promote humaneness in armed conflict.

As odious as the activities of mercenaries may be, it would accord with ordinary good sense to grant them prisoner of war status if they complied with the laws of war. This would serve as an incentive to mercenaries to comply with the laws of war. This, in turn, might make the activities of mercenaries less troublesome than they have been in the past. In addition, denial of combatant and prisoner of war status to mercenaries is at variance with the principle of humanity and the cause of human rights in general. Thus, from a strictly humanitarian standpoint, extending the applicability of the Protocol to mercenaries can only have a salutary effect on the law of armed conflict. More importantly, granting prisoner of war status to mercenaries does not in any way endanger the safety of civilian populations. On the contrary, the security of the civilian populace will be enhanced if mercenaries are encouraged to comply with the laws of war.

Mercenaries do have certain protections under the Protocol, notwithstanding their illegal combatant status. Article 47(1) states that a mercenary "shall not have the right to be a combatant or a prisoner of war." 118 This must not be equated with the phrase "shall not be accorded" a combatant or prisoner of war status. Many delegates at the Diplomatic Conference argued for the latter provision. 119 The implication of such a provision would have been grave—it would have implied, for example, that any contracting state party which accorded prisoner of war status to a captured mercenary would be in violation of the Protocol.

The travaux préparatoires suggests that mercenaries are entitled to certain fundamental guarantees even though they are denied combatant and prisoner of war status. Paragraph 3 of article 45 provides, inter alia, that "[a]ny person who has taken part in hostilities, who is not entitled to prisoner of war status and who does not benefit from more favorable treatment in accordance with the Fourth Convention shall have the right at all times to the protection of article 75 of this Protocol." 120 It is

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117. Art. 1(4) of Protocol I extends greater protections to national liberation movements by classifying wars involving such movements as international armed conflicts. I have discussed this in an earlier article. See Kwakwa, The Use of Force by National Liberation Movements: Trends Toward a Developing Norm? (Book Review) 14 YALE J. INT'L L. 199 (1989).


119. See XV OFF. RECS., supra note 18, para. 105 ("[A] number of delegations desired to see an absolute requirement that mercenaries must not be treated as prisoners of war or combatants, thus making it mandatory that the capturing Power deny such status.")

120. Article 75 applies to "persons who are in the power of a Party to the conflict and who
evident that mercenaries fall within this provision: they take part in hostilities, they are not entitled to prisoner of war status according to article 47(1), and thus, they do not benefit from more favorable treatment in accordance with the Fourth Convention. Several delegates at the Diplomatic Conference clearly stated that, in their view, the fundamental guarantees provided in article 75 applied to mercenaries. The Report of the Third Committee was also clear and unequivocal:

[A]lthough the proposed new article [47] makes no reference to the fundamental protections of [article 75], it was understood by the Committee that mercenaries would be one of the groups entitled to the protections of that article which establishes minimum standards of treatment for persons not entitled to more favourable treatment under the Conventions and Protocol I.

All of these statements were implicitly accepted at the Diplomatic Conference. Therefore, mercenaries are at least entitled to the minimal guarantees provided in article 75 of the Protocol.

**VI. CONCLUSION**

The definition of mercenaries provided in Protocol I still presents
problems of identification. The definition is so tightly drafted that it may almost invariably exclude all possible combatants. On the other hand, the narrow definition may be explained by the fact that mercenaries are expressly denied combatant and prisoner of war status. Thus, because of the legal consequences flowing from labeling a person a mercenary, it is understandable that the drafters attempted to be restrictive in their definition. Before deciding the treatment to be accorded a suspected mercenary, a determination will have to be made as to whether or not the combatant in question falls within the definition of mercenary provided in the second paragraph. In the interim, pending any such determination by a competent tribunal, the combatant in question must be presumed to be a prisoner of war (and thus protected by the Third Geneva Convention) until his status is established.125

With regard to treatment, article 47(1) denies mercenaries combatant or prisoner of war status. The legal effect of the denial of combatant and prisoner of war status is to deprive a captured mercenary of the treatment of prisoner of war as laid down in the Third Geneva Convention, and to subject him to criminal prosecution. This denial of combatant status to mercenaries has grave consequences. It will provide mercenaries with no incentive to comply with the law of war, and hence, the real victims will be noncombatants.

However, it is apparent that the article, on its face, simply denies mercenaries combatant and prisoner of war status as of right. State Parties are still at liberty to accord mercenaries prisoner of war treatment if they are so inclined. Although not entitled to prisoner of war status as of right, the mercenary is guaranteed all the fundamental safeguards of article 75.

Variations in state practices may lead to unpredictable outcomes in different conflicts. Some states may avail themselves of the liberty of according captured mercenaries prisoner of war treatment, while others may choose to follow the strict text of article 47. Under the circumstances, it is in a prospective mercenary's interest to find out a state's practice with regard to treatment of captured mercenaries before deciding whether to enlist in any particular armed conflict against that state.

State practice on the Protocol is still in its formative stages. While

125. Article 5(2) of the Third Geneva Convention provides:
Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.
Third Geneva Convention, supra note 4, art. 5, para. 2, 6 U.S.T. at 3324, 75 U.N.T.S. at 142.
there seems to be virtual agreement on the definition of mercenaries, subsequent state practice may show conflicting attitudes in the treatment of mercenaries. Needless to say, it would have been more desirable and more in conformity with international humanitarian law if there was uniformity in state practice on the treatment of mercenaries. Uniformity of treatment and approach to the mercenary problem is important because the phenomenon of mercenarism cuts across national boundaries. To date, there has been no reported incident of the treatment accorded to any captured mercenary subsequent to the drafting of Protocol I. Hopefully, the practice of states in the future will tend toward a recognition of the need to grant mercenaries prisoner of war status upon capture. Such a development would result in a more humanitarian law of armed conflict, induce mercenaries to comply more scrupulously with the laws of war, and ultimately inure to the benefit of the noncombatant population as well.