# Africa and Humanitarian Law *

**by Vangah Francis Wodie**

*The* International Review of the Red Cross *is pleased to publish this essay by Professor Vangah Francis Wodie on the perception of humanitarian law by African states, and their contribution to this law's development in view of the problems confronting them. The essay reflects the personal views of the author, who gives special attention to the legal and humanitarian problems facing many states as a result of the influx of refugees and the use of mercenaries in some conflicts.*

*His analysis and conclusions confirm the validity of the resolution adopted in July 1986 by the Council of Ministers of the Organization of African Unity which stressed the desire of African heads of state and government to promote respect for the universally recognized rules of humanitarian law and humanitarian principles, and urged OUA member states to aid the ICRC in its work (see p. 296)* (Ed.).

Before exploring the place accorded by Africa to international humanitarian law and what concerns it in this field, it is appropriate to define what is covered by this law. Traditional Africa was not unaware of humanitarian law, defined as an aggregate of rules to govern the conduct of hostilities and protect its victims. In a study devoted to the subject, "Humanitarian Law and Traditional African Law",[1] Yolande Diallo describes a number of principles

* Report presented to the Inaugural Conference of the African Association of International Law, Lusaka, 2 to 5 April 1986.

[1] Yolande Diallo, "Humanitarian Law and Traditional African Law", *International Review of the Red Cross* (*IRRC*) No. 179, February 1976, pp. 57-63, cited by J. Owona, Le Droit International Humanitaire, *Encyclopédie juridique de l'Afrique*, Les Nouvelles Editions Africaines, Abidjan/Dakar/Lomé, 1982; vol. II, ch. XVI, p. 384.

and humanitarian rules for the conduct of war and the treatment of victims. Africa however, destructured and integrated into the colonial system, lost the autonomy of its own law. Having returned to or achieved independence in international life, a majority of African states succeded or acceded without reservations to the four Geneva Conventions on humanitarian law as conceived on the European model. This law consists of "all the international legal provisions, whether of statute or customary law, ensuring respect for the individual and his well-being." This definition by Professor Jean Pictet [2] expands the domain of humanitarian law, which is explained by the author as follows: "Humanitarian law now comprises two branches: the law of war and human rights." The law of war is also divided into two branches: the law of The Hague, or law of war proper, specifying the rights and duties of the belligerents in the conduct of operations and limiting the choice of means, and the Law of Geneva or humanitarian law proper which seeks to protect soldiers who are *hors de combat* and persons not taking part in hostilities—civilian populations. It is in this sense, as an expression of human rights in times of armed conflict, that humanitarian law should be understood and the role of Africa determined.

The law of war or the Law of The Hague, dating from 1907, and humanitarian law, as defined by the four Geneva Conventions of 12 August 1949, were both evolved by European states while Africa was still divided, for the most part, into colonial territories. Hence, their rules were not subject to African influence. Africa, in its fight for decolonization and independence, derived practically no benefit from the provisions of humanitarian law—not even Article 3 common to the four Geneva Conventions of 1949, which the colonial powers brushed aside, regarding wars of liberation, at least in their early stages, as internal matters completely subject to the sovereignty of the State. Portugal offered the best example of this, stating: "As there is no actual definition of what is meant by a conflict not of an international character... Portugal reserves the right not to apply the provisions of Article 3, in so far as they may

[2] J. Pictet, *Humanitarian Law and the Protection of War Victims*, A.W. Sijthoff, Leiden, Henry Dunant Institute, Geneva, 1975, p. 13 cited by J. Owona, le Droit International Humanitaire, *Encyclopédie juridique de l'Afrique, op. cit.*, p. 381 and Philippe Bretton, "Remarques générales sur les travaux de la Conférence de Genève sur la réaffirmation et le développement du droit humanitaire applicable dans les conflits armés", *Annuaire français de droit international (AFDI)*, Paris, 1977, pp. 197 et s.

be contrary to the provisions of Portuguese law in all territories subject to her sovereignty in any part of the world." [3]

In addition to the external causes which reduced the significance and hence the function of humanitarian law in Africa, there were other causes resulting from the internal structure of the states which limited the range of application of this law. Generalization of the one-party system, growth of personal political power and fake elections closed the way to democratic alternatives and favoured *coups d'Etat* and civil wars in Africa. Neither the leaders of the *coups d'Etat* nor the leaders of governments threatened by civil wars were at all eager to apply the humanitarian law of Geneva as expressed in Article 3. This was the case for example in the Biafra war.[4] The delegate from Zaire to the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law expressed this view in commenting on the draft of Protocol II: "Several provisions of this Protocol (Protocol II) encroach upon the internal laws of States and thus dangerously compromise the sovereignty and territorial authority of these States on matters which, in conformity with Article 2 paragraph 7 of the Charter of the United Nations, are within their domestic jurisdiction. The mistake was to place on an equal footing a sovereign state and a group of its insurgent nationals, a legal governement and a group of outlaws, a subject of international law and a subject of domestic law." [5]

There is certainly no doubt that some of these provisions of humanitarian law would impose limits on the unbridled sovereignty of various African states—and there is also no doubt that it can constitute a powerful adjunct to decolonization, the equality of people and the sovereignty of states.

Africa has been and still is the continent of predilection for colonization and race discrimination. The Organization of African Unity (OAU), to help in its fight against the inequality of peoples and of individuals, has characterized the kind of race discrimination that has been raised to the level of a governmental institution by South Africa as a form of colonization and colonialism. In

[3] Claude Pilloud, "Reservations to the Geneva Conventions of 1949," *IRRC*, March 1976, No. 180, p. 116, cited by Owona, *op. cit.*, p. 381.

[4] See V.F. Wodie, "La sécession du Biafra et le droit international", *Revue générale de droit international public (RGDIP)*, Paris, 1969, No. 4.

[5] Michael Bothe, "Conflits armés internes et droit international humanitaire", *RGDIP*, 1978, No. 1, pp. 82 et s.

parallel with its struggles for national liberation and self determination, from 1960 to 1970, Africa suffered from a reinfestation by colonialist mercenaries, recruited mainly in Europe, the United States and from the white populations of South Africa and "Southern Rhodesia." They attacked various African states, in particular Angola, Mozambique, Nigeria, Zaire, Guinea and Benin, constituting a serious danger to the stability and sovereignty of these states. The mercenaries lit or relit the fires of conflict and tension wherever they went. This fight, like the original fight for decolonization, brought Africa into conflict with countries abroad. Classic humanitarian law, embodied mainly in the four Geneva Conventions of 1949, could not deal with nor satisfy the new demands arising under these conditions. This situation led to the convocation of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law, which opened in Geneva on 20 February 1974 and ended on 10 June 1977 with the adoption of the two Additional Protocols. "Two concepts of the development of humanitarian law came face to face. The traditional one offered a programme of articles and amendments which would fill in gaps and bring up to date the material rules of the Conventions, without disturbing their general pattern. The other concept called for a new humanitarian law which, by emphasizing the predominant political realities of the time, arising from situations of decolonization and inequality of development, would bring about a profound transformation of the existing law, which should cease to be a European law, made for Europeans." [6] Accordingly, having already devoted itself to the development of a regional humanitarian law adapted to its concerns and needs, Africa, together with other third world states,[7] intended to make a substantial contribution to the reaffirmation and development of universal humanitarian law.

[6] Paul de la Pradelle, "Le droit humanitaire des conflits armés", *RGDIP*, 1978, No. 1, pp. 9 ff.

[7] With the assistance and support of the socialist states.

## I. THE CONTRIBUTION OF AFRICA TO REGIONAL HUMANITARIAN LAW

In this domain, Africa determined to devote its efforts to two subjects of great importance—one of internal origin, the problem of refugees, and the other of external origin, that of mercenaries.

### A. THE PROTECTION OF REFUGEES AND THE OAU CONVENTION OF 1969

More than half of the refugees in the world today—about five million—are of African origin, confirming the statement by Owona that Africa in the year 1970 appeared to be the continent for refugees "par excellence." The increase in the number of refugees in Africa has resulted from various factors: wars for self-determination, especially in territories where several liberation movements coexist and confront one another; inter-state and inter-ethnic conflicts; social discrimination and repression of political adversaries under one-party systems and military regimes in which people are deprived of legal means of expression. Although some states may take steps individually, the most appropriate solution is through regional co-operation. Accordingly, the OAU has given the question of refugees a high place among its concerns since 1969, adopting a Convention on the subject which entered into effect on 20 June 1974 after receiving the required minimum of 11 ratifications. The Convention defines refugees, establishes their status and provides for inter-African regional co-operation.

#### 1. **The status of refugees**

Article 1, paragraph 1 of the OAU Convention defines the refugee as follows: "For the purpose of this Convention, the term "refugee" shall mean every person who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former habitual residence as a result of such events is unable or, owing to such fear, is unwilling to return to it."

Under this Convention, a refugee is a person who, for external reasons or because of his own feelings, is outside of his state of nationality or usual residence. Two criteria are thus used, teleological and territorial. The definition is also enlarged to designate as a refugee: "Every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality."

This clause takes into account the consequences or effects of wars of liberation or self determination. If he fulfils the conditions referred to above, the refugee may benefit from asylum in any one of the states party to the Convention. The state granting asylum is the only authority qualified to evaluate the conditions and determine the modalities. No precise obligations are imposed on the states in this domain and a state may grant or refuse asylum to a refugee on its territory.[8] It is forbidden however to close its frontiers against refugees or force them back to their countries of origin (state of nationality or usual residence) or to a territory where their "physical integrity or liberty would be threatened". No state can refuse this minimum humanitarian treatment.

When it welcomes refugees, a state must do its best, as specified in Article II, paragraph 1, "to secure the settlement of those refugees who, for well-founded reasons, are unable or unwilling to return to their country of origin or nationality".

In Article IV, the OAU Convention obliges its Member states to give their protection to refugees "without discrimination as to race, religion, nationality, membership of a particular social group or political opinions". For reasons of security, refugees should be settled at a reasonable distance from the frontier of their country of origin. As beneficiaries of the humanitarian treatment provided for in the Convention, refugees have certain obligations. They must, like all residents, submit to the authority of the state, respect its laws and regulations and abstain from any conduct tending to disturb public order. They must also refrain from any political

[8] See on this point Georges Abi-Saab, "Quelques concepts juridiques techniques concernant l'admission et l'expulsion de réfugiés en portant attention particulière à l'Afrique", *Pan-African Conference on the situation of refugees in Africa, Meeting of experts on legal issues, Arusha, 7-11 May 1979*, UNHCR, Geneva, 1984.

involvement and any subversive or hostile activities against the country of asylum or any state Member of the OAU. This obligation, referring only to members of the OAU, cannot be construed as an obstacle to exercise the right of self-determination which, in the opinion of the OAU, is always directed against non-African states.

The benefit of the status of refugee, as outlined above, can be refused to any persons who, in the opinion of the host state, have been guilty of crimes against peace, war crimes or crimes against humanity, serious common law crimes or activities contrary to the purposes and principles of the Organization of African Unity or of the United Nations. Refugees also lose the benefit of this status if they seriously infringe the purposes and objectives of the Convention, thus placing themselves outside of its protection. The Convention provides for regional co-operation among the Member states to put this humanitarian treatment into effect.

## 2. **Regional co-operation for the protection of refugees**

Refugees come from some African countries to seek asylum in other African countries. Article II, paragraph 2, of the Convention specifies that: "The grant of asylum to refugees is a peaceful and humanitarian act and shall not be regarded as an unfriendly act by any Member state."

This provision tends to create a favorable atmosphere for regional co-operation, provided for in Article II, paragraph 4: "Where a Member state finds difficulty in continuing to grant asylum to refugees, such Member state may appeal directly to other Member states and through the OAU, and such other Member states shall in the spirit of African solidarity and international co-operation take appropriate measures to lighten the burden of the Member state granting asylum."

The African states are underdeveloped countries, facing poverty and famine. Their capacity for the reception of refugees is limited in economic and financial terms. The burden imposed by a massive presence of refugees on its territory may be unbearable for the state granting asylum. Regional co-operation can be a means of easing the burden by sharing it. Member states receiving refugees are called upon to provide them with travel documents enabling them to travel freely from one country to another and when appropriate to move to another country.

The Member states are also asked to supply the Director General of the OAU with information on the condition of refugees, the way in which the Convention is implemented and other appropriate data, to permit effective co-ordination of the action of all the states concerned. For this purpose, the OAU created the Bureau for the employment and education of African refugees by a resolution of its Council of Ministers in June 1971. Commissions, committees and national correspondents in various countries assist the Bureau in its work. Owona notes that already in 1970 there were national correspondents in Cameroon, the Central African Republic, Chad, Zaire, Congo, Gabon, Mauritania, Niger, Senegal and Burkina Faso.

The regional co-operation thus organized is opened up to the rest of the world by the collaboration established between the OAU and the UN, through a specialized agency, the United Nations High Commissioner for Refugees.[9]

The situation of refugees must be regarded as temporary and there must be a constant concern with establishing or re-establishing them in normal conditions. Accordingly, the Convention provides for the voluntary repatriation of refugees, while stating that no refugee may be repatriated against his will. The country of origin in receiving refugees back must facilitate their resettlement and grant them the full rights of nationals, with the same rights and obligations.

When the status of refugee comes to an end, the Convention ceases to apply, just as in the case of a refugee who regains his own nationality or acquires a new nationality. In both circumstances, he ceases to have the status of refugee and becomes—or becomes again—a national or citizen in the full sense of the term.

In addition to valorizing and protecting the status of refugees in the Convention of 1969, the OAU organized the fight against mercenarism in its Convention of 1977.

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[9] The reader will find useful information in the following documents:

— Seminar on the situation of refugees in West Africa, Dakar, Senegal, 13-17 June 1983, UNHCR, Geneva, 1983.
— Final report of the seminar on the problems of refugees in Zaire, Kinshasa, 19-25 April 1982, UNHCR, Geneva, 1982.
— Jaeger, G., "Determination of Refugee Status under International Instruments", in *African Refugees and the Law*, ed. by G. Melander, P. Nobel, The Scandinavian Institute of African Studies, Uppsala, 1978.
— Seminar on the situation of refugees in Central Africa, Yaoundé, Cameroon, 18-22 February 1985, UNHCR, Geneva, 1985.
— Recommendations of the Pan-African Conference on the situation of refugees in Africa, Arusha, 7-17 May 1979, UNHCR, Geneva, 1984.

## B. THE STRUGGLE AGAINST MERCENARISM AND THE OAU CONVENTION OF 1977

The practice of mercenarism goes back to antiquity and has afflicted us in Africa since the Middle Ages. Europe still has occasion to remember the infamous Italian condottieri. In the twentieth century, Africa suffered an intensification of this curse due to the intensification of struggles against colonialism and racism.

The United Nations has constantly had to deal with the question of mercenarism and has devoted numerous specific or general resolutions to it. For example, in connection with the Congo conflict and the secession of Katanga, the Security Council adopted resolutions 161A and 169 on 21 February 1961 and 24 November 1961 respectively.[10]

Mercenarism and resort to its use are regarded as illegal activities in view of the threat they constitute to the stability, sovereignty and independence of states and because they may constitute obstacles to the struggle against colonialism and racism, which in our time appear more and more to assume the form of state institutions and constitute crimes against humanity. Security Council resolution 405 of 14 April 1977 adopted by consensus, condemns all forms of outside interference in the internal affairs of member states, including the use of international mercenaries to destabilize the states or to violate their territorial integrity, sovereignty and independence.[11] While Africa contributed to the development and adoption of these international instruments as it also did with respect to the two Additional Protocols to the Geneva Conventions, it was natural for her to take her own particular measures directed to the elimination of this curse of which she had been a principal victim from 1960 to

[10] Resolution 289 of 23 November 1970 was devoted to the invasion of Guinea by Portuguese mercenaries. Earlier, resolution 2465 (XXIII) of 20 December 1968, proposed by the USSR to give effect to the declaration concerning the granting of independence to colonial countries and peoples, condemned mercenarism directed against Movements of National Liberation and independence of peoples as a criminal act, and defined mercenaries themselves as criminals. Likewise the declaration concerning the principles of international law affecting friendly relations and co-operation between states (resolution 2625 (XXV) of 24 October 1970 made it obligatory for states to abstain from encouraging mercenarism in their mutual relations. The same concerns were repeated in resolution 3314 (XXIX) of 24 December 1974 defining aggression.

Concerning these points see J. Tercinet, "Les mercenaires et le droit international", *AFDI*, Paris, 1977, pp. 269 ff.

[11] J. Tercinet, *op. cit*, p. 278.

1974. Accordingly, a number of resolutions and national actions were taken and the OAU Convention on the elimination of mercenarism was adopted at Libreville in 1977.[12]

After defining the term "mercenary", the Convention proceeds to provide means for prevention and repression of mercenarism.

## 1. The prevention of mercenarism

Mercenarism is considered to be an offence which must be prevented. To succeed in this effort it is essential to know what categories of individuals are guilty of this offence. Under the terms of Article 1, paragraph 1 of the Convention, 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;
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) is not sent by a state other than a party to the conflict on official mission as a member of the armed forces of the said state.

This definition emphasizes the alien nature of mercenarism because the mercenary escapes both from the sovereignty and the usual control exercised by states in conflict with one another. It is specified that he is one who acts for reasons of private gain and

[12] Examples are provided by the resolution of 10 September 1967 of the OAU Council of Ministers, the resolution of 14 September 1967 of the Conference of Heads of State, the resolutions of the Special Commission on the problem of mercenaries of 12 November 1967 and the Council of Ministers of 12 December 1970, condemning the practice of mercenarism and the invasion of Guinea by mercenaries which was regarded as an aggression. At the Conference of OAU Heads of State in September 1967 in Zaire, a resolution was passed asking the states to treat mercenarism as a crime. In national terms, Angola, Guinea and Benin played decisive roles. The trial of mercenaries in Luanda in 1976, characterized by Owona as the "Nuremburg of mercenaries" contributed directly to a growing consciousness of the evil and to the adoption of the OAU Convention on the elimination of mercenarism in 1977.

personal motives without political or ideological considerations. The mercenary is thus distinguished sharply from the international volunteer who "disregarding the danger to which he exposes himself comes to the assistance of a people engaged in a struggle for its liberty and independence because his own moral position is in harmony with the just cause for which this people is fighting."[13]

The contracting states are obliged to take all necessary measures to eradicate mercenary activities in Africa by preventing their nationals or foreigners on their territories from engaging in such activities, preventing entry into or passage through their territories of mercenaries or any equipment intended for their use, prohibiting on their territory any activities by persons organizing or using mercenaries against member states of the OAU or the peoples of Africa, forbidding on their territories the recruitment, training, financing or equipping of mercenaries and any other form of activity likely to promote mercenarism.

In order to co-ordinate and strengthen the fighting against mercenarism by preventing it, the states must co-operate with one another by communicating either directly or through the OAU secretariat all necessary information concerning the activities and movements of mercenaries.

They are required to provide mutual assistance in investigations aimed to repress mercenarism, which is defined as an international crime.

## 2. **The repression of mercenarism as an international crime**

Article 1, paragraph 2 of the Libreville Convention states that mercenarism is "a crime against peace and security in Africa and shall be punished as such". The same article notes that the crime of mercenarism may be committed by an "individual, a group, an association, a representative of a state or by the state itself who, with the aim of opposing by armed violence a process of self-determination, stability or the territorial integrity of another state, practises any of the following acts:

a) shelters, organizes, finances, assists, equips, trains, promotes, supports or in any manner employs bands of mercenaries;

[13] P. Laugier, "Les volontaires internationaux", *RGDIP*, Paris, 1976, pp. 75-116, cited by J. Owona, *op. cit.*, p. 394.

b) enlists, enrols or tries to enrol in the said bands;
c) allows the activities mentioned in par. a) to be carried out in any territory under its jurisdiction or in any place under its control or affords facilities for transit, transport or other operation of the above-mentioned forces".[14]

The crime of mercenarism may be committed against an already existing state, against its stability or territorial integrity, or the crime may be committed against a people struggling for its independence and moving toward the establishment of a state. The crime of mercenarism may also be committed by a state which violates its obligations with respect to the prevention of mercenarism. The fact of assuming command over or giving orders to mercenaries is considered as an aggravating circumstance, under the provisions of Article 2.

Being thus defined, the crime of mercenarism is punishable in each state by its heaviest penalties, including the death sentence. The crime of mercenarism is a crime against peace and the security of Africa, and the state which is a victim of mercenarism is authorized to bring its case before the appropriate OAU bodies for the settlement of conflicts. We can begin to see the emergence of a kind of regional *jus cogens,* as mercenarism constitutes a grave attack on human rights and the rights of peoples.

The crime of mercenarism must not in any way be regarded as a political offence. Since he is defined as a *common law* criminal, a mercenary cannot benefit from the preferential treatment which protects the perpetrators of certain acts from extradition. The state must act and punish, otherwise it must extradite the criminal. A state which has the responsibility for suppression in a given case must inform the other member states of the OAU of the measures it has been able to take in this domain. A mercenary engaged in conflicts cannot in any way benefit from the status of combatant, and if he falls into the power of the adversary the mercenary cannot be given the treatment accorded to a prisoner of war.

These provisions bring about so complete a degradation of the status of the mercenary that he can no longer even benefit, as Owona comments, from the diplomatic protection of his own state of origin or nationality, since he has in a sense been put "out of court" because of the requirement that one enters a court with "clean hands".

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[14] Cited by Owona, *op. cit.*, p. 394.

Being unable to commit the responsibility of a state in terms of diplomatic protection, the mercenary is compelled to face the fact of his personal responsibility for the crime he has committed and for other offences related to that crime. As the participants at Geneva in the Diplomatic Conference on Humanitarian Law, the African States sought to integrate their regional concerns into the provisions of the two Additional Protocols which emerged from the Conference.

## II. THE CONTRIBUTION OF AFRICA TO THE RENEWAL OF UNIVERSAL HUMANITARIAN LAW

Africa brought a significant contribution to the Geneva Diplomatic Conference on The Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts. Participants included not only the representatives of states but also of liberation movements, a large number of which have their headquarters in Africa. On the proposal of Cuba, supported by third-world states including the African states, national liberation movements were admitted to participation in the Conference on two conditions: first of all they had to be recognized by an international regional organization and in the case of Africa this meant the OAU; in the second place they had to have been invited by the Conference. Their status was superior to that of observers since these movements cannot only take part in the discussions but, as separate entities, could also sign the final Act of the Conference. They were excluded only from participation in voting.

In their advance toward the self determination of their peoples, a number of national liberation movements achieved independence before the end of the Conference (Angola, Mozambique, etc.). Guinea-Bissau occupied an intermediate position. Having been recognized by about forty socialist and third-world states following her unilateral proclamation of independence, it was admitted to the Conference by consensus. Portugal, a previous colonial power, limited itself to the expression of reservations without opposing the participation of this state, to which the Conference attributed one of its vice-presidencies.

Africa, in co-operation with other third-world states and those of the socialist group, was able to incorporate some of its concerns

in the drafting of the provisions of both protocols. For example, Article 85 paragraph 4 (c) of Protocol I defined as a grave breach, practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination. One author [15] had good reason to declare that the most important innovative provisions of the texts adopted in June 1977 in Geneva could be regarded as a consecration and legitimization of the demands of the third world, supported by the socialist states. Two points deserve particular attention: recognition of wars of national liberation as international armed conflicts and the debasement of the status of mercenaries.

## A — RECOGNITION OF WARS OF NATIONAL LIBERATION AS INTERNATIONAL ARMED CONFLICTS

The four Geneva Conventions of 12 August 1949 made a clear distinction between international conflicts with states taking part and internal conflicts which did not have this characteristic. Internal conflicts could benefit from the provisions of Article 3 common to the four Conventions. The western states at the Geneva Conference of 1974 resisted in vain the recognition of wars of national liberation as international conflicts, basing themselves on the confusion between *jus in bello* and *jus ad bellum* and on the need to make a distinction between international conflicts in the sense of war between states and those conflicts which were of another character. The decision to establish wars of liberation as international armed conflicts was adopted by 70 votes in favour, with 17 abstentions and 21 votes against. It is appropriate to consider first the new scope given to international conflicts and then to examine the status which results from this for the combatants.

[15] Philippe Bretton: "L'incidence des guerres contemporaines sur la réaffirmation et le développement du droit international humanitaire applicable dans les conflits armés internationaux et non internationaux", *Journal de droit international (JDI)*, April-June 1978, No. 2, pp. 208-271.

## 1. The scope of international conflicts

The inclusion of wars of international liberation in the domain of international conflicts considerably reduced the scope of internal conflicts and of Protocol II which was intended to cover the latter. Whereas Protocol I contains 102 articles, Protocol II has only 28, thus being reduced to its simplest possible form, on the proposal of Pakistan, supported by Nigeria.

Protocol I relating to the protection of victims of international armed conflicts, in part I, art. 1, paragraph 4, gives the following definition of international conflicts: "The situations referred to in the preceding paragraph 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, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations." The concept of international conflict is thus enlarged, going beyond warfare between states to warfare in which a state confronts a movement of national liberation fighting for its self-determination or against external domination or against racism. There remains only a narrow category of non-international armed conflicts, which cannot include mere situations of internal disturbances and tensions such as riots, isolated and sporadic acts of violence and other acts of a similar nature.

Article 1 of Protocol II, which deals with non-international armed conflicts, and which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949, applies to all armed conflicts which are not covered by Article 1 of Protocol I additional to the Geneva Conventions of 12 August 1949 relating to the victims of international armed conflicts. It requires for its applicability that the conflicts in question "take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol".

This article of Protocol II goes on to specify that it "shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature as not being armed conflicts". To avoid offering an escape clause to colonial, neo-colonial or racist states, some del-

egations, including Algeria and Mozambique, had proposed to exclude from the field of reservations Article 1 of Protocol II, since a reservation concerning it would be incompatible with the object and the purpose of this convention. The convention is mute on this question.

The fact that international armed conflict should be thus defined does not settle all problems which may arise in the application of this Additional Protocol. Indeed, the question remains open concerning the designation to be assigned to specific conflicts and specification of a competent body to make such a designation. For example, what designation is to be given to the conflicts in the Ogaden, Eritrea and the Western Sahara? In the opinion of the OAU, the question is decided by the fact that colonialism or colonisation implies a relationship of subjugation from abroad which cannot in any sense be the fault of an African state. We must note at the same time that the case of the Western Sahara is a special one, as the conflict originated from the precipitate departure of the colonial power. With respect to South Africa, we must stress that it is not an African state in the terms of the charter and of the practice of the OAU. Accordingly, as long as the other conditions for application are fulfilled, the struggle against apartheid is subject to the application of the provisions described above. The definition of international armed conflict thus provided also serves as the basis for raising the status of "guerrillas".

## 2. **Raising the status of guerrillas**

The first question to be decided is that of the definition of the guerrilla. The guerrilla is a combatant who, as such, must be distinguished from those who are not combatants, that is to say the civilian populations. The Protocols make a distinction in the situation of a combatant who actually takes part in hostilities and the civilian populations who do not. At the request of third-world states a special status was recognized for guerrillas, because to subject them in every respect to the traditional status of combatants would be to expose them to extermination. Accordingly, Article 44 paragraph 3, after establishing the obligation of combatants to distinguish themselves from the civilian population so as to give the latter better protection against the effects of hostilities, anthorize the guerrilla not so to distinguish himself, but specifies that he must carry his arms openly. This derogation is explained and justified by

the nature of the hostilities in question and the particular situation of the guerrilla, who is recognized as a combatant. The status of combatant imposes obligations on those who benefit from it, in that they are obliged to respect the rules of international law applicable in armed conflicts. Violation of these rules deprives the combatant of the protection otherwise granted him. Violations of these rules do not deprive the guerrilla of the status and rights of a combatant. He benefits in particular from this provision: "Any combatant who falls into the power of an adverse Party while not engaged in an attack or in a military operation preparatory to an attack shall not forfeit his rights to be a combatant and a prisoner of war by virtue of his prior activities." [16] Granting guerrillas the status of combatants is related to the definition of wars of decolonization, the successful outcome of which all states are obliged to support. This definition also debases the status of mercenaries who oppose the normal evolution of these wars.

## B. DEBASEMENT OF THE STATUS OF MERCENARIES

Africa, which organized the combat against mercenarism in the Libreville Convention of 1977, also sought to weaken the status of mercenaries on the worldwide level.

In the opinion of Gaston Bouthoul, a mercenary is one who carries war as a trade seeking to derive the greatest possible benefit for himself at the least personal risk.[17] It is useful to know how Protocol I defines mercenaries in order to know how they are to be treated.

### 1. **The definition of mercenaries**

Article 47, Protocol I gives the following definition:
A mercenary is any person who:
— is specially recruited locally or abroad in order to fight in an armed conflict;

[16] Protocol I, art. 44, paragraph 5.

[17] Cited by Philippe Bretton, "L'incidence des guerres contemporaines sur la réaffirmation et le développement du droit international humanitaire applicable dans les conflits armés internationaux et non internationaux," *JDI*, April-June 1978, No. 2, p. 234.

— does, in fact, take a direct part in the hostilities;
— 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;
— is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
— is not a member of the armed forces of 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.

The definition given by this article is too narrow because it requires the combination of all the criteria listed. It thus limits the field for identifying mercenaries and thus limits the scope for suppression which should result from it.

## 2. **The treatment of mercenaries**

The treatment specified in the Protocol is a compromise between the third world—Africa in particular—and the Western states where mercenaries are recruited and where they find refuge. Article 47, paragraph 1 limits itself to the statement that "A mercenary shall not have the right to be a combatant or a prisoner of war." Mercenarism is not regarded as a crime against humanity, as it is in Africa for example, and its suppression is not provided for, since the Protocol does not specify either the nature or the extent of the obligations imposed on states in this respect. There is no mention in any paragraph of the duty of states to abstain from recruiting, training, maintaining or placing their territories at the disposal of mercenaries. Mercenaries, according to commentators, benefit from the fundamental guarantees specified in Article 75 of Protocol I. There is no desire whatsoever among the Western States to forbid and seriously punish mercenarism, which they look upon with favour. Mercenarism is not included in the provisions of Article 85 defining grave breaches of humanitarian law.

Mercenaries and guerrillas are polar opposites; whereas the former fight to maintain colonial and racist domination, the latter

fight against such domination. The desire of some African delegates to see the ideological definition of mercenaries adopted was not fulfilled. It is true that this concept was far from being universally accepted within Africa itself. The delegate from Mali urged that only the payment of money be recognized as the motivation for mercenarism, and that it should in no way be identified or be related to any political motivation.

Africa could not obtain the inclusion of all of its claims in the Additional Protocols. Until these desired changes are brought about, it will be able through the provisions of the Libreville Convention to protect itself partially from the weaknesses and deficiencies of Protocol I with respect to the struggle against mercenarism, considered in Africa as an international crime.

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