Anti-government mercenaries and Katangan gendarmes at Bukavu, Congo, in 1967

MERCENARIES AND THE LAW

Ron Smith criticises plans to criminalise mercenary activity and to enable New Zealand to ratify the Anti-Mercenary Convention.

The International Convention against the Recruitment, Use, Financing and Training of Mercenaries arose from understandable African concerns about the influence of European mercenaries in the continent during decolonisation in the 1960s and early 1970s. These same concerns also gave rise to a very adverse treatment of the concept 'mercenary' in Protocol 1 (1977) to the Geneva Conventions of 1949. However, these events do not justify, in 2004, further anti-mercenary measures and, particularly, they do not require the ratification of the convention against mercenary activity, about which even the existing small number of parties have considerable doubt. As the British Foreign Secretary said in his foreword to an official green paper on the subject, 'Today's world is a far cry from the 1960s when private military activity usually meant mercenaries of the rather unsavoury kind involved in post-colonial and neo-colonial conflicts'.

Before adopting further strictures we ought seriously to consider the basis of present anti-mercenary prejudice and, particularly, the services that private military companies might provide in the modern world. Suitably regulated and appropriately used, mercenaries might offer timely humanitarian protection and security in cases where individual states or the United Nations (for a variety of reasons) cannot act. The ratification by further states of the Anti-Mercenary Convention would also tend to reinforce the anomalous combatant status of persons deemed to be mercenaries and, thus, undermine the humanitarian protection of such persons. Notwithstanding all this, New Zealand has presently before Parliament a Bill to criminalise mercenary activity and to enable New Zealand to ratify the Convention. This is the prime focus of the comments that follow.

The purpose of the Mercenary Activities (Prohibition) Act 2003 is said to be 'to implement in New Zealand law New Zealand's obligations under the Mercenaries Convention' and the reason that New Zealand would want to do this is that,

> Becoming a party to it demonstrates to the international community that New Zealand is among those countries that consider the recruitment and use of mercenaries to be unacceptable as a method of conflict resolution.

Of course, the crucial question that follows is: why is the use of mercenaries necessarily unacceptable as a method of conflict resolution? It is also instructive to ask what company New Zealand would be in when it does ratify the convention.

In addition, there is an acute problem of definition. The definition used in the Convention (and Protocol) and in the Mercenary Activities Bill is so complex as to present insuperable problems in its application. The parliamentary select committee process made a number of changes in this re-

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spect, but the fundamental problem remains. The concept as defined in the Bill is such that virtually none of the activity that people refer to when they ordinarily talk about 'mercenaries' would be caught by the definition. On the other hand, it is possible that the New Zealand government could find itself in diplomatic difficulty over the extradition requirements of the Convention when faced with requests to extradite citizens of states that are known to be sensitive about these things.

UN forces with mercenaries captured in the Congo province of Katanga in 1963

To date, the Convention has not been ratified by any of the five permanent members of the Security Council (Britain, China, France, Russia and the United States). Equally, Australia, Canada, India, Japan and Germany are not parties. In fact only 25 of the 191 states of the world have ratified or acceded to the treaty. The full list of parties (as of April 2004) is: Azerbaijan, Barbados, Belarus, Belgium, Cameroon, Costa Rica, Croatia, Cyprus, Georgia, Guinea, Italy, Libya, Maldives, Mali, Mauritania, Qatar, Saudi Arabia, Senegal, Seychelles, Suriname, Togo, Turkmenistan, Ukraine, Uruguay and Uzbekistan. This is the company we would be in. It is not immediately evident why it is the company we should seek.

Two categories

The definition of 'mercenary', as amended in the select committee process, follows exactly that of the 1989 Mercenaries Convention, which distinguishes two categories of mercenary, depending on whether 'a concerted act of violence' is involved. Otherwise the definitional elements are the same in each case. Being a mercenary entails:

- fighting in an armed conflict (or participating in a concerted act of violence);
- acting for the purpose of private financial gain (significantly more than other participants in the conflict);
- not being a citizen or resident or member of the armed forces of a party to the conflict; and
- not having been sent by a state on official duty.

The Bill defines the phrase 'concerted act of violence' (taken from the Mercenaries Convention) as 'an act of violence designed to . . . overthrow a government or otherwise undermine the constitutional order of the state; or undermine the territorial integrity of the state'. This is important since it constitutes one of the two grounds that the Convention provides for opposing mercenary activity. The other ground is a supposed link between mercenaries and drug trafficking. Both these arguments are given further discussion below.

The most extraordinary thing about the definition(s) of 'mercenary' employed in the Bill (and taken from the text of the Convention) is that it has now been comprehensively repudiated by the parties to the Convention itself. After two meetings, an expert panel convened by the parties concluded 'that the current definition in article 1 of the 1989 Convention was unworkable and deficient as a basis for effectively criminalising mercenary activity'.[1] As matters stand at present, there is *no agreed definition* of the crucial key term 'mercenary' in the Mercenaries Convention that the Mercenary Activities (Prohibition) Act will enable New Zealand to ratify. The appendix of the expert panel report does contain a pair of replacement definitions (which are every bit as complex as the ones they would replace), but, as paragraph 62 of that report indicates, 'consensus was not achieved'.

Despite this, it is clear that the committee stage amendments to the Bill were substantially influenced by considerations derived from the work of the expert panel (a lack of consensus, notwithstanding). Particularly, this includes the notion that mercenaries are persons who commit certain crimes. As the Commentary in the select committee report puts it, 'being a mercenary is not in itself an offence; some other conduct is required for criminal liability'. Extraordinarily, the Bill does not tell us what this 'other conduct' might be. The expert panel report referred to above is more forthcoming. These offences include destabilisation of legitimate governments, terrorism, sabotage etc. Surely the point here is that these are offences in themselves and may be committed equally by persons who are not 'mercenaries', however the term is defined. If, as the Commentary appears to say, being a mercenary is not in itself an offence, why do we need an international convention banning it and, particularly,

Legislation now before Parliament will permit New Zealand to ratify the 1989 International Convention against the Recruitment, Use, Financing and Training of Mercenaries. There are reasons to doubt whether this is a good idea. To begin with, there is a substantial and unresolved problem with the definition of the central concept, and this fact is accepted by the relatively few states that are already party. More positively, there is some opinion that, properly regulated, private military companies (which seem to be the main target of the Convention) might provide a valuable niche service to some of the more troubled of the world, both individually and collectively.

Mercenaries could have a role in establishing security in troubled areas

why did New Zealand need to legislate against it?

Traditional understanding

The traditional understanding of the term 'mercenary' is much broader than that employed in the Anti-Mercenary Convention (new or old definitions), and in the Bill, and this is another source of considerable anxiety. On the one hand, it is very unlikely that any professionally organised group would allow itself to be caught by the very narrow definition in the Convention. (Even the Sandline mercenaries engaged briefly by Papua New Guinea in 1997 were to be enrolled as Special Constables and thus could have been said to be 'members of the armed forces of a party to the conflict'.[2]) On the other hand, it is very likely that the term 'mercenary' will continue to be used in its general meaning as referring to persons who, individually or collectively, are recruited for military purposes by a state that is not their own. This would embrace Nepalese in the British and Indian armies (Gurkhas), Pakistanis in the Saudi Arabian military and various nationals in the French Foreign Legion, or, in earlier times, volunteers for the Spanish Civil War. It would also include private military forces like Executive Outcomes and Military Professional Resources, Inc. (MPRI).

Many of these individuals or groups are clearly motivated to serve by financial considerations, but in some cases (for example the French Foreign Legion) motivation may be more varied. In this sense, not all are 'mercenaries'. It may also be worth noting that New Zealand forces involved in the Vietnam War were also categorised by their adversaries as mercenaries. More generally, it is clear from the reports of the UN Special Rapporteur with responsibility for these things that the accusation continues to be widely used to condemn the activities of adversary parties.[3] The consequence of all this is that anti-mercenary provisions, however limited in their intended application (or definitional scope), are very likely to be used to condemn the participation of combatants from outside the area of conflict and to deny combatant status and humane treatment to a much wider range of belligerents.

African experience

White mercenaries, mainly from Europe, were employed by regional independence movements in various recently independent African countries like Congo (Katanga Province) and Nigeria (Biafra) from the 1960s. In 1975 the long-running civil war in Angola began. Again mercenaries were attracted. This was during the Cold War, and Western interests supported the FNLA and UNITA opposition, whilst communist interests supported the governing MPLA, with Cuba sending a large number of troops. With the Vietnam experience still fresh in their minds, the United States did not want to send regular forces, but it did support the utilisation of irregulars (mercenaries). The discipline and behaviour of mercenary forces in these earlier African wars was generally poor and the situation seemed to attract social misfits and psychopaths.

The consequence of all this was a strong adverse reaction to mercenary activity generally. This resulted in the anti-mercenary provisions of the 1977 Protocols to the Geneva Conventions and the 1989 International Convention Against the Recruitment, Use, Financing and Training of Mercenaries. In a later phase, private military companies like Executive Outcomes provided disciplined, formed units to support governments, like that of Sierra Leone, against rebel forces. The intervention of mercenary forces in Angola was said (by the UN Special Rapporteur in his 2003 report) to have aggravated and prolonged the conflict. There is something in this, but it is a rather partial observation. Outside support for either side in a civil war will generally have the effect of prolonging conflict and preventing a resolution by force, and the main effect in Angola (as elsewhere) was the intervention of states, rather than private forces.

Cuban example

The Cuban government complained in 2002 (as it had done earlier) about the use by Florida-based Cuban-American interests of 'organisations of mercenaries' against Cuba. Actions in this case included aeroplane hi-jackings and attacks on tourist centres. The perpetrators appear to have been Cuban citizens and for the most part Cuban residents. They were described as 'mercenaries' by the Cuban authorities because 'they acted under the orders, the financing and directions of a foreign power' (the United States). Those accused were sentenced to various periods of imprisonment and, in some cases, death. The sentences and the mode of the trials were subject to a great deal of criticism. Independent Cuban journalists who commented adversely on the proceedings were also condemned as 'mercenaries'.

On the face of it, it does not appear that these dissidents were mercenaries, even within the wider limits of the traditional understanding of the term. The cause was manifestly their own (however deplorable the means they employed) and there is little to suggest that they were motivated by money (although their activities were probably made possible by the financial assistance of others). It is interesting, though, that the proposed new definition of 'mercenary' (suggested by the expert group convened by the states who were party to the Convention) includes the possibility that a mercenary may be 'a national of the country affected by the crime' who is 'hired to commit the crime in his country of nationality'. This particular provision was not taken into the New Zealand legisla-

tion.

It seems evident that the Anti-Mercenary Convention is aimed primarily at private military forces of the Sandline or MPRI type, although, as earlier indicated, it seems likely that they would be able to avoid its application by providing that their personnel were enlisted in the armed forces of a state that is party to whatever conflict they were engaged in. But assuming that these mercenary companies are the target, it is important to be sure that they are the unmitigated evil that proponents of the Convention have portrayed them. There are grounds for thinking that this may not be so and that, on the contrary, such agencies could make a valuable contribution to global order.

Useful role

Private military forces have the potential to bring stability and security to states where order has collapsed and where the resources of existing governments are unable to cope. This happened in Sierra Leone in the period 1995–97, when forces supplied by Executive Outcomes were contracted by the National Provincial Ruling Council government of Valentine Strasser. Executive Outcomes' small force rapidly routed the forces of the Revolutionary United Front, which to that time had been terrorising the country. As David Shearer notes, 'where it [Executive Outcomes] was based, *civilians experienced the first security from the ravages of both their own army as well as the rebels*'.[4]

Disciplined and readily available forces of this kind could also have been of enormous value to the international community in relation to Rwanda and the Rwandan refugees. As it was, the familiar United Nations processes meant that nothing effective was done to stop the massacres, or protect the refugees in (then) eastern Zaire. There were similar UN failures in Somalia and the Balkans. The availability of disciplined and immediately available forces for humanitarian emergencies could be an enormous boon.[5] Further strengthening of anti-mercenary sentiment and law could cut right across this.

Much anti-mercenary sentiment stems from a supposition that mercenaries have a particular propensity for committing atrocities.[6] This may or may not have been true of white mercenaries supporting separatist forces in the 1960s and 1970s, but it is not evidently true of the modern mercenary company. The Sandline group

Tim Spicer, chief exectutive of Sandline International, in Port Moresby

that was briefly in Papua New Guinea signed a contract with the PNG government that specifically provided that they would operate within the provisions of the Geneva Conventions (and, of course, they were working for the government).[7] If such providers were accepted as part of the security scene, they would have every incentive to make and keep such a commitment, since by doing so they would increase their prospects of getting other contracts.

Drug trafficking

The enormous wealth-creation potential of the drug trade means that it is always an attractive source of finance for political enterprise, especially of the extremist and violent kind. In some cases the parties involved have been described as 'mercenaries' (as was the case with the Taliban in eastern and southern Afghanistan in 1998).[8] In other cases, insurgent parties, like the Kosovo Liberation Army in Kosovo in 1999, who again used the opium trade to finance their activities, were also associated with known private military organisations (in this case the Washington-based MPRI).

More generally, and particularly throughout the Cold War years, the intelligence organisations of many countries (or their surrogates) combined support for insurgent activities with acquiescence, or even active support, for drug-running, even when (as in the case of the United States) that policy conflicted with other interests, such as controlling crime and drug-use in their own country.

Of course, drugs are not the only source of revenue to finance wars. Mineral resources like diamonds can also function in this way. In the Sierra Leone case mentioned above, the RUF rebels controlled diamond-producing regions and their restoration to government hands provided the basis for paying the mercenary fee. Notwithstanding all this, there is no necessary connection between mercenary activity and drug trafficking, and certainly there are plenty of belligerent parties who finance their activities from the drug trade who are not in any sense mercenaries. This includes organisations whose 'core business' is drugs, rather than politics, such as those in Colombia.

Regrettable aspect

One of the most extraordinary and regrettable aspects of the 1977 Proto-

Chris Haiveta, PNG's Deputy Prime Minister and Minister of Finance, was the driving force behind the Sandline contract

col 1 to the Geneva Conventions of 1949 is that mercenaries (as there defined) are excluded from the category of lawful combatants (Article 47-1): 'A mercenary shall not have the right to be a combatant or a prisoner of war'. The implications of this are substantial. Mercenaries are in a worse situation with regard to the protection of their human rights than other individuals or groups who, not being part of any formal military formation, nonetheless take part in hostilities. Such individual(s) 'shall be presumed to be prisoner(s) of war' (Article 45-1). Interestingly, the most recent report of the Special Rapporteur on Mercenaries seems to accept that the Protocol is defective in this respect.[9] The 2003 Bill does nothing to remedy this situation. Indeed, by conforming to an ill-considered prejudice against mercenaries, it merely compounds the evil.

Three categories of private military provider may be distinguished:

- non-lethal service providers (logistics, mine-clearance);
- private security companies (industrial and diplomatic protection);
- private military companies (military training and offensive combat).

It is the latter that conform most closely to the traditional notion of the mercenary, although whether they would always (or even usually) fit the narrow definition in the international convention, or Protocol 1, is more open to doubt. However, there is no doubt that, suitably regulated, private military companies could play a valuable role in international security.

As matters stand, the provision of private military services, particularly of the active kind, goes on in an obscure nether-world of changing corporate institutions. The previously active specialist organisations, Sandline International and Executive Outcomes, are now quiescent and have been replaced by corporations that offer a wider range of services that could include active military activity. Contemporary examples of this are Northbridge Services Group and Isec Corporate Security Ltd. The latter are also associated with Westminster International, who offer a wide range of services. Westminster's site says that ISEC is able to 'deploy a large reaction force' for stabilisation and humanitarian protection purposes and with a strict code of conduct. Their motto is 'Ethics in Action'. A New Zealand company, Protective Response International (PRI), seems to offer services mainly in the private security area.

Moral questions

There is a longstanding prejudice against activities with a significant moral component that are undertaken for money. This is particularly the case when they seem to be done *just* for money, or where it seems that an activity would not be done except for the money. Historically this has applied especially to prostitution and to participation in war (although attitudes seem to be softening in relation to the former). As far as the killing of war is concerned, it may be that such an activity is seen as so morally obnoxious that it can only be justified on the basis of unavoidable necessity. Persons may only engage in it in self-defence or in the defence of others. This, of course, has been a formula for much ineffectual defence of just causes and the needless slaughter of inadequately trained volunteers and conscripted citizens.

The logic of the use of violent means for good ends is the same as the logic of any other worthwhile enterprise. It is best undertaken by persons who are competent, disciplined and properly equipped. We have professional and disinterested police forces maintaining order within states. Why is it unthinkable that we should have professional military forces (mercenaries) contributing to order in the international arena? The crucial issue is surely how they behave and not how they are constituted. Insofar as there is a valuable niche role that such forces could occupy in the modern world (and the author thinks there is), it is simply contrary to the national interest to legislate such a role away.

NOTES

1. Special Rapporteur on Mercenaries' Report to UN General Assembly, 2 Jul 2003 (A/58/115), para 59. An earlier green paper by the British government (2002) also concluded that 'the definition used in the UN Convention *is unworkable* for practical purposes'.
2. In 1994 two young men from Morrinsville (Robert and Christopher Grose) allegedly went to South Africa to fight for the Afrikaner Resistance Movement against the recently installed black-led government of Nelson Mandela. They were caught in South Africa in possession of explosives. These two rather naïve sons of a New Zealand farmer would be the most likely sort of 'mercenary' to be prosecuted if the proposed legislation became law. Any proceedings stemming from the International Convention against the Recruitment, Use, Financing and Training of Mercenaries will inevitably produce arbitrary and politically motivated prosecution in the tradition of 'Breaker Morant'.
3. For example, in the 1994 report to the UN Human Rights commission, the Rapporteur records both India and Pakistan making accusations regarding the use by the other party of 'mercenaries' in Kashmir and the Sind, respectively.
4. David Shearer, 'Privatising Protection', *World Today*, Aug–Sep 2001.
5. There is also some reason to believe that such forces would have greater 'staying power', through being rather less 'casualty averse' than nationally contributed contingents.
6. See, eg, the 1997 report of the Special Rapporteur: 'Mercenaries . . . constitute an international scourge whose sole aim is to perform violent acts which affect human lives, cause material damage and compromise economic activities, and to carry out attacks which, in more than one case, have unleashed or aggravated conflicts with catastrophic consequences for the peoples involved.'
7. Of course, this arrangement was unequivocally condemned by the Australian government (as it was by that of New Zealand). It may be that Australia opposed PNG use of mercenaries in part, at least, because it would increase the independence of action of the PNG government.
8. UN General Assembly Special Session, 8 Jun 1998.
9. UN General Assembly Report A/58/115, para 44.

NOTE FOR CONTRIBUTORS

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