

NOTES

AMERICAN MERCENARIES AND THE NEUTRALITY ACT: SHORTENING THE LEASH ON THE DOGS OF WAR

INTRODUCTION

Mercenaries¹ have participated in armed conflicts for over 3000 years.² Kings and despots utilized mercenaries to acquire and maintain power and wealth.³ Recent events in Africa⁴ and Central America⁵ indicate that a strong market for mercenaries still exists today and that mercenaries remain a real threat to national sovereignty and world peace. Third World representatives have expressed alarm

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1. A mercenary has been defined as a person who:
 - a) is especially 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 combatants of similar rank and function in the armed forces of that Party;
 - d) is neither a national of a Party to the Conflict nor a resident of a 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.

Final Act of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, June 10, 1977, reprinted in D. SCHINDLER & J. TOMAN, *THE LAWS OF ARMED CONFLICTS, A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS* 579 (1981).

The author finds this definition inadequate, however, because it excludes those individuals engaging in paramilitary activities for ideological rather than pecuniary reasons. A proper definition of mercenaries must not, as a matter of logic, differentiate between "freedom fighters" (such as Cubans in Angola), religious fanatics in the Middle East, or American citizens fighting in Central America.

2. W. BURCHETT & D. ROEBUCK, *THE WHORES OF WAR: MERCENARIES TODAY* 7 (1977).

For a history of mercenaries, see V. G. KIERNAN, *FOREIGN MERCENARIES AND ABSOLUTE MONARCHY, PAST AND PRESENT* 66-86 (1957); M. MALLETT, *MERCENARIES AND THEIR MASTERS: WARFARE IN RENAISSANCE ITALY* (1974); R. SMITH, *MERCENARIES AND MANDARINS: THE EVER-VICTORIOUS ARMY IN NINETEENTH CENTURY CHINA* (1978); A. MOCKLER, *THE MERCENARIES* (1964).

Until the French Revolution, most European monarchs considered it an accepted practice to conduct warfare with an army comprised predominantly of mercenaries. The death of feudalism and the emergence of the nation-state made mercenary armies obsolete. A. MOCKLER, *supra* at 14-15.
3. For example, Hannibal's army, which invaded and sacked Rome, was composed entirely of mercenaries. England built her empire with soldiers rented from Frederick the Great. *Id.* at 17-18. Great Britain's King George III utilized Hessian mercenaries to fight against American revolutionaries. Most recently, many of the white regimes in colonial Africa used mercenaries to fight against black insurgents during the African wars of liberation. W. BURCHETT and D. ROEBUCK, *supra* note 2, at 8-9.
4. Cesner and Brant, *The Law of the Mercenary: An International Dilemma*, 6 CAP. U. L. REV. 340 (1977). In June of 1976, Angola convicted 14 mercenaries and executed five, including one American, for participating in paramilitary activities against that nation. *Id.* at 340. See also 19 U.N. MONTHLY CHRON. Feb. 1982, at 64. In November, 1981, South African, Rhodesian and European mercenaries attacked Seychelles in an attempt to overthrow that nation's leftist government. Seychelles' army repulsed the attack. Most of the mercenaries returned to South Africa, which refused to extradite them for trial. *Id.* at 64-65.
5. 42 CONG. Q. 2230 (1984). On September 1, 1984, Nicaraguan troops shot down a helicopter, killing two Americans from Alabama fighting with the Contradistas. See also *U.S. Policy towards Nicaragua*, CONG. DIG. Nov. 1984, at 265.

over the growing use of mercenaries by "imperialistic" nations in covert operations.⁶ The United Nations responded to this threat by adopting a resolution urging all member nations to "consider effective measures to prohibit the recruitment, training, assembly, transit and use of mercenaries within their border."⁷

In the three years since the United Nations adopted this resolution, the United States has yet to enact legislation concerning the recruitment of mercenaries within the United States. The recent deaths of two American mercenaries in Nicaragua⁸ has spurred interest in formulating laws to restrict the involvement of private citizens in foreign conflicts.⁹ The Reagan administration, however, has stated that it will not discourage private citizens from participating in foreign civil wars¹⁰ since United States law¹¹ does not prohibit private military expeditions begun on foreign soil.¹²

While the Reagan administration's legal interpretation is technically correct,¹³ it ignores the impact American mercenaries have on national security and foreign relations. The Government's complicity in both the training of foreign mercenaries on American soil and the presence of American mercenaries abroad serves only to increase an already tense world situation.¹⁴ The administration's interpretation is also in conflict with the United Nations position on mercenaries. The

6. Note, *Leashing the Dogs of War: Outlawing the Recruitment and Use of Mercenaries*, 22 VA. J. INT'L L. 589, n. 4 (1982). During recent United Nations debates on mercenaries, representatives of the Third World emphasized the threat that mercenaries pose to their nations. See *Summary Record of the 17th Meeting*, at 2, U.N. Doc. A/C.6/36/SR.17 (1981).

7. Note, *supra* note 6, at 590. The U.N. stated that mercenary acts represent a threat to the "self-determination of all peoples struggling against colonialism, racism, and apartheid and all forms of foreign domination." G.A. Res. 35/48, 35 U.N. GAOR Supp. (No. 8) at 257-58, U.N. Doc. A/35/48 (1981). See also 18 U.N. MON. CHRON. Feb. 1981, at 64 (regarding establishment of an ad hoc committee to draft a convention on mercenaries). The U.N. has increasingly emphasized the threat presented by mercenaries fighting on behalf of repressive regimes in wars of national liberation. See *Drafting of an International Convention Against Activities of Mercenaries*, G.A. Res. 34/104, 34 U.N. GAOR Supp. (No. 46) at 42, U.N. Doc. A/34/46 (1980).

Communist and Third World Nations promoted the recognition of a distinction between volunteers fighting on behalf of "legitimate" liberation efforts and mercenaries hired to defend reactionary regimes. They were unable, however, to develop a workable criteria by which to make a distinction. See *Summary Record of 20th Meeting at 4*, U.N. Doc. A/C. 6/36/SR.20 (1981).

8. See CONG. Q. *supra* note 5, at 2230.

9. See, e.g., H.R. 6243, 98th Cong. 2nd Sess., 130 CONG. REC. H9526 (daily ed. Sept. 13, 1984). The bill, introduced by Rep. G. V. Montgomery (D-Miss.), would prohibit any member of the U.S. military reserves or National Guard from participating in any foreign conflict without the express permission of the President or Secretary of State. Montgomery opposes the involvement of these groups on the grounds that it erodes U.S. military readiness. CONG. Q., *supra* note 5, at 2230. Other congressmen have expressed the fear that "free-lance" military activity by private citizens will misrepresent United States official foreign policy towards a particular nation or conflict. *Id.* That members of the military reserves were acting as private citizens could be overshadowed by the implication that their membership in the U.S. Reserves "connotes U.S. government complicity." *Id.* at 2445.

10. CONG. Q., *supra* note 5, at 2230. See also Friedlander, *Mr. Casey's "Covert" War: The United States, Nicaragua and International Law*, 10 U. DAYTON L. REV. 265 (1985). The Reagan administration initially denied any official involvement, but acknowledged that U.S. embassy personnel throughout Central America were in contact with the mercenaries. *Id.*

11. Neutrality Act, 18 U.S.C. § 960 (1982). *Infra* notes 76-88 and accompanying text.

12. CONG. Q., *supra* note 5, at 2230.

13. The Reagan administration is not the first to adopt this interpretation of the Neutrality Act. The Kennedy, Ford and Carter administrations also utilized similar excuses to ignore the mercenary activities of U.S. citizens abroad. In 1961, Attorney General Robert Kennedy justified nonenforcement of the neutrality laws on the grounds that the invasion of Cuba at the Bay of Pigs, although organized in the United States, was launched from C.I.A. bases in Guatemala.

14. Sigmund, *Latin America: Change or Continuity*, 60 FOREIGN AFF. 629, 639 (1982). Nicaragua justified expanding its army to 50,000 soldiers with a 200,000 man militia, receiving \$28 million in military aid from Cuba and the Soviet Union, and allowing 1,500 Cuban advisors into the country in part because the United States has failed to enforce its neutrality laws. The Nicaraguans have also asserted that the presence of American mercenaries in Central America and U.S. support of rebels are a pro-

United Nations has reduced the mercenary to an outlaw.¹⁵ By refusing to enforce current laws or enact new laws which limit mercenary activity, the United States violates its moral and international legal obligation to respect the sovereignty of other nations.¹⁶ The mercenary activities of private citizens is incongruous with the purpose¹⁷ and formulation of American foreign policy.¹⁸

This note will examine international law concerning mercenaries and state responsibility for citizen actions. It then argues that the United States has a duty under international law to restrict the mercenary activities of its citizens, both within and without its borders, to activities expressly authorized by the President or Secretary of State. It also assesses the threat to foreign policy and national security posed by American mercenaries. Finally, the note will review the status of American mercenaries under the current law and proposes legislation which will restrict mercenary activity while complying with the constitutional right to travel.

MERCENARIES AND THE INTERNATIONAL COMMUNITY

Under traditional international law the state and the individual operated in different spheres. International law did not impute the purely private acts of a citizen to the state. Instead, traditional international law did not expect states to regulate the actions of its citizen beyond its borders.¹⁹ The nineteenth century *laissez-faire* position of no state control beyond its borders fails given the princi-

logue to an United States invasion. See *Nicaragua's Compliant of Aggression Discussed by Security Council*, 21 U.N. MONTHLY CHRON. Mar. 1984, at 7.

We again face very dangerous events, clearly aimed at bringing about a war of destruction in the Central American region. These [rebel] attacks on Nicaragua, U.S. monetary and military support for the rebel forces, and the presence of Americans fighting with the [rebels] could be the precursors of a war between Honduras and Nicaragua, provoked by the United States to justify intervention.

Id. at 7.

15. "[T]he practice of using mercenaries against movements for national liberation and independence is punishable as a criminal act and the mercenaries themselves are outlaws." U.N. Resolution No. 2548 (XXIV) (December 11, 1969). See also G. SCHWARZENBERGER, *INTERNATIONAL LAW AND ORDER* 234-36 (1971).
16. M. GARCIA-MORA, *INTERNATIONAL RESPONSIBILITY FOR HOSTILE ACTS OF PRIVATE PERSONS AGAINST FOREIGN STATES* 5 (1962) "Within its territory [each government has] the obligation to prevent the commission of injurious actions against other states." *Id.* at 5. See also C. FENWICK, *INTERNATIONAL LAW*, 301 (4th ed. 1965) "Intervention, 'directly or indirectly, for any reason whatever, in the international or external affairs of any other state is forbidden.'" *Id.* at 301 (quoting U.N. CHARTER art. 15.)
17. C. FENWICK, *FOREIGN POLICY AND INTERNATIONAL LAW* 1 (1968). "Foreign policy may be defined . . . as the attitude the United States takes in its relations to and with other countries which, it is believed best assures our national safety; how to protect our political, economic and social interest" *Id.* These goals are best served when the tools of foreign policy are restricted to a small, responsive group within society. This allows policy to be executed in a consistent manner. *Id.*
18. U.S. CONST. art. I, § 8, cls. 10 and 11; Sec. 8 states: "The Congress shall have power . . .

. . . To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations.

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water."

Art. II, 2, cl. 2, states:

"The President . . . shall have the Power, by and with the Advice and Consent of the Senate, to make Treaties, . . . and he shall nominate . . . Ambassadors. . . ."

The Constitution grants exclusive control of foreign policy to the Federal Government, particularly the executive branch. Allowing private citizens to engage in hostile acts against other sovereigns with whom the United States is at peace interferes with the implementation of foreign policy and the protection of national security by those bodies designated by the Constitution.

19. See M. GARCIA-MORA, *supra* note 16, at 6-8. This attitude reflected a *laissez-faire* perception of international law. A state had no right or duty to restrict the freedom of its citizens to engage in voluntary activities against another nation. This coincided with the traditional international law per-

ples of twentieth century global interdependence articulated in the United Nations charter.²⁰

Mercenaries and International Law

Traditional customary international law²¹ did not hold a nation vicariously liable for the acts of its citizens.²² International law only held a nation liable for the acts of private persons when the nation acquiesced in the performance of those acts or failed to exercise due diligence in preventing them.²³ A neutral nation

ception of the sovereign enjoying absolute rights within its boundaries, but only within its boundaries. *Id.* at 6.

The failure of traditional international law to obligate neutral states to restrict their citizens' mercenary activities ignores the actual harm they cause. In analyzing international law, Professor John B. Moore states:

No act . . . could be more clearly unneutral than that of a citizen of a neutral country going abroad and enlisting in the military or naval service of a belligerent; and yet this is an act which a neutral government is not obliged to prevent, and neutral governments do not in fact undertake to prevent it.

C. HYDE, *INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES* 2306 (2d rev. ed. 1945).

20. U.N. CHARTER art. 1.

The purpose of the United Nations is "to maintain international peace and security . . . [through] effective collective measures for the prevention and removal of threats to peace . . ." *Id.*

The Charter requires nations to take necessary steps to alleviate threats to world peace. *Id.* at art. 2, 14. See also M. GARCIA-MORA, *supra* note 15, at 97; A. CASSESE, *THE NEW HUMANITARIAN LAW OF ARMED CONFLICT* 120-21 (1979).

21. M. AKEHURST, *A MODERN INTRODUCTION TO INTERNATIONAL LAW* 25-34 (4th ed. 1982). Customary international law is one of the sources utilized by the International Court of Justice to decide disputes. *Id.* at 23. See also STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, art. 5, § 1, cl. b., reprinted in S. ROSENNE, *DOCUMENTS ON THE INTERNATIONAL COURT OF JUSTICES* 79 (1979). Customary law arises primarily from the content of states' public pronouncements by government officials, respected treatises or court opinions. Akehurst, *supra* at 25-26.

Some question exists concerning the role of customary international law in relation to American domestic law. In *The Paquete Habana*, 175 U.S. 677 (1900), the Supreme Court stated:

International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations

175 U.S. at 700.

Cases following *The Paquete Habana* have split on whether customary international law is a part of domestic law. Holding for inclusion, *See Filartiga v. Pena-Irala*, 630 F.2d 876, 886 (2d Cir. 1980); *Fernandez v. Wilkinson*, 505 F. Supp. 787, 798 (D. Ks. 1980), *aff'd* *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382 (10th Cir. 1981). Even before *The Paquete Habana* the Supreme Court had incorporated the law of nations into domestic law. See *The Nereide*, 13 U.S. (9 Cranch) 388, 422 (1815); *Ware v. Hylton*, 3 U.S. (3 Dall.) 198 (1796); *Republica v. DeLongchamps*, 1 U.S. (1 Dall.) 113, 119 (1784).

In contrast, the District of Columbia Circuit affirmed dismissal on the grounds that international law did not give the court jurisdiction. See *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 777 (D.C. Cir. 1984) (*per curiam*) (Bork, J., concurring); *United States v. Mitchell*, 369 F.2d 323 (2d Cir. 1966), *cert. denied*, 386 U.S. 972 (1967).

Commentators have also disagreed on what, if any, weight courts should give customary international law. Henkin, *International Law in the United States*, 82 MICH. L. REV. 1555 (1984).

That international law is part of the law of the United States is asserted and accepted today as it was at our national beginnings . . . [I]t seems right too that the courts should continue to give effect to developments in international law to which the United States is a party, unless Congress is moved to reject them as domestic law. . . .

Id. at 1569. See also Dickinson, *The Law of Nations as Part of the National Law of the United States*, 101 U. PA. L. REV. 26, 27 (1952). *Contra* Goldklang, *Back on Board The Paquete Habana; Resolving the Conflict Between States and Customary International Law*, 25 VA. J. INT'L. L. 144 (1984).

22. Burmester, *The Recruitment and Use of Mercenaries in Armed Conflict*, 72 AM. J. INT'L. L. 37, 42 (1978); See also M. GARCIA-MORA, *supra* note 16, at 81.
23. C. FENWICK, *supra* note 17, at 390. A state's responsibility could arise either through a direct act against a foreign state or by offenses against foreign aliens residing, permanently or temporarily, in the nation of the offenders. States have the responsibility to extend to aliens the same protection offered its

only has a duty to remain impartial. Impartiality meant a neutral state would not allow the formation of armed bands or the operation of recruiting stations within its territory.²⁴ The nation had no duty to restrict volunteers from offering their services to foreign belligerents.²⁵ Instead, traditional international law associated volunteers with the belligerents they joined.²⁶ This *laissez-faire* construction of international law was codified in 1907,²⁷ and remained the controlling law until after World War II.²⁸

Although the United Nations has not specifically banned the use of mercenaries, it has, through various conventions and resolutions,²⁹ lowered their status to that of a common criminal.³⁰ The United Nations equates mercenary acts with a violation of state sovereignty.³¹ Mercenary acts breach the founding principles of the United Nations of international peace, security and protection of the territorial integrity of independent states.³² In 1969, the U.N. General Assembly

own citizens. *Id.* at 391. See J. STARKE, *INTRODUCTION TO INTERNATIONAL LAW*, 294 (9th ed. 1984). Traditional international law did hold nations vicariously responsible for the private acts of its officers or agents. The "imputability" of an act depended on two circumstances: "conduct of a state's . . . official in breach of an obligation defined in a rule of international law; [and] that according to international law, the breach will be attributed to the state." *Id.* at 294.

24. Garcia-Mora, *International Law and the Control of Revolutionary Activities by Political Refugees Under American Law*, 1961 WASH. U.L.Q. 195, 196 (1961). As Judge Huber stated in *Island of Palmas* (U.S. v. Ned.) 2 R. Int'l Arb. Awards 831 (1928):

Territorial sovereignty . . . involves the exclusive right to display the activities of the State. This right has a corollary duty: the obligation to protect within [its] territory the rights of other states, in particular their right of integrity and inviolability in peace and war, together with the right each may claim for its nationals in foreign territory.

Id. at 839.

25. Burmester, *supra* note 22, at 42.
26. Myers, *Contemporary Practice of the United States Relating to International Law*, 54 AM. J. INT'L L. 632, 656 (1960).
27. Hague Convention (V) of 1907, Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, 36 Stat. 2310, TS No. 540 (1908), reprinted in *LAWS OF ARMED CONFLICT* *supra* note 1, at 847. Article 5 provides: "A neutral power . . . is not called upon to punish acts in violation of its neutrality unless the said acts have been committed on its own territory." *Id.* at 849. See also A. CASSESE, *supra* note 20, at 118-19.
28. M. GARCIA-MORA, *supra* note 16, at 68-69.
29. Regarding the legal significance of U.N. Resolutions and Conventions, see J. CASTENEDA, *LEGAL EFFECTS OF UNITED NATIONS RESOLUTIONS* (1969) ("[U.N. Resolutions] dealing with the external activity of the organization do not legally require their recipients to comply with their content, that is, they are recommendations") *Id.* at 71, and O. ASAMOAH, *THE LEGAL SIGNIFICANCE OF THE DECLARATIONS OF THE GENERAL ASSEMBLY OF THE UNITED NATIONS* (1966) ("[R]esolutions of the Assembly, apart from creating precedence . . . in appropriate circumstances constitute formal or material sources of international law") *Id.* at 46.
30. Additional Protocol I to the Geneva Convention art. 47 § 1, reprinted in *LAWS OF ARMED CONFLICTS* *supra* note 1, at 579. "A mercenary shall not have the right to be a combatant or a prisoner-of-war." This denies a mercenary the rights afforded combatants under the Geneva Convention. See Resolution No. 2548 (XXIV) of December 11, 1969. The "practice of using mercenaries against movements for national liberation and independence is punishable as a criminal act and the mercenaries themselves are considered outlaws." *Id.* The resolution in essence allows nations against whom the mercenary has fought to prosecute that individual under domestic laws.
31. Note, *supra* note 6, at 594. "[T]he sending of mercenaries, by or on the behalf of a state, in carry out acts of armed force against another state, constitutes 'aggression' as contemplated by the [U.N.] Charter." *Id.*, (quoting Definition of Aggression, G.A. Res. 3314, 29 GAOR Supp. (No. 31) at 142-43, U.N. Doc. A/9631 (1975)).
32. U.N. CHARTER, art. 2, § 4, 59 Stat. 1031, 1037, TS No. 993, at 7 (1945). "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the purposes of the United Nations." *Id.* at 2(4).

Mercenary activities have gained greater attention in the U.N. since the emergence of the non-aligned nations as a concerted voice. This probably reflects the reality that mercenaries are most often used against these nations. Also, mercenaries most often originate from European or North American nations. One basic tenet of mercenaries is, "white and west are wisest and best." W. BURCHETT & D. ROEBUCK, *supra* note 2, at 116.

adopted a resolution which made the use of mercenaries a crime.³³ The resolution encourages the passage of domestic sanctions against recruiting, financing and training mercenaries within a state's jurisdiction. The resolution also encourages states to pass domestic legislation prohibiting their nationals from participating in paramilitary expeditions against foreign states.³⁴ Four years later, the General Assembly adopted a resolution endorsing the legal status of "freedom fighters", as opposed to mercenaries.³⁵ In 1975, U.N. Resolution 3314 brought the use of mercenaries within the general definition of "aggression"³⁶ by stating that, with or without a declaration of war, the sending of "armed bands, groups, irregulars or mercenaries, which carry out acts of armed forces against another state" shall constitute an act of aggression.³⁷

Finally, in 1977, Additional I Protocol to the Geneva Convention³⁸ further altered the legal status of mercenaries. The Convention stripped mercenaries of their legal status as participants in armed conflict.³⁹ Without this status mercenaries lack the protection afforded other combatants. By categorizing mercenaries as outlaws, the Protocol places them outside the accepted methods of warfare and within the definition of hostile acts which international law prohibits.

Since amending the Geneva Convention of 1949,⁴⁰ the United Nations has attempted to expressly outlaw mercenaries. In 1980, the United Nations established the Ad Hoc Committee on the Drafting of an International Convention against the Use, Financing and Training of Mercenaries.⁴¹ While the committee has not yet produced a definitive convention outlawing mercenary activity, at least one nation, relying on the United Nations proclamations, has prosecuted captured

33. See *supra* note 5.

34. See Resolution No. 2548 *supra* note 28. (The language of the resolution reflected the increased influence of Third World and Communist Bloc nations).

While not passed in response to the U.N. resolution, the United States presently has laws proscribing the recruitment, training and financing of mercenaries within its borders. 18 U.S.C. §§ 959-960 (1982). It has not, however, taken any steps to regulate the mercenary actions of Americans abroad.

35. Resolution No. 2548 (XXIV) of December 11, 1969, *quoted in* G. SCHWARZENBERGER, *supra* note 15, at 235. Resolution No. 3103 (XXVII) contained the identical distinction. A "freedom fighter" is a "volunteer" assisting in the liberation of oppressed peoples. In contrast, a mercenary assists in the propagation of repressive regimes. Obviously, one person's "freedom fighter" is another's mercenary, depending on their ideological perspective.

36. Definition of Aggression, G.A. Res. 3314, 29 U.N. GAOR Supp. (No. 31) at 142-43, U.N. Doc. A/9631(1975), *reprinted in* Note, *supra* note 6, at 594, n.32.

37. See D. SCHINELLER & J. TOMAN, *supra* note 1, at 579.

38. *Supra* note 30.

39. D. SCHINDLER & J. TOMAN, *supra* note 1, at 577-79 (providing combatants, prisoners of war and belligerents certain rights).

40. Convention (I) For the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field, July 6, 1906, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 5.

41. 18 U.N. MONTHLY CHRON. Feb. 1981, at 64, Resolution No. 35/48 Dec. 4, 1980. The Committee has met for the past three years but has yet to present a final draft for adoption. The committee has concentrated on: defining mercenaries; penalties for the offense; implementing the provisions of the convention by appropriate administration and legislative measures; status of mercenaries; establishment of jurisdiction . . . ; concurrent jurisdiction by which a state having jurisdiction might invoke the convention's provisions against the offending State before any competent international organization or tribunal; preventive measures against mercenary activities; mutual assistance among States; the taking into custody of mercenaries; judicial guarantees; communication of the outcome of final proceedings; extraditable offenses; and actions for damage/reparation. 19 U.N. MONTHLY CHRON. May 1982, at 37.

The committee has put forth draft articles imputing the actions of mercenaries to their nations of origin and requiring that the state prosecute offenders. The draft would encourage states to pass legislation necessary to inhibit mercenaries from leaving their territory. *Id.* at 36. The United States, among others, has objected to preambular language which frames mercenary activities as a violation of international law when the mercenaries "[impede] the self-determination of all peoples struggling against colonialism, racism, and apartheid and all forms of foreign domination." 18 U.N. MONTHLY CHRON. Feb. 1981 at 64. Given the numerical strength of the Third World and Communist bloc nations on the committee, any final draft will likely reflect a bias against Western-backed forces.

soldiers of fortune.⁴²

The United Nations has outlawed both mercenary acts and interference with the internal affairs of another country. Both violate basic principles of international law.⁴³ The United States has endorsed the basic ideals of international law⁴⁴ and has advocated the concept of an ordered international legal system as a means of achieving these goals.⁴⁵ The United States Constitution expressly provides that Congress will pass laws to "define and punish . . . offenses against the law of nations."⁴⁶ Under international law, this must be done with due diligence.⁴⁷ Therefore, the United States has a duty to enact laws designed to vitiate any act, committed domestically or abroad, which breaches these principles of international law.⁴⁸ The United States owes this duty to all nations, whether or not it executes treaties of non-aggression or cooperation, since these are "obligations *erga omnes*."⁴⁹

In addition to its legal obligation, the United States also has a moral duty to prevent the mercenary activities of Americans. As a sovereign, the United States must respect the territorial integrity and political legitimacy of nations with whom

42. Cesner and Brant, *supra* note 4, at 339. In 1979, Angola utilized the protocol to convict a number of mercenaries.

43. U.N. CHARTER, art. 1, § 1. ("The purpose of the United Nations are: To maintain international peace, . . . to take effective collective measures for the prevention and removal of the threats to the peace, and for the suppression of acts of aggression or other breaches of the peace. . . .") *Id.* at 1(1).

44. Charter of the United Nations and Statute of the International Court of Justice, 59 Stat. 1031, TS No. 993 (1945).

45. S. ROSENNE, DOCUMENTS ON THE INTERNATIONAL COURT OF JUSTICE 415 (2d ed. 1979). President Truman, with the advice and consent of the Senate (Resolution of August 2, 1946) subject the United States to compulsory jurisdiction before the International Court of Justice on any question of fact which, if proven, would constitute a breach of international obligation. Truman reserved the right to unilateral jurisdiction over matters essentially within the domestic jurisdiction of the United States. *Id.* at 415. See 61 Stat. (2)1218(1947), T.I.A.S. No 1598.

President Reagan invoked the reservation to deny the World Court jurisdiction in Nicaragua's suit concerning the CIA's mining of Nicaraguan ports. See Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.) 1984 I.J.J. 4, reprinted in 23 INT'L LEGAL MATERIALS at 472-74. See Comment, *Application of El Salvador to Intervene in the Jurisdiction and Admissibility Phase of Nicaragua v. United States*, 78 AM. J. INT'L. L. 929 (1984) and, Hassan, *A Legal Analysis of the United States' Attempted Withdrawal From the Jurisdiction of the World Court in the Proceeding Initiated by Nicaragua*, 10 U. DAYTON L. REV. 295 (1985).

See also Moynihan, *International Law & International Order*, 11 SYRACUSE J. INT'L. L. & COM. 1 (1984). Senator Moynihan, former U.S. Permanent Representative to the United Nations, argues that United States observance of international law "is a practical need . . . as much as domestic law is a practical need . . . absent law, there would be no sanction for conduct that injures society." *Id.* at 8. (emphasis in original).

46. U.S. CONST. art. I, § 8, cl. 10.

47. J. MOORE, A DIGEST OF INTERNATIONAL LAW, 61 (1906) citing, *United States v. Arjona*, 120 U.S. 479 (1887). See also *The Paquete Habana*, 175 U.S. 677, 700 (1900); and *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

48. Paust, *Federal Jurisdiction Over Extraterritorial Acts of Terrorism and Nonimmunity for Foreign Violators of International Law under the FSIA and the Act of State Doctrine*, 23 VA. J. INT'L L. 191, 227 (1983). Failure to fulfill international obligations could seriously impair United States foreign policy objectives. The Federal Government itself has acknowledged that the failure to enforce basic international law in domestic courts would not only be inappropriate, but also "might seriously damage the credibility of our nation's commitment" to an international legal system. See Memorandum for the United States as Amicus Curiae, *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), reprinted in 19 I.L.M. 585, 604 (1980). (The Government specifically addressed the issue of human rights, but it applies to international law generally.) See Paust, Book Review, 56 N.Y.U. L. REV. 227 (1981).

49. Case Concerning The Barcelona Traction Light and Power Co. (Belg. v. Spain), 1970 I.C.J. 4. The International Court of Justice found that every nation had obligations to the world community in general, as opposed to those owed only to nations with which it had executed a treaty. Among these obligations the court cited the prevention of outlawed acts of aggression, genocide and violations of basic human rights. See Paust, *supra* note 47, at 225, and, *The Antelope*, 23 U.S. (10 Wheat.) 66, "No principal of general law is more universally acknowledged than the perfect equality of nations." *Id.* at 122.

it is at peace.⁵⁰ Given the present international situation,⁵¹ this rule should apply not only to the authorized acts of government personnel and their proxies, but also to mercenaries.⁵² A nation cannot avoid responsibility by hiding behind the excuse that it does not have responsibility for the acts of private individuals. The hostile acts of private individuals against a foreign state violate that nation's dignity as much as an invasion by official armed forces.⁵³ Current international law, as represented by U.N. resolutions, and the United States own admissions, would dictate that a member of the international community take the necessary domestic steps to eradicate mercenaries.

Mercenaries, Foreign Policy and National Security

In addition to furthering the purposes of international law, the United States could produce a more cohesive foreign policy by outlawing mercenary activity.⁵⁴ The most important goal of a nation's foreign policy is to protect its national

50. See Garcia-Mora, *supra* note 24, at 196 (quoting Judge Huber in Island of Palmas).

51. 62 FOREIGN AFF. 777-804 (1983). During 1984, Foreign Affairs catalogued conflicts between Iran and Iraq, Israeli troops and Moslems in Lebanon; Christian and Moslem factions in Lebanon, Russian troops and Afghan rebels, guerillas in El Salvador and Nicaragua and the governments of those nations, and the U.S. and Grenada; terrorist attacks on U.S., French, Israeli, Phillippine, Peruvian, South African and South Korean officials and troops; and civil strife in Northern Ireland, India, Bangladesh, the Phillipines, Cambodia, the Sudan, Chad, Zimbabwe and Nigeria.

52. Two schools of thought exist on state responsibility for the hostile acts of private persons. One view holds the state liable only if the injured party shows fault. A second view holds the state strictly liable for the conduct of its citizens.

Hugo Grotius first articulated the theory of fault-based liability. "A civil community, just as any other community, is not bound by the acts of the individual, apart from some act or neglect of its own . . . , to participate in a crime a person must not only have knoweldge of it but also have the opportunity to prevent it." H. GROTIUS, *DE JURE BELLI AC PACIS LIBRI TRES* bk II, ch XXI, § 2 (Kelsey trans. 1925).

Grotius' theory of state liability continues to have force in modern international law. See, e.g., E. BROCHARD, *THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD OR THE LAW OF INTERNATIONAL CLAIMS* (1915) and C. FENWICK, *INTERNATIONAL LAW* 310 (3d ed. 1948).

In contrast, Pufendorf presumes the existence of fault. "Now it is presumed unless its lack be clearly established." S. PUFENDORF, *DE JURE NATURAE ET GENTIUM LIBRI OCTO* bk. VIII, ch. VI, § 12 (W. Oldfather Trans. 1934).

Professor C.C. Hyde has carried Pufendorf's philosophy forward in international law. "[T]he society imposes upon each of its members . . . certain duties to prevent the occurrence of . . . acts . . . that are . . . necessarily defiant of the principles of international law, or which may be productive of a situation at variance with what these principles appear to demand" C. HYDE, *INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES* 36 (2d ed. 1945). For a complete discussion of the competing views of state liability and the hostile acts of private citizens, see generally M. GARCIA-MORA, *supra* note 16.

Under either interpretation the U.S. could potentially incur liability for the mercenary acts of its citizens. Obviously, it would also incur liability under a system of implied state complicity because the U.S. has the capacity to restrict mercenary activities.

53. [T]he Nation sovereign, must not allow its citizens to injure the subjects of another state, much less to offend that state itself. . . . Nations should mutually respect one another and avoid any offense, injury or wrong. . . . If a sovereign who has power to see that his subjects act in a just manner permits them to injure a foreign nation . . . he does no less a wrong than if he injured it himself. Finally, the very safety of the state and of the society at large demands this care on the part of every sovereign.

E. DE VATTTEL, *LE DROIT DES GENS*, bk. II, ch. VI, 72 (Fenwick Trans. 1916).

The United States has adopted such a stance towards nations which condone or support the terrorist activities of their nationals. In particular, the United States had accused Nicaragua of exporting revolution and aggression throughout Central America. During the debate on the CIA's mining of Nicaraguan harbors, U.S. delegate to the U.N., Charles Lichenstein, stated: "[Since the Sandinista takeover] coffee has given way as Nicaragua's principle export to so called indigenous revolutions and to the systematic effort to destabilize free and democratic Governments throughout Central America." *Nicaragua's Complaint of Aggression Discussed by Security Council*, U.N. MONTHLY CHRON., March 1984, at 7-8. The United States should at least be held to its own standards of nonintervention.

54. C. FENWICK, *supra* note 17 at 3-4. The formulation of a consistent foreign policy has a close relation to the purpose and enforcement of international law.

security.⁵⁵ Attaining this goal of national security is accomplished only by centralizing the mechanisms of foreign policy in one democratically responsive body. The Constitution places exclusive control of foreign affairs in the Federal Government's hands.⁵⁶ Mercenaries take the execution of foreign policy and the protection of national security out of the Government's hands, hence the public's hands, and places it with private individuals interested only in pecuniary or ideological gain. Thus, the Government needs to take steps to restrict the free movement of mercenaries, to prevent their activities from interfering with the execution of foreign policy and the protection of national interests.

Mercenaries operate outside the sphere of government control, yet their acts reflect negatively on their nation. By allowing volunteers to engage in mercenary activities, a nation implies that it condones their actions and that they represent official policy. Moreover, since mercenary actions may draw a nation into a conflict it did not seek,⁵⁷ or one it unequivocally hoped to avoid, unauthorized paramilitary activities threaten the safety and security of other Americans.⁵⁸ Ironically, because mercenaries operate outside the sphere of official policy, an administration seeking to influence foreign events could utilize mercenaries as proxies for government troops. By using private armies, the government can covertly participate as a third party in foreign conflicts while maintaining an official position of neutrality. In such a case the administration violates its fiduciary duty to the electorate. The covert invasion of another country, either by official troops or the use of mercenaries, undermines the democratic decision-making process.⁵⁹ In a democratic society the nation should engage in war or armed conflict only after public debate and discussion. The Constitution dictates that warfare be public.⁶⁰

55. *Id.* at 1.

56. Note, *Settlement of the Iranian Hostage Crisis: An Exercise of Constitutional and Statutory Executive Perogative in Foreign Affairs*, 13 N.Y.U. J. INT'L L. & POL. 993, 1003-1004 (1981). The Constitution divides the conduct of foreign affairs between the Congress and the Executive. Congress retains power over interstate commerce to "lay and collect . . . Duties, Imposts, and Excises . . . ; define and punish . . . felonies committed on the high Seas, and offenses against the law of Nations . . . ; declare War . . ." U.S. CONST., art. I, § 8.

The president may exercise his power as "Commander-in-Chief of the Army and Navy . . . when called into actual Service of the United States . . . make treaties (with the Advise and Consent of the Senate) . . . [and] appoint Ambassadors." U.S. CONST., art. II, § 2. See also *Zscherning v. Miller*, 389 U.S. 429 (1968); *Hines v. Davidowitz*, 312 U.S. 52, 64 (1941); and, *Fong Yue Ting v. United States*, 149 U.S. 698 (1893).

The courts have recognized the President as the "sole organ" of American foreign policy. See, e.g., *U.S. v. Hooker*, 607 F.2d 286 (9th Cir. 1979) cert. denied, 445 U.S. 905 (1980); *Neil-Cooper Grain Co. v. Kissinger*, 385 F. Supp. 769 (D.D.C. 1974). See also H. KISSINGER, *AMERICAN FOREIGN POLICY* 349 (3d ed. 1977).

57. 42 CONG. Q., *supra* note 5 at 2445.

58. M. GARCIA-MORA, *supra* note 16, at 9. The presence of mercenaries not only represents a violation of international law, it also threatens national security. Thus, tolerating mercenaries violates the executive's fiduciary duty to the domestic population.

59. Lobel and Ratner, *Is United States Military Intervention in Central America Illegal?* HUM. RTS. Fall 1984 at 22.

60. *Id.* "[T]he Constitution, War Powers Act and Neutrality Act, are designed to ensure that the American people decide when to go to war with another country . . . disregarding these . . . provisions . . . threatens the democratic decision-making process upon which our government ought to rest." *Id.* at 54.

See also THE FEDERALIST No. 26, at 159 (A. Hamilton) (E. Meade ed. 1937). (Hamilton argued that resting the power over military spending in Congress, to be exercised bi-annually, would grant the people control of foreign relations, and protect them from an unfettered military). "As often as the question comes forward, the public attention will be roused and attracted to the subject, by the party in opposition. . . .

If such presumptions [that all elected officials would conspire to deprive the electorate of their

The fear that the acts of an uncontrolled individual⁶¹ would draw the United States into conflict with one of the European powers led to the passage of the initial neutrality laws.⁶² Early American courts also recognized the potential harm individuals, particularly mercenaries, could do to national security. For example, in 1866, the Circuit Court of New York, in explaining the purpose of the neutrality laws, stated that a sovereign would lose its power to formulate foreign policy if it allowed individuals to engage in hostilities against foreign nations.⁶³ The court stated that the actions of a few could lessen a nation's control over national security by embroiling an unwitting nation in an undesired confrontation.⁶⁴ With the increase in terrorism, civil wars, and wars of liberation,⁶⁵ the likelihood that individual acts could precipitate an international conflict is greater today than it was in 1866. The penchant of Western mercenaries to attack leftist states and Third World nations only intensifies tensions and increases the difficulty of conducting affairs with these nations.⁶⁶

proper power over all affairs] can not fairly be made, there ought at once be an end of all delegated authority." *Id.* at 163-64.

See also H. KISSINGER, *supra* note 56, at 205. "In a democracy, the conduct of foreign policy is possible only with public support. Therefore . . . government owes . . . an articulation of the purposes which its policies are designed to serve — to make clear our premises, to contribute to enlightened debate, and to explain how [these] policies serve the American peoples." *Id.*

61. THE FEDERALIST NO. 3, 14 (J.Jay) (E. Earle ed. 1937). The framers of the Constitution recognized the threat that individual actions posed to national security. Jay argued that the power over foreign affairs should rest exclusively in the Federal Government because such an arrangement would provide the greatest security for the people.

The number of wars which have happened or will happen in the world will always be found in proportion to the number and weight of the causes, whether *real* or *pretended*, which *provoke* or *invite* them. If this remark be just . . . (then fewer) . . . causes of war are likely to be given by *United America* as by *disunited America* . . . it will then follow that . . . the Union" could better avoid conflict than the thirteen separate states.

Id. at 14. Or, presumably, isolated individuals pursuing their personal fortunes or ideologies.

Hamilton recognized that failure to centralize foreign relations in the Government endangered the safety of the whole. "[T]he peace of the *Whole* ought not to be left at the disposal of a *Part*. The Union will undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for an injury ought ever to be accompanied with the faculty of preventing it." *Id.* at No. 80 (A. Hamilton) at 517 (emphasis in original).

62. See Lobel, *The Rise and Decline of The Neutrality Act: Sovereignty and Congressional War Powers in United States Foreign Policy*, 24 HARV. INT'L L. J. 1, 15 (1983); Note, *Nonenforcement of the Neutrality Act: International Law and Foreign Policy Powers Under The Constitution*, 95 HARV. L. REV. 1936, 1961 (1982).

63. Charge to Grand Jury — Neutrality Laws, 30 F. Cas. 1017 (C.C.N.D.N.Y. 1866) (No. 18,264)

The duty of a government to restrain its own citizens . . . from engaging in military expeditions against powers with which such government is at peace, arises out of the law of nations, and its faithful observance is of the very highest importance to the peace of the world, the stability and good order of society and the welfare of mankind. Were individuals . . . by whatever motives . . . permitted, upon their own motion, to organize warlike enterprises . . . and engage in excursions into the territory of . . . friendly nations, governments would no longer have control of the momentous questions of war and peace.

Id. at 1018.

64. *Id.*

65. *Treasury, Postal Service & General Government Appropriation for Fiscal Year 1983, Before the Subcomm. on Treasury, Postal Service & General Government Appropriations of the House Comm. on Appropriations*, 97th CONG., 2nd Sess. 1112-14 (1982) (Statement of John Simpson, Director, U.S. Secret Service). Attacks against diplomats alone increased from 213 against diplomats of 31 nations in 1970 to 409 attacks against diplomats from 60 countries in 1980. *Id.* at 1114. The Secret Service has reports of attacks by 103 separate terrorist organizations. *Id.* at 1119. See also *supra* at note 50.

66. M. GARCIA-MORA, *supra* note 16, at 10. Western democracies have found it easy to ignore the illegality of mercenary attacks on states whose political or economic philosophies do not coincide with their own. They have argued that international law does not require a democratic state to prevent its citizens from attacking a totalitarian or Marxist state. They argue that such a policy would violate the national security interests of a democratic state. This justification, however, ignores the basic principles of international law which cross ideological borders. It also denies the reality that, in the contemporary world of global interdependence, Western nations must learn to deal with the Eastern bloc and Third World nations on a level above warfare.

Foreign sovereigns, particularly in the Third World, have become increasingly suspicious of United States interference with their internal affairs.⁶⁷ Americans cease to be welcome tourists or advisors and instead are the objects of scorn and mistrust. Allowing Americans to participate in paramilitary operations only serves to justify the suspicions of foreign sovereigns, endanger the safety of Americans abroad, and interfere in the formulation of foreign policy.

Both Democrat and Republican Presidents have justified military actions under the guise of "coming to the rescue" of American citizens.⁶⁸ For example, the Reagan administration justified the invasion of Grenada as a rescue mission of American medical students.⁶⁹ The importance of the Grenada invasion lies in its precedential value. Future Presidents seeking to strike a blow against perceived threats from a foreign country, could utilize the "coming to the rescue" justification to invade a nation where the rescuees are not innocent students, but mercenaries. Such a scenario seems unlikely until one considers that a President normally acquires popular and political support when defending Americans abroad.⁷⁰

67. These suspicions are not without justification. The Central Intelligence Agency and other government agencies have attempted on numerous occasions, with varying degrees of success, to overthrow or destabilize foreign governments. See, e.g., F. FITZGERALD, *FIRE IN THE LAKE* 96-184 (1972) (regarding the role of the CIA in the overthrow of South Vietnam's president Ngo Dinh Diem); P. WYDEN, *BAY OF PIGS: THE UNTOLD STORY* (1979) (regarding the botched attempt to overthrow Castro in Cuba). For Phillip Agee's accounts of the CIA's world-wide covert operations, see P. AGE, *INSIDE THE COMPANY: CIA DIARY* (1975); P. AGE, *DIRTY WORK: THE CIA IN WESTERN EUROPE* (cited in *Haig v. Agee*, 453 U.S. 280, 284 (1981)).

See also Rositzke, *America's Secret Operations: A Perspective*, 53 FOREIGN AFF. 334 (1975). "Abroad, 'CIA' has become a symbol of American Imperialism, the protector of dictators, the enemy of the left, the mastermind of coups and counter-coups in the developing world." *Id.*

68. Note, *The War Powers Resolution: An Act Facing "Imminent Hostilities" A Decade Later*, 16 VAND. J. TRANSNAT'L L. 915, 1044-45 (1983). The past three administrations, two Republican, one Democrat, have each justified a military operation as a rescue mission. During the Ford Administration, Cambodian communists attacked and captured the merchant vessel *Mayaguez*. President Ford ordered the marines to retake the vessel to protect the lives and property of Americans. *Id.* at 968. With regard to the *Mayaguez* incident see Paust, *The Seizure and Recovery of the 'Mayaguez'*, 85 YALE L. J. 774 (1976) and Friedlander, *The 'Mayaguez' in Retrospect: Humanitarian Intervention or Showing the Flag?* 22 ST. LOUIS U. L. J. 601 (1979) (arguing that the doctrine of self-help stands diametrically opposed to the purposes of the United Nations charter). *Id.* at 602.

In 1980, President Carter first ordered, then aborted, a rescue operation to free the American hostages held in Teheran, Iran. President Carter argued that he did not have to report the mission to Congress because it was for humanitarian purposes and not a military action directed against Iran. See Letter from President Carter to the Speaker of the House and the President Pro-Tempore of the Senate (Apr. 26, 1980), reprinted in *Rescue Attempt for American Hostages in Iran, 1980-1981* Pub. Papers 777, 777-779 (1981).

In 1983, President Reagan dispatched armed forces — along with troops from six Caribbean nations — on a "rescue mission" to the island of Grenada. The Reagan administration publicized the invasion as a means of rescuing approximately 1,000 Americans, mostly medical students, on the island. The administration sought to preempt any Cuban or Grenadian plans to seize the Americans as hostages. Following the invasion, troops did find documents indicating plans to take U.S. citizens hostage. See *U.S. Reports Evidence of Island Hostage Plan*, N.Y. Times, Oct. 28, 1983, at 10, col. 5.

Chronology, 62 FOREIGN AFF. 691 (1983). The invasion of Grenada began 25 October, 1983. The U.S. argued that "an atmosphere of violent uncertainty" had engulfed the island since a coup wherein a Marxist, pro-Cuban, government took control of the island. During the invasion, 18 Americans and 27 Cubans died. *Id.* at 691.

69. *U.S. Military Actions in Grenada, Implications for U.S. Policy in the Eastern Caribbean*, Hearing Before the Subcomm. on International Security and Scientific Affairs on Western Hemisphere Affairs of the House Comm. on Foreign Affairs, 98th Cong., 1st Sess. (1983). (Compare views of Rep. Mervyn Dymally (D-Cal.) ("The invasion represents a means of solving the [U.S.'s] problems in the region.") and Rep. Robert Logomarsino (R. Cal.) ("The U.S. acted correctly and responsibly.") *Id.* at 2-4. The invasion also presented the opportunity to eradicate what the administration perceived as "another Cuba" in the Caribbean. *Id.* at 39.

For a general discussion on the legality of the United States invasion of Grenada, see Symposium, *The United States Action in Grenada*, 78 AM. J. INT'L. L. 131-175 (1984).

70. Regarding the *Mayaguez* incident, see *Ford Is Backed*, N.Y. Times, May 15, 1975, at 1, col. 7 (city

Whether the executive carries out such a military action to rescue legitimately endangered Americans, or to execute a punitive invasion of a nation, the possibility exists that the "free-lance" paramilitary activities of mercenaries could draw the nation into an unwanted conflict.⁷¹ In either case, the private actions of the mercenaries, rather than the democratic institutions intended by the Constitution, would control the course of foreign policy.⁷² Such a possibility poses a threat to national security by increasing the likelihood of U.S. involvement in the internal affairs of foreign nations and reduces the accountability of those bodies responsible for the conduct of foreign policy.⁷³

AMERICAN MERCENARIES AND DOMESTIC LAW

The United States does not have a comprehensive law prohibiting mercenary activity by American citizens. While the United States does have laws which regulate mercenary activities within its borders,⁷⁴ these laws have fallen into disuse since the end of World War II.⁷⁵ Moreover, none of these laws address the serious, and potentially more dangerous, problem of Americans serving as mercenaries abroad.

In 1794, Congress enacted the Neutrality Act which made it unlawful for an American citizen to accept a commission with a foreign nation.⁷⁶ The Act had three purposes: to incorporate international law into domestic law, to isolate the

ed.); On Grenada, see *The View From a Capitol Colored by Grenada* . . . N.Y. Times, Nov. 4, 1983, at 14, col. 3. Regarding political support, see, e.g., *An ABC Call-In Poll Shows 90% Support Invasion of Grenada* N.Y. Times, Oct. 30, 1983, at 16, col. 6; *Grenada Move Earns Reagan Broad Political Gains. Poll Shows*, Wash. Post, Nov. 9, 1983, at A3, col. 1.

71. 42 CONG. Q, *supra* note 5, at 2445.

72. See *supra* note 57 and accompanying text.

73. *United States-Angolan Relations, Hearing Before the Subcomm. on Africa of the House Comm. on International Relations*, 95th CONG. 2D SESS. 10 (1978) (Statement of John Stockwell, former Chief, CIA Angola Task Force) ("Henry Kissinger and the CIA lied to the American people" about U.S. involvement in Angola.) Despite Congressional restrictions, the CIA sent nearly \$15 million to finance pro-Western forces in Angola. Approximately \$300,000 of this supported the use of American and Western European mercenaries. *Id.* at 10. See generally W. BURCHETT & D. ROEBUCK, *supra* note 2, for a discussion of the CIA's role in Angola.

The U.S. also misled the international community on the status of American's fighting in Africa. See 78 DEPT. OF STATE BULL. 714-15 (1975). Responding to allegations that there were U.S. citizens fighting as mercenaries on behalf of the Rhodesian army, Congressman Donald M. Fraser, U.S. Representative to the U.N. General Assembly stated: "There are no U.S. military personnel in Rhodesia." *Id.* at 714.

74. These three laws are the Neutrality Act of 1794, 18 U.S.C. § 960 (1982); 18 U.S.C. § 958 (1982) (regarding Commissions to serve against friendly nations); and 8 U.S.C. § 1481 (1982) (regarding loss of citizenship by entering into the armed forces of another sovereign). See also, 22 U.S.C. § 618(a)(2) (1982) (regarding the registration of foreign agents operating in the United States). See *Mercenaries in Africa: Hearing Before the Special Subcomm. on Investigations of the House Comm. on International Relations*, 94th Cong., 2nd Sess. (1976) (Statement of Robert L. Keuch, Deputy Assistant Attorney General); and McDowell, *Contemporary Practice of the United States Relating to International Law*, 71 AM. J. INT'L. L. 133, 141 (1977).

75. Lobel, *supra* note 62, at 37-44.

For a period of 130 years, between 1795 and 1925, there were thirty-four reported prosecutions, an average of one reported case every four years. Since 1925, there have been three reported cases or an average of one every twenty years. Similarly, under § 959, a companion to § 960, there were eleven reported prosecutions between 1794 and 1925, or one every twelve years. Since 1925 there have been none.

Id. at 43-44.

76. Act of June 5, 1794. As currently codified the Act 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 domination 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 \$3,000 or imprisoned not more than three years, or both.

18 U.S.C. § 960 (1982) (emphasis added).

United States from foreign conflicts, and to outlaw private warfare so as to strengthen the Federal Government's control of foreign policy.⁷⁷ By incorporating into the Act international law prohibiting interference in the internal affairs of a foreign nation, Congress sought to facilitate enforcement of its duty to respect the integrity of other nations.⁷⁸ Courts have given the Neutrality Act a broad interpretation and application.⁷⁹ The courts have held that the Act prohibited the training,⁸⁰ recruiting and enlisting of troops⁸¹ and the contributing to or furnishing of the means of expediting a hostile expedition.⁸² To violate the Act, the individuals need not even execute their plans.⁸³

Given the Neutrality Act's intended purposes and the broad interpretation provided by the courts, the private acts of war carried out by American mercenaries clearly violate the Act. The Government should be able to prosecute and convict American mercenaries. The law, however, contains a fatal flaw which restricts its usefulness and allows mercenaries to easily avoid its prohibitions.

While courts have broadly construed the Act they have also emphasized the jurisdictional requirement that some overt act must occur within the United States.⁸⁴ In *Wiborg v. United States*⁸⁵ the United States Supreme Court held that

77. *Nonenforcement of the Neutrality Act* *supra* note 62, at 1965. The Federal Government accepted responsibility for the acts of its citizens and thus felt constrained to restrict their movements. Further, the Framers considered unauthorized hostile acts by private citizens as inconsistent with a civil society. *Id.* at 1965. The proponents felt that law would incorporate the nation's international duty of neutrality into domestic law. *Id.* Supporters also felt it would isolate the United States from the potentially destructive wars between the European powers. See Lobel, *supra* note 62, at 21. "Neutrality was a policy designed to enable a militarily weak and geographically isolated United States . . . advance her commercial interest by avoiding . . . European wars." *Id.* at 21. Attorney General Randolph observed in 1795:

An infant country, deep in debt; necessitated to borrow in Europe; without manufacture; without a land or naval force; without a competency of arms or ammunition . . . with a constitution no more than four years old; in a state of probation, and not exempt from foes—such a country can have no greater curse in store for her than war.

Letter from Randolph to James Monroe (June 1, 1795), reprinted in 1 American State Papers: Foreign Relations 706 (W. Lawrie and M. Clard ed.) The principal purpose of the Neutrality Act lay, however, in strengthening the authority of the central government over the citizen and placing the conduct of warfare strictly with the state. Framers of the bill considered prevention of U.S. citizens from conducting private warfare a quid pro quo to insure neutrality with foreign powers. Passage of the Neutrality Act was designed to outlaw private warfare, thereby guaranteeing that Congress and the President would formulate national policy, not private individuals, Lobel *supra* note 62 at 25.

When Congress revised the Act in 1817, it reiterated the Act's original purpose. *Id.* at 25, n.136.

78. *Nonenforcement of the Neutrality Laws*, *supra* note 61, at 1955.

79. *The Santissima Trinidad*, 20 U.S. (7 Wheat) 283 (1822), (the Act affords protection against attack to all nations with which the United States is at peace, whether or not the United States had accorded it diplomatic recognition); *Charge to Grand Jury — Neutrality Laws*, 30 F. Cas. 1017 (C.C.N.D.N.Y. 1866) (No. 18, 264) (the law applies to both American citizens and foreign nationals organizing hostile expeditions within the United States); *United States v. Burr*, 25 F. Cas. 201, 202 (C.C.D. Va. 1807) (No. 14,694a); see also, *The Three Friends*, 166 U.S. 1, 56 (1897); *Wiborg v. United States*, 163 U.S. 632, 647 (1896); *De Orozco v. United States*, 237 F. 1009, 1012 (5th Cir. 1916).

The Supreme Court has not limited the Act to large expeditions but has concentrated on the "military character" of the act intended. *Wiborg v. United States*, 163 U.S. at 651; *United States v. Sander*, 241 F. 417, 419-20 (S.D.N.Y. 1917).

80. *United States v. Hughes*, 70 F. 976 (E.D.S.C. 1895).

81. *United States v. Lumsden*, 26 F. Cas. 1013, 1015 (C.C.S.D. Ohio 1856) (No. 13,641); *United States v. Sullivan*, 27 F. Cas. 367,377 (S.D.N.Y. 1851) (No. 15,974).

82. *Charge to Grand Jury — Neutrality Laws*, 30 F. Cas. 1021, 1022 (C.C.D. Ohio 1851) (No. 18,267) (Money, Clothing and arms); *United States v. Murphy*, 84 F. 609 (D. Del. 1818) (transportation).

83. *United States v. Ybanez*, 53 F. 536, (C.C.W.D. Tex. 1892) "The . . . statute is very comprehensive and peremptory . . . it does not wait for the project to be consummated . . ." *Id.* at 538.

84. With regard to § 958, See *Charge to Grand Jury, Neutrality Laws*, 30 F. Cas. 1018 (C.C. Ohio 1838) (No. 18,265) "[E]very violation of this law must have been committed within this state; and by a citizen of the United States." *Id.* at 1019. Regarding § 959, see *United States v. O'Brien*, 75 F. 900 (C.C.S.D.N.Y. 1896). "[P]ersons desiring to enlist in foreign military service may lawfully go abroad for this purpose in any way they see fit . . . either separately or in association . . . Provided they do

the Act did not prohibit an individual or group from voluntarily going abroad to enlist in a foreign military service or from conducting private acts of hostility against a foreign state.⁸⁶ The Court stated that the law only proscribed acts occurring within the United States which contribute toward such hostile acts against foreign states.⁸⁷

Numerous administrations have utilized this interpretation of the Neutrality Act to avoid bringing prosecutions against pro-Western mercenaries.⁸⁸ This interpretation effectively negates the Act's purpose of centralizing foreign policy and protecting American neutrality. Given this jurisdictional loophole, American citizens may pursue their ideological and economic forays against foreign states by simply stepping beyond the borders of the United States before declaring their purpose. This loophole renders the Neutrality Act an empty shell in need of revision.

MERCENARIES AND THE RIGHT TO TRAVEL

The Constitution does not explicitly protect the right to travel.⁸⁹ Over time, however, Americans have come to expect the right to travel free of government

not form or set on foot any military expedition or enterprise . . . within the territory of the United States. *Id.* at 907. See also *Burmester supra* note 22 at 52; and *Note supra* note 6, at 595-99.

85. 163 U.S. 632 (1896). In *Wiborg*, a sea captain and his crew transported armed insurgents from New Jersey to Cuba to assist in the war between Spain and Cuba. The Court upheld the conviction of the sea captain, but found his crew innocent of violating the neutrality laws. The Court differentiated between them on the grounds that the captain knew of the violation while still within United States territory, while the crew only became aware of the ship's destination after entering international waters.

86. See *Cesner, supra* note 4, at 356. The court enforced this holding in *Gayon v. McCarthy*, 252 U.S. 171 (1920); and *The Three Friends*, 166 U.S. 1 (1897), where they found acts which occurred within the U.S. sufficient to justify prosecution.

87. 163 U.S. at 653. See also *Gayon v. McCarthy*, 252 U.S. 171, 176 (1920).

88. The Kennedy, Carter and Reagan administrations have all invoked this interpretation of the Neutrality Act when questioned on the presence of U.S. mercenaries in foreign lands, 42 CONG. Q. 2230 (1984). "Recent administrations have read [the provisions of § 960] very narrowly: . . . the law did not bar military operations by U.S. citizens against a foreign country so long as they are launched from non-U.S. territory." *Id.* at 2230.

Shortly before U.S.-backed mercenaries and exiles invaded Cuba, Attorney General Robert Kennedy attacked the neutrality laws as "among the oldest laws in our statute books. . . . Clearly . . . not designed for the kind of situation which exists in the world today." *Id.*

The Reagan administration has gone one step further and completely ignored the antifunding clause of § 960. The State Department announced on September 10, 1984, that it would not discourage the raising of funds to support the anti-Sandinista guerillas. The State Department stated: "[i]t is our understanding that such contributions can be perfectly legal." *Id.* at 2230. Such funding is legal only if not used in organizing, outfitting, or supporting armed aggression against any foreign country or its commerce. See *Bailey v. O'Mahoney*, 10 Abb. Pr. N.S. 270 (1871).

The neutrality laws have never significantly controlled mercenaries' activities. Yet, the Reagan administration has downgraded the laws to little more than a bargaining chip. See *Sigmund, supra* note 13, at 639. For example, Cuban and Nicaraguan exiles conducted paramilitary training in California and Florida. The Reagan administration refused to prosecute the groups on the grounds that they had not hurt anyone and had not formulated specific plans to invade their homelands. Note, *supra* note 62, at 1955. When Secretary of State Haig began negotiations with the Sandinistas, one American proposal included enforcement of United States domestic laws to protect Nicaragua from attack by the exiles. *Id.* at 1955. See also *N.Y. Times*, Mar. 16, 1982, at A1, col. 6; *Id.* Apr. 15, 1982, at A2, col. 5.

The Reagan Administration contends its support for the Contras represents either actions taken in self-defense against the aggression of Cuba and Nicaragua against El Salvador, or simply represents aid to one side in a civil war. See *Lobel and Ratner, supra* note 62, at 22. See also *Dellums v. Smith*, 577 F. Supp. 1449 (N.D. Ca. 1984). (The court in *Dellums* upheld a private citizen's mandamus action compelling the Attorney General to investigate whether or not the President had violated the Neutrality Act by supporting armed insurgency against Nicaragua, and held that the Neutrality Act applied to the President).

89. Z. CHAFEE, *THREE HUMAN RIGHTS IN THE CONSTITUTION OF 1787* 162 (1956). "Nothing in the Constitution expressly protects freedom of movement." *Id.* at 162.

restrictions.⁹⁰ The Supreme Court has recognized the right to unfettered interstate travel.⁹¹ Although the courts initially viewed the right to travel abroad as equivalent to interstate travel,⁹² the Supreme Court has distinguished the two.⁹³ The Court has found less constitutional protection for the right to travel internationally.⁹⁴ The Court has also held that the Executive has the authority to restrict international travel when the individual's purpose for traveling abroad conflicts with national security.⁹⁵ Mercenary activities of American citizens clearly fall within the category of conduct which conflicts with national security.

The privilege to travel abroad has become inexorably linked to the possession of a passport.⁹⁶ The President, through the Secretary of State, has the authority⁹⁷

90. Note, *The Right to Travel and Passport Revocation: Haig v. Agee*, BROOKLYN J. INT'L L. 391 (1982). Common law nations have long sought to control ingress and egress from their borders. *Id.* at 396. For a history of the battle between the early monarchy and the Catholic Church over the right to travel, see Note, *Passport and Freedom of Travel: The Conflict of a Right and a Privilege*, 41 GEO. L.J., 63, 65 (1952). For a natural law perspective on the right to travel see Fahy, *The Right to Travel*, 6 NAT. L. F. 109 (1961). English barons secured the right to travel freely in section 42 of the Magna Carta. See Lansing, *Freedom of Travel: Is the Issuance of a Passport an Individual Right or a Governmental Privilege*, 11 DEN. J. INT'L L. & POL'Y. 15, 16 (1981). The Magna Carta abolished the writ of *Ne Exeat Regno*, by which the British Crown regulated travel by requiring a traveler to obtain royal permission before leaving the country. *Id.* at 16. In the New World the English settlers incorporated freedom of movement into their charters. See, e.g., Massachusetts Body of Liberties of 1641, 117, "Every man of or within this jurisdiction shall have free libertie, not with standing any Civill power, to remove both himselfe and his familie at their pleasure out of the same, provided there be no legall impediment to the contrarie." Lansing, *supra* at 398.

The Framers of the Constitution cited King George III's attempts to restrict immigration to the colonies in the Declaration of Independence. The Declaration of Independence, § 2 (U.S. 1776). The Articles of Confederation explicitly recognized a right of unfettered travel:

The better to secure and perpetuate mutual friendship and intercourse among the peoples of the different states in this union, the free inhabitants of these states shall be entitled to all the privileges and immunities of free citizens in the several states; and the people of each state shall have free ingress and regress to and from any other state . . .

ARTICLES OF CONFEDERATION, art. IV. At the Philadelphia Convention of 1787, however, the drafters of the Constitution did not incorporate article IV into the Constitution. Chaffe, *supra* note 88, at 185. See Fahy, *supra* (The natural rights of man included the right of interstate and international travel and represented an unchallenged right in Colonial America). *Id.* at 109-10.

The right to travel received support in the fourteenth amendment. "No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States," U.S. CONST. art. 14. See also Note, *The Right to Travel and the Loyalty Oath: Woodward v. Rogers* (D.D.C. 1972), 12 COLUM. J. TRANSNAT'L L. 387, 391 (1973). The U.S. Supreme Court early on recognized a right of interstate travel. In *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1869), the Court struck down a Nevada tax of one dollar assessed against each person leaving the state. The Court declared that each citizen had "the right to come to the seat of the government . . ." and ". . . has a right to free access to its (the nation's) sea-ports . . . and the right is . . . independent of the will of any State over which soil he must pass in the exercise of it." *Id.* at 44. The Court did not rest its decision on the commerce clause, but instead read into the Constitution a right of undisturbed travel to the nation's capital. Chaffe, *supra* note 89, at 189. Subsequent Supreme Court decisions have affirmed the right of interstate travel, relying on either the commerce clause, see, e.g., *Edwards v. California*, 314 U.S. 160 (1941); the due process clause of the fourteenth amendment, *Williams v. Rears*, 179 U.S. 270 (1900); *Allgeyer v. Louisiana*, 165 U.S. 579 (1896); or the fourteenth amendment's privileges and immunities clause, *Shapiro v. Thompson*, 394 U.S. 618 (1968); *United States v. Guest*, 383 U.S. 745 (1966); *Edwards v. California*, 314 U.S. 160, 177 (1941) (Douglas, J., concurring).

91. *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1869). See also *Edwards v. California*, 314 U.S. 160 (1941), in which the Court struck down a state law making it a crime for a resident to bring indigent nonresidents into the state.

92. *Bauer v. Acheson*, 106 F. Supp. 445 (D.D.C. 1952). "[I]t is difficult to see where in principle, freedom to travel outside the United States is any less an attribute of personal liberty [than interstate travel]." *Id.* at 451. See also *Shachtman v. Dulles*, 225 F.2d 938 (D.C. Cir. 1955).

93. *Califano v. Aznavorian*, 439 U.S. 170 (1978).

94. *Zemel v. Rusk*, 381 U.S. 1, 15-16 (1965).

95. *Haig v. Agee*, 435 U.S. 280 (1981).

96. U.S. law requires the possession of a passport to leave or enter the United States. See *Travel Control of Citizens and Aliens*, 22 U.S.C. § 1185 (1982). See also Jaffe, *The Right to Travel: The Passport Problem*, 35 FOREIGN AFF. 17 (1956) 96.

97. See 8 U.S.C. § 1185 (1982) and, 22 U.S.C. § 211(a) (1982).

to deny an application for a passport⁹⁸ or to revoke a passport.⁹⁹ Citizens have, however, successfully challenged the President's authority when denied passports on political grounds.¹⁰⁰ The Supreme Court has held that revoking a passport as a means of silencing free speech violates the first amendment.¹⁰¹ The Supreme Court has also limited the Executive's discretion by holding that while the right to travel is not protected by the first amendment, it is protected by the due process clause of the fifth amendment.¹⁰² The Court has, however, consistently upheld the President's right to restrict travel in the interest of national security.¹⁰³

With the power to revoke the passports of those whose conduct interferes with national security, the Executive could curtail the mercenary activities of American citizens. The problem remains, however, of creating a law which the President will consistently enforce. Congress could insure enforcement of the Neutrality Act by revising both the neutrality laws and the laws governing the mechanism by which Americans travel abroad, the passport.¹⁰⁴ The first step of the two step revision would result in making mercenary activities engaged in outside the borders of the United States a clear violation of the Neutrality Act. The revised structure of the Passport Act would require the President to revoke the passports of persons violating the Neutrality Act. The revised passport laws become, in essence, the tool necessary to enforce the Neutrality Act.

In a recent decision, *Haig v. Agee*¹⁰⁵ the Supreme Court provides the constitutional basis for such a revision. In *Agee*, the Supreme Court upheld the revocation of an American citizen's passport whose conduct was "likely to cause serious damage to national security or foreign policy of the United States."

Between 1974 and 1980, a former CIA agent, Philip Agee traveled to numerous nations and publicly exposed CIA agents operating in those nations.¹⁰⁶ Agee's activities led to incidents of violence against individuals associated with

98. *Briehl v. Dulles*, 248 F.2d 561 (1957).

99. *Haig v. Agee*, 453 U.S. 280 (1981). The President has the authority to revoke passports when the holder's activities cause or are likely to cause serious damage to national security or foreign policy. *Id.* at 301. See J. MOORE, *INTERNATIONAL LAW DIGEST* (1906). The President and Secretary of State have held the express power to revoke or deny passports since 1856. Passport Act of 1856 § 23, 11 Stat. 60 (1856). The Secretary would not grant passports to anyone violating the laws of the United States, Moore, *supra*, at 960.

100. *Aptheker v. Secretary of State*, 378 U.S. 500 (1964); *Kent v. Dulles*, 357 U.S. at 116 (1958).

101. 378 U.S. at 500; 357 U.S. at 116.

102. *Regan v. Wald*, 52 U.S.L.W. 4966, 4971 (1984); *Zemel v. Rusk*, 381 U.S. 1 (1965). See also *Harisiades v. Shaughnessy*, 342 U.S. 580, 589 (1952).

103. *Haig v. Agee*, 453 U.S. 280 (1981).

104. The Supreme Court first defined the legal effect of a passport in *Urtetiqui v. D'Arcy*, 34 U.S. (9 Pet.) 692 (1835):

There is no law of the United States in any manner regulating the issuing of passports, or directing upon what evidence it may be done, or declaring their legal effect It is a document which, from its nature and object, is addressed to foreign powers; purporting only to be a request that the bearer of it may pass safely and freely; and it is to be considered rather in the character of a political document, by which the bearer is recognized in foreign countries as an American citizen; and which, by usage and the law of nations, is received as evidence of the fact.

Id. at 698.

105. *Haig v. Agee*, 453 U.S. 280 (1981). From 1957 to 1968 the CIA employed Agee as an agent gathering covert intelligence in foreign nations. Agee left the agency in 1968 and in 1974 began a campaign to expose CIA operatives and to abolish the CIA. *Id.* at 287.

106. *Id.* at 284. Between 1974 and 1978 Agee published two books identifying hundreds of CIA employees. See P. AGE, *INSIDE THE COMPANY: CIA DIARY* (1975); *DIRTY WORK, THE CIA IN WESTERN EUROPE* (P. Agee & L. Wolf, eds. 1978). In the latter and a subsequent work, Agee compiled and published "Who's Where" lists of alleged CIA personnel and "Who's Who" biographies of these employees. See also P. Agee, Introduction, in *DIRTY WORK 2: THE CIA IN AFRICA* (E. Ray, W. Schapp, K. Van Meter, & L. Wolf, eds. 1979). Cited at 453 U.S. at 284, n. 3.

the CIA.¹⁰⁷ In 1979, the Secretary of State notified Agee, then living in West Germany, that his passport had been revoked.¹⁰⁸ Agee sued,¹⁰⁹ alleging that the revocation violated his fifth amendment right to travel and first amendment right to free speech.¹¹⁰ The district court found the regulation invalid and restored Agee's passport. The court of appeals affirmed.¹¹¹ The United States Supreme Court reversed.¹¹²

The Court found that the Secretary of State had broad powers to revoke passports¹¹³ based in the wide scope given the Executive regarding national security and foreign policy.¹¹⁴ The Court found that Congress intended the Executive, in executing foreign policy, to "curtail or prevent international travel by American citizens if it was contrary to the national security."¹¹⁵

The Court dismissed Agee's constitutional objections, holding that the interest of national security outweighed Agee's conditional right to travel. Regarding Agee's first amendment claim, the Court found the revocation rested on Agee's conduct, not his political beliefs.¹¹⁶ The Court concluded that the Executive may revoke a passport to restrict the action of an American citizen where a substantial likelihood exists that such action will seriously damage national security or foreign policy.¹¹⁷ Due process requires no more than a statement of reasons and a prompt post revocation hearing.¹¹⁸

The dissent in *Agee* argued that the majority's opinion gave the President far greater power to revoke a passport than Congress intended.¹¹⁹ Justice Brennan

107. *Id.* at 285. The Government in its brief did not accuse Agee of inciting violence. Acts of violence did, however, closely follow the exposure of CIA personnel. In Greece, in December of 1975, Richard Welsh was murdered after being identified as a CIA Chief of Station by an Athens newspaper. In 1981, two members of the American Institute for Free Labor Development in El Salvador were assassinated after Agee identified the Institute as a front for the CIA. *Id.* at 285, n.7.

108. 453 U.S. at 286. The notice informed Agee of the reason for the revocation—his campaign against the CIA—and advised Agee of his right to an administrative hearing. The Secretary based his authority on 22 C.F.R. § 51.70(b)(4) (1980): "A passport may be refused in any case in which:

(4) The Secretary determines that the national's activities abroad are causing or are likely to cause serious damage to the national security or foreign policy of the United States."

109. *Agee v. Vance*, 483 F. Supp. 729 (D.D.C. 1980).

110. 483 F. Supp. at 732.

111. *Agee v. Muskie*, 629 F.2d 80, 87 (D.C. Cir. 1980).

112. *Haig v. Agee*, 453 U.S. at 310.

113. The Court found the Secretary's power in the Passport Act, 22 U.S.C. § 211 (1982), which states:

The Secretary of State may grant and issue passports, and cause passports to be granted, issued, and verified in foreign countries by diplomatic representatives . . . under such rules as the President shall designate and prescribe for and on behalf of the United States, and no other person shall grant, issue, or verify such passports. Unless authorized by law, a passport may not be designated as restricted for travel to or for use in any country other than a country with which the United States is at war, where armed hostilities are in progress, or where there is imminent danger to the public health or the physical safety of United States travellers.

Id. at § 211(a).

114. 453 U.S. at 291-92. The Court stated that "Congress—in giving the Executive authority over matters of foreign affairs — must of necessity paint with a brush broader than it customarily wields in domestic areas, [*Zemel v. Rusk*] 381 U.S. at 17." (emphasis in original) *Id.* at 292.

115. 453 U.S. at 297. The Court stated that unless the Secretary could revoke passports on national security grounds, the intent of Congress in enacting Travel Control Act of May 22, 1918, ch 81 §§ 1-2, 40 Stat 559, would not be fulfilled. The language of the Travel Control Act was identical in pertinent part to the Passport Act of 1926.

116. 453 U.S. at 306.

117. *Id.* at 307.

118. *Id.* at 310. On *Haig v. Agee* see Note, *The Right to Travel and Passport Revocation: Haig v. Agee*, 8 BROOKLYN J. INT'L L. 391 (1982); Note, *The Power of the Executive to Restrict the International Travel of American Citizens on National Security and Foreign Policy Grounds*, 30 BUFFALO L. REV. 781, 799 (1981); LANSING, *Freedom to Travel: Is the Issuance of a Passport an Individual Right or A Government Perogative?* 11 DEN. J. INT'L L. & POL'Y. 15 (1981).

119. 453 U.S. 280, 310 (1980) (Brennan, J., dissenting).

stated that Congress must "expressly delegate authority to the secretary to deny or revoke passports for foreign policy or national security reasons before he may exercise such authority."¹²⁰ Further, the Court failed to construct the necessary guidelines to revoke passports.¹²¹

REVISING THE NEUTRALITY AND PASSPORT ACTS TO RESTRICT MERCENARIES.

The Court's interpretation of the Passport Act of 1926 in *Agee* provides the President with the power necessary to curtail the mercenary activities of American citizens. The problem of presidential inaction and nonenforcement of the neutrality laws, however, remains. Any new law to eradicate mercenaries must solve this problem. It must also incorporate the central purposes of the Neutrality Act — Federal control of foreign policy and incorporation of international law into domestic law. It must also facilitate continuation of a responsive, democratic process of decision making in foreign affairs. Finally, any new law should conform with not only the due process requirements established by the majority in *Agee*, but also, to avoid abuse, the constitutional issues raised in the dissent.¹²² Congress could accomplish this goal by revising both the Neutrality Act and the Passport Act to form an effective, two-step weapon against mercenaries.

Revising the Neutrality Act

The Neutrality Act would be revised in following ways.¹²³ The most impor-

120. 453 U.S. at 312 (Brennan, J., dissenting). Relying on *Zemel v. Rusk*, 381 U.S. 1 (1965) and *Kent v. Dulles*, 357 U.S. 116 (1958), Justice Brennan found the right to travel came under the umbrella of personal liberties protected by the fifth amendment. As such, any infringement could only occur "pursuant to the law-making function of the Congress" *Id.* at 312. Justice Brennan stated that the Passport Act of 1926 did not expressly authorize the revocation of Passports on national security grounds. *Id.* at 313. Failing to find sufficient administrative practice, Justice Brennan argued that *Kent* unequivocally held that "mere construction by the Executive . . . is not sufficient." *Id.* at 314 (emphasis in original).

121. 453 U.S. at 318 (Brennan, J., dissenting). See Note, *The Right to Travel*, *supra* note 118, at 526. (As now construed the Secretary's potential reach is very broad. During oral argument, Solicitor General Wade H. McCree stated that the Secretary of State could utilize his revocation authority to deny a passport to a person wishing to go to El Salvador to denounce the United States' policy in that country. Justice Brennan interpreted the opinion as sanctioning the revocation of not only the passport of the Philip Agees of the world, but also any individual who disagrees with government policy and expresses their views. 453 U.S. at 319 (Brennan, J., dissenting)).

122. *Supra* notes 119-121 and accompanying text.

123. Currently the Neutrality Act 18 U.S.C. § 960 (1982) states:

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 no more than \$3,000 or imprisoned not more than three years, or both (emphasis added).

A revised Neutrality Act would state:

(a) any person, or enterprise, who knowingly begins or recruits or sets on foot or provides or prepares a means for or furnishes money, arms, equipment or military materials for, or takes part in or organizes or supervises, any military or naval expedition or mission to be carried out against or within 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 \$10,000 or imprisoned for five years, or both and shall be subject to the provisions of [revised] title 22, United States Code, Section 211(a).

(b) It shall be unlawful for any person to conspire to violate the provisions of subsection (a) of this section.

(c) As used in this section—

(1) "person" includes any individual or entity capable of holding a legal or beneficial interest in property, and includes, but is not limited to, United States citizens,

(2) "enterprise" includes, but is not limited to, any individual, association, or other legal entity, any union or group of individuals associated in fact although not a legal entity.

tant revision would be the elimination of the jurisdictional loophole which now exists. Congress could accomplish this by simply removing the language limiting the application of the Act to mercenary missions begun "within the United States." This would allow the President to bring actions against mercenaries regardless of the point of origin of their operations. The revised law would also expand the potential defendants by expressly defining the terms "person" and "enterprise" and by including a conspiracy provision.¹²⁴ By broadly defining person and enterprise and including a conspiracy provision the revised Neutrality Act provides the necessary tools to reach not only the actual soldier of fortune, but also the source of funding and organization behind the mercenary operations.

The revised Neutrality Act would also dictate that the President enforce the act against mercenaries regardless of the status of relations between the United States and the aggrieved nation. The definition of state provided in the revised act does not differentiate between a government which the United States recognizes and one which it does not. The revised Act eliminates discretionary sentencing and requires that mercenaries convicted under the Act receive a fine of \$10,000 or a prison term of five years. Finally, and most importantly, in conjunction with the revised passport laws, the act requires the Executive to revoke the passport of any person violating the neutrality laws of the United States.

Revising the Passport Act of 1926

The one problem not rectified in the revised Neutrality Act is consistent enforcement by the Executive. Congress should require the Secretary of State to revoke the passport of any American violating the provisions of the revised Neutrality Act. Congress could effectuate this by amending the Passport Act to require the President to revoke the passport of any citizen violating the neutrality laws.¹²⁵ Granting the Executive the power to revoke passports strengthens the Neutrality Act and fulfills its intended purpose.

Mandatory revocation serves other purposes as well. Failure of the President to enforce the Neutrality Act implies official support of the mercenary activities. Congress may then take appropriate steps under the War Powers Act.¹²⁶ It also pushes support for mercenaries by the United States into the public forum where the President must justify his actions before the people and their representatives. In both cases, the two-step revision contributes to the democratization of foreign policy. If the President does invoke the revised laws this sends a clear message to the foreign nations involved that the United States does not support the merce-

(3) "states" includes any foreign sovereign whether or not recognized by the United States for diplomatic purposes.

(d) The provisions of this title shall be liberally construed to effectuate its intended purposes.

124. The language of these provisions is based on similar language in the Racketeer Influenced and Corrupt Organization Act, 18 U.S.C. §§ 1961, 1962(d) (1982).

125. A revision of the Passport Act would appear as:

§ 211(a). Authority to grant, issue, and verify passports;

The Secretary of State may grant and issue passports, and cause passports to be granted, issued, and verified in foreign countries by diplomatic representatives . . . under such rules as the President shall designate and prescribe for and on behalf of the United States, and no other person shall grant, issue, or verify such passports. Unless authorized by law, a passport may not be designated as restricted for travel to or for use in any country other than a country with which the United States is at war, where armed hostilities are in progress, or where there is imminent danger to the public health or the physical safety of United States travellers.

§ 211(b). The President or the Secretary of State, shall revoke the passport of any citizen who violates the provisions of the Neutrality laws of the United States (18 U.S.C. § 960). Nothing in subsection (a) of this chapter will operate to restrict the execution of this subsection.

126. 50 U.S.C. § 1541 (1982).

naries. Thus the two-step revision brings domestic law into line with customary international law favoring the outlawing of mercenaries.¹²⁷ The revised laws allow the United States to fulfill its international duty to respect the integrity of other sovereign states and to take all necessary steps to abide by the goals of the United Nations.¹²⁸

The two-step revision also addresses the constitutional objections raised by the dissent in *Agee*.¹²⁹ It constructs adequate guidelines for the revocation of passports. The revised Act would remove the discretionary aspect of revocation. With a clear, albeit broad, definition of a mercenary and no jurisdictional limitation on the Neutrality Act, the Secretary of State must act when it becomes apparent that Americans have breached the nation's neutrality.

CONCLUSION

Under customary international law a sovereign had no responsibility for the mercenary acts of its nationals. International law distinguished between private and state behavior and did not require nations to actively protect the integrity of other nations. This *laissez-faire* perception of state responsibility changed following World War II. Since the end of that war, the world community has come to realize the threat mercenaries pose to international peace and security. Modern international law calls for each nation to take all necessary steps to restrict the recruitment, training and transit of mercenaries.

Current United States law on mercenaries, however, still conforms with nineteenth century international law. The United States has a responsibility to the world community to revise its law to restrict American mercenaries. It can accomplish this by refining and clarifying the Neutrality Act. Specifically, the United States could withdraw current jurisdictional restrictions thus allowing the prosecution of American mercenaries regardless of where they begin their mercenary activities.

This revision alone, however, does little to fulfill either the purposes behind the Neutrality Act or our international responsibilities. Without a mechanism to enforce the Act, the neutrality laws become little more than an instrument of foreign policy, rather than a strict guide. Congress could provide this mechanism by making a violation of the neutrality laws per se grounds for revocation of a citizen's passport. Revising the Passport Act would make a violation of the Neutrality Act a predicate offense requiring the Secretary of State to revoke the mercenaries' passports. Such a revision would strengthen the neutrality laws and force the President to take action when he became aware of the presence of American mercenaries or mercenaries funded by Americans in foreign lands. Thus, the President would be forced to prosecute the violators or acknowledge that they represent American foreign policy.

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127. *Supra* note 16 and accompanying text.

128. *Supra* note 16 and accompanying text.

129. *Supra* notes 119-121 and accompanying text.

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