

motivated to take part in the hostilities essentially for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party [— while this at first would suggest that developing countries or liberation movements paying little to their own forces are at a disadvantage, this is not, in fact, the case, since persons assisting such countries or movements are obviously motivated by other than mercenary considerations; this is yet a further example of discrimination in the application of the law, for the decision on status rests not on active participation in hostilities but on ascertainment of the motive of the individual or on the promises held out by the recruiting agency whether they are fulfilled or not]; (d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict [— this would damage the position of foreign volunteers serving as such if paid on a different scale]; (e) is not a member of the armed forces of a Party to the conflict [— this would protect, for example, such units as the Eagle Squadron serving with the Republic Force in the Second World War, or non-Israeli Jews or gentiles serving in any of the Middle Eastern wars and incorporated with the army of Israel, but, since no state recognizes Rhodesia or its nationality, does this mean that every member of the Rhodesian Army opposing the Zimbabwe forces is a mercenary and as such liable to trial as a war criminal?]; and [— clearly the provisions are cumulative, so that if any one is not satisfied the individual cannot be regarded as a mercenary]; (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” [— the Cubans in Angola therefore cannot be regarded as mercenaries]. It has recently been announced that the Organization of African Unity has accepted this definition rather than that of Luanda. Perhaps the fact that the provisions are cumulative will provide the safeguard for those states that would otherwise find it difficult to ratify the protocol without reserving on this article.

The articles considered so far relate to the present political temper of international society, with its emphasis on decolonization and respect for self-determination. Closely related to such considerations is the condemnation of *apartheid*, which the United Nations has described as a crime against humanity. It is perhaps not surprising, therefore, that when the

conference came to review and extend the notion of grave breaches that would constitute a basis for universal criminal jurisdiction, it included among such breaches “practices of *apartheid* and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination”. Even though there was one delegate who considered that the separation of black prisoners of war from their white colleagues was more to be deplored than the murder of prisoners of war, one cannot but wonder how a legal authority would define any of the practices here condemned, or draft an indictment on the basis thereof.

Less objectionable is the provision condemning as a grave breach unjustifiable delay in the repatriation of prisoners of war and of civilians, a matter that was of deep concern at the termination of the Korean and Vietnamese hostilities. Equally, no objection can be taken to the condemnation of intentional attacks upon civilians or other non-combatants. One might even agree that it is, in fact, a grave breach to launch an attack against “works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects”, although there are some who would argue that even this is permitted in the cause of self-defence. Again, one cannot disagree that it is a grave breach “perfidiously” to make use of the protected emblems of the Red Cross, Crescent or Lion and Sun. This protection does not extend to the Red Shield of David used by Israel, since this is not a recognized emblem. In 1976, a Canadian attempt to forbid the wrongful and abusive use of any unrecognized but habitually-employed sign, thus prohibiting Israel from using the Red Shield in a “perfidious” manner, was overwhelmingly defeated under Arab and Third World pressure.

Cultural heritage

A completely new development relates to the protection of objects forming part of “the spiritual or cultural heritage of peoples” — a somewhat vaguely defined conception. The leading role for such protection was taken by the Vatican, Austria, Italy, Greece, Egypt and Iran, and it is now a grave breach to make “clearly-recognized historic monuments, works of art or places of worship, which constitute the cultural or spiritual heritage of peoples” the object of attack, when they are not located “in the immediate proximity of military objectives”, provided special pro-