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## OVERCOMING POST-COLONIAL MYOPIA: A CALL TO RECOGNIZE AND REGULATE PRIVATE MILITARY COMPANIES

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*These, in the day when heaven was falling,  
The hour when earth's foundations fled,  
Followed their mercenary calling  
And took their wages and are dead.*

*Their shoulders held the sky suspended;  
They stood, and earth's foundations stay;  
What God abandoned these defended,  
And saved the sum of things for pay.<sup>2</sup>*

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2. A.E. HOUSMAN, EPITAPH ON AN ARMY OF MERCENARIES (1917), *reprinted in* NORTON POETRY 15 (J. Paul Hunter ed., 1973). Howe, in quoting Housman's second stanza, noted that it was Kaiser Wilhelm who in World War I referred to the British disparagingly as "an army of mercenaries." HERBERT M. HOWE, AMBIGUOUS ORDER: MILITARY FORCES IN AFRICAN STATES 187 n.4 (2001). Mockler, in referring to the same stanza, remarked that "Housman was defending on grounds of motive what the Kaiser was attacking on grounds of status," that is, the motive of money versus the status of serving a foreign flag. ANTHONY MOCKLER, MERCENARIES 13 (1969). The modern international instruments designed to regulate mercenary activities continue this debate. *See infra* Part III.

## I. Introduction

The sovereign's resort to mercenaries is as old as history itself. Ramses II led an army composed largely of Numidian mercenaries in the Battle for Kadesh in 1294 B.C.,<sup>3</sup> and King David used mercenaries to drive the Philistines from Israel in 1000 B.C.<sup>4</sup> From 800 to 400 B.C., mercenaries played a relatively minor role in the Greek hoplite armies,<sup>5</sup> but by the time Alexander the Great crossed the Hellespont to invade Persia in 334 B.C., specialized mercenaries comprised almost one third of his army.<sup>6</sup> In 50 B.C., Caesar relied almost entirely on mercenaries for his cavalry,<sup>7</sup> and 600 years later, many of the *foederati* of Justinian's East Roman Army were mercenaries.<sup>8</sup> Mercenary use continued unabated by William's army during the Norman Conquest,<sup>9</sup> by Renaissance Italian city-states with their *condottieri*,<sup>10</sup> and by Britain who resorted to Hessian mercenaries to fight American colonists during the Revolutionary War.<sup>11</sup> Indeed, the sovereign's use of mercenaries predates the national armies that arose only after

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3. R. ERNEST DUPUY & TREVOR N. DUPUY, *THE ENCYCLOPEDIA OF MILITARY HISTORY FROM 3500 B.C. TO THE PRESENT* 6 (2d ed. 1986) (outlining the 3200 year history of mercenaries, from Ramses' use of Numidian mercenaries at the Battle of Kadesh in 1294 B.C. to 1967 when Belgian and French mercenaries attempted to seize control of the Congo's Kitanga and Kivu provinces).

4. See H.W. PARKE, *GREEK MERCENARY SOLDIERS FROM THE EARLIEST TIMES TO THE BATTLE OF IPSUS* 3 (1933) (referring to the Cherithite and Pelethite mercenaries used during the reign of David, 1010-973 B.C., as well as the Shardana mercenaries of the Pharaohs). Parke's history focuses on early Greek mercenary use from 800 B.C. to 400 B.C. *Id. passim*.

5. G.T. GRIFFITH, *THE MERCENARIES OF THE HELLENISTIC WORLD* (Groningen 1968) (1935) (essentially picking up the history of Greek mercenary use where H.W. Parke concluded his history, in about 400 B.C.).

6. *Id.* at 12-13. Of the 11,900 mercenaries in Alexander's army, nearly all were foot soldiers, including Cretan archers and Agrianian skirmishers, although some 900 were light horse cavalry. *Id.* This number of mercenaries was consistent throughout most of Alexander's campaigns. *Id.* at 14. While the best foot soldiers of Darius's Persian army were said to be Greek mercenaries, Alexander's greatly outnumbered forces soundly defeated Darius at the Battle of Issus in 333 B.C., killing more than 50,000 Persian troops and losing no more than 500 of their own. DUPUY ET AL., *supra* note 3, at 48-49. Persian nobles murdered Darius two years later after Alexander defeated him at the Battle of Arbela (or Gaugamela) in which the Persians subsequently lost another 50,000 men to Alexander's pursuing forces. *Id.* at 49-50; LYNN MONTROSS, *WAR THROUGH THE AGES* 33-35 (3d ed. 1960).

7. DUPUY ET AL., *supra* note 3, at 98. Dupuy said that the "average Roman legionary [of 100 B.C.] was a tough, hard-bitten man, with values and interests—including a rough, heavy-handed sense of humor—comparable to those always found among professional private soldiers." *Id.* at 99.

8. MONTROSS, *supra* note 6, at 109.

the Treaty of Westphalia.<sup>12</sup> Despite the recent success of modern standing armies, however, the mercenary and the sovereign's resort to his services endures.

In the twentieth century's latter half, international law attempted to limit states' practice and individuals' conduct regarding mercenary activities. Regulation of state practice concerned primarily states' recruitment and use of mercenaries for intervention against "foreign"<sup>13</sup> self-determination movements, raising questions of the *jus ad bellum*. Regulation of individual mercenaries concerned their status and conduct during foreign conflicts, raising questions of the *jus in bello*. Oftentimes, the drafters of international legal provisions affecting mercenaries confused the principles of *jus ad bellum* and *jus in bello*, thereby producing questionable and

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9. E.A. FREEMAN, HISTORY OF THE NORMAN CONQUEST 232 (1876). "William of Normandy brought no great following to England. The army which defeated Harold near Hastings was no more than 6,000 or so, and of them many were mercenaries hired for adventure and dismissed in 1070 . . . ." DORIS M. STANTON, ENGLISH SOCIETY IN THE EARLY MIDDLE AGES (1066-1307) 12-13 (3d ed. 1962). See generally JOHN SCHLIGHT, MONARCHS AND MERCENARIES: A REAPPRAISAL OF THE IMPORTANCE OF KNIGHT SERVICE IN NORMAN AND EARLY ANGEVIN ENGLAND (1968).

10. MOCKLER, *supra* note 2, at 43-73. *Condottieri* is defined as: "A professional military leader or captain, who raised a troop, and sold his service to states or princes at war; the leader of a troop of mercenaries. The name arose in Italy, but the system prevailed largely over Europe from the 14th to the 16th [centuries]." OXFORD ENGLISH DICTIONARY (2d ed. 1989), Oxford University Press, *Oxford English Dictionary Online*, <http://dictionary.oed.com>.

11. ANTHONY MOCKLER, THE NEW MERCENARIES 6 (1985). See 1 THOMAS JEFFERSON, WORKS 23 (1859) ("He [George III] is at this time transporting large armies of foreign mercenaries."). "[George] Washington warned that 'Mercenary Armies . . . have at one time or another subverted the liberties of almost all the Countries they have been raised to defend . . . .'" Reid v. Covert, 354 U.S. 1, 24 n.43 (1955) (quoting 26 THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES 388 (John C. Fitzpatrick ed., 1944)). Mockler's 1985 text pertains mainly to mercenary activities in Africa through 1980, MOCKLER, *supra*, *passim*, whereas his 1969 work provides an exhaustive history of early mercenary use and an overview of mercenary activities in the Congo and Biafra during the 1960s, MOCKLER, *supra* note 2, *passim*.

12. Peace Treaty Between the Holy Roman Emperor and the King of France and Their Respective Allies, signed Oct. 24, 1648, reprinted in 1 MAJOR PEACE TREATIES OF MODERN HISTORY 7 (F. L. Israel ed., 1967), available at <http://www.yale.edu/lawweb/avalon/westphal.htm>. "[M]odern public international law traces its genesis to the period immediately preceding the formation of a community of sovereign states with the Treaty of Westphalia in 1648." William C. Bradford, *International Legal Regimes and the Incidence of Interstate War in the Twentieth Century: A cursory Quantitative Assessment of the Associative Relationship*, 16 AM. U. INT'L L. REV. 647, 652 n.12 (2001).

13. "Foreign" is used here in its literal sense to mean "in . . . a country . . . other than one's own." OXFORD DESK DICTIONARY 302 (1997).

ultimately tenuous attempts at international regulation.<sup>14</sup> More often, the drafters struggled to define adequately the ancient profession.<sup>15</sup>

An underlying political component further complicated the mercenary issue. This pit First World, former colonial powers wherein most mercenaries originated against Third World, post-colonial African powers that undoubtedly bore the brunt—and occasional benefit—of twentieth century mercenary activities.<sup>16</sup> The Cold War's ideological divisions only exacerbated the political taint expressed in the debate and resulting international provisions aimed at mercenaries.<sup>17</sup> Unfortunately, the first attempts at mercenary regulation focused on eliminating but one type of mercenary, the indiscriminate hired gun who ran roughshod over African self-determination movements in the post-colonial period from 1960 to 1980.<sup>18</sup> As mercenaries evolved, however, mercenary regulations did not.

The focus on post-colonial mercenary activity continued as attempts at mercenary regulation progressed from aspirational declarations by the United Nations (UN)<sup>19</sup> and Organization of African Unity (OAU)<sup>20</sup> in the

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14. See Françoise Hampson, *Mercenaries: Diagnosis Before Prescription*, in 3 NETH. Y.B. INT'L L. 1, 14-16 (1991).

15. See discussion *infra* Part III.A.4.

16. See, e.g., G.A. Res. 3103, U.N. GAOR, 28th Sess., Supp. No. 30, at 142, U.N. Doc. A/9030 (1973) (“The use of mercenaries by colonial and racist regimes against the national liberation movements struggling for their freedom and independence from the yoke of colonialism and alien domination is considered to be a criminal act and mercenaries should accordingly be punished as criminals.”); Hampson, *supra* note 14, at 29 (“Pressure from Third World and Socialist States led to the adoption of Article 47 [of Geneva Protocol I].”); MOCKLER, *supra* note 11, at 212 (describing how Cubans in Angola persuaded the Angolans to stage a show trial for captured mercenaries—later known as the Luanda Trial—that would serve as “a virtuous example of solidarity among progressive nations”).

17. See, e.g., Kevin A. O'Brien, *Private Military Companies and African Security: 1990-98*, in MERCENARIES: AN AFRICAN SECURITY DILEMMA 43, 48 (Abdel-Fatau Musah & J. Kayode Fayemi eds., 2000) (“It must be remembered that, throughout the 1970s and 1980s, the vast majority of conflicts in Africa were subsumed within the global bipolarity of the Cold War.”).

18. Although mercenary forces operated in Africa before 1960, they were hired primarily by De Beers “to conduct anti-smuggling activities” in Sierra Leone during the 1950s. UNITED KINGDOM FOREIGN AND COMMONWEALTH OFFICE, PRIVATE MILITARY COMPANIES: OPTIONS FOR REGULATION 28, ann. A (2002) [hereinafter UK GREEN PAPER] (Mercenaries: Africa's Experience 1950s-1990s).

19. See, e.g., G.A. Res. 2465, U.N. GAOR, 23d Sess., Supp. No. 18, at 4, U.N. Doc. A/7218 (1968).

20. See, e.g., Organization of African Unity, Resolution on the Activities of Mercenaries, AHG/Res. 49 (IV) (1967) [hereinafter OAU Mercenary Resolution], *reprinted in* MERCENARIES: AN AFRICAN SECURITY DILEMMA, *supra* note 17, app. III, at 281-82.

1960s; to defining and discouraging individual mercenaries in Article 47 of Protocol I in 1977;<sup>21</sup> to articulating states' responsibilities in regards to mercenary activities when the International Convention Against the Recruitment, Use, Financing, and Training of Mercenaries (UN Mercenary Convention) finally entered into force in 2001.<sup>22</sup> As a result, today's international provisions aimed at mercenary regulation suffer from myopic analyses<sup>23</sup> because, in law and fact, they are still directed at controlling post-colonial mercenary activities in Africa. This flawed approach ignores mercenaries' long history,<sup>24</sup> their modern transformation into sophisticated private military companies (PMCs), and their increasing use by—not against—sovereign states engaged in the legitimate exercise of procuring foreign military services.

This article first presents a brief historical overview of mercenary activities. The primary analysis section then demonstrates that existing international law provisions were designed to regulate only one type of mercenary, the unaffiliated individual that acted counter to the interests of post-colonial African states. The article next summarizes the limited liability imposed by existing international provisions upon unaffiliated individuals, state actors, and states themselves. Concluding that these provisions are altogether inadequate to reach modern PMC activities, the article's final section proposes a draft international convention and accompanying domestic safeguards that will serve to recognize and regulate state-sanctioned PMCs, while further marginalizing the unaffiliated mer-

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21. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 47, 1125 U.N.T.S. 3 [hereinafter Protocol I].

22. U.N. GAOR, 44th Sess., Supp. No. 43, U.N. Doc. A/RES/44/34 (1989) (entered into force Oct. 20, 2001) [hereinafter UN Mercenary Convention]. See *infra* Appendix B (reproducing Articles 1-7 of the UN Mercenary Convention).

23. This extends to legal commentators as well. See, e.g., David Kassebaum, *A Question of Facts: The Legal Use of Private Security Firms in Bosnia*, 38 COLUM. J. TRANSNAT'L L. 581, 588 n.42 (2000). "The role of mercenaries in international affairs has a very long history but it is one that need not be discussed here, since current international law reflects the experiences of the international community in the past few decades." *Id.*

24. See L.C. GREEN, *ESSAYS ON THE MODERN LAW OF WAR* 175 (1985). Green observed that the uproar caused by post-colonial mercenaries in Africa "might well lead one to assume that the problem is new. To adopt such an attitude, however, not only indicates a lack of historical knowledge, but also an ignorance of classical international law." *Id.*

canary whose violence offends international law because it is exercised without state authority.

## II. Background

### A. Mercenaries in History

National armies with professional soldiers allegiant to their nation-state represent a surprisingly new phenomenon. Prior to the French Revolution, no dishonor followed the man who fought under a flag not his own.<sup>25</sup> Instead, leaders often turned to private soldiers during times of military necessity, and these men were equally willing to soldier for pay on someone else's behalf.<sup>26</sup> The oldest use of the term mercenary referred to a "hireling,"<sup>27</sup> and today the *Oxford English Dictionary* defines the term simply as "a professional soldier serving a foreign power."<sup>28</sup> Legal commentators typically merge these two ideas, describing the mercenary as someone who provides military services to a foreign power for some compensation.<sup>29</sup> From this premise, one might conclude that a mercenary will result only when three fundamental conditions occur: war or prospective war, a person or group willing to pay a foreigner to satisfy their domestic military needs, and an individual "willing to risk his life for a livelihood in a cause that means nothing to him."<sup>30</sup>

Not until the Franco-German War of 1870 did the "nation-in-arms" concept gain predominance in the world's militaries.<sup>31</sup> As Griffith observed, "[I]t is only comparatively recently that whole nations have been cajoled and coerced into arms."<sup>32</sup> Mockler explained more delicately,

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25. MOCKLER, *supra* note 2, at 15.

26. GRIFFITH, *supra* note 5, at 293 (remarking that early Greek mercenaries were paid less than their hoplite counterparts). Because pay was not forthcoming until a campaign was completed, "[a]ll casualties were thus a clear financial gain to the employer." *Id.*

27. OXFORD ENGLISH DICTIONARY (2d ed. 1989) (originating from the vulgar *mercenarius* found in Chapter XII of John), Oxford University Press, *Oxford English Dictionary Online*, <http://dictionary.oed.com>.

28. *Id.*

29. See, e.g., John R. Cotton, Comment, *The Rights of Mercenaries as Prisoners of War*, 77 MIL. L. REV. 143, 148 & n.26 (1977). "A mercenary is a volunteer, owing and claiming no national allegiance to the party for whom he is fighting, who acts in a military role for whatever remuneration by his own free will on a contract basis." *Id.*

30. GRIFFITH, *supra* note 5, at 1.

31. MOCKLER, *supra* note 2, at 15.

32. GRIFFITH, *supra* note 5, at 1.

“The idea, now so widely accepted that a man can be obliged to fight for his country could only be accepted when a man had a country that was more than a geographical expression to fight for.”<sup>33</sup> This is not to imply that mercenaries fighting for selfish purposes were widely revered before the advent of the modern army built on national loyalties. Even in ancient Greece, contemporary opinion held that having the polis pay for mercenaries was an “unmitigated evil.”<sup>34</sup> They were tacitly accepted before the twentieth century, however, if not by polite society,<sup>35</sup> then by most states, their armies, and international law.<sup>36</sup>

Mockler separated the historical mercenaries into four classes: (1) the lone adventurer who often appears, but seldom exerts much influence in a single conflict; (2) the elite guards with which heads of state have always surrounded themselves, like the Swiss Guards and their modern-day descendants, the Papal Guards; (3) the bands of professional soldiers, temporarily united, that “reappear . . . in one form or another throughout history; usually at a time of the breakdown of empires, or political anarchy, and of civil war”;<sup>37</sup> and (4) the “semi-mercenaries” who make up a “respectable element hired out by major military powers to minor allies or client states.”<sup>38</sup> The second category’s close affiliation with the sovereign’s authority explains their widespread international acceptance, whether the highly capable Swiss mercenaries of the sixteenth century who were organized into the Swiss Guards,<sup>39</sup> the fierce Nepalese Gurkhas who once defeated and were later incorporated into British regiments,<sup>40</sup> or the displaced men of the French Foreign Legion who were organized for service “outside of France.”<sup>41</sup> The first and third categories continue to gen-

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33. MOCKLER, *supra* note 2, at 15.

34. GRIFFITH, *supra* note 5, at 1.

35. WILLIAM SHAKESPEARE, HENRY V, sc. 7, line 74 (“Many of our Princes . . . Lye drown’d and soak’d in mercenary blood.”); WILLIAM COWPER, HOPE (1781) (“His soul abhors a mercenary thought, And him as deeply who abhors it not.”).

36. GREEN, *supra* note 24, at 183. As late as the nineteenth century, “[t]he general view . . . seems to have been that the use and enlistment of foreign volunteers was legitimate . . .” *Id.* Moreover, “[t]he economic liberalism of the nineteenth century extended to a man’s freedom to contract out his services to fight.” Hampson, *supra* note 14, at 7.

37. MOCKLER, *supra* note 11, at 16.

38. *Id.*

39. *See id.* at 19-21; DUPUY ET AL., *supra* note 3, at 678-79 (relating that it was Swiss Guards that protected and died while defending Louis XVI at the time of the storming of the Tuileries by Parisian mobs on 10 August 1792). Mockler estimated that French kings employed some one million Swiss mercenaries from 1481 until 1792. MOCKLER, *supra* note 11, at 20.

40. *See* DUPUY ET AL., *supra* note 3, at 786, 860, 1292.

erate great controversy, most likely because they lack the second category's sovereign imprimatur. The fourth category, which encompasses many PMCs, rests somewhere in between.

## B. The Rise of the Private Military Companies

Private military companies take on many labels today, including, among others, mercenary firms, private armies, privatized armies, private military corporations, private security companies or firms, private military contractors, military service providers, non-lethal service providers, and corporate security firms. Their corporate model can be traced to Harold Hardraade's Norse mercenaries, first offered in support of the Byzantine Empire in 1032.<sup>42</sup> This group went on to form the mercenary Varangian Guard, whose Norse-Russian members became the most important component of the Byzantine army for the next 200 years.<sup>43</sup> By 1300, Byzantium hired Roger de Flor's small army of Catalan mercenaries,<sup>44</sup> known as the Grand Catalan Company, which was the first and longest-lived of the medieval "free companies."<sup>45</sup> For the next 150 years, other mercenary free companies arose and flourished in post-feudal Europe.<sup>46</sup>

Like the free companies, similar corporate characteristics were found in the English Company of the Staple and Merchant Adventurers, first ascendant in 1354,<sup>47</sup> whose members rivaled the English nobility in wealth

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41. MOCKLER, *supra* note 11, at 21; *see also id.* at 19-33 (describing the origins of the Legion in the Swiss Guards, its formation in 1831 and subsequent garrisoning in Sidi-bel-Abbes in the Sahara, and its influence on African politics after a 1961 coup attempt in Algiers by officers of its 1st Parachute Regiment, which led to the Regiment's disbandment and a flood of unemployed mercenaries). It was the Legion's 1st Regiment that lost 576 of its 700 men at Dien Bien Phu in Vietnam. *Id.* at 30. *See generally* ANTHONY CLAYTON, FRANCE, SOLDIERS AND AFRICA (1988) (discussing extensively the origins of *Légion Etrangère*, the French Foreign Legion).

42. DUPUY ET AL., *supra* note 3, at 303.

43. *See id.* at 304-06, 382. In later times, the Varangian Guard was composed primarily of Danish and English mercenaries, who were slaughtered by Crusaders and Venetians during the Conquest of Constantinople in 1204. *Id.* at 382.

44. *Id.* at 387-88.

45. MOCKLER, *supra* note 11, at 9-10. Their leader assassinated by the Byzantine emperor's son in 1305, the Grand Catalan Company's troops first rampaged through Thrace and Macedonia, DUPUY ET AL., *supra* note 3, at 387-88, and then set up their own Catalan duchy in Athens from 1311 to 1374. MOCKLER, *supra* note 11, at 10.

46. MOCKLER, *supra* note 11, at 9-15.

and influence until their demise in the late sixteenth century.<sup>48</sup> The free companies themselves were transformed in the fifteenth century.

The French solution to the problem of free companies . . . was to establish a standing army. . . . These companies [of the standing army] were quartered in various regions of France, and absorbed a great number of the free companies, both en masse and individually. Quickly they established law and order, the remaining mercenaries soon going elsewhere—mainly to the *condottiere* companies in Italy.<sup>49</sup>

Whereas France made from the free companies the first modern, professional standing army,<sup>50</sup> Italy entrusted almost all of its military endeavors during the fifteenth century to its *condottieri*.<sup>51</sup>

The century of the *condottieri* marked the zenith of mercenary influence over states' affairs. Of the many types of *condotta* or contracts signed by the *condottieri* and their employers, they all shared one characteristic: "there was no pretense on either side of claim of loyalty or allegiance outside of the terms of the *condotta*, in contrast with the rules governing the behavior of the free companions in France."<sup>52</sup> This distinction represented the beginning of the modern era's divergent allegiances, with state soldiers pledging loyalty to some central authority and mercenaries agreeing only to abide by their contracts' terms.

As the professional state army matured, mercenary use declined but never vanished. The able Swiss, who Mockler called the "Nation of Mercenaries," continued to provide specialized warriors to most developing Western European state armies.<sup>53</sup> From 1506 when Pope Julius II formed the Swiss Guards, later called the Papal Guards, until 1830 when France disbanded its last four Swiss Regiments, the European powers often turned

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47. A.R. MYERS, *ENGLAND IN THE LATE MIDDLE AGES* 223 (8th ed. 1971). "In overseas trade London merchants were increasingly influential not only in the Company of the Staple but in that of the Merchant Adventurers—so called because they 'adventured' abroad, in contrast to the Staplers . . ." *Id.* at 225.

48. See S.T. BINDOFF, *TUDOR ENGLAND* 287 (1950).

49. DUPUY ET AL., *supra* note 3, at 409.

50. *Id.* at 424-25. This transformation of the free companies by France led to the "rise of military professionalism" from 1445-1450, which hailed the dawn of the modern military era, according to Dupuy. *Id.*

51. GRIFFITH, *supra* note 5, at 2-3. "Greek warfare never became, as did Italian warfare [in the fifteenth century,] almost entirely an affair of mercenary armies." *Id.* at 3. See also MOCKLER, *supra* note 11, at 42-43.

to mercenary forces.<sup>54</sup> But by the nineteenth century, the mercenary companies competed against strong national armies. Writing in *Parameters*, Eugene Smith posited:

The growth of bureaucratically mature states [in the nineteenth century] capable of organizing violence created increasingly strong competition for private military corporations. At the same time, states began to recognize that their inability to control the actions of these private organizations challenged state sovereignty and legitimacy. The result was that the utility of the private military corporation as a tool of state warfare disappeared . . . until recently.<sup>55</sup>

Now 500 years after the demarcation between mercenary and standing armies, 700 years after the formation of the free companies, and 2300 years after Alexander employed mercenary Cretan archers, the international

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52. MOCKLER, *supra* note 2, at 45. Dupuy commented that Italy's total reliance on mercenaries made its fifteenth century endeavors "the most sterile in military history." DUPUY ET AL., *supra* note 3, at 429. Because of this, he concluded, "for three subsequent centuries, Italy was to become the battleground of the great European powers." *Id.* at 430. A contemporary of the *condottieri*, Machiavelli cautioned Italian rulers against these unprincipled men who would inevitably overthrow the governments that hired them. NIC-COLÒ MACHIAVELLI, *THE PRINCE* ch. 12 (George Bull trans., Penguin 1999) (1505) (How Many Kinds of Soldiery There Are, and Concerning Mercenaries). See generally WILLIAM CAFERRO, *MERCENARY COMPANIES AND THE DECLINE OF SIENA* (1998) (finding that the Italian city-state of Siena's exhaustive payments to mercenary companies in the fourteenth century contributed to her marked decline in relation to neighboring Florence); JANICE THOMSON, *MERCENARIES, PIRATES & SOVEREIGNS: STATE-BUILDING AND EXTRATERRITORIAL VIOLENCE IN EARLY MODERN EUROPE* (1996).

53. See MOCKLER, *supra* note 2, at 74-104.

54. *Id.* at 20-21. French reliance also continued, as most of the Swiss from the disbanded regiment became leaders of the Foreign Legion upon its formation in 1831. *Id.* at 21.

55. Eugene B. Smith, *The New Condottieri and U.S. Policy: The Privatization of Conflict and Its Implications*, *PARAMETERS*, Winter 2002, at 107-08. Smith outlined the rise and demise of conflict privatization, including the accepted use of private soldiers by states and mercantile companies from the fourteenth to eighteenth centuries. Smith also offered an interesting discussion of privateers who acted with authority under international law because sovereign states granted them "letters of marque and reprisal," a concept that Smith proposed to revive to confer legitimacy to modern PMCs and to maintain congressional control over PMC use by the United States. *Id.* at 106, 113.

community again wrestles with the question of how to regulate mercenaries.

### C. Modern Private Military Companies

Today's PMCs possess sophisticated military capabilities that historical mercenaries—and many modern state militaries—could only dream of.<sup>56</sup> As happened at the end of the Peloponnesian War,<sup>57</sup> the Cold War's conclusion produced a surplus of highly trained, professional soldiers in search of employment opportunities.<sup>58</sup> Therefore, most modern PMCs were formed by capable Cold War veterans from professional First World armies,<sup>59</sup> and their primary countries of origin include the United States, the United Kingdom, South Africa, and Israel.<sup>60</sup> These PMCs collectively offer to perform a full range of military services, from basic training to full-scale combat.<sup>61</sup>

The United Kingdom's Foreign and Commonwealth Office recently published a report entitled *Private Military Companies: Options for Regulation*,<sup>62</sup> which examines the scope of PMC military services and the potential utility that PMCs offer to states and international organizations. While commenting on the breadth of modern PMC services, the report concludes that most services fall within the areas of military advice,<sup>63</sup> training,<sup>64</sup> logistic support,<sup>65</sup> demining,<sup>66</sup> and peace operations monitoring roles.<sup>67</sup> In contrast, the report finds few PMCs capable or willing to provide private military forces for combat operations.<sup>68</sup> The report cautions, however, that PMC services still encompass vital military functions because “[t]he distinction between combat and non-combat operations is often artificial.”<sup>69</sup>

Examining PMC areas of expertise reinforces this blurred distinction. Military Professional Resources, Inc. (MPRI), perhaps the most dynamic U.S. PMC, advertises competency in a wide variety of skills, including air-

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56. See, e.g., O'Brien, *supra* note 17, at 44-70 (detailing PMC operations in Africa since 1990, and looking specifically at the military specialties offered by Britain's Sandline and South Africa's now-defunct Executive Outcomes (EO)); Smith, *supra* note 55, at 108-11 (describing the post-Cold War resurgence of PMCs and discussing their functions and capabilities).

57. GRIFFITH, *supra* note 5, at 4.

58. HOWE, *supra* note 2, at 79-80 (“The Cold War and then its cessation facilitated the dumping of large amounts of military equipment and trained personnel upon the world market.”).

borne operations, civil affairs, close air support, counterinsurgency, force

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59. For example, Military Professional Resources, Inc. (MPRI), of Alexandria, Virginia, is headed by President Carl Vuono, former U.S. Army Chief of Staff, and Senior Vice President Crosbie Saint, former commander of U.S. Army forces in Europe. MPRI, *Home Page*, at <http://www.mpri.com> (last visited Mar. 15, 2003) (Our Team/Corporate Organization Chart). On 30 June 2000, L-3 Communications Holding, Inc. acquired MPRI for \$39.6 million. L-3 Communications Holding, Inc. (LLL), Annual Report, SEC Form 10-K, item 7 (Mar. 13, 2003), <http://www.edgar-online.com>. Prospects for future growth at L-3 looked favorable.

[T]he DoD budgets have experienced increased focus on command, control, communications, intelligence, surveillance and reconnaissance (C3ISR), precision-guided weapons, unmanned aerial vehicles (UAVs), network-centric communications, Special Operations Forces (SOF) and missile defense. We believe L-3 is well positioned to benefit from increased spending in those areas. In addition, increased emphasis on homeland defense may increase demand for our capabilities in areas such as security systems, information security, crisis management, preparedness and prevention services, and civilian security operations.

*Id.* Neither L-3's most recent annual report, *id.*, nor its most recent quarterly report break out earnings for MPRI. See L-3 Communications Holding, Inc. (LLL), Quarterly Report, SEC Form 10-Q (Nov. 14, 2002), <http://www.edgar-online.com>. Quarterly net income for L-3, however, rose from \$27.39 million before L-3 acquired MPRI in June 2000, to \$61.76 million in the quarter ending 30 September 2002. Compare *id.*, with L-3 Communications Holding, Inc. (LLL), Quarterly Report, SEC Form 10-Q (Aug. 14, 2000), <http://www.edgar-online.com>.

60. UK GREEN PAPER, *supra* note 18, para. 23. A partial list of U.S. PMCs includes: Armor Holdings; Betac Corp.; Booz Allen Hamilton; Cubic Corp.; DFI International; DynCorp, Inc.; International Charter, Inc.; Brown & Root Services, a subsidiary of Halliburton; Logicon, a subsidiary of Northrop Grumman; MPRI, discussed *supra* note 59; Pacific Architects and Engineers; and Vinnell, a subsidiary of BDM, which is owned by the Carlyle Group, a merchant banking firm. In 1975, Vinnell contracted to train the Saudi Arabian National Guard, and this was regarded as the first use of a U.S. PMC. See *id.* tbl.1; David Isenberg, *Combat for Sale: The New Post-Cold War Mercenaries*, USA TODAY MAG., Mar. 1, 2000, at 10; DAVID ISENBERG, SOLDIERS OF FORTUNE LTD.: A PROFILE OF TODAY'S PRIVATE SECTOR CORPORATE MERCENARY FIRMS (Center for Defense Information Monograph, Nov. 1997), available at <http://www.ciaonet.org/wps/isd03>.

61. See generally KEN SILVERSTEIN, PRIVATE WARRIORS (2000). The Foreign Area Officer Association Web page details numerous PMC job opportunities, illustrating the diversity of modern PMC services. See Foreign Area Officer Association, *Job Prospects*, at <http://www.faoa.org/jobs.html> (last visited Mar. 27, 2003). See also Major Thomas J. Milton, *The New Mercenaries—Corporate Armies for Hire*, Dec. 1997, FOREIGN AREA OFFICER ASS'N J., at <http://www.faoa.org/journal/newmerc3.html>.

62. UK GREEN PAPER, *supra* note 18.

63. *Id.* para. 10. "[T]his may cover anything from advice on restructuring the armed forces, to advice on purchase of equipment or on operational planning." *Id.*

integration, foreign affairs, joint operations, intelligence (both strategic and tactical), leader development, legal services, ordnance, reconnaissance, recruiting, security assistance, special operations, surface warfare, training development, and weapons control.<sup>70</sup> Although MPRI's core

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64. *Id.* "This is a major activity by PMCs. . . . For example, in the 1970s the UK company, Watchguard, trained forces in the Middle East including personal bodyguards of rulers. The U.S. company, Vinnell, is reported as training the Saudi Palace guard today." *Id.*

65. *Id.*

For example MPRI assisted the U.S. Government in delivering humanitarian aid in the former Soviet Union; [DynCorp Inc.] and Pacific [Architects and Engineers] provided logistic support for the UN force in Sierra Leone (UNAMSIL); [and] Brown & Root [Services] is said to provide U.S. forces in the Balkans with everything from water purification to the means of repatriating bodies.

*Id.*

66. *Id.* para. 10, ann. A. See O'Brien, *supra* note 17, at 55-56 (stating that the American company Ronco "supplied both demining expertise and technology, as well as limited training to the Rwandan forces" after the conclusion of the Rwandan civil war in 1994).

67. UK GREEN PAPER, *supra* note 18, para. 10, ann. A.

68. *Id.* paras. 9, 24. South Africa's EO was a notable exception that performed direct combatant functions in both Angola (1993-1994) and Sierra Leone (1995-1996). See DAVID SHEARER, PRIVATE ARMIES AND MILITARY INTERVENTION 47-55 (1998) (Adelphia Paper 316) (offering an objective look at the abilities and limitations of private military companies); see also David Shearer, *Outsourcing War*, FOREIGN POL'Y 112 (Fall 1998) (same). Writing in 2000, Khareen Pech speculated that former EO personnel were still engaged in mercenary combatant activities in Africa.

Many of the companies who provide military services to the armies involved in civil and regional conflicts in Africa are linked to one another and the former EO group. As such, South African, European and African mercenaries with links to the former EO group are presently in the service of both rebel and state armies in Angola, the [Democratic Republic of the Congo], Congo-Brazzaville and Sudan.

Khareen Pech, *The Hand of War: Mercenaries in the Former Zaire 1996-97*, in MERCENARIES: AN AFRICAN SECURITY DILEMMA, *supra* note 17, at 117, 148. According to the *UK Green Paper*, EO is still "closely related to other companies which remain extant, including Sandline International." UK GREEN PAPER, *supra* note 18, para. 22. See generally Tim McCormack, *The "Sandline Affair": Papua New Guinea Resorts to Mercenarism to End the Bougainville Conflict*, in 1 Y.B. INT'L HUMAN. L. 292 (1998).

69. UK GREEN PAPER, *supra* note 18, para. 11.

70. MPRI, *Home Page*, at <http://www.mpri.com> (last visited Mar. 15, 2003) (Our Team/MPRI Skills Competency Base). See *supra* note 59 (describing MPRI's senior management).

business involves military advice and training, some commentators credited MPRI for the success of the Croat offensive, Operation Storm, which soundly defeated Serb forces holding Krajina in August 1995.<sup>71</sup> If this credit is due, it is most remarkable because MPRI's fourteen-man training team sent to perform the MPRI-Croatian government contract had less than eight months to train the Croat military leadership.<sup>72</sup>

The company insisted that the training team led by retired Major General John Sewall had limited its training to classroom instruction regarding civil-military relations.<sup>73</sup> Nonetheless, "MPRI benefited from the suspicions of its role,"<sup>74</sup> and it continued to provide significant military services in the Balkans to both the Croatian and Bosnian governments.<sup>75</sup> Like most U.S. PMCs, MPRI typically provides military services to and within the United States.<sup>76</sup> As its mission statement reflects, however, it also provides military services to foreign governments and the private sector.

MPRI's mission is to provide the highest quality education, training, organizational expertise, and leader development around the world. We serve the needs of the U.S. government, of foreign governments, and of the private sector with the highest standards and cost effective solutions. Our focus areas are defense, public security, and leadership development.<sup>77</sup>

Therefore, at the opening of the twenty-first century, multifaceted companies like MPRI will continue to offer military services to foreign entities in exchange for some compensation. To this extent, theirs is a mercenary profession.

#### D. Expanding the Role of Private Military Companies

Several commentators advocate expanding the scope of military services provided by PMCs such as MPRI.<sup>78</sup> Among other rationales offered, this would allow PMCs to transfer specialized military services to strug-

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71. SHEARER, *supra* note 68, at 58.

72. *See id.*

73. *Id.* at 58-59.

74. *Id.* at 59.

75. *Id.* at 59-63.

76. UK GREEN PAPER, *supra* note 18, para. 12.

77. MPRI *Mission*, at <http://www.mpri.com/channels/mission.htm> (last visited Mar. 15, 2003).

gling states in the developing world on behalf of states like the United States and United Kingdom whose militaries are stretched to the limit in performing missions across their entire spectrum of operations.<sup>79</sup> The 2002 *National Security Strategy of the United States* foresees the necessity to adapt the U.S. armed forces to evolving security threats: “The major institutions of American national security were designed in a different era to meet different requirements. All of them must be transformed.”<sup>80</sup> As part of this transformation, the U.S. military must emphasize warfighting rather than “peace engagement operations,” according to the 2001 *Quadrennial Defense Review (QDR)*.<sup>81</sup> Unlike its 1997 predecessor,<sup>82</sup> the 2001 *QDR* “makes no reference to peacekeeping, peace enforcement,

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78. See, e.g., *id.* para. 59 (“The United States has used DynCorp and subsequently Pacific A&E to recruit and manage monitors for it in the Balkans; so it is possible to imagine the UN as a whole adopting such a practice.”); O’Brien, *supra* note 17, at 45-46 (“Indeed it may be seen that, in some cases but not all, PMCs have been much more effective in resolving conflicts in many African countries than has the international community . . . .”); SHEARER, *supra* note 68, at 73-77; Smith, *supra* note 55, at 107. But see Steven Brayton, *Outsourcing War: Mercenaries and the Privatization of Peacekeeping*, 55 J. INT’L AFF. 303 (2002) (critiquing private military companies and their peacekeeping potential) (While identifying several problems with the current peacekeeping regime and summarizing the arguments against using private military companies, the author offers no solutions or alternatives.); Dena Montague, *The Business of War and the Prospects for Peace in Sierra Leone*, 9 BROWN J. WORLD AFF. 229 (2002) (criticizing state use of private military companies generally, and the now-defunct EO specifically). Despite the arguments against their very existence, PMC growth since 1990 is explained by other commentators in economic terms. “[The] PMCs continue to exist and grow in their operations simply because the demand is there. They often supply what the particular state cannot provide: security, whether for the citizens of the state or for international investment.” O’Brien, *supra* note 17, at 44.

79. Smith, *supra* note 55, at 113-14. State reliance on the private sector also offers economic advantages. See DEFENSE SCIENCE BOARD, *OUTSOURCING REPORT* (1995) (suggesting a \$6 billion annual Pentagon budget savings by outsourcing all U.S. military support functions); GENERAL ACCOUNTING OFFICE, *BASE OPERATIONS: CHALLENGES CONFRONTING DOD AS IT RENEWS EMPHASIS ON OUTSOURCING*, REPORT NO. GAO/NSIAD-97-86, at 4 (1997) (“[T]wo areas of outsourcing appear to offer the potential for significant savings, but the extent to which the services are exploring them is mixed. They involve giving greater emphasis to (1) the use of omnibus contracts, rather than multiple contracts, for support services and (2) the conversion of military support positions to civilian or contractor positions.”).

80. NATIONAL SECURITY COUNCIL, *THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA* ch. IX, at 29 (Sept. 2002) (The chapter is entitled “Transform America’s National Security Institutions to Meet the Challenges and Opportunities of the Twenty-First Century.”). The changing nature of warfare is also expected to place an enormous strain on states’ armies organized primarily to fight a now distant Cold War. See generally MARTIN L. VAN CREVALD, *THE TRANSFORMATION OF WAR* (1991) (predicting a resurgence of low intensity conflict).

sanction enforcement, preventative deployments, disaster relief, or humanitarian operations.”<sup>83</sup> And yet the global need remains for professional military forces—whether public or private—to accomplish these missions.<sup>84</sup>

In addition to the national security concerns confronting the United States, the larger international community increasingly demonstrates its unwillingness to intervene during the early stages of internal armed conflict due to cost, inadequate strategic interest, risk of casualties, or lack of national support and political will.<sup>85</sup> Despite this reluctance, Shawcross observed, “The lesson we learn from ruthless and vengeful warlords the world over is that [international] goodwill without strength can make things worse.”<sup>86</sup> In this way, timely military intervention during the early

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81. OFFICE OF THE SECRETARY OF DEFENSE, QUADRENNIAL DEFENSE REVIEW 2001, at 13 (2001). See also Leslie Wayne, *America's For-Profit Secret Army*, N.Y. TIMES, Oct. 13, 2002, at 3-1. “‘The main reason for using a contractor is that it saves you from having to use troops, so troops can focus on war fighting,’ said Col. Thomas W. Sweeney, a professor of strategic logistics at the Army War College in Carlisle, Pa.” *Id.* With this in mind, Smith offered four justifications for increased U.S. reliance on PMCs: (1) the increased military resource requirements needed to provide effective homeland defense; (2) a “national military strategy [that] requires a full-spectrum [of conflict] force . . . to achieve American strategic objectives in the world,” Smith, *supra* note 55, at 113; (3) the increasing strain placed on this full-spectrum force; and (4) the post-Cold War flood of “ethnic conflict, failing states, and transnational threats” leading to “new missions at the lower end of the conflict spectrum.” *Id.*

82. Cf. OFFICE OF THE SECRETARY OF DEFENSE, QUADRENNIAL DEFENSE REVIEW 1997 § 3 (1997) (“At the other end of the spectrum is the argument that as the world’s only remaining superpower, the United States has significant obligations that go well beyond any traditional view of national interest, such as generally protecting peace and stability around the globe, relieving human suffering wherever it exists, and promoting a better way of life, not only for our own citizens but for others as well.”).

83. CARL CONETTA, THE PENTAGON’S NEW BUDGET, NEW STRATEGY, AND NEW WAR, COMMONWEALTH INSTITUTE PROJECT ON DEFENSE ALTERNATIVES, POLICY REPORT (2001), <http://www.comw.org/pda/0206newwar.html>.

84. Smith asserted that PMCs may help fulfill this need. “[M]ilitary means are not sufficient to allow full and efficient implementation of the U.S. national security strategy. If the risk is to be mitigated, the United States must find alternative approaches. One such approach is the increased use of PMCs.” Smith, *supra* note 55, at 113. *But see* David Hackworth, *Rent-a-Soldier Tactics Not Good for U.S.*, AUSTIN AM. STATESMAN, July 28, 1995, at A15 (arguing against the shift of military functions to private companies). Nevertheless, U.S. practice suggests its increased reliance on PMC military services. See U.S. DEP’T OF STATE, BUREAU OF POLITICAL-MILITARY AFFAIRS, FOREIGN MILITARY TRAINING AND DOD ENGAGEMENT ACTIVITIES OF INTEREST (2002) [hereinafter FOREIGN MILITARY TRAINING REPORT] (published annually and compiled by the Departments of State and Defense, and demonstrating increasing use of private military companies by the United States), <http://www.state.gov/t/pm/rls/rpt/fmtrpt/2002>.

stages of internal armed conflict may offer the most effective means to prevent gross human rights violations. O'Hanlon argued:

Conventional wisdom holds that the use of force should be a last resort, used only after diplomacy and other measures have been attempted and found wanting. At the same time, it is highly desirable to intervene as soon as possible in a conflict that seems destined to be severe. The humanitarian benefits of doing so are often obvious. In addition, though it is sometimes said that civil wars must burn themselves out before peace is possible, they can accelerate as easily as they can reach some natural exhaustion point.<sup>87</sup>

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85. See, e.g., Michael Scharf & Valerie Epps, *The International Trial of the Century? A "Cross-Fire" Exchange on the First Case Before the Yugoslavia War Crimes Tribunal*, 29 CORNELL INT'L L.J. 635 (1996) (discussing international hesitancy to avert the human catastrophe that occurred in the former Yugoslavia and in many other twentieth century internal armed conflicts, as well as the lack of an international "police force" to intervene in such conflicts). Referring to the former Yugoslavia, William Shawcross remarked:

What the administration did not or would not understand was that the Vance-Owen plan [for Yugoslavia] did not pretend to be a "just settlement." It was, in fact, designed as an imperfect alternative to war which reflected basic political realities, including the unwillingness of Western powers, above all the United States, to commit their forces to impose a settlement of which they approved.

WILLIAM SHAWCROSS, *DELIVER US FROM EVIL: PEACEKEEPERS, WARLORDS AND A WORLD OF ENDLESS CONFLICT* 91 (2000) (considering the efficacy of humanitarian intervention). Referring to U.S. intervention during internal ethnic conflicts, David Callahan stated:

Military intervention in ethnic conflicts is an intrinsically difficult proposition. Since the United States rarely will have vital interests at stake in an ethnic conflict, it will almost always be inclined to use military force on a limited scale, if at all. It will seek to keep casualties low and minimize the national prestige that it lays on the line—goals that are notoriously hard to achieve.

DAVID CALLAHAN, *UNWINNABLE WARS: AMERICAN POWER AND ETHNIC CONFLICT* 187-88 (1997).

86. SHAWCROSS, *supra* note 84, book jacket. Cf. Robert Turner, *Taking Aim at Regime Elite: Forward: Thinking Seriously About War and Peace*, 22 MD. J. INT'L L. & TRADE 279 (1999) ("The great wars of history have not resulted from the victims being too well prepared or from an out-of control arms race. Rather, they come from perceived weakness—from a lack of military power, or above all else a lack of apparent will to use power effectively—and a consequential absence of effective deterrence.").

Callahan reached a similar conclusion: “The decisive use of [military] force by an outside party might have altered the course of several recent ethnic conflicts and contained the scope of fighting.”<sup>88</sup>

The Rwandan civil war of 1990-1994 provides the most poignant example. Third party states displayed overwhelming apprehension against deploying their armies to intervene, resulting in an ineffective UN peace enforcement operation.<sup>89</sup> This international indifference endured despite years of recurring Hutu and Tutsi ethnic massacres in Rwanda and Burundi,<sup>90</sup> a history replete with indicators of the likely outcome for Rwanda’s four-year civil war.<sup>91</sup> It is highly unlikely that any modern PMC could have diffused the Rwandan crisis in mid-1994.<sup>92</sup> Two of the seven genocide indicators identified by Keeler, however, bear mentioning: (1) “a group in power publishes messages of hate and the need to kill the other group,”<sup>93</sup> and (2) “genocide first occurs on a small scale, as if to see if the international community will intervene.”<sup>94</sup> A capable and willing PMC could have seized, disabled, or simply jammed the Hutu-controlled *Radio Mille Collines* early on to prevent further anti-Tutsi propaganda.<sup>95</sup> Moreover, properly equipped PMC peacekeepers could have intervened to prevent or at least discourage those responsible for the organized but small-

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87. MICHAEL O’HANLON, *SAVING LIVES WITH FORCE: MILITARY CRITERIA FOR HUMANITARIAN INTERVENTION* 8 (1997). See generally T. Modibo Ocran, *The Doctrine of Humanitarian Intervention in Light of Robust Peacekeeping*, 25 B.C. INT’L & COMP. L. REV. 1 (2002) (distinguishing between intervention as aggression and humanitarian intervention, and exploring the legal bases for such actions).

88. CALLAHAN, *supra* note 85, at 205.

89. See SHAWCROSS, *supra* note 85, at 124-29.

90. Ethnic massacres took place in 1959, 1962-1963, 1965, 1966, 1969, 1972, 1988, and 1991-1993. CALLAHAN, *supra* note 85, at 57-58; see also SHAWCROSS, *supra* note 85, at 124-45 (providing a brief history of Rwanda’s turmoil, from independence in 1959 to its 1997 refugee crises in which up to 200,000 may have been killed).

91. See Joseph A. Keeler, *Genocide: Prevention Through Nonmilitary Measures*, 171 MIL. L. REV. 135, 163-70 (2002) (identifying seven indicators of impending genocide). Keeler argued that a timely international response is critical to avert genocide, and he proposed a UN-monitored early warning system to respond to internal armed conflicts posing an imminent danger of genocide. *Id.* at 179-87.

92. See, e.g., UK GREEN PAPER, *supra* note 18, para. 24 (“Analysts have focused on the activities of Executive Outcomes in Angola and Sierra Leone; these were, however, exceptional operations and it is not clear if anything like them will be repeated . . .”).

93. Keeler, *supra* note 91, at 167-78.

94. *Id.* at 168-69.

95. In May 1994, “Boutros-Ghali asked Washington to jam the inflammatory broadcasts of *Radio Mille Collines*; he said he was told that it would be too expensive.” SHAWCROSS, *supra* note 85, at 139-40.

scale assaults, rapes, and murders that began in 1990.<sup>96</sup> With international recognition, therefore, such PMC humanitarian interventions could foreseeably diffuse the volatile conditions leading to genocide. If there is any reasonable possibility of averting humanitarian catastrophes like the Rwandan genocide, which claimed over 600,000 victims in less than 100 days,<sup>97</sup> the international community should explore the potential for this preventive application of PMC military services.<sup>98</sup>

### III. Analysis

#### A. Mercenaries and International Law

The previous section closed with a few of the compelling arguments in favor of expanding the scope of military services that PMCs provide. Before this can occur, however, an adequate legal footing must be established, one which recognizes the fine distinction between unaffiliated mercenaries and state-sanctioned PMCs.<sup>99</sup> Existing international provisions fail even to define mercenaries to most scholars' satisfaction, and they remain exceedingly ill-equipped to regulate effectively the full breadth of current PMC activities.<sup>100</sup>

The following subsections examine in detail the international provisions that attempt to regulate mercenary activities, including the Hague Conventions of 1907,<sup>101</sup> the Geneva Conventions of 1949,<sup>102</sup> the UN Charter and related resolutions,<sup>103</sup> Article 47 of Protocol I,<sup>104</sup> the OAU's declarations and conventions,<sup>105</sup> and the UN Mercenary Convention.<sup>106</sup> The section concludes with a summary of potential liability under existing

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96. Rwanda's "criminal code would surely have prohibited assault, rape, and murder. No Hutu was arrested, however, and no Hutu was tried for committing obvious criminal misconduct." Keeler, *supra* note 91, at 168.

97. *Id.* at 162-63.

98. After the Rwandan civil war's conclusion, the United States recognized the utility of PMCs in promoting post-conflict stability in Rwanda. Both BDM International and Betac Corporation have been hired since 1995 to assist U.S. Special Forces in training the nascent Rwandan army. See O'Brien, *supra* note 17, at 56.

99. Enrique Bernales Ballesteros, the UN Special Rapporteur on mercenary issues, spoke of "the thin line dividing the activities of private security companies and the use of mercenaries." *Report of the Second Meeting of Experts on Traditional and New Forms of Mercenary Activities as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, Economic and Social Council, 59th Sess., Agenda Item 5, at 8, U.N. Doc. E/CN.4/2003/4 (2002) [hereinafter *Report of the Second Meeting of Experts*].

international law for mercenary activities by unaffiliated individuals, state actors, and states themselves.<sup>107</sup>

### 1. *Hague Conventions*

The Hague Conventions of 1907 represent the first international effort aimed at regulating mercenary activities. The Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (Hague V)<sup>108</sup> aspires to “lay down more clearly the rights and duties of neutral Powers [toward belligerents] in case of war on land,”<sup>109</sup> thereby codifying customary international law to the satisfaction of the states’ plenipotentiaries attending the drafting conference. Therefore, the authors of Hague V incorporated customary international law then existing when they distinguished between “active participation or condon[ing] of [mercenary] recruitment by a state on its territory and the acts of individual citizens leaving to join a [mercenary] force of their own accord.”<sup>110</sup>

Article 4 of Hague V provides: “Corps of combatants cannot be formed nor recruiting agencies opened on the territory of a neutral Power to assist the belligerents.”<sup>111</sup> Article 6 continues: “The responsibility of a

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100. Mercenary regulation has always proved difficult, even when the mercenaries were loyal to the sovereign.

[The Western soldiers of the late middle ages] were professional soldiers, in both the Roman and modern sense of the term; they bore allegiance to the king, even though commanded and raised by the nobles, and they thought of themselves as English soldiers. They were, however, also mercenaries, who were not easily controlled or utilized in times of peace, when they often turned their unruly natures and military skills to plundering and terrorizing the civilian populace.

DUPUY ET AL., *supra* note 3, at 335.

101. *See* discussion *infra* Part III.A.1.

102. *See* discussion *infra* Part III.A.2.

103. *See* discussion *infra* Part III.A.3.

104. *See* discussion *infra* Part III.A.4.

105. *See* discussion *infra* Part III.A.5.

106. *See* discussion *infra* Part III.A.6.

107. *See* discussion *infra* Part III.A.8.

108. Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (Hague Convention No. V), Oct. 18, 1907, 36 Stat. 2310-31; 1 Bevans 654-68 [hereinafter Hague V].

109. *Id.* pmbl.

neutral Power is not engaged by the fact of persons crossing the frontier separately to offer their services to one of the belligerents.”<sup>112</sup> From Article 4 one may conclude that a neutral state must allow neither mercenary expeditions to be formed nor mercenary recruiting to take place on its territory.<sup>113</sup> From Article 6, however, it is clear that the state’s regulatory obligation is limited because it has no duty to prevent individuals—whether its citizens or another state’s citizens—from crossing its borders to serve as mercenaries for a belligerent.<sup>114</sup> Therefore, a neutral state must prevent domestic mercenary recruitment or staging activities under Hague V, but it is not required to outlaw the mercenary per se. In this way, “[t]he individual mercenary himself was only indirectly affected [through Hague V], by means of the implementation by a State of its obligations as a neutral.”<sup>115</sup>

## 2. Geneva Conventions

Some forty years later, the Geneva Convention Relative to the Treatment of Prisoners of War (POW) failed to mention mercenaries specifically, even in Article 4 which extends POW status to certain persons “who have fallen into the power of the enemy.”<sup>116</sup> While the *Commentary on the Geneva Conventions*<sup>117</sup> suggests by its silence that the drafters never considered mercenary status,<sup>118</sup> scholars debate whether the drafters intended

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110. H.C. Burmester, *The Recruitment and Use of Mercenaries in Armed Conflicts*, 72 AM. J. INT’L L. 37, 41 (1978). Burmester reached this conclusion after examining *opinio juris* from Suarez in 1621, F. SUAREZ, DE TRIPLICI VIRTUTE THEOLOGICA 832-35 (Classics of International Law ed. 1944), to Bynkershoek in 1737, C. VAN BYNKERSHOEK, QUASTIONUM JURIS PUBLICI LIBRI DUO 124 (Classics of International Law ed. 1944), to Lorimer in 1884, J. LORIMER, THE INSTITUTES OF THE LAW OF NATIONS 179 (1884). Burmester, *supra*. See also Hampson, *supra* note 14, at 7 (“By the early twentieth century a clear distinction was being drawn between the acts of individuals enlisting with foreign troops and the attitude shown by a State in allowing the organization of mercenaries within its territory.”).

111. Hague V, *supra* note 108, art. 4.

112. *Id.* art. 6.

113. See Burmester, *supra* note 110, at 42.

114. See *id.*

115. Hampson, *supra* note 14, at 7. A German proposal would have had belligerent states agree not to accept the service of foreigners, and neutral states would agree to prohibit such service by their citizens. The state representatives to the Hague Conference, however, rejected the proposal. *Id.* at 8 (citing A.S. de Bustamente, *The Hague Convention Concerning the Rights and Duties of Neutral Powers and Persons in Land Warfare*, 2 AM. J. INT’L L. 95, 100 (1908)).

116. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 4, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III].

to deny POW status to mercenaries, thereby refusing to recognize mercenaries as lawful combatants.<sup>119</sup> Most agree that the Conventions' drafters intended to treat mercenaries no differently than other combatants.<sup>120</sup> The protected status debate aside for the moment,<sup>121</sup> it can be said with certainty that the Geneva Conventions in no way criminalize the fact of being a mercenary, although they do require states parties to hold mercenaries accountable for combatant actions amounting to grave breaches of the Conventions' provisions.<sup>122</sup>

### 3. *The UN Charter and Principles of Non-Intervention*

Four years before the states parties signed the four Geneva Conventions, the drafters of the UN Charter recognized the sovereign equality of member states,<sup>123</sup> and they established a collective security mechanism for preventing and removing threats to international peace and security.<sup>124</sup> As a corollary, they required in Article 2(4) that all member states "refrain from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the

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117. See COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949: III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR (Jean S. Pictet et al. eds., 1960).

118. See Cotton, *supra* note 29, at 155.

119. Compare *id.* at 143, 155-60 (arguing that the Convention's protections were intended to be inclusive unless otherwise specified, thus extending protections to mercenaries), with Tahar Boumedra, *International Regulation of the Use of Mercenaries in Armed Conflicts*, 20 REVUE DE DROIT PÉNAL MILITAIRE ET DE DROIT DE LA GUERRE 35, 54 (1981) (concluding that "the situation envisaged by the drafters of the Convention was probably that of normal conflicts between two or [more] national States[,] each side fighting with forces made up of its own nationals," thus excluding mercenaries from protection).

120. See *infra* notes 191-200 and accompanying text (discussing how Protocol I, Article 47, diverged from what had become an accepted principle of customary international law).

121. See Protocol I discussion *infra* Part III.A.4.

122. Alleged perpetrators of grave breaches, regardless of nationality, must be brought to trial by states parties to the Geneva Conventions. See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, arts. 49-50, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, arts. 50-51, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention III, *supra* note 116, arts. 129-130; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, arts. 146-147, 6 U.S.T. 3516, 75 U.N.T.S. 287.

123. U.N. CHARTER art. 1(1).

124. *Id.* art. 2(1).

[p]urposes of the United Nations.”<sup>125</sup> Commentators refer to either “aggression” or “intervention” when referring to states’ “threat or use of force,” with the former term commonly used,<sup>126</sup> and the latter term reserved for discussing use of force relating to the development of neutrality law since the Hague Conventions.<sup>127</sup> Regardless of terminology, Article 2(4) of the UN Charter significantly limits when states may resort to use of force.<sup>128</sup> The Charter makes exceptions for individual or collective self-defense in the face of an armed attack<sup>129</sup> and for collective security measures involving use of military force authorized by the UN Security Council.<sup>130</sup> Several non-binding UN resolutions<sup>131</sup> issued since 1965, however, may place additional restrictions on states’ authority to use force, to include states’ use of mercenaries.

In 1965, the UN General Assembly issued Resolution 2131, the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty, which 109 member states unanimously adopted.<sup>132</sup> It states:

No State has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. . . .<sup>133</sup>

. . . .

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125. *Id.* art. 2(4).

126. *See, e.g.,* YORUM DINSTEIN, *WAR, AGRESSION AND SELF-DEFENSE* (2d ed. 1994) (discussing mercenary use as a form of state aggression).

127. *See, e.g.,* Burmester, *supra* note 110, at 43-44 (“The [state’s] right to resort to force and to provide assistance to another state under attack have been severely curtailed in the case of international conflicts. Use of mercenaries in such conflicts may reasonably be regarded as foreign intervention [in violation of the UN Charter.]”); Hampson, *supra* note 14, at 22.

128. *See* U.N. CHARTER art. 2(4). This may include dispatching mercenary forces. *See* John Norton Moore, *The Secret War in Central America and the Future of World Order*, 80 AM. J. INT’L L. 43 (1986) (discussing UN Charter, Article 2(4), and the definition of aggression, which includes dispatching mercenary forces); David P. Fidler, *War, Law & Liberal Thought: The Use of Force in the Reagan Years*, 11 ARIZ. J. INT’L L. 45 (1994) (arguing that the Reagan Administration’s support to the Nicaraguan Contras amounted to dispatching a mercenary force against another nation). Some observers have argued that the Reagan Administration also dispatched mercenaries in violation of Article 2(4) when it trained Libyan mercenaries to overthrow the Gaddafi government. Hampson, *supra* note 14, at 5 n.9.

129. U.N. CHARTER art. 51.

Also, no State shall organize, assist, foment, finance, incite or *tolerate* subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State or interfere in civil strife in another State.<sup>134</sup>

While a strong defense of sovereignty, Resolution 2131 does not mention mercenaries. If one equates “armed activities” to mercenary incursions, this widely accepted resolution would seem to prohibit states from recruiting, organizing, financing, or sending mercenaries to intervene in foreign states. The term “tolerate” also implies that a state could not knowingly allow its citizens or others to undertake such activities on its territory when those activities were undertaken to affect another state’s regime change or interfere in matters related to its internal unrest. Although Resolution 2131 offers appealing potential for mercenary regulation, it fails to proscribe mercenary activities specifically. Moreover, no subsequent UN declaration and few scholars have cited the resolution as authority for this proposition.<sup>135</sup>

In 1968, the General Assembly issued Resolution 2465, the Declaration on the Granting of Independence to Colonial Countries and Peoples, which was adopted fifty-three to eight with forty-three abstentions.<sup>136</sup> Significantly for purposes of mercenary regulation, the resolution states:

[T]he practice of using mercenaries against movements for national liberation and independence is punishable as a criminal

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130. *Id.* arts. 39, 42. Regarding collective security measures, the UN Charter envisions a lawful resort to use of force, but only when the Security Council determines this “may be necessary.” *Id.* art. 42. The Charter requires member states to make available their military forces for this purpose.

All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.

*Id.* art. 43. Although a supranational authority, the UN undoubtedly represents a power “foreign” to the individual soldier or military technician that member states provide to the Security Council. *See supra* note 13. Therefore, one could argue legitimately that the UN employs these individuals in a mercenary endeavor consisting of “professional soldier[s] serving a foreign power.” *See supra* text accompanying note 28 (defining the term mercenary).

act and . . . mercenaries themselves are outlaws . . . [;] Governments of all countries [should] enact legislation declaring the recruitment, financing and training of mercenaries in their territory to be a punishable offence and [should prohibit] their nationals from serving as mercenaries.<sup>137</sup>

With this language, the General Assembly for the first time pronounced mercenarism to be a crime, albeit in the limited circumstances when the

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131. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 103 (1987) [hereinafter RESTATEMENT THIRD].

c. Declaratory resolutions of international organizations. States often pronounce their views on points of international law, sometimes jointly through resolutions of international organizations that undertake to declare what the law is on a particular question, usually as a matter of general customary law. International organizations generally have no authority to make law, and their determinations of law ordinarily have no special weight, but their declaratory pronouncements provide some evidence of what the states voting for it regard the law to be. The evidentiary value of such resolutions is variable. Resolutions of universal international organizations [such as the UN], if not controversial and if adopted by consensus or virtual unanimity, are given substantial weight. Such declaratory resolutions of international organizations are to be distinguished from those special “law-making resolutions” that, under the constitution of an organization, are legally binding on its members.

*Id.* § 103, cmt. c. In addition, consensus resolutions may evidence entry into customary international law. See *id.* § 103 (reporter’s note 2). Hampson remarked:

General Assembly resolutions, [while] not binding as such in [the area of resort to armed force], may nevertheless represent an encapsulation of customary international law. This is particularly likely to be the case where they are adopted by large majorities, especially if the majority includes the Security Council veto powers.

Hampson, *supra* note 14, at 20. See generally THE CHARTER OF THE UNITED NATIONS: A COMMENTARY (Bruno Sima ed., 2002).

132. G.A. Res. 2131, U.N. GAOR, 20th Sess., Supp. No. 14, at 11, U.N. Doc. A/6014 (1965) (adopted 109 to 0). See Hampson, *supra* note 14, at 20 (Resolution 2131 was “adopted without dissent on points of substance . . .”). The most obvious precursor to Resolution 2131 was the Declaration on the Granting of Independence to Colonial Countries and Peoples. G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, at 66, U.N. Doc. A/4684 (1960). “All armed action or repressive measures against dependent peoples shall cease in order to enable them to exercise peacefully and freely their right to complete independence, and the integrity of their national territory shall be respected.” *Id.* at 67.

133. G.A. Res. 2131, *supra* note 132, at 12, para. 1.

134. *Id.* para. 2 (emphasis added).

mercenary fights against a national liberation and independence movement.<sup>138</sup>

The bold but non-binding Resolution 2465 reflected no existing international or domestic mercenarism crime. Instead, it was merely aspirational, a *de lege ferenda* principle encouraged by some UN member states out of hope that it might one day become customary international law.<sup>139</sup> It certainly did not reflect customary international law in 1968, and the novel resolution got no closer to becoming so when put to the vote.

Resolution 2465 received slightly more than half of the General Assembly members' votes, which suggests an international principle far short of widespread acceptance.<sup>140</sup> This explains why in the same provision the General Assembly called upon states' governments to enact legislation prohibiting their nationals from acting as mercenaries and

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135. *But cf.* Hampson, *supra* note 14, at 20-21. Hampson argued that Resolution 2131's "principles were reiterated in 1970 in [General Assembly Resolution 2625,] the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States," *id.*, but Resolution 2625 is limited to states' organizing or encouraging mercenary activities, and it does not encompass states' toleration of mercenary (or "armed") activities by its citizens or others. *See* G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 123, U.N. Doc. A/8028 (1970). Moreover, Resolution 2625 fails to reiterate, recall, or reaffirm the text or principles of Resolution 2131. *Id.* at 121. From these two resolutions and the principles of neutrality law, however, Hampson developed a construct that spells out states' responsibilities to prevent unlawful intervention, a construct that she called "intervention law." Hampson, *supra* note 14, at 20-23. While quite compelling in the way it merges neutrality law and principles of non-intervention, the analysis may be questioned for the assumption that Resolution 2625 "provides . . . that no State shall tolerate armed activities directed towards another State." *Id.* at 21 (reading in that language from Resolution 2131). Thirty years later, however, the UN Mercenary Convention arguably codified this principle, thereby lending authority to Hampson's intriguing intervention law paradigm. *See* UN Mercenary Convention, *supra* note 22, art. 6(a) (States parties shall take "all practicable measures to prevent [mercenary-related] preparation in their respective territories . . .").

136. G.A. Res. 2465, *supra* note 19.

137. *Id.* para. 8.

138. *See* Boumedra, *supra* note 119, at 56. In 1969, the General Assembly in Resolution 2548 reiterated that mercenaries were outlaws and, therefore, that state use of mercenaries against national liberation and independence movements was also criminal. G.A. Res. 2548, U.N. GAOR, 24th Sess., Supp. No. 30, U.N. Doc. A/7630 (1969).

139. This is opposed to a *de lege lata* principle, which represents an emerging rule of customary international law. *See* Hersch Lauterpacht, *Codification and Development of International Law*, 49 AM. J. INT'L L. 16, 35 (1955).

140. *See supra* note 130.

prohibiting the “recruitment, financing and training of mercenaries in their territory,”<sup>141</sup> a principle eventually addressed in the 1989 UN Mercenary Convention.<sup>142</sup> Nevertheless, even if viewed in the best possible light, Resolution 2465 limits its application to mercenary activities against national liberation and independence movements.<sup>143</sup> As such, it is largely irrelevant when considered outside of the post-colonial context existing when it was written.

In 1970, the General Assembly issued Resolution 2625, the Declaration of Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations.<sup>144</sup> The General Assembly adopted the resolution by a consensus vote, but it differed from previous declarations in three material respects. First, it reflected international law because it did not refer to individual mercenaries as criminals *per se*.<sup>145</sup> Second, it was not limited to national independence and liberation movements, which limited Resolution 2465 to the post-colonial context.<sup>146</sup> Third, the resolution did not deplore state toleration of mercenary activities when it elaborated on states’ responsibilities: “[E]very state has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State.”<sup>147</sup>

Therefore, by Resolution 2625’s widely accepted terms, states should not organize or encourage mercenaries—whether or not the mercenaries are fighting against national liberation and independence movements—but states are not prohibited from knowingly tolerating mercenary activities that lead to incursions in other states.<sup>148</sup> This is consistent with the principles of neutrality law embodied in Hague V, which generally distinguishes between state versus individual actions and the corresponding responsibility for those actions.<sup>149</sup> Ultimately, Resolution 2625 stands out because of its consistency with international law and its lack of political overtones, two characteristics that may explain the resolution’s unanimous approval and its explicit incorporation into customary international law by a subsequent decision of the International Court of Justice.<sup>150</sup> The same cannot be

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141. G.A. Res. 2465, *supra* note 19, para. 8.

142. UN Mercenary Convention, *supra* note 22, art. 5.

143. G.A. Res. 2465, *supra* note 19, para. 8.

144. G.A. Res. 2625, *supra* note 135.

145. *See supra* text accompanying notes 115, 122.

146. *See supra* note 143 and accompanying text.

said about the General Assembly's next resolution relevant to mercenary regulation.

In late 1973, the General Assembly returned to regulating mercenary activities in post-colonial regimes, a theme first articulated in 1968 by Resolution 2465.<sup>151</sup> Resolution 3103, the Declaration on Basic Principles of the Legal Status of the Combatants Struggling Against Colonial and Alien Domination and Racist Regimes, met less than unanimous approval much like its 1968 topical predecessor.<sup>152</sup> Arguably, international support was increasing because Resolution 2465 received fifty-three votes, with eight votes against and forty-three abstentions,<sup>153</sup> while Resolution 3103 received eighty-three votes, with thirteen votes against and nineteen abstentions.<sup>154</sup> The level of political rhetoric, though, markedly increased in Resolution 3103, which states: "The use of mercenaries by colonial and racist regimes against the national liberation movements struggling for

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147. G.A. Res. 2625, *supra* note 135, Annex, at 123. Resolution 2625 contains a separate provision related to terrorist activities and activities that further other states' civil strife. It also imposes a duty on states to refrain from acquiescing to such activities on their territory.

Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when [the acts] involve a threat or use of force.

*Id.* Unlike Resolution 2131 of 1965, however, Resolution 2625 does not say that states must not tolerate "armed activities," arguably including mercenary activities, which seek to overthrow foreign regimes or interfere in a state's internal strife. *See supra* notes 132-35 and accompanying text. Therefore, by its terms, Resolution 2625 is limited to states that encourage or organize mercenary activities, a higher threshold than mere toleration of such activities.

148. *But see* Hampson, *supra* note 14, at 21. Considering Resolutions 2131 and 2625 together, Hampson concludes: "Inaction is not sufficient. If there is any evidence of [mercenary] activities, the State must take positive action to prevent, deter, and punish it. Inaction amounts to [prohibited] toleration of the activities." *Id.* *See supra* note 135 (considering Hampson's conclusion).

149. *See* Hague V, *supra* note 108, arts. 4, 6.

150. *See* Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 187-92 (June 27) (Merits).

151. G.A. Res. 2465, *supra* note 19. *See supra* notes 136-42 and accompanying text.

152. G.A. Res. 3103, *supra* note 16.

153. G.A. Res. 2465, *supra* note 19.

154. G.A. Res. 3103, *supra* note 16.

their freedom and independence from the yoke of Colonialism and alien domination is considered to be a criminal act and the mercenaries should accordingly be punished as criminals.”<sup>155</sup>

The language of Resolution 3103 returns the debate to mercenary activities directed against national liberation and independence movements. Like the 1970 Declaration of Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations,<sup>156</sup> Resolution 3103 refers to states’ responsibilities regarding mercenaries. Whereas the 1970 resolution said that all states have a responsibility to refrain from organizing or encouraging mercenary incursions into other states, whether or not the mercenaries fought against national liberation or independence movements,<sup>157</sup> Resolution 3103 pertains only to “colonial and racist regimes.”<sup>158</sup> Resolution 3103 also goes beyond states’ responsibilities, declaring that it amounts to a criminal act when this select category of states uses mercenaries against national liberation and independence movements.<sup>159</sup>

Like Resolution 2465 of 1968, Resolution 3103 again refers to mercenarism as criminal in nature. Unlike its 1968 predecessor, however, Resolution 3103 uses the phrase “should be punished as criminals,” rather than “mercenaries themselves are outlaws.” In contrast to the General Assembly’s novel and unsupported declaration that one category of states, the alien and racist regimes, commits a crime when they use mercenaries against a second category of states, those engaged in national liberation and independence movements, the General Assembly’s call for states to enact legislation to punish mercenaries as criminals better reflects international law, which in 1973 criminalized neither mercenarism itself, nor any state’s use of mercenaries.<sup>160</sup> This approach also acknowledges the generally non-binding nature of General Assembly resolutions, which do not

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155. *Id.* art. 5.

156. G.A. Res. 2625, *supra* note 135.

157. *See supra* text accompanying note 147.

158. G.A. Res. 3103, *supra* note 16, arts. 2-3, 5.

159. *Id.* art. 5.

160. *See* Frits Kalshoven, *Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts: The First Session of the Diplomatic Conference, Geneva, 20 February – 29 March 1974*, in 5 NETH. Y.B. INT’L L. 3, 24 (1974) (concluding that Resolution 3103 was neither an accurate nor authoritative statement on the law). “[R]esolution 3103 (XXVII) cannot be accepted as an accurate, let alone as an authoritative, statement of the law; on the contrary, it provided a clear case of abuse of block voting power.” *Id.* at 24.

amount to customary international law unless approved by wide majorities and affirmed by subsequent state practice.<sup>161</sup>

This is not to say that the UN cannot legislate in effect regarding international peace and security generally, or use of force specifically. In 1974, the General Assembly released Resolution 3314, the Draft Definition of Aggression issued by the UN Special Committee on the Question of Defining Aggression.<sup>162</sup> The resolution defined as an act of aggression state participation in the use of force by militarily organized unofficial groups, that is, “[t]he sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another state . . . .”<sup>163</sup> Resolution 3314 enjoyed widespread support and was adopted by consensus, suggesting states accepted it as customary international law.<sup>164</sup> By its terms, all states, and not just those labeled as colonial or racist regimes, engage in aggression—the “use of force against the territorial integrity or political independence of [another] state” in violation of Article 2(4) of the UN Charter<sup>165</sup>—when they send mercenaries to use force against another state.<sup>166</sup>

Looking at the cumulative effect of the General Assembly resolutions that most likely evidence customary international law,<sup>167</sup> Resolutions 2131, 2625, and 3314,<sup>168</sup> a concise restriction on mercenary activities

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161. See RESTATEMENT THIRD, *supra* note 131, § 103 (reporter’s note 2).

A resolution purporting to state the law on a subject is some evidence of what the states voting for the resolution regard the law to be, although what states do is more weighty evidence than their declarations or the resolutions they vote for. The evidentiary value of such a resolution is high if it is adopted by consensus or by virtually unanimous vote of an organization of universal membership such as the United Nations or its Specialized Agencies.

*Id.* Regarding Resolution 3103, Verwey said: “Even among African circles doubt seems to prevail as to whether the claim formulated in this resolution has in the meantime developed into a rule of customary law.” Wil D. Verwey, *The International Hostages Convention and National Liberation Movements*, 75 AM. J. INT’L L. 69, 81 (1981).

162. G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 31, at 143, U.N. Doc. A/9631 (1974).

163. *Id.* para. 3(g).

164. See *supra* notes 131, 161.

165. U.N. CHARTER art. 2(4).

166. See G.A. Res. 3314, *supra* note 162, art. 1.

167. See *supra* notes 131, 161 and accompanying text.

emerges. States must not organize, encourage, or send mercenaries to use armed force against another state. This applies whether or not the organizing, encouraging, or sending state is a colonial or racist regime, and whether or not the mercenaries are organized, encouraged, or sent to fight against a national liberation and independence movement. Despite this restriction, however, the General Assembly resolutions do not in themselves prohibit states from knowingly tolerating mercenary activities that lead to a use of armed force in other states.

#### 4. Protocol I

Continuing the General Assembly's endeavor to regulate mercenaries, the Diplomatic Conference on the Reaffirmation and Development of International Law Applicable in Armed Conflicts first attempted to define mercenaries when it met from 1974 to 1977. The Diplomatic Conference's ultimate achievement, the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), provides the international community's definitive statement on mercenaries.<sup>169</sup> The Nigerian representative put forth the issue,<sup>170</sup> and his nation brought significant experience to the negotiations because Nigeria fought mercenary forces employed by Biafra during the nation's civil war from 1967-1969.<sup>171</sup> The assembled representatives, however, found it difficult to reach consensus on defining mercenaries. This resulted in inevitable compromise, producing an international

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168. G.A. Res. 2131, *supra* note 132; G.A. Res. 2625, *supra* note 135; G.A. Res. 3314, *supra* note 162.

169. Protocol I, *supra* note 21, art. 47 (defining mercenaries and denying them prisoner of war status).

170. 3 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS, GENEVA (1974-1977) 192 (Swiss Federal Political Department 1978) [hereinafter OFFICIAL RECORDS] (CDDH/III/GT/82, May 13, 1976). The proposed article 42 *quater* on mercenaries read:

1. The status of combatant or prisoner of war shall not be accorded to any mercenary who takes part in armed conflicts referred to in the Conventions and the present Protocol.
2. A mercenary includes any person not a member of the armed forces of a party to the conflict who is specially recruited abroad and who is motivated to fight or take part in armed conflict essentially for monetary payment, reward or other private gain.

*Id.*

provision designed to discourage rather than to regulate mercenary activities.<sup>172</sup>

After the first meeting of the Committee III Working Group on Protocol I, which debated the proposed article on mercenaries, Mr. Baxter from the United States reported that “[t]he matter had been discussed at length in the Working Group and had proved to be much more complex than [it] appeared when the study of the topic began.”<sup>173</sup> A contemporary author summed up the group’s dilemma. “As with any label used in today’s multi-polar world,” he said, “the term ‘mercenary’ is subject to various interpretations by parties seeking to justify their own actions.”<sup>174</sup> The opinions expressed thus represented the existing Cold War dichotomy and the emerging North-South divide among states,<sup>175</sup> with the then-Soviet Union still identifying itself firmly with the Third World states of the South.<sup>176</sup>

In general, the Third World representatives of the Working Group perceived mercenaries as simple criminals unworthy of any legal protections. Mr. Clark, the Nigerian representative, used the phrase “common criminals,”<sup>177</sup> Mr. Lukabu K’Habouji of Zaire referred to mercenaries as the

171. See GERRY S. THOMAS, *MERCENARY TROOPS IN MODERN AFRICA* 11, 16 (1984) (offering a thorough analysis of the ethnic and tribal composition of the opposing forces, as well as the composition, motivation, and tactics of mercenary forces). See generally Abdel-Fatau Musah & J. Kayode Fayemi, *Africa in Search of Security: Mercenaries and Conflicts—An Overview*, in *MERCENARIES: AN AFRICAN SECURITY DILEMMA*, *supra* note 17, at 13. Ironically, Nigeria also employed mercenaries during its civil war, see HOWE, *supra* note 2, at 49, and it continued employing mercenaries throughout the 1990s. See O’Brien, *supra* note 17, at 61-63. See generally JOHN DE ST. JORRE, *THE NIGERIAN CIVIL WAR* (1972). So did many other African states. See *infra* note 372.

172. See 15 OFFICIAL RECORDS, *supra* note 170, at 189-202, 481 (providing the historical documents of the committee considering the new article on mercenaries for Protocol I); see also 3 HOWARD S. LEVIE, *PROTECTION OF WAR VICTIMS: PROTOCOL I TO THE GENEVA CONVENTIONS 27-55* (1980) (also compiling the documents of the 1974-1977 Geneva Diplomatic Conference). See generally COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 (Yves Sandoz et al. eds., 1987); George H. Aldrich, *New Life for the Laws of War*, 75 AM. J. INT’L L. 764, 776-77 (1981) (providing an analysis of the Geneva Protocols and specifically Article 47, which defines mercenaries).

173. 15 OFFICIAL RECORDS, *supra* note 170, para. 24, at 107 (CDDH/III/SR.49, June 4, 1976).

174. Cotton, *supra* note 29, at 146. “The use of the term [mercenary] is fraught with enormous political, diplomatic and even moral overtones.” *Id.*

175. See generally NASSAU A. ADAMS, *WORLDS APART: THE NORTH-SOUTH DIVIDE AND THE INTERNATIONAL SYSTEM* (1993).

176. See *infra* note 185 and accompanying text.

“odious ‘profession’ of paid killers,”<sup>178</sup> Mr. Abdul El Aziz of Libya called them “criminals guilty of crimes against humanity,”<sup>179</sup> and Mrs. Silvera of Cuba concluded simply, “the mercenaries themselves [are] criminals.”<sup>180</sup> As further illustration, Mr. Bachir Mourad of Syria voiced his country’s displeasure at the final article because his delegation “would have preferred a more stringent text giving no protection whatever to mercenaries,”<sup>181</sup> apparently dissatisfied with Mr. Clark’s implication that mercenaries would still enjoy the fundamental guarantees of Protocol I, Article 75.<sup>182</sup> No love was lost for the mercenaries, and no representative put forth a defense for their historic or contemporary constructive use. Their only spokesmen were the Holy See representative and some of the former colonial powers, who maintained that Article 75’s fundamental guarantees should still extend to these men, “whatever their faults and their moral destitution.”<sup>183</sup>

After examining the *Official Records* of the Protocol I Diplomatic Conference, one senses that all Working Group and Committee III discussions referenced the example of mercenaries in Africa since 1960 and their corresponding effect upon post-colonial struggles for self-determination.<sup>184</sup> This context seems obvious after reading the Soviet Union representative’s statement following Committee III’s adoption of Protocol I, Article 47:

Faithful to its consistently-held [sic] principles and policy of supporting the legitimate struggle of the peoples for their national liberation, the Soviet Union from its inception and thereafter throughout the next sixty years has supported and will

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177. 15 OFFICIAL RECORDS, *supra* note 170, para. 15, at 192 (CDDH/III/SR.57, Apr. 29, 1977).

178. 15 *id.* para. 19, at 193 (same).

179. 15 *id.* para. 38, at 198 (same).

180. 15 *id.* para. 32, at 196 (same).

181. 15 *id.* para. 34, at 196-97 (same).

182. *See* 6 *id.* para. 81, at 157 (CDDH/SR.41, May 26, 1977).

183. 6 *id.* para. 87, at 158 (same).

184. *See, e.g.*, 15 *id.* para. 33, at 196 (CDDH/III/SR.57, Apr. 29, 1977). “Mercenaries . . . had always fought against national liberation movements, as was attested by the experience of many countries of the third world.” *Id.* (statement of Mr. Alkaff, Yemen). The Mozambique delegation offered some insight into the myopic nature of the committee’s analysis when it stated: “The trial of mercenaries in Angola in 1976 shed new light on the scope and the criminal nature of the system of mercenaries, *hitherto considered a noble profession by those who procure them.*” 6 *id.* at 193 (CDDH/SR.41, Annex, May 26, 1977) (emphasis added).

continue to support every effort aimed at helping nations to put a speedier end to colonialism, racism, apartheid and other forms of oppression, and to strengthen their national independence.<sup>185</sup>

In focusing on a problem then confronting the world for some seventeen years, however, the Diplomatic Conference failed to address the larger issues of effective mercenary regulation and the possible utility of mercenary forces. This ignored more than 3000 years of recorded state mercenary use, looking instead no farther than the relatively brief post-colonial period when self-determination was pitted against lingering colonial interests. One scholar placed events in perspective:

Since the end of the Second World War a certain disdain for soldiers of fortune has developed. Perhaps this attitude has developed because utilization of mercenaries has become less common, and has often been restricted to small, "third world" colonial wars where political judgments concerning legitimacy of the colonists' cause infect outsiders' perception of the hired soldiers.<sup>186</sup>

Nevertheless, on 8 June 1977 the High Contracting Parties agreed to Protocol I,<sup>187</sup> the protections of which were intended to apply to international armed conflicts<sup>188</sup> and "armed conflicts [in] which peoples are fighting

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185. 6 *id.* at 203 (CDDH/SR.41, Annex, May 26, 1977).

186. Cotton, *supra* note 29, at 152.

187. According to the *Official Records*, the text of Article 47 was adopted on 29 April 1977 by Committee III, which consisted of forty-three members, including thirteen Organization of African Unity members and eight Soviet Bloc members. See 15 OFFICIAL RECORDS, *supra* note 170, at 189-90 (CDDH/III/SR.57, Apr. 29, 1977). "Although the new article had not received the Working Group's unqualified acceptance, [the Rapporteur] would suggest that it be adopted by consensus, subject to any reservations that might be formulated after its adoption. . . . It was so agreed. The new article on mercenaries . . . was adopted by consensus." *Id.* at 190.

188. Protocol I, *supra* note 21, art. 1(3) ("This Protocol . . . shall apply in the situations referred to in Article 2 common to [the Geneva Conventions of 12 August 1946].").

against alien occupation and against racist regimes in the exercise of their right to self-determination.”<sup>189</sup>

Part III of Protocol I, entitled *Methods and Means of Warfare[;] Combatant and Prisoner-Of-War Status*, includes Article 47, *Mercenaries*, which reads:

1. A mercenary shall not have the right to be a combatant or a prisoner of war.
2. A mercenary is any person who:
  - (a) is specially recruited locally or abroad in order to fight in an armed conflict;
  - (b) does, in fact, take a direct part in hostilities;
  - (c) is motivated to take part in hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
  - (d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
  - (e) is not a member of the armed forces of a Party to the conflict; and
  - (f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.<sup>190</sup>

First and foremost, Article 47 of Protocol I deprives mercenaries of the privilege to serve as lawful combatants and the immunity to be treated as prisoners of war upon capture.<sup>191</sup> This was a significant departure from customary international law, which traditionally gave “mercenaries the

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189. *Id.* art. 1(4). This provision further illustrates the political environment in which Protocol I was adopted. Regarding the U.S. position towards Article 1(4), Michael J. Matheson remarked: “It probably goes without saying that [the United States] likewise do[es] not favor the provision of article 1(4) of Protocol I concerning wars of national liberation and do[es] not accept it as customary law.” Michael J. Matheson, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT’L L. & POL’Y. 419, 425 (1987) (defining the portions of Protocol I considered customary international law by the United States). Mr. Matheson was the Deputy Legal Advisor, U.S. Department of State, and his analysis was accepted as the Reagan Administration’s only authoritative statement on Protocol I’s provisions. See Memorandum of Law, Major P.A. Seymour, subject: Additional Protocol I as Expressions of Customary International Law (n.d.) (on file with author).

190. Protocol I, *supra* note 21, art. 47.

same status as the members of the belligerent force for which they were fighting.”<sup>192</sup>

Proponents of Article 47 argued this deprivation represented recent developments in customary international law,<sup>193</sup> specifically the disdain expressed for mercenaries by several UN General Assembly resolutions<sup>194</sup> and by the Organization for African Unity’s Convention for the Elimination of Mercenarism in Africa.<sup>195</sup> Most significantly, Mr. Clark, the Nigerian representative who first proposed what became Article 47, said immediately after its adoption on 26 May 1977:

[Nigeria] had taken the initiative in proposing the new article because it was convinced that the law on armed conflicts should correspond to present needs and aspirations. The [Diplomatic] Conference could not afford to ignore the several resolutions adopted by the United Nations and certain regional organizations, such as the Organization of African Unity, which over the years had condemned the evils of mercenaries and their activities, particularly in Africa . . . [Article 47], therefore, was fully in accordance with the dictates of public conscience, as embodied in the resolutions of the United Nations.<sup>196</sup>

Mr. Clark ironically concluded his final statement to the Diplomatic Conference, one dedicated to extending humanitarian rights to unconventional combatants, by stating: “By adopting [Article 47], the Conference had once and for all denied to all mercenaries any such rights [as lawful com-

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191. See Boumedra, *supra* note 119, at 35, 41. “As far as mercenaries are concerned, Protocol I constituted a renovation of Geneva Convention III (1949). Article 47 puts mercenaries in the category of unlawful combatants and deprives them of the protection afforded to lawful combatants and POWs.” *Id.*

192. See Burmester, *supra* note 110, at 55.

193. See Boumedra, *supra* note 119, at 55-67.

194. See, e.g., G.A. Res. 2465, *supra* note 19; G.A. Res. 3103, *supra* note 16. Regarding General Assembly Resolution 3103, Cotton remarked: “While such inflammatory rhetoric is not commendable in any attempt to develop a well reasoned and practical solution to the mercenary question, it does at least show some sentiment that mercenaries should be denied prisoner of war status and should be treated as brigands.” Cotton, *supra* note 29, at 161.

195. Organization of African Unity, Convention for the Elimination of Mercenarism in Africa, OAU Doc. CM/817 (XXIX), Annex II (3d rev. 1977) [hereinafter OAU Mercenary Convention].

196. 6 OFFICIAL RECORDS, *supra* note 170, para. 79, at 157 (CDDH/S.R.41, May 26, 1977).

batants or prisoners of war]. The new article [thus] represented an important new contribution to humanitarian law.”<sup>197</sup>

Several observers took issue with the notion that Article 47 represented a natural evolution of customary international law.<sup>198</sup> In particular, the United States specifically rejected Article 47 as an expression of *jus gentium*. According to Michael J. Matheson, then Deputy Legal Advisor for the U.S. Department of State, the United States “[does] not favor the provisions of article 47 on mercenaries, which among other things introduce political factors that do not belong in international humanitarian law . . . .”<sup>199</sup> Moreover, “[the United States does] not consider the provisions of article 47 to be part of current customary law.”<sup>200</sup>

Legal commentators echoed U.S. reservations to Article 47. Burmester appeared to dispute directly Mr. Clark’s analysis when he stated:

The exaggerated assertions of the UN [General Assembly] resolutions were not adopted at the Conference and do not appear to reflect the consensus of the international community. Nevertheless, the removal of even certain protections from combatants who would otherwise qualify for such protections must be viewed with some concern. At the same time one is extending protection under the laws of war to guerillas, it seems inconsistent to be taking it away from other combatants. . . . Once protection is denied to one class of persons[,] the way is left open

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197. 6 *id.* para. 81, at 157-58.

198. *See, e.g.,* Hampson, *supra* note 14, at 9.

Historically . . . the mercenary was in the same position as any other fighter. He committed no offence in international law by taking part in a conflict[,] and during the hostilities he was to be treated in the same way as any other combatant. If he satisfied the requirements, he was entitled to be treated as a privileged belligerent. Equally, he was bound by the rules of international law governing the conduct of hostilities and the protection of the victims of war. He could be tried for breach of those rules. He could not, however, be tried for “being a mercenary.”

*Id.*

199. Matheson, *supra* note 189, at 426. Mr. Matheson’s analysis was accepted as the Reagan Administration’s only authoritative statement on Protocol I. *See supra* note 189. His intent was to “review the principles that [the United States] believe[d] should be observed and in due course recognized as customary law, even if they have not already achieved that status . . . .” Matheson, *supra* note 189, at 422.

200. *Id.* at 426.

for other classes to be similarly denied protection. If states consider foreign participation in national liberation struggles against colonial and racist regimes to be of such gravity as to require that certain protections not be accorded mercenaries, it seems only logical . . . that such protections should not be accorded to *any* private foreign participants.<sup>201</sup>

Freymond also warned that “[t]he temptation to establish privileged categories of combatants who are fighting for a cause regarded as the only just cause, or as being more just than another, must be resisted.”<sup>202</sup> In addition, Cotton observed that “if guerillas and other classes of unconventional combatants are to be included in the [Geneva] Convention’s [Article 4] protections through the Protocols, then mercenaries should also be included.”<sup>203</sup> This stands to reason if efforts to expand the Conventions’ protections through Protocol I were made out of objective humanitarian concerns.<sup>204</sup>

But Protocol I singled out mercenaries based on a seemingly visceral reaction towards their use during two decades in post-colonial Africa. They were branded as criminals, regardless of who employed them or on whose behalf they fought.<sup>205</sup> Regarding moral legitimacy and foreign intervention, however, it may be unfair to characterize mercenaries as fighting with unclean hands vis-à-vis local guerillas and national armies. Experience has shown that lines often blur when one attempts to distin-

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201. Burmester, *supra* note 110, at 55-56 (internal citations omitted). “[T]he exclusion of mercenaries from human rights protections while extending it to terrorists and guerillas is ‘another milestone on the high road to violence unlimited.’” *Id.* at 55 n.82 (quoting Schwarzenberger, *Terrorists, Hijackers, Guerrilleros and Mercenaries*, 24 CURRENT L. PROBLEMS 257, 282 (1971)). Burmester certainly appreciated the problems posed by mercenaries. He critiqued Article 47, however, because it focused on individuals’ motivations and not on the “essentially private, non-governmental nature of the intervention which seems to be the basic problem which is raised by the use of mercenaries.” *Id.* at 38. *Cf.* Hampson, *supra* note 14, *passim* (describing the mercenary problem as one of foreign intervention, whether private or governmental in nature).

202. Jacques Freymond, *Confronting Total War: A “Global” Humanitarian Policy*, 67 AM. J. INT’L L. 672, 687 (1973), *quoted in* Cotton, *supra* note 29, 163 n.98.

203. Cotton, *supra* note 29, at 164.

204. *Id.* at 164 n.99.

205. *See supra* notes 177-82 and accompanying text.

guish between indigenous and foreign forces partaking in wars of self-determination.

For example, after the Portuguese withdrew from Angola in 1974, three very determined indigenous factions battled for the nation's control.<sup>206</sup> Jonas Savimbi's National Union for the Total Independence of Angola (UNITA) received South African military equipment, technical advisors, and—more discreetly—limited combatant forces.<sup>207</sup> They also received covert U.S. funding, but no U.S. technical advisors or military combat troops.<sup>208</sup> Holden Roberto's Front for National Liberation of Angola (FNLA) received,<sup>209</sup> after a referral by the French Secret Service, U.S. funding and U.S.-funded mercenaries, specifically the famed French mercenary Bob Denard and the mercenary band that he assembled with the assistance of Britain's John Banks.<sup>210</sup> This was the hapless group<sup>211</sup> that later gained mercenary infamy during Angola's Luanda Trials,<sup>212</sup> which

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206. See THOMAS, *supra* note 171, at 12; MOCKLER, *supra* note 11, at 164-65.

207. MOCKLER, *supra* note 11, at 165. Savimba apparently declined the Central Intelligence Agency's offer of white mercenaries for appearance's sake, although he freely accepted U.S. financial assistance. *Id.*

208. *Id.* at 167.

209. Musah and Fayemi assert that "no fewer than 200 Americans arrived at San Salvador in Northern Angola in 1975 [presumably to assist the FNLA, which operated in Northern Angola], with the implicit backing of the Central Intelligence Agency." Musah & Fayemi, *supra* note 171, at 21.

210. MOCKLER, *supra* note 11, at 162-64, 167-69. Bob Denard, a former French marine NCO who was once imprisoned for involvement in an assassination plot against French political leader Pierre Mendes-France, earned his reputation in the Congo as a mercenary leader fighting for Katangese secessionist forces. Denard fought, with some success, UN forces under the command of General Sean McKeown, sent to the Congo in 1961 to quell the Katangese revolt. *Id.* at 41-42, 48-51. After the UN withdrew in 1964, the on-again, off-again Katangese revolt against the government of General Mobutu continued for several years until ultimately crushed in 1968. Both Mobutu, who seized power in a military coup, and the Katangese secessionists employed mercenaries throughout this period. *See id.* at 56-116.

211. Of this misdirected band, Mockler said:

[E]ven given their small numbers and—in the case of the later recruits—their dubious and in some cases positively unmilitary backgrounds, they might have held the [Marxist Popular Movement for the Liberation of Angola] if they had been properly officered. But not one ex-officer of the British Army was ever in a position of authority over them; all the lieutenants, captains, and majors in the FNLA's white mercenary army from "Colonel" Callan downwards were former troopers and corporals, or at best sergeants and warrant officers.

*Id.* at 172.

resulted in several of their executions.<sup>213</sup> Finally, the Marxist Popular Movement for the Liberation of Angola (MPLA) received Soviet Bloc financial support and military equipment, to include T-54 tanks, 122 millimeter Katyusha rockets, and Soviet MiGs based out of nearby Brazzaville. The MPLA were also directly supported by several thousand black Cuban soldiers who deftly attempted to go unnoticed by wearing the MPLA's uniform.<sup>214</sup>

The personnel associated with foreign intervention in Angola consisted of foreign technical advisors, foreign soldiers, and mercenaries. In the context of this Cold War battleground, it is difficult to discern which, if any, element of foreign intervention dominated the moral high ground and could thus claim justness or legitimacy at the outset of the Angolan civil war.<sup>215</sup> Based on numbers alone, however, the several thousand Cuban soldiers operating their sophisticated weapons systems arguably exerted the greatest influence over Angola's war of self-determination.<sup>216</sup> Next in influence would likely be the foreign technical advisors, highly skilled and acting with the financial backing of their sending states, both Soviet and South African. Least influential in Angola were the few hundred mercenaries who fought beside and attempted to lead into combat the indigenous fighters.<sup>217</sup> Regardless, Article 47 of Protocol I criminalizes mercenary activities while extending protections to indigenous guerillas

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212. See Boumedra, *supra* note 119, at 70-73 (commenting on the mercenaries' trial before the People's Revolutionary Court of Angola).

213. See discussion *infra* note 284 and accompanying text.

214. MOCKLER, *supra* note 11, at 167-68. Notably, the "indigenous" MPLA, in a Cuban-led operation, overran the tiny, independent, oil-rich nation of Cabinda in November 1975. *Id.*

215. This presumes the underlying legitimacy of the three competing indigenous movements, of course, under the assumption that they were equally footed under international law to compete for dominance within Angola.

216. Indeed, the MPLA ultimately prevailed, only to later hire mercenaries themselves when it suited their needs. See O'Brien, *supra* note 17, at 51 ("In many senses, Angola has been the testing ground for the development and evolution of PMCs in Africa.").

217. Musah and Fuyemi referred to the "humiliation of American and British-inspired mercenaries in Angola," which should have led to the "demise of freelance soldiers in internal conflicts." Musah & Fayemi, *supra* note 171, at 22.

and preserving the rights of foreign military forces fighting on their behalf.<sup>218</sup> Or does it?

There can be no doubt that Article 47 condemns mercenary activities and deprives mercenaries of the protections afforded lawful combatants and prisoners of war. But does it make criminal the act of being a mercenary? The Indonesian representative summed up the Working Group's intent when she said: "The aim of the article was to *discourage* mercenary activity and prevent irresponsible elements from getting the rights due to a combatant or prisoner of war."<sup>219</sup> Boumedru interprets this statement and others made after the Working Group approved Article 47 as signifying that "at no stage of the [Diplomatic Conference] was the principle of criminalizing the *status* of mercenaries put into question."<sup>220</sup> Undoubtedly, Article 47 deprives mercenaries of lawful combatant or prisoner of war status, thereby opening them to domestic prosecution provided that domestic legislation criminalizes their mercenary status or individual acts. "The mere fact of being a mercenary is not, however, made a criminal act [by Article 47]."<sup>221</sup> The Soviet Union's closing statement reinforces this conclusion: "We hope that this article . . . will provide an incentive to Governments to adopt domestic legislation prohibiting the criminal as well as anti-humanitarian institution of the use of mercenaries."<sup>222</sup>

Article 47 discourages individual mercenary activity by removing the protections afforded lawful combatants and prisoners of war, but it does not enumerate a specific crime of mercenarism. Article 47 also fails to make criminal mercenary recruiting, training, or financing, whether done by states or individuals. In addition, as U.S. Ambassador Aldrich surmised, the Diplomatic Conference struck a compromise that necessarily

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218. See *supra* text accompanying note 190.

219. 6 OFFICIAL RECORDS, *supra* note 170, para. 94, at 159 (CDDH/SR.41, May 26, 1977) (statement of Mrs. Sudirdjo, Indonesia) (emphasis added).

220. Boumedra, *supra* note 119, at 58 & n.66 (citing 6 OFFICIAL RECORDS, *supra* note 170, at 156 (CDDH/SR.41, May 26, 1977)) (emphasis added).

221. Burmester, *supra* note 110, at 55. *But see* Musah & Fayemi, *supra* note 171, at 21. Remarkably, educated observers persist in asserting that Article 47 "outlawed" mercenarism and use of mercenaries. "African states also spearheaded the international campaign leading to the adoption of several resolutions condemning the use of mercenaries and to Article 47 of the Geneva Convention[, Protocol I], which *outlaws the use of mercenaries.*" *Id.* (emphasis added).

222. 6 OFFICIAL RECORDS, *supra* note 170, at 204 (CDDH/SR.41, May 26, 1977) (statement of the Union of Soviet Socialist Republics).

limited the definition of a mercenary and therefore the scope of Article 47's coverage. He said:

Certainly, there have been persons in recent conflicts, particularly in Africa, who might qualify as mercenaries under [the Article 47] text, but it would not seem difficult in the future for any party to a conflict to avoid its impact, most easily by making the persons involved members of its armed forces. While the negotiators of this provision were definitely aware of the possibilities for evasion, they were more concerned about the risks of abuse—the denial of [prisoner of war] status through charges that prisoners were mercenaries.<sup>223</sup>

As a final limitation, paragraph 2 of Article 47 imposes criteria as to a mercenary's motivation<sup>224</sup> and relative compensation,<sup>225</sup> elements which will be extremely difficult to prove, thus limiting a state's legal basis to deprive mercenaries of lawful combatant and prisoner of war status.<sup>226</sup> This determination will by necessity include comparison to the motivations of individuals who join states' armies,<sup>227</sup> many of whom join because of relatively attractive compensation and benefit packages.<sup>228</sup> In recently considering Article 47's mercenary definition in its entirety, the United Kingdom's Foreign and Commonwealth Office concluded, "A number of governments including the British Government regard this definition as unworkable for practical purposes."<sup>229</sup>

Unfortunately, Article 47's shortcomings were later compounded when the General Assembly incorporated Protocol I's flawed mercenary definition into the UN Mercenary Convention.<sup>230</sup> Before turning to the UN Mercenary Convention, the international community's most ambitious attempt at mercenary regulation, it is illustrative to consider its origins in the OAU Convention for the Elimination of Mercenarism in Africa.<sup>231</sup> Although instruments issued by regional organizations lack weight of authority in international law, excepting their value as evidence of state practices,<sup>232</sup> a comparative study reveals that the OAU single-handedly shaped the debate leading to the UN Mercenary Convention.

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223. Aldrich, *supra* note 172, at 777.

224. Protocol I, *supra* note 21, art. 47(2)(c), cl. 1.

225. *Id.* art. 47(2)(c), cl. 2.

### 5. OAU Convention for the Elimination of Mercenarism in Africa

Newly independent and optimistic African states formed the OAU in 1963, at the time the world's largest regional organization.<sup>233</sup> The OAU

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226. REPORT OF THE COMMITTEE OF PRIVY COUNSELORS APPOINTED TO INQUIRE INTO THE RECRUITMENT OF MERCENARIES para. 7 (1976) (the "Diplock Report") ("Mercenaries, we think, can only be defined by reference to what they do, and not by reference to why they do it."), *cited in* Burmester, *supra* note 110, at 38 & n.1.

The distinction between *jus ad bellum* and *jus in bello* poses an additional concern, one which Article 47's drafters may have overlooked. Françoise Hampson believed that the *jus ad bellum* of foreign intervention represents the fundamental international legal issue when discussing mercenaries, as opposed to the *jus in bello* of mercenary conduct and corresponding status during a conflict. Hampson, *supra* note 14, at 14-15 ("If the issue is one of real or perceived intervention, this comes within the *jus ad bellum* and not the *jus in bello*.") Status is irrelevant, said Hampson, and so are the mercenaries' motivation and remuneration, two elements which Article 47 emphasizes. *Id.* at 37. Instead, it is the unlawfulness of resorting to force or participating in a conflict, whether by mercenaries or others, which offends concepts of neutrality and what Hampson called "intervention law." *Id.* at 28. Therefore, Hampson proposed an international convention that adequately controls foreign intervention, to include mercenary adventures, by defining states' regulation responsibilities under customary international law. *Id.* at 33-37. Nevertheless, the Article 47 Working Group limited its analysis to status, leading Hampson to comment wryly, "Since there is no place in a treaty regulating the *jus in bello* for a provision which properly concerns the *jus ad bellum*, one may welcome the fact that the offending Article [47] is unworkable." *Id.* at 30. *See supra* note 135. *But see* Boumedra, *supra* note 119, at 58 (arguing that the Diplomatic Conference considering Protocol I, Article 47, properly dealt with the *jus in bello* aspect of mercenarism, in light of a series of UN General Assembly and Security Council resolutions demonstrating that the United Nations "sees questions related to the [*jus in bello*] as a matter of international legislation").

227. Hampson, *supra* note 14, at 6 n.14.

228. MOCKLER, *supra* note 11, at 16 ("The professional too—the regular army officer or NCO in any army in the world—fights for money and, as a comparison between recruiting figures and wage increases show, often mainly for money . . .").

229. UK GREEN PAPER, *supra* note 18, para. 6. The *Green Paper* added that mercenary "[c]ontracts can also be drafted so that those employed under them fall outside the definitions in [Article 47 of] the convention." *Id.*

230. UN Mercenary Convention, *supra* note 22.

231. OAU Mercenary Convention, *supra* note 195.

232. *See* RESTATEMENT THIRD, *supra* note 131, § 103, cmt. c. "International organizations generally have no authority to make law, and their determinations of law ordinarily have no special weight, but their declaratory pronouncements provide some evidence of what the states voting for it regard the law to be. The evidentiary value of such resolutions is variable." *Id.*

233. *See* P. Mwetwa Munya, *The Organization of African Unity and Its Role in Regional Conflict Resolution and Dispute Settlement: A Critical Evaluation*, 19 B.C. THIRD WORLD L.J. 537, 538 (1999).

members sought a collective voice “to discourage armed neocolonialism or subversion among themselves.”<sup>234</sup> The OAU Charter,<sup>235</sup> much like the UN Charter that inspired its authors, elevates state sovereignty “by calling for the inviolability of national borders and denouncing any uninvited interference in a member state’s internal affairs.”<sup>236</sup>

The contemporaneous crises in the Congo underscored sovereignty’s value to the OAU members. By the mid-1960s, Belgium, the Belgian mining firm of Union Minière, Rhodesia, the Soviet Union, the United States, and a sizeable UN military force had all to some degree intervened in the Congo’s internal affairs.<sup>237</sup> Meanwhile Belgian, British, French, German, and South African mercenaries were actively fighting on behalf of one side or the other during the Congo’s seemingly endless Katangese secessionist movement.<sup>238</sup>

From this background, it did not take long before the OAU looked for solutions to confront mercenaries’ destabilizing effect in Africa. Their first step was the 1967 OAU Resolution on the Activities of Mercenaries,<sup>239</sup> signed in the newly dubbed Kinshasha.<sup>240</sup> The resolution states that the OAU was determined to safeguard member state sovereignty in the face of a mercenary menace that constituted a “serious threat to the security” of OAU member states.<sup>241</sup> Therefore, the resolution strongly condemns mercenary aggression in the Congo, and it specifically demands the departure of mercenaries then operating in the eastern Congo’s Bukavu region.<sup>242</sup>

The 1967 OAU resolution next implores OAU member states to assist the Congo in putting “an end to the criminal acts perpetrated by these mer-

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234. HOWE, *supra* note 2, at 47. See also Munya, *supra* note 233, at 540-43 (describing the OAU’s pan-African origins).

235. Charter of the Organization of African Unity, May 25, 1963, 479 U.N.T.S. 39.

236. HOWE, *supra* note 2, at 48.

237. See MOCKLER, *supra* note 11, at 37-116; THOMAS, *supra* note 171, at 9-18, 67-117.

238. The movement eventually ended in November 1967 after the unsuccessful “Mercenaries’ Revolt.” See MOCKLER, *supra* note 11, at 93-110.

239. OAU Mercenary Resolution, *supra* note 20, at 281-82.

240. General Mobutu had renamed what was the city of Leopoldville earlier in 1967. MOCKLER, *supra* note 11, at 38.

241. OAU Mercenary Resolution, *supra* note 20, at 281. The resolution also illustrates continuing post-colonial tensions, expressing the OAU’s awareness that “the presence of mercenaries would inevitably arouse strong and destructive feelings and put in jeopardy the lives of foreigners in the continent.” *Id.*

cenaries,” and “calls upon the UN to deplore and take immediate action to eradicate such illegal and immoral practices.”<sup>243</sup> Finally, the resolution makes an appeal that extends beyond condemning mercenaries, going to what was the heart of the mercenary issue for the OAU: “[A]ll States of the world [are urged] to enact laws declaring the recruitment and training of mercenaries in their territories a punishable crime and deterring their citizens from enlisting as mercenaries.”<sup>244</sup> As previously discussed,<sup>245</sup> in 1968 the UN General Assembly made a very similar appeal when it issued Resolution 2465, the Declaration on the Granting of Independence to Colonial Countries and Peoples.<sup>246</sup> Examining the language of both resolutions, the General Assembly undoubtedly was responding to the OAU’s plea.

The OAU next met in Addis Ababa, Ethiopia, and in 1971 produced its Declaration on the Activities of Mercenaries in Africa.<sup>247</sup> The declaration articulates an underlying theme that would resonate in subsequent UN General Assembly pronouncements. In short, continuing foreign domination in some African states enabled mercenaries to operate and, therefore, African states still under such domination had to be liberated, “as this is an essential factor in the final eradication of mercenaries from the African continent.”<sup>248</sup> The declaration further implores states not to tolerate the “recruitment, training and equipping of mercenaries on their territory,”<sup>249</sup>

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242. At the time, the “Mercenaries’ Revolt” was under way in the Congo. The term “revolt” was used because General Mobutu either employed or expected loyalty from many of the mercenaries and the military forces they led. Although this was a continuation of the Katangese secessionist movement that began in 1960, one must carefully study events to appreciate fully the competing powers, shifting loyalties, and underlying intrigue practiced by all sides. See MOCKLER, *supra* note 11, at 93-110. Government forces prevailed by November 1967, and although the last 150 or so mercenaries were allowed safe passage out of the Congo in 1968, General Mobutu was believed to have earlier ordered the executions of over thirty mercenaries in Leopoldville. The executed men, some employed by Mobutu, held mainly administrative and logistical positions. *Id.* at 100, 112-13. Some speculate that Mobutu may have also ordered the massacre of 3000 disarmed Katangese after their 1966 revolt, but others hold responsible mercenary Bob Denard and his men of Five Commando. *Id.* at 83.

243. OAU Mercenary Resolution, *supra* note 20, at 282.

244. *Id.*

245. See *supra* notes 136-39 and accompanying text.

246. G.A. Res. 2465, *supra* note 19.

247. Organization of African Unity, Declaration on the Activities of Mercenaries in Africa, June 23, 1971, reprinted in MERCENARIES: AN AFRICAN SECURITY DILEMMA, *supra* note 17, app. IV, at 283-85.

248. *Id.* at 285.

249. *Id.* at 284.

and it calls on heads of state to “mobilize world opinion so as to ensure the adoption of appropriate measures for the eradication of mercenaries from Africa, once and for all.”<sup>250</sup> Finally, the declaration laid the groundwork for a draft OAU convention on mercenaries.<sup>251</sup>

In 1972, the OAU produced the Draft Convention for the Elimination of Mercenaries in Africa (OAU Draft Convention).<sup>252</sup> This pioneering effort defined mercenaries before the UN attempted to do so in Article 47 of Protocol I;<sup>253</sup> it criminalizes mercenary recruitment and mercenarism, “a crime against the peace and security of Africa”;<sup>254</sup> and it briefly details OAU member states’ duties regarding mercenaries.<sup>255</sup> The OAU Draft Convention also “correctly identifies what needs to be proscribed”; it defines mercenarism without reference to motivation; it identifies both state and individual responsibilities; and, unlike Article 47 of Protocol I, it does not deal with mercenary status under the laws of war.<sup>256</sup> The OAU premised the instrument on concern for “the grave threat which the activities of mercenaries represent to the independence, sovereignty, territorial integrity and harmonious development of Member States of OAU.”<sup>257</sup>

In 1973, the UN General Assembly again responded to the OAU’s concerns, this time with Resolution 3103, the Declaration on Basic Principles of the Legal Status of the Combatants Struggling Against Colonial and Alien Domination and Racist Regimes.<sup>258</sup> Resolution 3103 echoes the 1971 OAU declaration and the considerations underlying the 1972 OAU

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250. *Id.*

251. Musah & Fayemi, *supra* note 171, at 21.

252. OAU Doc. CM/433/Rev. L, Annex 1 (1972) [hereinafter OAU Draft Mercenary Convention], *reprinted in* MERCENARIES: AN AFRICAN SECURITY DILEMMA, *supra* note 17, app. V, at 286-88.

253. *Id.* art. 1. The OAU draft definition differed significantly from the Protocol I mercenary definition. *Compare id.* art. 1, with Protocol I, *supra* note 21, art. 47(2). The complexities of defining mercenaries are explored more fully *infra* notes 307-14 and accompanying text.

254. OAU Draft Mercenary Convention, *supra* note 252, art. 2.

255. *Id.* art. 3. The final OAU Mercenary Convention vastly increased these state obligations. *See* Kofi Oteng Kufuor, *The OAU Convention for the Elimination of Mercenarism and Civil Conflicts*, in MERCENARIES: AN AFRICAN SECURITY DILEMMA, *supra* note 17, at 198, 202.

256. Hampson, *supra* note 14, at 26-27. In this way, the OAU Draft Convention “defines mercenaries narrowly according to their purpose.” UK GREEN PAPER, *supra* note 18, para. 8.

257. OAU Draft Mercenary Convention, *supra* note 252, pmb., para. 2.

258. G.A. Res. 3103, *supra* note 16. *See* discussion *supra* notes 151-61 and accompanying text.

Draft Convention, although the resolution invokes stronger language. Resolution 3103 deplores “[t]he use of mercenaries by colonial and racist regimes against the national liberation movements struggling for their freedom and independence from the yoke of Colonialism and alien domination.”<sup>259</sup> This rhetoric-laden statement led at least one commentator to dismiss Resolution 3103 as “an evident attempt to prejudge the issues in question [of mercenary regulation] before the [Protocol I] Diplomatic Conference had even started.”<sup>260</sup>

In late June 1976, the International Commission of Inquiry on Mercenaries (International Commission) issued its Draft Convention on the Prevention and Suppression of Mercenarism, often called the “Luanda Convention.”<sup>261</sup> Serious scholars have dismissed this work for its presumed bias, describing it as “a political tract masquerading as a legal text.”<sup>262</sup> It is important, however, if for no other reason than for its remarkable influence upon subsequent international law provisions concerning mercenary activities, including the OAU Mercenary Convention.

The Marxist revolutionary government of Angola had empanelled the International Commission less than one month before the Luanda Convention’s release. This coincided, on 13 June 1976, with the opening in Luanda of the Angolan government’s case before the five-member Popular Revolutionary Tribunal. The thirteen defendants in the case, including their leader, Costas Giorgiou, have since become known as the world’s most notorious band of post-colonial mercenaries.<sup>263</sup> The facts underlying the “Luanda Trial,” as it came to be known, bear repeating because of their unquestionable significance to the International Commission. The Commission’s fifty or so delegates attended the trial, drafted the Luanda Convention in the nearby National Science Museum while the trial was under

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259. G.A. Res. 3103, *supra* note 16, art. 5.

260. Kalshoven, *supra* note 160, at 24 (Resolution 3103 was “rushed through the Sixth Committee without any opportunity for discussion or even serious consideration.”).

261. International Commission of Inquiry on Mercenaries, Draft Convention on the Prevention and Suppression of Mercenarism (1976) [hereinafter Luanda Convention], reprinted in Paul W. Mourning, *Leashing the Dogs of War: Outlawing the Recruitment and Use of Mercenaries*, 22 VA. J. INT’L L. 589, 615 (1982), available at University of Pretoria, *Human Rights Database*, at <http://www.up.ac.za/chr> (last modified July 22, 2002).

262. Hampson, *supra* note 14, at 28.

263. See MOCKLER, *supra* note 11, at 209-31; see also Musah & Fayemi, *supra* note 171, at 22 (referring to “the notorious ‘Colonel’ Callan”).

way, and completed the Convention before the verdict was announced on 28 June 1976.<sup>264</sup>

Giorgiou, who called himself “Callan,” was by all accounts an audacious warrior. In numerous daring if tactically questionable ambushes, Callan single-handedly killed scores of Cuban and MPLA soldiers.<sup>265</sup> At the same time, he was a mercenary leader without compunction who eventually became a homicidal rogue.<sup>266</sup> He held a strange penchant for executing disloyal, unmotivated, or unlucky Angolan irregulars who also fought for Holden Roberto’s FNLA.<sup>267</sup>

Callan made no serious attempt to integrate the FNLA irregulars into an organized, mercenary-led force for area coordination and control. In fact, he seemed to work actively at alienating the [Angolan] population by firing indiscriminately at civilians and by conducting summary executions which even included a cousin of FNLA President Roberto himself.<sup>268</sup>

Not surprisingly, Callan’s conduct earned him few friends among indigenous Angolans.

Callan’s subordinate mercenaries also feared him, having witnessed his pistol executions, or “toppings,” on countless occasions.<sup>269</sup> One group of newcomers, twenty-five in all, laid a nighttime ambush in which they fired Belgian FN machine guns and a 66 millimeter rocket-launcher into an oncoming, aluminum-bodied Land Rover. Tragically for all concerned,

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264. See MOCKLER, *supra* note 11, at 213-14, 225.

265. See *id.* at 171, 199. *But cf.* THOMAS, *supra* note 171, at 89 (1984) (“Callan and his men never succeeded in employing guerilla tactics against the Cubans. . . . Ambush sites were uniformly untenable or improperly manned . . .”). See also *supra* notes 206-17 and accompanying text (describing the warring factions in post-colonial Angola).

266. Callan was a former enlisted man dishonorably discharged from Britain’s First Parachute Regiment. THOMAS, *supra* note 171, at 26. Of mercenary “Colonel” Callan’s military leadership style, Thomas writes, “[Callan was] perhaps the most extreme modern example of misplaced leadership.” *Id.* at 56.

267. See MOCKLER, *supra* note 11, at 171-210.

268. THOMAS, *supra* note 171, at 89 (citing CHRIS DEMPSTER & DAVE TOMKINS, FIRE-POWER 401 (1980)). Thomas’s citation is noteworthy because, according to Mockler, Dempster and Tomkins fought alongside Callan in Angola, and Dempster may have participated in the killings for which Callan was tried and executed. See MOCKLER, *supra* note 11, at 187, 195-96.

269. By Mockler’s count, Callan must have personally executed at least fifteen men, most of whom were FNLA irregulars. See MOCKLER, *supra* note 11, at 182-84.

the vehicle carried four of Callan's most seasoned men who barely escaped with their lives. Soon realizing what they had done, and fearing Callan's legendary temper, the newcomers fled north towards the relative safety of the Congo.<sup>270</sup>

By the next morning, Callan and the more senior mercenaries learned of the newcomer's ambush and attempted desertion. After swiftly apprehending, disarming, and questioning twenty-four of the deserters, the killing of the junior mercenaries began.<sup>271</sup> When the man who fired the rocket into the Land Rover cautiously stepped out of formation and admitted his mistake, Callan held up his pistol, said, "This is the only law here," and shot the man three times in the head.<sup>272</sup> Ten of the remaining deserters were allowed to return to duty, but Callan ordered the executions of the remaining thirteen. Within the hour, seven of the seasoned mercenaries—three of whom were in the Land Rover ambushed the night before—drove the unfortunate thirteen a short distance outside of town and carried out Callan's execution order.<sup>273</sup> More rough justice was to follow.

Soon thereafter, the FNLA collapsed into disarray in northern Angola, UNITA and its supporters fled from southern Uganda, and the MPLA consolidated its power. While most of the FNLA's mercenaries fled the country, MPLA forces captured Callan and twelve others.<sup>274</sup> The thirteen mercenaries then stood in judgment before the Popular Revolutionary Tribunal in the capital city of Luanda. Oddly enough, the only damning evidence against the thirteen accused mercenaries concerned the executions of their thirteen fellow mercenaries, a crime which Callan and only one other of the accused participated in.<sup>275</sup>

Founded in 1956, the MPLA had attracted its support "by preaching a doctrine of anti-colonial class struggle which appealed to the elite urban *mestizo* and leftist white elements,"<sup>276</sup> a theme which the Angolan revolu-

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270. *Id.* at 190-92.

271. *Id.* at 192-94. The mercenaries were indeed junior. They had flown out of Britain only a few days earlier, believing that they would be serving as combat support personnel for the FNLA in Angola. At the time of the ambush, they had been in-country for less than twenty-four hours. *Id.* at 185-88.

272. *Id.* at 194.

273. *Id.* at 195-96.

274. *Id.* at 206-11.

275. *Id.* at 194-95, 214-23. Callan also admitted to executing the fourteenth mercenary. "I have killed one English soldier; the reason being I was told that he fired the rocket at my men which were in the Land Rover . . . ." *Id.* at 227 (quoting Callan's statement before sentencing).

tionary government continued. The MPLA had gained victory earlier in 1976 only through the overwhelming military support provided by Cuba and the Soviet Union,<sup>277</sup> two countries that played instrumental roles in the post-war, communist government of the People's Republic of Angola. As for the decision to try the mercenaries, "It was the Cubans who insisted on a show trial for all thirteen."<sup>278</sup>

Six days before the trial opened, Angola's Director of Information and Security proclaimed, unremarkably, that "the mercenaries were guilty, that the Angolan government had only to decide how much to punish them, and that British and American imperialism were really on trial, not the [thirteen] mercenaries."<sup>279</sup> The very same government empanelled the International Commission whose delegates came mainly from Third World and Eastern Bloc states.<sup>280</sup> While observers agreed that the merits phase of the trial was well-managed and procedurally fair,<sup>281</sup> at sentencing the presiding judge "read through a text that bore no relation whatsoever to the trial or the evidence, a text that might well have been prepared months in advance."<sup>282</sup> Callan and three others were sentenced to death, their nationalities all British, save one unfortunate mercenary who the Angolans chose simply because he was an American.<sup>283</sup> The remaining nine mercenaries received sentences ranging from sixteen to thirty years' confinement and,

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276. THOMAS, *supra* note 171, at 12.

277. *Id.* at 3-4, 23, 67, 89.

278. MOCKLER, *supra* note 11, at 211.

279. Hampson, *supra* note 14, at 27; *see also* MOCKLER, *supra* note 11, at 213 (It soon became clear to Mockler, who attended the entire trial, that this "was not to be so much a trial of the thirteen accused themselves as of the Western powers who permitted and indeed had encouraged and financed *mercenarismo* throughout the African continent . . .").

280. MOCKLER, *supra* note 11, at 213-14. The Commission also included a handful of Western delegates, most either openly communist or "discreetly radical." *Id.* at 213.

281. *See id.* at 214-28 (describing the able defense provided by Callan's Cuban defense counsel, Maria Teresinha); Hampson, *supra* note 14, at 27 ("The trial itself appears to have been fair, procedurally speaking.").

282. MOCKLER, *supra* note 11, at 229.

283. *Id.* at 229-31. Daniel Gearhart, the American, had never even fired a shot during his one week in Angola before his capture. *Id.* at 230. Mockler relates, "[I]t was unthinkable [to the revolutionary government] that three British mercenaries should be sentenced to death, and not a single American." *Id.* Excepting Gearhart's case, Mockler finds a "certain rough justice" in the other sentences because Callan and one other condemned man participated in the mercenaries' executions, while all three British men had served the longest period out of the mercenaries, although no one was in Angola for more than two months. *Id.* at 170, 181, 229-30.

twelve days after the tribunal adjudged the sentences, an MPLA firing squad carried out the four death sentences.<sup>284</sup>

The International Commission forged the Luanda Convention in the politically charged environment surrounding the Luanda Trial. The Convention condemns mercenarism as “part of a process of perpetuating by force of arms racist colonial or neo-colonial domination over a people or State.”<sup>285</sup> It also identifies the emergence of peremptory norms imposing new obligations under international law, referring specifically to *inter alia* General Assembly Resolutions 2465 and 3103.<sup>286</sup> “[T]he resolutions of the UN and the OAU and the statements of attitude and the practice of a growing number of States are indicative of the development of new rules of international law making mercenarism an international crime.”<sup>287</sup> As previously discussed, these two questionable resolutions carried limited, if any, weight of authority in international law.<sup>288</sup>

While the Luanda Trial was criticized for “breaching the principle of *nulla crimen sine lege*,”<sup>289</sup> that is, no crime without corresponding law, the International Commission, perhaps in response, proposed the elements for a novel crime: mercenarism, “a term hitherto unknown to the law.”<sup>290</sup>

The crime of mercenarism is committed by the individual, group or association, representatives of state and the State itself which, with the aim of opposing by armed violence a process of self-determination, practices any of the following acts:

- (a) organizes, finances, supplies, equips, trains, promotes, supports or employs in any way military forces consisting of or including persons who are not nationals of the country where they are going to act, for personal gain, through the payment of a salary or any other kind of material recompense;
- (b) enlists, enrolls or tries to enroll [sic] in the said forces;

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284. *Id.* at 230-31.

285. Luanda Convention, *supra* note 261, pmb., para. 2.

286. *Id.* pmb., para. 3 (citing General Assembly Resolutions 3103, 2548, 2465, and 2395).

287. *Id.* pmb., para. 4.

288. *See supra* notes 160-61 and accompanying text.

289. Hampson, *supra* note 14, at 27; *see also* Mourning, *supra* note 261, at 601-03 (discussing the legal arguments premised on domestic and international law that were made during the Luanda Trial).

290. Hampson, *supra* note 14, at 27.

(c) allows the activities mentioned in paragraph (a) to be carried out in any territory under its jurisdiction or in any place under its control or affords facilities for transit, transport or other operations of the abovementioned forces.<sup>291</sup>

The Luanda Convention's authors made no attempt to define a mercenary.<sup>292</sup> As if justifying Callan's death sentence, however, Article Two of the Convention adds, "The fact of assuming command over mercenaries or giving orders may be considered as an aggravating circumstance."<sup>293</sup>

One year later, on 3 July 1977, the OAU issued its Convention for the Elimination of Mercenarism in Africa (OAU Mercenary Convention).<sup>294</sup> Here, the OAU abandoned the measured language used in the OAU Draft Convention and adopted instead the polemic phraseology favored by the Luanda Convention and General Assembly Resolutions 2465 and 3103, referring to "colonial and racist domination"<sup>295</sup> that was perpetuated by the "scourge" of mercenarism.<sup>296</sup> More than mere happenstance, similar language appeared in the general provisions of Protocol I, which the High Contracting Parties signed on 8 June 1977.<sup>297</sup>

In several material respects, the OAU Mercenary Convention mirrors Article 47 of Protocol I. It defines mercenaries using nearly identical language:

1. A mercenary is any person who:
  - (a) is specially recruited locally or abroad in order to fight in an armed conflict;
  - (b) does in fact take a direct part in the hostilities;

291. Luanda Convention, *supra* note 261, art. 1.

292. *Cf.* Hampson, *supra* note 14, at 27 (arguing that the Convention's silence on this point may simply demonstrate that it intended the crime itself to define the mercenary; that is, anyone committing the crime of mercenarism would therefore be a mercenary).

293. Luanda Convention, *supra* note 261, art. 2.

294. OAU Mercenary Convention, *supra* note 195, pmbl.

295. *Id.* para. 2.

296. *Id.* pmbl., para. 5.

297. *See* Protocol I, *supra* note 21, art. 1(4) (extending the protections of Article 2 common to the Geneva Conventions to wars for national liberation, and specifically to persons "fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination"). On a related note, Mr. Clark of Nigeria proposed Protocol I's draft Article 47 on 13 May 1976, three months after Callan's capture, and one month before the beginning of the Luanda Trial. *See supra* note 170 and accompanying text.

- (c) is motivated to take part in the hostilities essentially by the desire for private gain and in fact is promised by or on behalf of a party to the conflict material compensation;
- (d) is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict;
- (e) is not a member of the armed forces of a party to the conflict; and
- (f) is not sent by a state other than a party to the conflict on official mission as a member of the armed forces of the said state.<sup>298</sup>

The OAU Mercenary Convention similarly denies mercenaries the status of lawful combatants and prisoners of war when it states, “Mercenaries shall not enjoy the status of combatants and shall not be entitled to prisoner of war status.”<sup>299</sup> In other respects, however, the OAU Mercenary Convention represents the most ambitious international instrument of its kind to attempt mercenary regulation.<sup>300</sup> The drafters responded to concerns first raised in the 1967 OAU Resolution on the Activities of Mercenaries,<sup>301</sup> and they expanded mercenary proscriptions into areas that OAU member state delegates advanced before the Diplomatic Conference considering Protocol I.<sup>302</sup> Weakened by relying on Article 47’s flawed mercenary definition, however, the OAU Mercenary Convention suffers further

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298. OAU Mercenary Convention, *supra* note 195, art. 1(1). Most importantly, Article 1(1)(c) of the OAU Mercenary Convention only requires that the mercenary is promised “material compensation,” whereas Protocol I, *supra* note 21, art. 47(2)(c), requires “material compensation substantially in excess of that promised combatants of similar ranks and functions . . . .” This change reflects the term “material recompense” found in the Luanda Convention. *See* Luanda Convention, *supra* note 261, art. 1(a).

Another minor variation in language between the OAU Mercenary Convention and Article 47 is found in subparagraph “f” of both provisions. *Compare* OAU Mercenary Convention, *supra* note 195, art. 1(1)(f) (“is not sent by a state other than a party to the conflict on official mission as a member of the armed forces of the said state”), *with* Protocol I, *supra* note 21, art. 47(2) (“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”).

299. OAU Mercenary Convention, *supra* note 195, art. 3. *Cf.* Protocol I, *supra* note 21, art. 47(1) (“A mercenary shall not have the right to be a combatant or prisoner of war.”). Likewise, Article 4 of the Luanda Convention reads: “Mercenaries are not lawful combatants. If captured they are not entitled to prisoner of war status.” Luanda Convention, *supra* note 261, art. 4.

300. The OAU represented a legitimate regional organization, unlike the politicized International Commission. *See supra* note 262 and accompanying text.

301. OAU Mercenary Resolution, *supra* note 20, at 281-82. *See supra* notes 239-46 and accompanying text.

injury by adopting nearly verbatim the suspect International Commission's crime of mercenarism.

Article 1(2) of the OAU Mercenary Convention reads:

The crime of mercenarism is committed by the individual, group or association, representative of a State or the State itself who with the aim of opposing by armed violence a process of self-determination, stability or the territorial integrity of another State, practi[c]es any of the following acts:

- (a) Shelters, organi[z]es, finances, assists, equips, trains, promotes, supports or in any manner employs bands of mercenaries;
- (b) Enlists, enrolls or tries to enrol [sic] in the said bands; [or]
- (c) Allows the activities mentioned in paragraph (a) to be carried out in any territory under its jurisdiction or in any place under its control or affords facilities for transit, transport or other operations of the above mentioned forces.<sup>303</sup>

Even casual readers will notice striking similarities to the Luanda Convention's Article 1.<sup>304</sup> The only distinctions are in subparagraph (a). First, the OAU Convention adds the term "shelters" in place of the Luanda Convention's "supplies."<sup>305</sup> Second, the subparagraph drops the Luanda Convention's phrase "military forces consisting of or including persons who are not nationals of the country where they are going to act, for personal gain, through the payment of a salary or any other kind of material recompense."<sup>306</sup> This was necessary to avoid redundancy with the mercenary definition found in the OAU Mercenary Convention's Article 1(1).

Putting aside for the moment the International Commissions's potential influence, the crime of mercenarism deserves closer scrutiny. The crime's description seems exhaustive, and the OAU Mercenary Convention broadens the scope of criminal responsibility by holding the merce-

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302. See, e.g., 15 OFFICIAL RECORDS, *supra* note 170, at 193 (CDDH/III/SR.57, Apr. 29, 1977). The delegate from Zaire called for "more stringent regional instruments" that would detail states' obligations, including those that recruit mercenaries. *Id.* He also called generally for stricter "provisions to prohibit the odious 'profession' of paid killers." *Id.*

303. OAU Mercenary Convention, *supra* note 195, art. 1(2).

304. See *supra* note 261 and accompanying text.

305. Compare OAU Mercenary Convention, *supra* note 195, art. 1(2)(a), with Luanda Convention, *supra* note 261, art. 1(a).

306. See Luanda Convention, *supra* note 261, art. 1(a).

nary responsible “both for the crime of mercenarism and all related offenses, without prejudice to any other offense for which he may be prosecuted.”<sup>307</sup> The disparity between the mercenary definition and the crime of mercenarism, however, creates an obvious dilemma. One could be termed a mercenary yet fail to satisfy the elements of the crime of mercenarism. Likewise, one could engage in mercenary activities yet fail to satisfy either the mercenary definition or the elements of the crime of mercenarism provided by the OAU Mercenary Definition.

Consider the example of a French adventurer and former Legionnaire, one motivated by profit and equipped with a light assault weapon who offers his services to a rebel faction indigenous to the Ivory Coast. The rebels never attempted to recruit him, however, and they express no interest in procuring his services. To prove his battlefield prowess and potential value to rebel operations—and in hopes of being hired—the Frenchman then engages in combat alongside rebel forces fighting to pressure the central government to hold a referendum election on an issue of local political import. The rebels are not fighting to control territory or to overthrow or destabilize the government, which is no longer in a period of post-colonial self-determination.

Upon capture by government forces, the French adventurer is not a mercenary because he was not promised “material compensation” by the rebels, as required by Article 1(c) of the OAU Mercenary Convention.<sup>308</sup> Moreover, he cannot be prosecuted for mercenarism because: (1) he tried to enlist with the rebels, but as residents of the territory, the rebels cannot be considered a “mercenary band”; and (2) neither he nor the rebels had “the aim of opposing by armed violence a process of self-determination, stability or . . . territorial integrity.”<sup>309</sup>

Changing the facts slightly reveals the OAU Mercenary Convention’s greatest shortcoming, one which illustrates the legacy of the myopic focus upon regulating mercenary activities in post-colonial Africa. Instead of offering to fight alongside a rebel group that never sought his services, consider the situation where an official of the Ivory Coast’s Ministry of Defense recruits and then enters into a lengthy contract with the Frenchman and with several other foreigners.<sup>310</sup> In exchange for his combatant

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307. OAU Mercenary Convention, *supra* note 195, art. 4. *Cf.* Luanda Convention, *supra* note 261, art. 5 (“A mercenary bears responsibility both for being a mercenary and for any other crime committed by him as such.”).

308. This is identical to Protocol I, *supra* note 21, art. 47(2)(c).

309. OAU Mercenary Convention, *supra* note 195, art. 2.

services, the adventurer is motivated by and will be paid a significant sum in a stable currency. He is not a resident of the Ivory Coast, he is not a member of the Ivory Coast's military, and he was not sent by any other state on an official mission as a member of that state's armed forces. In short, he is a mercenary as defined by Article 47 of Protocol I<sup>311</sup> and the OAU Mercenary Convention.<sup>312</sup> And yet, he cannot be prosecuted for mercenarism.

The French mercenary escapes prosecution because he is not using armed violence against another OAU state, as required by the OAU crime of mercenarism's first element. Rather, he is contractually bound to fight *for* an OAU state.<sup>313</sup> Even though he serves for profit as a private soldier in a mercenary band, he commits no violation provided he does not direct his "armed violence" against "a process of self-determination, stability or the territorial integrity of another State."<sup>314</sup> Therefore, the government-hired mercenary goes unpunished by the OAU Mercenary Convention's terms.

This example demonstrates that provisions narrowly tailored to address mercenary activities in a post-colonial environment—provisions focusing on the sensational facts surrounding a single trial involving but a few post-colonial and criminal adventurers—must invariably fail once the post-colonial period ends. Moreover, by the early 1980s, Africa's "liberation struggle was over and most states had consolidated their independence."<sup>315</sup> Having drafted legal instruments that focused on politicizing and demonizing a small segment of mercenary activities, the OAU—like the drafters of Article 47 and the Luanda Convention before them—failed to recognize and regulate mercenaries' historical and, yes, pragmatic uses.

In this way, the OAU Mercenary Convention and Article 47 stand irrelevant and ill-equipped to deal with today's predominant mercenary issue, the government-hired PMC. Moreover, the international commu-

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310. See MOCKLER, *supra* note 11, app. (reprinting a typical and remarkably detailed contract between the Democratic Republic of the Congo and a mercenary).

311. See *supra* text accompanying note 190.

312. See *supra* text accompanying note 298.

313. The OAU Mercenary Convention "hopes to ban only those soldiers who fight 'against any African state member of the Organization of African Unity.' Private soldiers fighting for a government receive implicit approval." HOWE, *supra* note 2, at 228 (quoting OAU Mercenary Convention, *supra* note 195, art. 6(c)).

314. OAU Mercenary Convention, *supra* note 195, art. 1(2).

315. Kufuor, *supra* note 255, at 200.

nity's latest attempt at mercenary regulation, the UN Mercenary Convention,<sup>316</sup> once again falls short of effective mercenary regulation because it essentially offers an amalgamation of legal concepts found in the OAU Mercenary Convention and Article 47.

6. *International Convention Against the Recruitment, Use, Financing and Training of Mercenaries*

In 1980, the UN confronted the mercenary dilemma head on in response to member states' dissatisfaction with Protocol I's limited curtailment of mercenary activities<sup>317</sup> and the similarly limited regional and domestic mercenary regulations.<sup>318</sup> The General Assembly thus created the Ad Hoc Committee charged with drafting an international mercenary convention,<sup>319</sup> and nine years of diplomatic, legal, and political wrangling ensued.<sup>320</sup> The Ad Hoc Committee struggled to create a comprehensive instrument that would define mercenaries, enumerate specific mercenary crimes, and establish states' responsibilities regarding, among others, mercenary activities, implementing legislation, and extradition procedures.<sup>321</sup>

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316. UN Mercenary Convention, *supra* note 22.

317. See *Draft Resolution on Drafting of an International Convention Against the Recruitment, Use, Financing and Training of Mercenaries*, U.N. GAOR, 35th Sess., U.N. Doc. A/C.6/35/L.14 (1980).

318. See *List of Relevant Legislation of Member States and Conventions and Protocols Additional Thereto of International and Regional Organizations on Mercenaries*, U.N. GAOR, 36th Sess., U.N. Doc. A/AC.207/L.2 (1981).

319. GA Res. 35/48, U.N. GAOR, 35th Sess., Supp. No. 48, U.N. Doc. A/RES/35/48 (1980).

320. The Ad Hoc Committee had to reconcile "the views of those who would have produced a political document, offensive to those States whose nationals most commonly take part in extra-territorial fighting and resulting in an unratified convention, and of those who were prepared to accept a convention consonant with legal principle." Hampson, *supra* note 14, at 30.

321. See, e.g., *Report of the Ad Hoc Committee on the Drafting of an International Convention Against the Recruitment, Use, Financing and Training of Mercenaries*, U.N. GAOR, 36th Sess., Supp. No. 43, U.N. Doc. A/36/43 (1981); *Report of the Ad Hoc Committee on the Drafting of an International Convention Against the Recruitment, Use, Financing and Training of Mercenaries*, U.N. GAOR, 36th Sess., U.N. Doc. A/36/727 (1981); *Report of the Ad Hoc Committee on the Drafting of an International Convention Against the Recruitment, Use, Financing and Training of Mercenaries*, U.N. GAOR, 37th Sess., U.N. Doc. A/C.6/37/L.9 (1982); *Amendment to the Draft Resolution Contained in Document A/C.6/37/L.9*, United States of America, U.N. GAOR, 37th Sess., U.N. Doc. A/C.6/37/L.15 (1982). Hampson observes, "The Reports of the negotiating sessions show the degree to which the attitude of the participants evolved." Hampson, *supra* note 14, at 30.

It was an ambitious undertaking. Finally in 1989, the General Assembly adopted and opened for signature the UN Mercenary Convention.<sup>322</sup>

The UN Mercenary Convention<sup>323</sup> provides an elaborate hybrid of a mercenary definition, albeit one borrowed from predecessors of questionable legal lineage. It relies on the six cumulative requirements of Protocol I, Article 47,<sup>324</sup> for its primary mercenary definition.<sup>325</sup> It then creates a secondary, complementary definition taken in part from the crime of mercenarism found in the OAU Mercenary Convention and its ideological predecessor, the Luanda Convention. Because Article 47 and its shortcomings were previously detailed,<sup>326</sup> this discussion focuses on the UN Mercenary Convention's secondary mercenary definition. The primary mercenary definition, however, extends Article 47's mercenary definition, which previously applied only to international armed conflicts governed by Protocol I, to all conflicts, no matter how characterized.<sup>327</sup>

The secondary mercenary definition found in Article 1(2) of the UN Mercenary Convention states:

A mercenary is also any person who, in any other situation:

- (a) Is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at:
  - (i) Overthrowing a Government or otherwise undermining the constitutional order of a State; or
  - (ii) Undermining the territorial integrity of a State;

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322. UN Mercenary Convention, *supra* note 22.

323. Appendix B provides the full text of the UN Mercenary Convention, *id.*, articles 1-7.

324. *See supra* text accompanying note 190.

325. The UN Mercenary Convention, however, removes one of the requirements of Protocol I, *supra* note 21, art. 47(2)(b) ("does, in fact, take a direct part in hostilities"), from the mercenary definition, and makes it instead an element of one of the three enumerated mercenary offenses in Articles 2 through 4. UN Mercenary Convention, *supra* note 22, art. 3 ("A mercenary . . . who participates directly in hostilities or in a concerted act of violence, as the case may be, commits an offense for purposes of this Convention."). This "need for participation in the acts of violence prevents the crime from being a status offense." Hampson, *supra* note 14, at 31.

326. *See supra* Part III.A.4.

327. *See* UN Mercenary Convention, *supra* note 22, art. 16(b) ("The present Convention shall be applied without prejudice to . . . [t]he law of armed conflict and international humanitarian law . . .").

- (b) Is motivated to take part therein essentially by the desire for significant private gain and is prompted by the promise or payment of material compensation;
- (c) Is neither a national nor a resident of the State against which such an act is directed;
- (d) Has not been sent by a State on official duty; and
- (e) Is not a member of the armed forces of the State on whose territory the act is undertaken.<sup>328</sup>

Article 1(2)(a) parallels Article 1(2) of the OAU Mercenary Convention, which prohibits individuals from engaging in “armed violence” directed towards “the stability or the territorial integrity of another state.”<sup>329</sup> While the OAU Mercenary Convention also prohibits individuals from engaging in armed violence against a “process of self-determination,”<sup>330</sup> the UN Mercenary Convention only specifically prohibits states from opposing self-determination movements through recruiting, using, financing, or training mercenaries.<sup>331</sup>

Drawing pay that is “higher and above those of native counterparts” is one of the recurrent themes used to define mercenaries.<sup>332</sup> The UN Mercenary Convention establishes a lower threshold for the mercenary’s required compensation. Article 1(2)(b) of the UN Mercenary Convention rejects Article 47’s requirement that mercenaries be motivated by a promise of “material compensation substantially in excess of that promised or paid to combatants of similar rank or function.”<sup>333</sup> Instead, it favors the OAU Mercenary Convention’s slightly lowered requirement of “motivated to take part in hostilities essentially by the desire for private gain and is . . . promised . . . material compensation.”<sup>334</sup> Nevertheless, the UN Mercenary Convention repeats the same subjective test—complete with corre-

328. *Id.* art. 1(2).

329. *Cf.* OAU Mercenary Convention, *supra* note 195, art. 1(2), para. 1. *See supra* text accompanying note 298.

330. OAU Mercenary Convention, *supra* note 195, art. 1(2), para. 1.

331. *See* UN Mercenary Convention, *supra* note 22, art. 5(2).

332. Musah & Fayemi, *supra* note 171, at 16. Musah and Fayemi offered an interesting mercenary definition that relied on the compensation element: “Mercenarism—the practice of professional soldiers freelancing their labour and skills to a party in foreign conflicts for fees higher and above those of native counterparts—is as old as conflict itself.” *Id.*

333. Protocol I, *supra* note 21, art. 47(c).

334. OAU Mercenary Convention, *supra* note 195, art. 1(1)(c).

sponding problems of proof—found in both Article 47 and the OAU Mercenary Convention: the mercenary’s motivation.<sup>335</sup>

Conventional wisdom has it that mercenaries do not kill for the polis or for political principle or for any other noble cause.<sup>336</sup> They kill for, and are thus motivated by, money. For this reason, legislators confronting mercenaries cannot help but repeatedly point out this inherent evil.<sup>337</sup> Yet this will create insurmountable evidentiary problems for the unfortunate prosecutor tasked with proving illicit motivation—if indeed the world ever wit-

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335. On 24 June 2002, the Second Meeting of Experts debating the mercenary issue proposed an amendment to the UN Mercenary Convention that would eliminate the motivation subparagraphs of both the primary and secondary mercenary definitions. Motivation would be reduced to a matter in aggravation for consideration at sentencing. *Report of the Second Meeting of Experts, supra* note 99, Annex, at 12-13.

336. *Compare, e.g.*, 15 OFFICIAL RECORDS, *supra* note 170, at 193 (CDDH/III/SR.57, Apr. 29, 1977) (statement of Mr. K’Habouji, Zaire) (referring to the “odious ‘profession’ of paid killer[s]”), *and id.* at 196 (statement of Mr. Alkaff, Yemen) (“Mercenaries [have] always been attracted by the hope of gain . . .”), *with Mourning, supra* note 261, at 589 n.1 (The mercenary “is motivated by monetary gain rather than national sentiment or political conviction.”), *and* NORTON POETRY 15 n.3 (J. Paul Hunter ed., 1973) (quoting the Roman poet Horace) (“*Dulce et decorum est pro patria mori* (‘It is sweet and proper to die for one’s country.’)”). *See also* FREDERICK FORSYTH, DOGS OF WAR 86 (1975) (“So for the last six years he had lived as a mercenary, often an outlaw, at best regarded as a soldier for hire, at worst a paid killer.”).

337. Samuel Johnson did not limit money’s corrupting influence to private soldiers:

But scarce observ’d the knowing and the bold  
Fall in the gen’ral massacre of gold;  
Wide-wasting pest! that rages unconfi’n’d,  
And crowds with crimes the records of mankind;  
For gold his sword the hireling ruffian draws,  
For gold the hireling judge distorts the laws;  
Wealth heap’d on wealth, nor truth safety buys,  
The dangers gather as the treasures rise.

SAMUEL JOHNSON, THE VANITY OF HUMAN WISHES (THE TENTH SATIRE OF JUVENAL IMITATED) 21-28 (1749), *reprinted in* SAMUAL JOHNSON: SELECTED WRITINGS (Patrick Cruttwell ed., 1968).

nesses charges brought for a violation of the UN Mercenary Convention or corresponding state implementing legislation.<sup>338</sup>

The motivation requirement may also produce unforeseen results. Consider a volunteer whose ideological goals conflict with an indigenous forces' struggle for self-determination. According to the *Commentary on the Two 1977 Protocols Additional to the Geneva Conventions*, the motivation requirement of Protocol I, Article 47, was "intended to exclude volunteers[ ] who fight alongside an armed force for ideological . . . rather than financial motivation."<sup>339</sup> If the volunteer fights alongside the armed forces to further ideals that are blatantly racist or otherwise favoring alien domination, he cannot be labeled a mercenary unless compensation motivates him. In this way, the motivation requirement would clearly conflict with the Convention's purpose of safeguarding "the legitimate exercise of the inalienable right of peoples to self-determination."<sup>340</sup>

Beyond the question of motivation, the UN Mercenary Convention's secondary mercenary definition expands the term's scope beyond Article 47 in one significant respect: instances where an individual fights on behalf of an armed force that intends to overthrow a state's government or undermine the state's territorial integrity. The UN Mercenary Convention's primary mercenary definition would not include this individual if he was incorporated as "a member of the armed forces of a party to the conflict,"<sup>341</sup> whether state forces or irregular forces. Under the secondary definition, however, the same person incorporated into irregular forces would be labeled a mercenary.<sup>342</sup> The drafters likely added this distinction to protect the fragile sovereignty of young African states facing constant chal-

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338. Based on the author's research, an alleged mercenary has never been charged for a violation of the criminal provisions of the UN Mercenary Convention, *supra* note 22, arts. 2-4. Problems of proof provide the most likely explanation, but it could also be due to the Convention's relative youth, having entered into force in only October 2001.

339. Dino Kritsiotis, *The Privatization of International Affairs*, 22 FLETCHER F. WORLD AFF. 11, 18 n.32 (1998) (citing MICHAEL BOTHE, KARL JOSEF PARTSCH & WALDEMAR A. SOLF, *NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS* 270 (1982)).

340. *See* UN Mercenary Convention, *supra* note 22, art. 5(2). Conversely, this would also protect those persons fighting as volunteers with pure motives. *See, e.g.*, MOCKLER, *supra* note 11, at 133-39 (describing Swedish idealist Count Carl Gustav Von Rosen who, pursuing the principle that Biafran civilians should be spared indiscriminate aerial bombings from Nigerian government forces, acted without compensation as a near one-man air force for secessionist Biafra).

341. *Compare* UN Mercenary Convention, *supra* note 22, art. 1(1)(d), *with* Protocol I, *supra* note 21, art. 47(2)(e).

lenges by insurgent irregular forces. The nod of favoritism demonstrates the growing legitimacy of the newly formed states, but comes at the expense of groups of irregular forces still vying for power within those states.<sup>343</sup> Nevertheless, this international recognition of sovereign authority suggests that the post-colonial period was coming to a close, and that the groups of irregulars lacked legitimacy because they were not engaged in struggles of self-determination.

In addition to defining mercenaries, the UN Mercenary Convention imposes criminal liability on four categories of individuals: (1) anyone “who recruits, uses, finances or trains mercenaries”;<sup>344</sup> (2) a mercenary “who participates directly in hostilities or in a concerted act of violence”;<sup>345</sup> (3) anyone who attempts to commit the offenses in (1) or (2);<sup>346</sup> and (4) anyone who is an accomplice of one who commits any of the offenses in (1) through (3).<sup>347</sup> The first category responds to the original 1967 OAU declaration, which said: “[A]ll States of the world [are urged] to enact laws declaring the recruitment and training of mercenaries in their territories a punishable crime and deterring their citizens from enlisting as mercenaries.”<sup>348</sup> As previously discussed, the OAU saw this as the heart of the mercenary issue—controlling the states that sent the mercenaries to intervene in post-colonial African affairs.<sup>349</sup>

Open to debate, however, is whether or not a state agent may be held criminally liable under this first category—*anyone* recruiting, using, financing, or training mercenaries. Assuming the Ad Hoc Committee looked to the OAU Mercenary Convention for its secondary mercenary

342. See UN Mercenary Convention, *supra* note 22, art. 1(2)(e). A mercenary “is not a member of the armed forces of the *State* on whose territory the act is undertaken,” *id.* (emphasis added), but persons incorporated as members of the armed forces of a non-state party would still be considered mercenaries.

343. Cf. Carlos Zarate, *The Emergence of a New Dog of War: Private International Security Companies, International Law, and the New World Disorder*, 34 STAN. J. INT’L L. 75, 125 (1998) (“The major concern for African countries at this point [upon adoption of the OAU Mercenary Convention in 1977] was that mercenaries not be used against OAU-recognized liberation movements.”).

344. UN Mercenary Convention, *supra* note 22, art. 2.

345. *Id.* art. 3(1).

346. *Id.* art. 4(a).

347. *Id.* art. 4(b).

348. OAU Mercenary Resolution, *supra* note 20, at 281.

349. As Hampson put it, “The Convention establishes that both the ‘whores of war’ and their clients commit an offence.” Hampson, *supra* note 14, at 32. One may wonder who takes more offense at the oft-used cliché, the prostitutes or the mercenaries?

definition, they probably intended to include states' agents. After all, the OAU Mercenary Convention makes its crime of mercenarism applicable to the "individual, group or association, representative of a State or the State itself."<sup>350</sup>

Having defined mercenaries and listed the mercenary crimes applicable to individuals, the UN Mercenary Convention next articulates states' responsibilities regarding mercenary activities. Article 5(1) provides that states "shall not recruit, use, finance or train mercenaries" for any purpose,<sup>351</sup> and specifically, according to the very next subparagraph, states shall not do so "for the purpose of opposing the legitimate exercise of the inalienable right of peoples to self-determination."<sup>352</sup> Therefore, states now have an affirmative obligation to "prohibit" such activities, in general,<sup>353</sup> and actually "prevent" them if they are intended to oppose a self-determination movement.<sup>354</sup>

It is unclear whether or not the duty to prevent imposes a greater obligation than simply prohibiting such activities through enacting<sup>355</sup> and enforcing domestic enabling legislation, as already required by the Convention.<sup>356</sup> Nevertheless, it seems to suggest that the drafters deemed mercenary activities as especially "nefarious"<sup>357</sup> when directed against self-determination movements, which may justify heightened penalties in those cases.<sup>358</sup> Despite these debatable subtleties, though, the UN Mercenary

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350. OAU Mercenary Convention, *supra* note 195, art. 2. *See also* Luanda Convention, *supra* note 261, art. 1(a) ("The crime of mercenarism is committed by the individual, group or association, representatives of state and the State itself . . .").

351. UN Mercenary Convention, *supra* note 22, art. 5(1).

352. *Id.* art. 5(2).

353. *Id.* art. 5(1).

354. *Id.* art. 5(2).

355. *Id.* arts. 5(3), 9.

356. *Id.* art. 12 (In cases in which a person is suspected of committing one of the Convention's enumerated offenses, the state shall "submit the case to its competent authorities for the purpose of prosecution."). Even if a state does not prosecute the case, it may be required to extradite the suspect because it must make the Convention's offenses "extraditable offences in any extradition treaty existing between States Parties." *Id.* art. 15. In this way, "The Convention adopts the familiar legal principle of *aut dedere aut judicare*, that is, that a state must prosecute or extradite alleged offenders." Kritsiotis, *supra* note 339, at 21 n.49. In the event of disputes between states parties concerning states' responsibilities arising under the Convention, the states concerned must pursue the matter progressively by attempting negotiation and then arbitration before having recourse to litigation before the International Court of Justice. UN Mercenary Convention, *supra* note 22, art. 17.

357. UN Mercenary Convention, *supra* note 22, Annex, para. 6.

Convention makes an unmistakable distinction when it says, for the first time, that all states shall refrain from using mercenaries.<sup>359</sup>

The OAU Mercenary Convention imposes many of the same responsibilities on OAU states,<sup>360</sup> but it stops short of restricting states' use of mercenaries. From the beginning, the OAU sought to prevent the former colonial powers from sending, or acquiescing in the sending of, mercenaries who then unlawfully intervened in African states' internal affairs. The OAU defined the mercenary issue in those terms since 1967.<sup>361</sup> And yet the OAU did not want to prevent an African state—or at least the ones that the OAU viewed as legitimate states—from hiring mercenaries when it suited the African state's national interests, such as for a necessary bolstering of its armed forces.<sup>362</sup> Without exception, however, the UN Mercenary Convention permits neither individual nor state use of mercenaries.<sup>363</sup> This divergence of approaches to mercenary regulation has created an unlikely paradox: the OAU states that originally pressured the UN to take action to end state use of mercenaries no longer support the UN Mercenary Convention that resulted from their efforts.<sup>364</sup> But then again, neither do most other states.

The UN Mercenary Convention required twenty-two states parties before it would enter into force,<sup>365</sup> but by 1998, only twelve nations had acquiesced.<sup>366</sup> Many commentators questioned whether the Convention would ever enter into force.<sup>367</sup> On 20 September 2001, however, Costa

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358. *Id.* art. 5(3). States “shall make the offences set forth in the present Convention punishable by appropriate penalties which take into account the grave nature of the offenses.” *Id.*

359. *Id.* art. 5(1)-(2).

360. See OAU Mercenary Convention, *supra* note 195, art. 6.

361. OAU Mercenary Resolution, *supra* note 20, para. 5.

362. See HOWE, *supra* note 2, at 228.

363. UN Mercenary Convention, *supra* note 22, arts. 2, 5. The United Nations Special Rapporteur for Mercenaries disagreed with this implicit approval of mercenaries fighting for OAU governments, stating: “the mere fact that it is [a] government that recruits mercenaries or contracts companies that recruit mercenaries for its own defences or to provide reinforcements in armed conflict does not make such actions any less illegal or illegitimate.” HOWE, *supra* note 2, at 228 (quoting Report by the UN Special Rapporteur on the Use of Mercenaries, para. 36 (1998)).

364. See *infra* notes 371-77 and accompanying text.

365. UN Mercenary Convention, *supra* note 22, art. 19 (“The present Convention shall enter into force on the thirtieth day following the date of deposit of the twenty-second instrument of ratification or accession with the Secretary-General of the United Nations.”).

366. HOWE, *supra* note 2, at 228.

367. See, e.g., Kritsiotis, *supra* note 339, at 21.

Rica became the twenty-second state party, and the Convention entered into force the following month.<sup>368</sup> Although Enrique Bernales Ballesteros, the Special Rapporteur on mercenary issues, said in October 2001 that “nine other States were about to ratify the Convention,”<sup>369</sup> only Belgium and Mali have since acceded to its terms, bringing to twenty-four the total number of states that have “completed the formal process of expressing their willingness to be bound by the International Convention.”<sup>370</sup>

Of the six OAU states that urged and then signed the UN Mercenary Convention, only one, Cameroon, later became a state party.<sup>371</sup> “[A]t least two of those [original] signatories (Angola and [the Democratic Republic of the Congo]) subsequently hired mercenaries.”<sup>372</sup> Nigeria, the OAU state that originally proposed Article 47 of Protocol I<sup>373</sup> and the UN Mercenary Convention itself,<sup>374</sup> has not become a state party, although six other OAU states that did not sign the Convention have since become states parties.<sup>375</sup> In total, only seven of the fifty-three OAU<sup>376</sup> states have ratified or acceded to the Convention aimed specifically at controlling

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368. Press Release, U.N. GAOR 3d Comm., 56th Sess., 3d mtg., U.N. Doc. GA/SHC/3650 (2001).

369. *Id.*

370. *Report of the Special Rapporteur on the Question of the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, U.N. GAOR, 57th Sess., pt. VI, at 12-13, U.N. Doc. A/57/178 (2002) [hereinafter October 2002 Mercenary Report] (relating the status of the UN Mercenary Convention, *supra* note 22). The countries are Azerbaijan, Barbados, Belarus, Belgium, Cameroon, Costa Rica, Croatia, Cyprus, Georgia, Italy, Libya, Maldives, Mali, Mauritania, Qatar, Saudi Arabia, Senegal, Seychelles, Suriname, Togo, Turkmenistan, Ukraine, Uruguay, and Uzbekistan. *Id.* at 13. Belgium filed a reservation stating that it would not be bound to extradite Belgian nationals, and Saudi Arabia had a reservation to Article 17 regarding states' disputes procedures. United Nations, *Status of Multilateral Treaties Deposited with the Secretary General*, at <http://www.untreaty.un.org> (last modified Jan. 18, 2003).

371. United Nations, *Status of Multilateral Treaties Deposited with the Secretary General*, <http://www.untreaty.un.org> (last modified Jan. 18, 2003). The original signatories were Angola, Republic of the Congo (formerly Congo-Brazzaville), Democratic Republic of Congo (formerly Zaire and before that the Democratic Republic of the Congo), Cameroon, Morocco, and Nigeria. *Id.*

372. Howe, *supra* note 2, at 228. Numerous other African states have employed or received PMC military services since the 1960s. Examples include Kenya, Nigeria, Zambia, Tanzania, Malawi, Sierra Leone, Mozambique, Sudan, Cameroon, Botswana, Rwanda, Uganda, Ivory Coast, Ghana, Togo, and Namibia. O'Brien, *supra* note 17, at 46-48, 62-63.

373. *See supra* note 170 and accompanying text.

374. *See supra* note 317 and accompanying text.

375. The countries are Libya, Mali, Mauritania, Senegal, Seychelles, and Togo. October 2002 Mercenary Report, *supra* note 370, pt. VI, at 13.

mercenary activities in post-colonial Africa.<sup>377</sup> Moreover, only twenty-four of the United Nations' 191 member states have become states parties. As an indication of states' practice, this is not a ringing endorsement for the UN Mercenary Convention or its legal predecessors.<sup>378</sup>

### 7. *The Rome Statute of the International Criminal Court*

The International Criminal Court (ICC) presents a final option for the international regulation of mercenary activities. The Rome Statute<sup>379</sup> offers neither a definition nor a specific crime to address mercenaries. In time, however, the ICC could acquire jurisdiction over both individual<sup>380</sup> and state actors<sup>381</sup> involved in mercenary activities. The Rome Statute establishing the ICC provides limited jurisdiction over four categories of crimes,<sup>382</sup> including the crime of genocide, crimes against humanity, war crimes, and the crime of aggression.<sup>383</sup> The Rome Statute fails to grant

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376. More accurately, seven of the current fifty-four African states have become states parties to the Convention. Morocco—the fifty-fourth African state—left the OAU after the Western Sahara dispute in the 1980s. See African Union, *Home Page*, at <http://www.africa-union.org> (last visited Feb. 4, 2003). On 9 July 2002, the Organization of African Unity was renamed the African Union. *Id.* See generally Corinne A. A. Packer & Donald Rukare, *The New African Union and Its Constitutive Act*, 96 AM. J. INT'L L. 365 (2002).

377. Twenty-two of the fifty-four African states have ratified the OAU Mercenary Convention, and it entered into force in 1985. Angola, the state that originally proposed the Luanda Convention, has not ratified the OAU Mercenary Convention. University of Pretoria, *Human Rights Database*, at <http://www.up.ac.za/chr> (last modified July 22, 2002) (Status of the Primary African Human Rights Treaties).

378. Carlos Zarate concluded that “[t]he use of [PMCs] by numerous countries, especially by Nigeria, Angola, and other African nations which have led the charge against the use of mercenaries, further demonstrates that [PMCs] are not illegal under international legal norms.” Zarate, *supra* note 343, at 114 (favoring use of the term “private security company”).

379. Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9, July 18, 1998, as amended through Jan. 16, 2002, entered into force July 1, 2002 [hereinafter Rome Statute].

380. *Id.* art. 25 (Individual Criminal Responsibility).

381. *Id.* art. 27 (Irrelevance of Official Capacity).

382. As a further restriction, the court will only exercise its limited jurisdiction consistent with the principles of comparative complementarity. See *id.* art. 20(3) (deferring to domestic prosecution unless procedurally flawed or designed to shield the accused). See generally Lieutenant Colonel Michael A. Newton, *Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court*, 167 MIL. L. REV. 20 (2001).

383. Rome Statute, *supra* note 379, art. 5(1).

jurisdiction over mercenary-related crimes specifically, and, strictly speaking, “a person shall not be criminally responsible under [the Rome] Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.”<sup>384</sup> Mercenary activities could be characterized conceivably as crimes against humanity, although this would likely require associated criminal acts.<sup>385</sup> More foreseeable, however, mercenary activities could be characterized as a crime of aggression.<sup>386</sup>

Article 5(2) of the Rome Statute provides:

The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this

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384. *Id.* art. 22(1) (“*Nullum crimen sine lege*”).

385. *See id.* art. 7(h) (“persecution . . . on . . . other grounds that are universally recognized as impermissible under international law, [such as the UN Mercenary Convention,] in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court”), 7(j) (apartheid), 7(k) (other inhumane acts).

386. *See generally* Major Michael L. Smidt, *The International Criminal Court: An Effective Means of Deterrence?*, 167 MIL. L. REV. 156, 203-09 (considering the scope of the ICC’s jurisdiction over the crime of aggression); DINSTEN, *supra* note 126 (discussing mercenary use as a form of aggression and the Draft Code of Offenses Against the Peace and Security of Mankind).

This discussion does not consider the work of the International Law Commission (ILC), which in 1954 first considered an international criminal code. *See* Draft Code of Offenses Against the Peace and Security of Mankind art. 2(4), in *Report of the International Law Commission to the General Assembly*, U.N. Doc. A/2673 (1954), reprinted in [1954] 2 Y.B. Int’l L. Comm’n 140, 151. In 1991 and 1996, the ILC followed its earlier work with further revisions to its Draft Code of Crimes Against the Peace and Security of Mankind, but these drafts never became international instruments. More importantly, the ILC considered but decided against including mercenary activities in the Draft Code. *See Report of the International Law Commission on the Work of Its Forty-Eighth Session*, 51 U.N. GAOR Supp. (No. 10) at 14, U.N. Doc. A/51/10 (1996); *Report of the International Law Commission on the Work of Its Forty-Third Session*, 46 U.N. GAOR Supp. (No. 10) at 94, U.N. Doc. A/46/10 (1991). Like their predecessors, the ILC drafters found it nearly impossible to agree upon an acceptable mercenary definition. *See* L.H. McCormack & Gerry J. Simpson, *The International Law Commission’s Draft Code of Crimes Against the Peace and Security of Mankind: An Appraisal of the Substantive Provisions*, 5 CRIM. L.F. 1 (1994) (analyzing the Draft Code’s proposed Article 23, which attempted to define and regulate mercenary activity); Rosemary Rayfuse, *The Draft Code of Crimes Against the Peace and Security of Mankind*, 8 CRIM. L.F. 43 (1997) (critiquing the development of the Draft Code, including the bases for not including mercenary activities as a listed crime).

crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.<sup>387</sup>

The Working Group on the Crime of Aggression of the Preparatory Commission of the International Criminal Court considered the crime of aggression, but the Rome Statute has not yet been amended to include an aggression provision.<sup>388</sup> If an amendment is not forthcoming, the issue will likely be revisited when the Secretary General convenes a review conference to reconsider the Rome Statute in July 2009.<sup>389</sup>

In the meantime, General Assembly Resolution 3314<sup>390</sup> offers the most useful guidance on the topic of aggression. As previously discussed,<sup>391</sup> the resolution included within its definition of aggression state—but not individual—participation in the use of force by militarily organized unofficial groups, such as mercenaries, “which carry out acts of armed force against another state . . . .”<sup>392</sup> This is significant because the ICC will apply, “where appropriate, applicable treaties and the principles and rules of international law . . . .”<sup>393</sup> Therefore, in enforcing the crime of aggression, the court could look to Resolution 3314 defining aggression.

Once the door is opened to address one state’s aggressive use of mercenaries against another state, the court would likely look to the UN Mercenary Convention itself, which delineates states’ responsibilities and makes it a crime for any person to recruit, use, finance, or train “mercenaries, as defined.”<sup>394</sup> “Any person” could include state actors because, like the Rome Statute, the UN Mercenary Convention does not shield individuals acting in an official capacity.<sup>395</sup> Moreover, the phrase “mercenaries,

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387. Rome Statute, *supra* note 379, art. 5(2).

388. *See id.* arts. 5, 121.

389. *See id.* art. 123.

390. G.A. Res. 3314, *supra* note 162, at 143.

391. *See supra* notes 162-65 and accompanying text.

392. G.A. Res. 3314, *supra* note 162, para. 3(g).

393. Rome Statute, *supra* note 379, art. 12(b).

394. UN Mercenary Convention, *supra* note 22, art. 2.

395. *Compare id.* arts. 1-2, with Rome Statute, *supra* note 379, arts. 25, 27.

as defined” will require the court to apply the Convention’s complimentary mercenary definitions, warts and all.<sup>396</sup>

## B. Summary of International Law Provisions Regulating Mercenary Activities

Based on the foregoing analysis of applicable international law provisions, three paradigms emerge for assessing the legality of mercenary activities; one applies to individuals, one applies to state actors, and one applies to states themselves. This discussion defines the outer limits of international mercenary regulation because the underlying authorities—the principles of non-intervention, the relevant UN resolutions, the UN Mercenary Convention, and the Rome Statute<sup>397</sup>—are assumed, rightly or wrongly, to represent peremptory norms of international law. Despite their shortcomings, these authorities today provide the only international law limitations on mercenary activities.

### 1. *Liability of Unaffiliated Individuals*

Here, the term “unaffiliated individuals” refers to persons who are not state actors; they serve in no official capacity for any party to a conflict, and they are not working—as service members, government employees, or government-sanctioned contractors—for a third party, neutral state. Unlawful mercenary activities by these unaffiliated individuals may be enforced only by domestic courts in countries that enact legislation implementing the offenses contained in the UN Mercenary Convention.<sup>398</sup> Domestic courts may also enforce existing domestic anti-mercenary legislation that is unrelated to the UN Mercenary Convention,<sup>399</sup> but because

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396. See discussion *supra* Part III.A.6.

397. Because Article 47 of Protocol I merely discourages rather than regulates mercenary activities, and then only during international armed conflicts, it has been excluded from this discussion. See *supra* Part III.A.4.

398. See UN Mercenary Convention, *supra* note 22, art. 5(3). See *infra* Appendix B (reproducing Articles 1-7 of the UN Mercenary Convention).

399. See, e.g., S. AFR. CONST. ch. 11, May 8, 1996 (Butterworths Statutes of South Africa, LEXIS through December 2002 update) (regulating South African domestic security services); Regulation of Foreign Military Assistance Act 15 of 1998 (Butterworths Statutes of South Africa, LEXIS through December 2002 update) (regulating “the rendering of foreign military assistance by South African . . . persons”).

this rarely occurs, this discussion focuses on violations of internationally derived provisions.

If personal jurisdiction over the unaffiliated individual is satisfied, several subject matter jurisdiction requirements must be met before prosecution. First, the individual must meet either the primary<sup>400</sup> or the secondary<sup>401</sup> mercenary definition found in the UN Mercenary Convention. As previously detailed, the primary definition parallels Article 47 of Protocol I, and the secondary definition follows the more expansive model of the OAU Mercenary Convention, but it only applies when the individual is recruited to overthrow a government or to undermine the constitutional order or territorial integrity of a state. Both definitions require that the individual is recruited to participate in an armed conflict, and both are weakened by the same “motivation by material compensation” requirement.<sup>402</sup> Both definitions also apply to all armed conflicts, no matter how characterized.<sup>403</sup> Neither definition considers the legitimacy of the sending state or of the receiving party on whose behalf the person is employed. The primary definition excludes unaffiliated individuals who are made a member of the armed forces of any party to the conflict, nationals of a state party to the conflict, and residents of territory controlled by any party to the conflict.<sup>404</sup> The secondary definition excludes unaffiliated individuals who are made members of the armed forces of a state where the acts occur and nationals or residents of a state against which the acts are directed.<sup>405</sup>

Second, the individual must satisfy the elements of one of the UN Mercenary Convention’s two enumerated offenses found in Articles 2 and 3.<sup>406</sup> Mercenary status alone is not an offense. That is, simply satisfying one of the two mercenary definitions is not enough; the individual must participate directly in hostilities or in a concerted act of violence,<sup>407</sup> or the individual must recruit, use, finance, or train mercenaries.<sup>408</sup> In the alternative, the unaffiliated individual must either attempt<sup>409</sup> or serve as an

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400. UN Mercenary Convention, *supra* note 22, art. 1(1).

401. *Id.* art. 1(2).

402. *Id.* art. 1(1)(b), (2)(b).

403. *Id.* art. 16(b).

404. *Id.* art. 1(1)(c)-(d).

405. *Id.* art. 1(2)(c), (e).

406. *Id.* arts. 2-3.

407. *Id.* art. 3.

408. *Id.* art. 2.

409. *Id.* art. 4(a).

accomplice of one who attempts or commits<sup>410</sup> one of the two enumerated offenses.

## 2. *Liability of State Actors*

State actors are individuals—whether service members, government employees, or government-sanctioned contractors—affiliated with a third party, neutral state. Unlawful mercenary activities by a state actor may be enforced by either domestic courts in countries that enact legislation implementing the offenses contained in the UN Mercenary Convention, or potentially by the ICC pursuant to its future jurisdiction over crimes of aggression, which will reach only state actors.<sup>411</sup> Where domestic and ICC jurisdiction overlap, the ICC would accord deference to the domestic court consistent with the ICC’s principle of complementarity.<sup>412</sup> Without implementing domestic legislation, however, there could be no domestic jurisdiction, and thus the ICC would exercise primary jurisdiction over the state actor.

As with unaffiliated individuals, the state actor must first satisfy either the primary or secondary mercenary definition of the UN Mercenary Convention. The common elements of the two definitions are similar for unaffiliated individuals and state actors; as before, neither definition considers the legitimacy of the sending state or of the receiving party on whose behalf the person is employed. The primary definition would exclude state actors sent by their home state (a third party, neutral state), but only if they were “on official duty as a member of [the sending state’s] armed forces.”<sup>413</sup> In addition to covering service members, this exclusion would likely extend to military technical advisors who were government employees or government-sanctioned contractors of the sending state.<sup>414</sup> The secondary definition would exclude state actors sent by their home state, provided they were on “official duty.” Unlike the primary definition, the secondary definition’s official duty exclusion is more expansive because it is not limited to members of the sending state’s armed forces.<sup>415</sup> There-

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410. *Id.* art. 4(b).

411. *See* discussion *supra* notes 386-93 and accompanying text.

412. *See supra* note 382.

413. UN Mercenary Convention, *supra* note 22, art. 1(1)(e). It is assumed that state actors would not be made a member of the armed forces of a party to the conflict, nor would they be nationals of a state party to the conflict or residents of territory controlled by any party to the conflict. *See id.* art. 1(1)(c)-(d).

414. *See* Aldrich, *supra* note 172, at 776.

fore, this exclusion would cover any sending state government employee or government-sanctioned contractor, whether or not considered a member of the sending state's armed forces, in addition to the sending state's actual service members.<sup>416</sup>

The state actor, like the unaffiliated individual, must commit one of the two mercenary offenses enumerated by the UN Mercenary Convention. The state actor must either participate directly in hostilities or a concerted act of violence,<sup>417</sup> or he must recruit, use, finance, or train mercenaries.<sup>418</sup> In the alternative, the state actor must either attempt<sup>419</sup> or serve as an accomplice of one who attempts or commits<sup>420</sup> one of the two enumerated offenses. Although state actors satisfying one of the two mercenary definitions could be held individually liable for one of these offenses, the UN Mercenary Convention does not extend liability to state actors who fail to carry out one or more of their state's responsibilities imposed by the Convention.<sup>421</sup> This is significant because states' responsibilities go beyond merely recruiting, using, financing, or training mercenaries, and they include duties to prevent offenses under the Convention,<sup>422</sup> to notify the UN or affected states parties,<sup>423</sup> to establish jurisdiction over the Convention's offenses,<sup>424</sup> to apprehend suspects,<sup>425</sup> to extradite suspects under certain circumstances,<sup>426</sup> and, in cases where the state does not extradite the suspect, to "submit the case to its proper authorities for the purpose of prosecution."<sup>427</sup>

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415. See UN Mercenary Convention, *supra* note 22, art. 1(2)(d). It is assumed that state actors would not be made a member of the armed forces of a state where the acts occur, nor would they be nationals or residents of a state against which the acts are directed. See *id.* art. 1(2)(c), (2)(e).

416. Compare *id.* art. 1(1)(e), with *id.* art. 1(2)(d).

417. *Id.* art. 3.

418. *Id.* art. 2.

419. *Id.* art. 4(a).

420. *Id.* art. 4(b).

421. Compare *id.* arts. 1-4, with *id.* arts. 5-15.

422. *Id.* art. 6.

423. *Id.* arts. 8, 10.

424. *Id.* art. 9.

425. *Id.* art. 10.

426. *Id.* arts. 10, 12, 15.

427. *Id.* art. 5.

### 3. *Liability of States*

A state that violates its international responsibilities in relation to mercenary activities may be held liable through the negotiation and arbitration procedures outlined in Article 17 of the UN Mercenary Convention,<sup>428</sup> through the International Court of Justice,<sup>429</sup> or in rare cases, through UN Security Council declarations.<sup>430</sup> This discussion ignores the complex and varied diplomatic measures leading to Security Council action, and instead examines those cases where an aggrieved state must show that an offending state violated its obligations under international law. Whether a violation of an obligation of customary international law or the UN Mercenary Convention in particular, ultimate jurisdiction for these disputes between states would rest with the International Court of Justice.<sup>431</sup>

Only states parties may refer a dispute to the International Court of Justice.<sup>432</sup> The court's jurisdiction "comprises all cases which the [states] parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force."<sup>433</sup> In determining a state's responsibilities in regards to mercenary activities, the court would likely look to the principles of neutrality found in the Hague Convention of 1907, the UN Charter, Articles 5 through 15 of the UN Mercenary Convention, states' practice as indications of customary international law, any

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428. *Id.* art. 17.

429. *See, e.g.*, *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27) (Merits).

430. Typically, however, the Security Council measures amount to no more than stern condemnations. *See, e.g.*, S.C. Res. 405, U.N. SCOR, 32d Sess., U.N. Doc. S/INF/33 (1977) (condemning mercenary recruitment as it affected Benin).

431. *See* UN Mercenary Convention, *supra* note 22, art. 17(1). The UN Mercenary Convention requires that, before resorting to the International Court of Justice, states must first pursue negotiation and at least consider arbitration if requested by one of the states parties. *Id.* In theory, a state aggrieved by another state's violation of international law other than the UN Mercenary Convention could seek immediate redress from the International Court of Justice. *See* Statute of the International Court of Justice, art. 38(1)(b)-(c), June 26, 1945, 59 Stat. 1031 (entered into force Oct. 24, 1945) [hereinafter ICJ Statute].

432. ICJ Statute, *supra* note 431, art. 34(1) ("Only states may be parties in cases before the Court."). The ICJ is open to UN member states; non-member states may still refer disputes to the court, but they must pay an administrative fee for the court's expenses. *Id.* art. 35. The ICJ would only have jurisdiction to hear disputes between states that one of the states parties referred to the court; it could not independently exercise jurisdiction. *See* UN Mercenary Convention, *supra* note 22, art. 17(1).

433. ICJ Statute, *supra* note 431, art. 36(1).

UN General Assembly resolutions that represent generally accepted principles of law, and relevant *opinio juris*.<sup>434</sup>

As previously discussed, international law imposes several mercenary-related obligations on states. A state must prevent domestic mercenary recruitment or staging activities on its territory, according to the Hague Convention.<sup>435</sup> A state must refrain “from the threat or use of force against the territorial integrity or political independence of [another] state,” by Article 2(4) of the UN Charter.<sup>436</sup> And by the widely accepted terms of General Assembly Resolutions 2131, 2625, and 3314,<sup>437</sup> a state must not organize, encourage, or send mercenaries to use armed force against another state. This obligation applies whether or not the organizing, encouraging, or sending state is a colonial or racist regime, and whether or not the mercenaries are organized, encouraged, or sent to fight against a national liberation movement. Simply put, the Hague Convention, the UN Charter, and these General Assembly resolutions reiterate a state’s obligation to refrain from unlawful intervention in another state’s sovereign affairs. This *jus ad bellum* principle would not be violated, however, if the receiving state actually invited or hired the mercenaries from the sending state. From the standpoint of neutrality, the receiving state’s concurrence prevents the intervention from being unlawful.

In one respect, the UN Mercenary Convention imposes a similar state obligation of neutrality. According to Article 5(2), a “state shall not recruit, use, finance or train mercenaries [as defined in the Convention] for opposing the legitimate exercise of the inalienable right of peoples to self-determination, in conformity with international law.”<sup>438</sup> This creates no new obligation, however, because as the previous paragraph indicated,

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434. *See id.* art. 38(1). In deciding cases, the court shall apply:

- (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- (b) international custom, as evidence of a general practice accepted as law;
- (c) the general principles of law recognized by civilized nations;
- (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

*Id.*

435. *See supra* Part III.A.1.

436. U.N. CHARTER art. 2(4).

437. *See supra* Part III.A.3.

states already had an obligation to refrain from intervention in another state's sovereign affairs for any purpose, including use of force against the political independence of any state, which appears to subsume self-determination movements occurring within the state. Nevertheless, while states previously could not organize, encourage, or send mercenaries for the purposes of any intervention, this provision of the UN Mercenary Convention merely modifies states' responsibilities to include refraining from recruiting, using, financing, or training mercenaries, but only if the mercenaries will oppose a self-determination movement.

In another respect, Article 5(1) of the UN Mercenary Convention reaches far beyond principles of states' neutrality obligations when it declares: "States parties shall not recruit, use, finance or train mercenaries [as defined in the Convention] and shall prohibit such activities in accordance with the provisions of the present Convention."<sup>439</sup> This represents a radical departure from states' previous international law responsibilities because the restriction has no relation to an unlawful intervention in another state's affairs. Indeed, this novel responsibility has no international component whatsoever; it represents a flat proscription: states "shall not recruit, use, finance, or train mercenaries" for any purpose. This provision restricts receiving states rather than sending states, and it effectively prevents a sovereign state from hiring mercenaries, even in cases where the state determines that doing so is absolutely necessary to defend the state from an internal or external aggressor. More so than in any other area of international mercenary regulation, states' practice weighs heavily against this provision's ever being accepted as a peremptory norm.<sup>440</sup>

The preceding three paradigms represent the outermost limits of current international law restricting mercenary activities. Whether examining restrictions on unaffiliated individuals, state actors, or states themselves, the obvious weak regulatory link is the definition of a mercenary, whether the primary definition taken from Article 47 of Protocol I, or the secondary definition taken from the OAU Mercenary Convention. Tragically, the elusive mercenary definition struggles even to reach the unaffiliated individual mercenary for which it was intended: a post-colonial rogue like Callan operating in 1976 Angola. When stretched to reach the case where a responsible state sends a state-sanctioned, highly professional PMC to a

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438. UN Mercenary Convention, *supra* note 22, art. 5(2). This essentially reiterates the aspirational declaration found in General Assembly Resolution 2465, *supra* note 19.

439. UN Mercenary Convention, *supra* note 22, art. 5(1).

440. See *supra* notes 371-78 and accompanying text.

requesting state or where a sovereign state independently attempts to hire similarly sanctioned and professional PMC services, the definition is nearly worthless. Even the UN Special Rapporteur agreed with this assessment. Reporting in June 2002, he stated: “The problem remains that there is no appropriate legal definition or legislation under which [mercenaries] can be prosecuted.”<sup>441</sup> This is further evidence that the mercenary definition is hopelessly outdated, and with it the entire international regulation regime aimed at mercenary activities.

#### IV. Resisting Rhetoric and Returning to Principles of International Law

Whereas the post-colonial approach to mercenary regulation has been marked by attempts to define and outlaw one type of mercenary specifically, the focus should be returned to principles of neutrality and non-intervention generally. In obsessing over the unaffiliated individual mercenary, especially those who prowled post-colonial Africa, current international law provisions have completely missed the larger danger posed by mercenary activities: the unregulated transfer of military services to foreign armed forces. Such transfers should be made unlawful unless they occur between two states or between a state and a foreign armed force that has been granted international recognition independent of its relation to a state. The keys to such lawful transfers of military services are legitimacy and consent, as applied to both the sending state and the receiving state.<sup>442</sup>

Sovereign states are assumed to possess legitimacy, and a consensual military transfer between two legitimate states violates none of the peremptory norms imposed by international legal principles of neutrality or non-intervention.<sup>443</sup> In rare cases, the international community, speaking through the UN Security Council, may brand a state as a rogue regime that lacks legitimacy. Iraq, the former state of Rhodesia, and apartheid-era South Africa are three recent examples where states lost their legitimacy and some degree of sovereignty because they violated fundamental principles of the UN Charter, whether through intervention in the case of Iraq or

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441. *Report of the Second Meeting of Experts*, *supra* note 99, at 4.

442. For purposes of this analysis, the term “receiving state” is used to represent a sovereign state—or a foreign armed force that has been granted international legitimacy—that receives a transfer of military services from a PMC. The term “sending state” is used in referring to the state from where the PMC originates.

443. *See* Hague V, *supra* note 108, pmb., arts. 4, 6; U.N. CHARTER art. 2(4); G.A. Res. 3314, *supra* note 162, art. 3(e).

opposition to equal rights and self-determination of peoples in the two African states.<sup>444</sup>

Recent UN declarations are replete with general references to “colonial and racist regimes” that oppose self-determination movements. If a particular state is specifically characterized that way by the Security Council, as happened to Rhodesia and apartheid-era South Africa, then those states lack legitimacy, to include legitimacy to send or receive a transfer of military services. If not specifically characterized as “colonial and racist” or “interventionist” or “violently opposed to internal self-determination movements”<sup>445</sup> by the Security Council, a state is presumed to retain its legitimacy, along with all of the authorities attaching by virtue of sovereignty, to include sending or consenting to receive transfers of military services.

Private military companies and individual mercenaries will never possess the inherent legitimacy of sovereign states. It is possible, however, that a state could confer its legitimacy through effective domestic regulation of companies that aspire to transfer military services. Grotius observed in his *Law of War and Peace* that “if any possess the sovereign power in part, they may to that extent wage a lawful war.”<sup>446</sup> In the case of PMCs, an imprimatur of state legitimacy could be imparted through a sending state’s strict licensing and oversight of its military service providers. As a corresponding requirement, the state would have to impose domestic sanctions against unaffiliated individuals<sup>447</sup> and unlicensed PMCs that attempt to transfer military services to foreign armed forces outside of the state’s licensing regime. For without the state’s legitimacy, the unaffiliated individual or unlicensed PMC usurps the state’s monopoly on military violence,<sup>448</sup> and so goes forth as an illegitimate international

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444. See, e.g., S.C. Res. 687, U.N. SCOR, 46th Sess., 2981st mtg., U.N. Doc. S/RES/687 (1991) (imposing disarmament requirements on Iraq); S.C. Res. 418, U.N. SCOR, 32d Sess., 2046th mtg. at 5, U.N. Doc. S/INF/33 (1977) (calling for an arms embargo against South Africa); S.C. Res. 217, U.N. SCOR, 20th Sess., 1265th mtg. at 8, U.N. Doc. S/PV.1265 (1965) (refusing to recognize Rhodesia’s statehood because of the “minority regime’s” presumed lack of legitimacy).

445. Obviously, there is a strong public policy interest against military transfers to regimes that use military force to suppress their own populations. See, e.g., S.C. Res. 713, U.N. SCOR, 46th Sess., 3009th mtg., U.N. Doc. S/RES/713 (1991) (imposing a weapons embargo on the former Yugoslavia, including Bosnia, Croatia, Macedonia, and Slovenia).

446. HUGO GROTIUS, *DE JURE BELLI AC PACIS* 633 (Francis W. Kelsey trans., 1925) (1646) (The Law of War and Peace).

447. That is, an individual that is not a state actor or an employee of a licensed military service provider. See *supra* text accompanying note 398.

actor,<sup>449</sup> lacking the state's obligation to refrain from unlawful intervention.<sup>450</sup>

A PMC regulation regime premised on legitimacy and consent would produce one very desirable byproduct. The likes of Callan would be punished for interfering with the sending state's sovereign authority to make determinations of the *jus ad bellum* of transfers of military services, as opposed to trying to reach his conduct by regulating post-intervention acts that may violate principles of the *jus in bello*.<sup>451</sup> For sending states should be most offended by the mercenary's status as one engaged in unlawful intervention that impugns the sending state's neutrality obligations.<sup>452</sup> Non-consenting receiving states, in contrast, suffer after the unlawful

448. See GROTIUS, *supra* note 446, at 91 ("Says Paul the jurist, 'Individuals must not be permitted to do that which the magistrate can do in the name of the state, in order that there may be no occasion for raising a greater disturbance.'").

449. *Id.* at 631 ("[A] gathering of pirates and brigands is not a state, even if they do perhaps mutually maintain a sort of equality, without which no association can exist.").

450. See Burmester, *supra* note 110, at 45.

Private actions of individuals can, in certain circumstances, have a major impact on interstate relations[,] and it no longer seems realistic not to impute responsibility to a state for the actions of persons under its jurisdiction and control in situations likely to endanger world peace and security. . . . [T]he modern state can, and must, exercise control over its nationals so as to prevent their involvement in activities contrary to international law and, in particular, so as to enable the state to fulfill its own obligations to respect the territorial integrity and political independence of other states.

*Id.*

451. Kritsiotis asked:

Or do all mercenaries, at base, unlawfully intervene in wars because these wars are not their own? If so, they should be prosecuted for this transgression of the *jus ad bellum* and their protection and conduct under the *jus in bello* stands to be considered as an entirely separate matter. That was the essence of the approach of the 1989 Convention Against the Recruitment, Use, Financing and Training of Mercenaries, but spoiled by the dogmatic stand taken by the first paragraph of Article 47 of [Protocol I, which the Mercenary Convention incorporated as its primary mercenary definition].

Kritsiotis, *supra* note 339, at 21.

452. See *Report of the Second Meeting of Experts*, *supra* note 99, at 9. "The involvement of private military companies in internal armed conflicts may be perceived as representing intervention by the State of incorporation of the security company." *Id.*

intervention, and are harmed not by virtue of the mercenary's status, but rather by the mercenary's conduct. Therefore, it stands to reason that sending states should regulate the *jus ad bellum* while receiving states should regulate the *jus in bello*. In this proposed regime, the UN should perform an oversight function, monitoring sending states' regulations for accountability and transparency, acting through the ICJ when states violate their international obligations, and acting through the ICC to punish an individual's unlawful acts<sup>453</sup>—irrespective of mercenary status—committed after the individual's intervention and during the armed conflict.

#### V. Proposed International Convention

With the foregoing in mind, this article proposes the Draft International Convention to Prevent the Unlawful Transfer of Military Services to Foreign Armed Forces (Draft Convention).<sup>454</sup> The Draft Convention attempts to codify states' international law responsibilities, to address concerns about PMC accountability and transparency,<sup>455</sup> to marginalize the unaffiliated individual who attempts to transfer military services without state sanction, and to buttress legitimate states' sovereign authority to engage in transfers of military services. In detailing the proposed Draft Convention, the article illustrates that international regulation is but one component to regulate mercenary activities successfully.

While international provisions can provide oversight and coordination of efforts to regulate PMC activities, comprehensive domestic provi-

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453. The bases for ICC jurisdiction would include acts that constitute "the crime of genocide, crimes against humanity, [or] war crimes," and not mercenary activities *per se*. See Rome Statute, *supra* note 379, art. 5(1).

454. See *infra* Appendix A. Hampson must be credited with first proposing in 1991 the idea of an international convention to compliment the UN Mercenary Convention. See Hampson, *supra* note 14, at 33-37. Hampson laid out several criteria for a proposed convention that would adequately control foreign intervention, to include mercenary adventures, by defining states' regulation responsibilities under customary international law. The one potential difficulty with her proposal, however, is the phrase "use of force for political ends," which may be no less subjective or impossible to prove than the motivation test of Article 47 and the UN Mercenary Convention. See *id.* at 33. Hampson today serves as one of the several Experts on the Traditional and New Forms of Mercenary Activities who are working on behalf of the UN Commission on Human Rights to resolve the mercenary regulation issue. *Report of the Second Meeting of Experts*, *supra* note 99, at 3.

455. See, e.g., Montgomery Sapone, *Have Rifle with Scope, Will Travel: The Global Economy of Mercenary Violence*, 30 CAL. W. INT'L L.J. 1 (1999) (arguing against any state use of private military companies, which the author contends lack accountability and transparency).

sions will still be required, for without one the other will surely fail. Therefore, effective sending state regulation of PMC activities provides the Draft Convention's cornerstone. The United States<sup>456</sup> and South Africa<sup>457</sup> are widely regarded as providing the best domestic PMC regulations to date.<sup>458</sup> These models should be refined and then emulated by other states intending to export military services through domestically licensed PMCs.

The Draft Convention uses several distinct terms, but it makes no attempt to define the mercenary.<sup>459</sup> It uses the term "authorizing state" to describe a state that develops an effective licensing regime. An authorizing state is the state in whose territory the PMC has a substantial presence and is licensed to operate. The authorizing state enforces PMC accountability, and it is charged with regulating the PMC and all other providers of military services under effective domestic guidelines and criminal sanc-

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456. While not specifically tailored to reach PMC activities, U.S. legislation has for years regulated the transfer of military services to foreign entities. *See* Arms Export Control Act of 1968, 22 U.S.C.S. § 2752 (LEXIS 2002) (as amended 1985) (regulating the export of military services and arms brokering by U.S. companies); International Traffic in Arms Regulations 22 C.F.R. pts. 120-130 (2002) (implementing the Arms Export Control Act, requiring U.S. companies to satisfy the export licensing requirements of the U.S. Department of State Office of Defense Trade Controls when providing military services to foreign nationals, and also requiring congressional notification when U.S. companies export more than \$50 million in defense services); *see also* Foreign Assistance Act, 22 U.S.C.S. § 2151 (preventing the United States from providing assistance "to the government of any country which engages in a consistent pattern of gross violations of internationally recognized human rights"); International Military Education and Training Accountability Act of 2001, S. 647, 107th Cong. (2001) (intending "to enable Congress to better monitor and evaluate the success of the international military education and training program in instilling democratic values and respect for internationally recognized human rights in foreign military and civilian personnel"). *See generally* FOREIGN MILITARY TRAINING REPORT, *supra* note 84. "Training events and engagement activities reported for fiscal 2001 and anticipated for 2002 will involve approximately 108,500 international military and civilian personnel from 176 countries around the world." *Id.* (Executive Summary).

457. For South African provisions on point, *see supra* note 399.

458. *See* UK GREEN PAPER, *supra* note 18, para. 69, ann. B (detailing and praising U.S. and South African domestic regulations); *Report of the Second Meeting of Experts*, *supra* note 99, at 9 (praising South Africa's Private Security Regulations Act of 2001). Of note, although "it was estimated that there were more than 90 private armies operating throughout Africa [during the 1990s], the majority of them in Angola," O'Brien, *supra* note 17, at 51, the U.S. Department of State refused to issue MPRI a license to operate in Angola during the same period, *id.* at 54.

459. The UN Meeting of Experts recently applauded Belgium's mercenary legislation, which "omits to define the term mercenaries, but its substance covers mercenaries in the context of military services given to foreign armies or irregular troops." *Report of the Second Meeting of Experts*, *supra* note 99, at 8.

tions. Criminal sanctions must proscribe all unaffiliated individuals from providing military services to a foreign armed force.<sup>460</sup> Therefore, only persons employed by licensed military service providers would be eligible to transfer military services. The authorizing state would subject all other persons to criminal liability, regardless of whether or not the person satisfied one of the UN Mercenary Convention's two mercenary definitions.

The underlying purpose of the tandem domestic PMC regulations and corresponding criminal provisions would be to marginalize the unregulated freelance mercenary. The Draft Convention attempts to squeeze out the freelance mercenary by identifying what he is not. He is not a soldier of his native state. He is not considered a soldier of the foreign state that he temporarily serves because he makes more money than the state's soldiers, and he does not answer to the state's military criminal code; hence, he did not enlist on the same terms as everyone else.<sup>461</sup> Moreover, unlike the licensed military service provider, the freelance mercenary does not serve under the authorizing state's imprimatur of legitimacy.

The Draft Convention uses the term "military services" to encompass those functions traditionally performed by professional members of a state's armed forces.<sup>462</sup> This includes, but is not limited to, training or performance of military functions associated with: task organization, leadership, command and control, battlefield operating systems' operation and maintenance, combined arms integration, maneuver, logistics, information operations, and combatant activities. "Combatant activities" would include taking a direct part in hostilities or a concerted act of violence on behalf of a foreign armed force. The Draft Convention intentionally

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460. *See, e.g.*, 18 U.S.C.S. §§ 958-960 (prohibiting "military . . . expeditions or enterprises" against foreign governments with which the United States is at peace, as well as enlisting or recruiting others for service in a foreign government under certain circumstances).

461. *Cf. Musah & Fayemi, supra* note 171, at 16 ("Mercenarism—the practice of professional soldiers freelancing their labour and skills to a party in a foreign conflicts for fees higher and above those of native counterparts—is as old as conflict itself.")

462. *See, e.g.*, U.S. DEP'T OF ARMY, FIELD MANUAL 1, THE ARMY ch. 3 (14 June 2001) ("The primary functions of The Army . . . are to organize, equip, and train forces for the conduct of prompt and sustained combat operations on land."). U.S. DEP'T OF ARMY, FIELD MANUAL 3-0, OPERATIONS 1.6 (14 June 2001) (describing full spectrum operations as "the range of operations Army forces conduct in war and military operations other than war," including offensive, defensive, stability, and support operations).

defines military services broadly because, as previously stated, “[t]he distinction between combat and non-combat operations is often artificial.”<sup>463</sup>

By the Draft Convention’s terms, both individuals and business entities may provide military services, but only a business entity can be a licensed military service provider. A “licensed military service provider,” therefore, would be a private, non-state business entity that contracts for and provides any military services to a foreign armed force. An authorizing state must license and regulate the military service provider. The Draft Convention would apply regardless of whether or not a state or non-state entity contracts for the services of the licensed military service provider; however, the Draft Convention would always require consent by both the sending state and the receiving state. This ensures legitimacy in the interstate transaction, even when a third party state or entity contracts to transfer military services from the sending state to the receiving state.

While the foregoing provisions of the Draft Convention ensure PMC accountability, other provisions are designed to add transparency to PMC operations, primarily through international coordination and oversight provided by the UN.<sup>464</sup> Coordination would occur between the state’s highest diplomatic office<sup>465</sup> and the Office of the UN High Commissioner for Human Rights (OHCHR), which the Draft Convention would charge with oversight responsibilities.<sup>466</sup> A state could serve as an authorizing state that grants licenses to its military service providers unless the OHCHR formally questioned the effectiveness of the state’s domestic reg-

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463. UK GREEN PAPER, *supra* note 18, para. 11. *See supra* note 69 and accompanying text.

464. Regional organizations offer another option for potential oversight of PMC operations because their primary function often involves collective security. *See* Davis Brown, *The Role of Regional Organizations in Stopping Civil Wars*, 41 A.F. L. REV. 255, 255 (1997) (“Collective security is joining forces to maintain peace and security within or near the group’s area of competence.”). *But cf.* Anthony Clark Arend, *Symposium: The United Nations, Regional Organizations, and Military Operations: The Past and the Present*, 7 DUKE J. COMP. & INT’L L. 3, 28 (1996) (Introduction) (describing the occasional dilemma created when the UN and regional organizations differ over their assessment of a crisis).

465. Within the Authorizing State, coordination would occur between the country’s diplomatic, defense, and corporate regulation agencies, *e.g.*, in the United States, the Department of State, Department of Defense, Security and Exchange Commission, and perhaps states’ attorneys general.

ulation regime. If challenged, the authorizing state would be afforded full due process to defend its regulation regime.<sup>467</sup>

For its part in promoting transparency, the OHCHR would issue minimal guidelines, which a state's domestic regulatory regime must satisfy before the state is qualified to function as an authorizing state, that is, before the state can license PMCs to transfer military services lawfully.<sup>468</sup> The authorizing state, in turn, must provide minimal advance notice to the OHCHR before a licensed military service provider's employee departs the authorizing state en route to the receiving state. At a minimum, this notice should include the PMC's name, the employee's name, the results of a background check verifying that no credible basis exists to believe the

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466. The OHCHR should provide this oversight function because that office:

- (a) Promotes universal enjoyment of all human rights by giving practical effect to the will and resolve of the world community as expressed by the United Nations;
- (b) Plays the leading role on human rights issues and emphasizes the importance of human rights at the international and national levels;
- (c) Promotes international cooperation for human rights;
- (d) Stimulates and coordinates action for human rights throughout the United Nations system;
- (e) Promotes universal ratification and implementation of international standards;
- (f) Assists in the development of new norms;
- (g) Supports human rights organs and treaty monitoring bodies;
- (h) Responds to serious violations of human rights;
- (i) Undertakes preventive human rights action;
- (j) Promotes the establishment of national human rights infrastructures;
- (k) Undertakes human rights field activities and operations; [and]
- (l) Provides education, information advisory services and technical assistance in the field of human rights.

*Bulletin on the Organization of the Office of the United Nations High Commissioner for Human Rights, U.N. Secretariat, U.N. Doc. ST/SGB/1997/10 (1997).*

467. The author recognizes the political pitfalls that this system may fall victim to, but the oversight authority must hold some power to challenge the authorizing state's domestic regulation regime.

468. The Second Meeting of Experts debating the mercenary issue recently recommended that the

OHCHR consider establishing a system of information flow to facilitate access by states to existing national legislation and implementing mechanisms for regulating private military/security companies. Where possible, the High Commissioner might consider exercising her mandate to provide technical assistance and advisory services in the drafting of appropriate national legislation on private military/security companies to those States in need of such assistance.

*Report of the Second Meeting of Experts, supra note 99, Annex, at 11.*

employee has committed past human rights abuses or other serious crimes, the foreign armed force receiving the military services, and the general terms of the contract and scope of military services to be provided.

Continuous transparency would rely on the ongoing, two-way exchange of information between the authorizing state and the OHCHR. Article 2.1(b)(iii) of the Draft Convention adds that transfers of military services remain lawful only when: “The employee did not continue providing military services to foreign armed forces after the [OHCHR] notified the employee and the authorizing state of credible evidence concerning the employee’s human rights violations or other serious crimes.”<sup>469</sup> The authorizing state also has a continuing notice obligation to the OHCHR in the event of any material change to the scope of the contract or any credible evidence of the employee’s human rights abuses or other serious crimes. In theory, the continuing transparency offered by international oversight will identify suspect PMC employees, allowing the authorizing state through its domestic regulation regime to hold accountable the PMC employee or the PMC itself.

While the proposed Draft Convention provisions cannot function without domestic regulation, the inverse of this proposition is also true. The United States or South Africa may individually go to great lengths to regulate PMC activities that provide military services to foreign armed forces, but there is little to prevent their PMCs from moving to a more hospitable regulatory environment, much like U.S. corporations gravitate to Delaware, or the shipping industry seeks registry in Panama. The same is true for any state that takes pains to enact stringent domestic PMC legislation. Therefore, without an international convention, PMCs may still escape regulation by operating from states with ineffective or nonexistent mercenary regulations.<sup>470</sup>

## VI. Conclusion

This article and its proposed Draft Convention represent a single step toward influencing and answering the difficult issues being debated by the UN Meeting of Experts on Traditional and New Forms of Mercenary Activities.<sup>471</sup> To be certain, the existing international regime of mercenary regulation falls short of expectations. This article postulates that the failure resulted from a politicized process that overlooked the traditions of

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469. Appendix A *infra*, art. 2.1(b)(iii).

international law and that ignored states' long history of mercenary use. The dangers posed by unregulated mercenaries acting without state sanction, however, cannot be ignored.

Freelance, unaffiliated mercenaries acting with no domestic or international oversight represent the greatest danger to state sovereignty and principles of non-intervention. Certainly, some freelance mercenaries may personally follow acceptable codes of conduct. But the murderous, post-colonial rogue-adventurer, best exemplified by Callan maniacally "topping" indigenous soldiers and fellow mercenaries alike in Angola, has justifiably brought regulation to the mercenaries' door. Today's private military companies, although professional and generally law-abiding, still live in the same house once occupied by unregulated criminals like Callan.<sup>472</sup> For this reason, they must submit to domestic regulation and international oversight in return for the legitimacy—not to mention the business opportunities—that a state-sanctioning regime will provide.

The question remains whether or not the international community can overlook the crimes of post-colonial mercenaries to confront the underlying-

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470. In the United States, the weak link in the current PMC regulation regime is a lack of effective oversight once a proposed transfer of military services gains U.S. approval. For example, the U.S. government has no idea the exact numbers, let alone individual names, of persons performing extra-territorial contracts outside of the United States on behalf of the United States. See Renae Merle, *More Civilians Accompanying U.S. Military: Pentagon Is Giving More Duties to Contractors*, WASH. POST, Jan. 22, 2003, at A10 ("The Defense Department does not keep track of the number of contractors overseas but recognizes that such assignments are part of a growing trend . . ."). Instead of this fire-and-forget system, transparency through effective, ongoing oversight should be incorporated through either domestic or international means. Enhanced domestic oversight may prove effective in the U.S. model where PMCs are less likely to move offshore because their primary income derives from the U.S. government. See UK GREEN PAPER, *supra* note 18, para. 12.

471. See *Report of the Second Meeting of Experts*, *supra* note 99, at 10-11.

The Commission on Human Rights request[s] the Sub-Commission to set up an in-session working group to consider the issues raised by the existence of private military/security companies and to consider how their activities could best be regulated, taking into account work which has been undertaken by the Special Rapporteur [on the question of the use of mercenaries] and in other forums on the question of mercenaries.

*Id.* at 11.

472. Kritsiotis, *supra* note 339, at 21 ("Mercenaries have no doubt been dogs of war in the past; their war record is by no means unassailable. They have much to account for, both in terms of their means and their end-game.").

ing intervention issue posed by all mercenary activities. If it decides to recognize and regulate PMCs, then the debate may proceed on expanding the scope of PMC military services, to include humanitarian intervention operations. If the international community persists in its myopic approach to mercenary activities, however, post-colonial contempt and suspicion will continue to follow the state-sanctioned PMC and unaffiliated mercenary alike.

**Appendix A: Proposed Draft Convention**INTERNATIONAL CONVENTION TO PREVENT THE UNLAWFUL  
TRANSFER OF MILITARY SERVICES TO FOREIGN ARMED  
FORCES

*The States Parties to the present Convention,*

*Considering* the past difficulties associated with defining mercenary activities and regulating private individuals' unlawful transfer of military services to foreign armed forces;

*Affirming* the principles of international law stated in the Fifth Hague Convention and Articles 2(1) and 2(4) of the United Nations Charter, and reaffirmed in General Assembly Resolutions 2131, 2625, and 3314;

*Concerned* about the precedent set when unaffiliated individuals transfer military services without the imprimatur of a sovereign State or the international community;

*Convinced* of the necessity for an international convention to ensure meaningful oversight and regulation of private military service providers;

*Cognizant* that matters not regulated by such a convention continue to be governed by the rules and principles of international law;

*Have agreed* as follows:

*Article 1*

For the purposes of the present Convention,

1. An "Authorizing State" is the Sending State in whose territory the military service provider has a substantial presence and is licensed to operate. Only Authorized States can license military service providers. A State is deemed an Authorizing State that can grant licenses to military service providers unless the United Nations High Commissioner for Human

Rights formally calls into question the effectiveness of the State's domestic regulation regime.

2. A "foreign armed force" includes a State's military forces—or in rare cases, internationally recognized irregular forces fighting for self-determination—in which the person has not enlisted for service on terms substantially similar to terms applicable to similarly situated members of the foreign armed force, to include, but not restricted to, comparison of rank upon entry, pay and bonuses, criteria for promotion, obligated duration of service, and subjection to the foreign armed force's military justice provisions. In rare cases, "enlisted for service as members of the foreign armed force" may encompass volunteers or indigenous persons engaged in spontaneous uprisings.

3. A "licensed military service provider" is a private, non-State business entity that contracts for and provides military services to a foreign armed force. An Authorizing State must license and regulate the military service provider. Both individuals and business entities may provide military services, but only a business entity can be a licensed military service provider.

4. "Military services" are services traditionally provided by professional members of a State's armed forces, including, but not limited to, training or performance of military functions associated with: task organization, leadership, command and control, battlefield operating systems' operation and maintenance, combined arms integration, maneuver, logistics, information operations, and combatant activities.

5. "Military services involving combatant activities" include cases where the person takes a direct part in hostilities or a concerted act of violence on behalf of a foreign armed force. Engaging in direct combatant activities shall subject the licensed military service provider to the highest scrutiny by the Authorizing State and the United Nations High Commissioner for Human Rights, including, but not limited to, enhanced reporting requirements and deployment of monitoring teams from the Authorizing State, United Nations, or International Committee of the Red Cross.

6. "Minimal advance notice" requires the Authorizing State to notify the United Nations High Commissioner for Human Rights not less than forty-five days before the licensed military service provider's employee(s) departs the Authorizing State. At a minimum, this notice shall include: the identity of the foreign armed force receiving the transfer of military ser-

vices; a copy of the formal agreement between the Sending State and the Receiving State that evinces their consent to the transfer of military services; the company name of the licensed military service provider; the general terms of the contract and the scope of military services to be provided; the name of the licensed military service provider's employee(s) performing the contract; and the results of a background check on each employee performing the contract, verifying that no credible basis exists to believe that the employee has committed past human rights abuses or other serious crimes.

7. A "person" is any individual, including, but not limited to, Sending State personnel, licensed military service provider employees, and individuals unaffiliated with either a Sending State or a licensed military service provider.

8. A "Receiving State" is the recipient sovereign state—or the otherwise-recognized leadership of a foreign armed force—to whom military services are transferred.

9. A "Sending State" is the state from where the PMC originates.

#### *Article 2*

A person commits the crime of unlawful transfer of military services under the present Convention when:

1. The person provides military services to a foreign armed force, *unless*,

(a) In response to a formal agreement between the Sending State and the Receiving State (or the otherwise-recognized leadership of the foreign armed force), the person has been sent as a technical advisor on official duty as:

(i) A member of the Sending State's armed forces; or

(ii) An agent, in any capacity, of the Sending State; or

(b) In response to a formal agreement between the Sending State and the Receiving State (or the otherwise-recognized leadership of the for-

eign armed force), the person has been sent as an employee of a licensed military service provider where:

(i) An Authorizing State has licensed the military service provider;

(ii) The Authorizing State has given the United Nations High Commissioner for Human Rights minimal advance notice of the licensed military service provider's specific contract under which the employee will provide military services to a foreign armed force; and

(iii) The employee did not continue providing military services to a foreign armed force after the United Nations High Commissioner for Human Rights notified the employee or the Authorizing State of credible evidence concerning the employee's human rights violations or other serious crimes.

#### *Article 3*

The States Parties shall enact and enforce domestic legislation that effectively incorporates the crime of unlawful transfer of military services as enumerated in Article 2 of the present Convention.

#### *Article 4*

Consistent with the principle of complementarity, the States Parties intend that the International Criminal Court shall exercise original jurisdiction over the crime of unlawful transfer of military services in those cases when a State Party fails to enact or enforce effective domestic legislation as required by Article 3 of the present Convention.

#### *Article 5*

The present Convention shall apply regardless of whether or not a State or a non-State entity contracts for the transfer of military services. The present Convention shall also apply whether or not one of the parties to the contract for the transfer of military services includes the Receiving State (or the otherwise recognized leadership of the foreign armed force).

In all cases, the Sending State and the Receiving State must enter a formal agreement evincing their consent to the transfer of military services.

*Article 6*

Responsibilities of the Office of the United Nations High Commissioner for Human Rights (OHCHR): (1) the OHCHR shall exercise international oversight responsibilities over all lawful military transfers; (2) the OHCHR shall issue minimal guidelines for regulating lawful military transfers, which a State's domestic regulatory regime must satisfy before the State may serve as an Authorizing State that licenses its military service providers; (3) if the OHCHR should challenge an Authorizing State's domestic regulatory regime, the OHCHR shall afford the Authorizing State thorough due process to defend the challenge; (4) the OHCHR shall maintain a database of all licensed military service providers and all military service provider contracts submitted by Authorizing States; and (5) the OHCHR shall immediately notify the Authorizing State of any credible evidence concerning human rights violations or other serious crimes by an employee of one of the Authorizing State's licensed military service providers.

*Article 7*

Responsibilities of the Authorizing State: (1) the Authorizing State shall regulate all transfers of military services to foreign armed forces that originate in the territory of the Authorizing State, to include enacting legislation consistent with Article 3 of the present Convention; (2) the Authorizing State shall license and regulate all domestic military service providers under a regime that satisfies the minimal guidelines prescribed by the OHCHR; (3) the Authorizing State shall provide minimal advance notice to the OHCHR consistent with Article 1(6) of the present Convention; and (4) the Authorizing State shall provide continuing notice to the OHCHR if there is a material change to the scope of a military services contract previously reported, or if there is any credible evidence of human rights abuses or other serious crimes committed by a licensed military service provider's employee.

**Appendix B: UN Mercenary Convention, Articles 1-7**

A/RES/44/34, Annex  
72nd plenary meeting  
Opened for Signature 4 December 1989  
Entered into Force 20 October 2001

International Convention against the Recruitment, Use,  
Financing and Training of Mercenaries

Article 1

For the purposes of the present Convention,

1. A mercenary is any person who:

(a) Is specially recruited locally or abroad in order to fight in an armed conflict;

(b) Is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar rank and functions in the armed forces of that party;

(c) Is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict;

(d) Is not a member of the armed forces of a party to the conflict;  
and

(e) 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.

2. A mercenary is also any person who, in any other situation:

(a) Is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at:

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

(ii) Undermining the territorial integrity of a State;

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

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

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

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

#### Article 2

Any person who recruits, uses, finances or trains mercenaries, as defined in article 1 of the present Convention, commits an offence for the purposes of the Convention.

#### Article 3

1. A mercenary, as defined in article 1 of the present Convention, who participates directly in hostilities or in a concerted act of violence, as the case may be, commits an offence for the purposes of the Convention.

2. Nothing in this article limits the scope of application of article 4 of the present Convention.

## Article 4

An offence is committed by any person who:

- (a) Attempts to commit one of the offences set forth in the present Convention;
- (b) Is the accomplice of a person who commits or attempts to commit any of the offences set forth in the present Convention.

## Article 5

1. States Parties shall not recruit, use, finance or train mercenaries and shall prohibit such activities in accordance with the provisions of the present Convention.

2. States Parties shall not recruit, use, finance or train mercenaries for the purpose of opposing the legitimate exercise of the inalienable right of peoples to self-determination, as recognized by international law, and shall take, in conformity with international law, the appropriate measures to prevent the recruitment, use, financing or training of mercenaries for that purpose.

3. They shall make the offences set forth in the present Convention punishable by appropriate penalties which take into account the grave nature of those offences.

## Article 6

States Parties shall co-operate in the prevention of the offences set forth in the present Convention, particularly by:

- (a) Taking all practicable measures to prevent preparations in their respective territories for the commission of those offences within or outside their territories, including the prohibition of illegal activities of per-

sons, groups and organizations that encourage, instigate, organize or engage in the perpetration of such offences;

(b) Co-ordinating the taking of administrative and other measures as appropriate to prevent the commission of those offences.

#### Article 7

States Parties shall co-operate in taking the necessary measures for the implementation of the present Convention.

....