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**ARTICLE:** The **Emergence of a New Dog of War: Private International Security Companies, International Law, and the New World Disorder**

**NAME:** Juan Carlos **Zarate** \*

**BIO:**

\* Federal Law Clerk, Southern District of California. J.D., Harvard Law School, 1997, B.A., Harvard University, 1993. My thanks to the following people who shared their time and expertise with me in the preparation of this Article: Professor Abram Chayes, Professor Herbert Howe, Ambassador James Pardew, Mr. Chuck Franklin, General Ed Soyster, Colonel Chris Gildenhuis, Mr. Adam Lifshy, Mr. Mark P. Poncy, Jr., Ms. Kathleen Heffron, and State Department officials in the South Africa and South Asia desks, Politico-Military Affairs, Legal Affairs, ATEC, and ISP offices. Thanks to Major and Mrs. James Kurt Vogel, Jr., for their loving hospitality in Alexandria, Virginia, and to my family and Cynthia Millsap for their unconditional love and support.

**LEXISNEXIS SUMMARY:**

... SCs provide a wide spectrum of military and security services usually reserved for official militaries. ... SCs represent a reconstituted form of organized corporate mercenarism that is responding to the need for advanced military expertise in escalating internal conflicts. ... Consequently, MPRI is currently training and advising the Bosnian Federation. ... IDAS, a Dutch Antilles company, and the German firm International Business Company offer troop training and weaponry. ... One could define a mercenary liberally as a foreigner serving in an organized armed force not his own; however, this definition may be too broad for the accepted practices of the international community. ... The question must, therefore, be raised whether the use of mercenaries or SCs in particular situations on behalf of a legitimate regime facing internal unrest is a legitimate means of restoring internal order. ... SCs represent quasi-state actors in the international arena, which takes them outside the mercenary concerns of the international community. ... As a result, he has called on the international community to ban mercenary activity in all its forms, including SCs. ... In the international community, SCs represent the military expertise of their home state and implicate the presence of the home state regardless of how distanced the SC appears to be. ...

**TEXT:**

[\*75]

War is not polite recreation but the vilest thing in life, and we ought to understand that and not play at war. Our attitude towards the fearful necessity of war ought to be stern and serious.

Leo Tolstoy

## I. Introduction

The end of the Cold War produced dramatic changes in the complexion of international relations and in the evolution of international law. <sup>n1</sup> The demise of the Soviet Union and the fall of communist regimes in Eastern Europe unleashed long-suppressed ethnic rivalries and historic conflicts resulting in low-scale wars, most notably evidenced [\*76] in the Balkan conflict. <sup>n2</sup> In other regions of the world, low-intensity, internal conflicts now dominate the geopolitical scene but receive relatively little attention or influence from foreign governments. The great states that once dominated the international landscape and frequently intervened in local and regional conflicts are now absent. <sup>n3</sup> Instead, a geopolitical power vacuum has replaced the bipolar international scene.

It is in response to this power vacuum that sophisticated military professionals have created the modern, private, international security company (SC). SCs provide a wide spectrum of military and security services usually reserved for official militaries. The services they offer range from creating military doctrine or manuals for established national militaries to engaging in actual combat in ongoing conflicts. These private companies have formed in militarily advanced countries, relying on the excess of military expertise and extensive networks of retired military officers to provide their services. <sup>n4</sup> Consequently, SCs have strong personal and professional links to the governments and militaries of their respective home states. They often work for their home-state governments and contract with foreign states, usually training national militaries. <sup>n5</sup> Some of these companies form parts of larger corporations with extensive economic interests. Most SCs have enjoyed enormous success and growth in this decade. <sup>n6</sup>

Two such SCs have received widespread attention in the world press because of their involvement in volatile military and political situations and their government contracts. Executive Outcomes (EO), a South Africa-based company composed of ex-commandos who served in South Africa's apartheid-era security forces, gained notoriety with its direct involvement and success in the Angolan and Sierra Leone civil wars [\*77] and its canceled contract with the government of Papua New Guinea. <sup>n7</sup> Military Professional Resources, Inc. (MPRI), a U.S.-based company founded and operated by former high-level U.S. military officers, contracted with both the Croatian Federation and the Bosnian Federation, among other parties, to train and professionalize their respective militaries. <sup>n8</sup>

Most commentators on these companies have characterized SCs as sophisticated mercenaries. <sup>n9</sup> Indeed, SCs have met with the same sorts of criticism meted to mercenaries in the past. EO's direct military involvement in African civil wars, for example, has met with severe criticism due to the company's connection to the apartheid-era security forces that intervened in African conflicts and covertly attacked established regimes. <sup>n10</sup> In addition, EO's direct corporate ties to multinational energy and mining companies have frightened those concerned with the corporate group's overwhelming resources, ability to control valuable territories, and influence over contracting governments. <sup>n11</sup>

MPRI has also come under international scrutiny. The media credited the company with resurrecting the Croatian military as it retook crucial territory, such as western Slavonia and the Krajina region, previously held by the Serbs. <sup>n12</sup> The same observers have criticized the company's current contract to "equip and train" Bosnian Federation forces as an arrangement that inflames tensions in the region and puts NATO soldiers at risk. <sup>n13</sup>

Concern about these SCs, like concern about mercenaries, pirates, and terrorists, stems from the inherent violence of their profession combined with a lack of control over and accountability for their actions. <sup>n14</sup> Since these are private companies, countries which recommend or export them arguably can disavow any connection to SCs' activities. Potentially, this allows exporting governments to use SCs as political pawns to affect the internal affairs of a country or region while retaining their official neutrality in such conflicts. Such "SC expor- [\*78] tation" seems like a convenient way for exporting countries to intervene with impunity in foreign wars.

Meanwhile, countries importing SCs gain quick access, with seemingly no political strings attached, to needed military expertise during a crisis. <sup>n15</sup> The contracting country can use and dispose of these services readily without concern for the company's political ambitions or for political favors which may need to be repaid. This "clean hands" approach to foreign policy appears dangerous to those who see transparent nation-state accountability as essential to

controlling human rights violations and the type and quality of military activity throughout the world.

In terms of SCs' motivations, there is concern that they act only in their pecuniary interests and change allegiances easily and often. <sup>n16</sup> Given their high-tech expertise and hardware, their sophisticated communication and tactical skills, and their ability to coordinate military operations, these companies could be hired by insurgents or foreign governments to help destabilize a recognized regime or to suppress a legitimate national liberation movement (groups fighting racist or colonial regimes). <sup>n17</sup> In the case of SCs that have links to multinational corporations with significant interests within contracting countries, the concern is that SCs will act solely for the benefit of those corporations by defending only their property, resulting in the creation of semi-sovereign entities to which the contracting government is beholden. <sup>n18</sup> Thus far, however, SCs have avoided such criticism by contracting only with legitimate, internationally recognized regimes. In addition, SCs have restricted their activities to training national militaries as opposed to serving as infantry in battle. In certain regions, they have even conducted humanitarian work alongside foreign forces. <sup>n19</sup>

The existence of SCs calls into question their legality. International law on mercenaries, as captured in U.N. resolutions and state action, has failed to crystallize. To the extent that such law can be identified, it provides little guidance regarding the services SCs provide, whether training or actual combat. <sup>n20</sup> First, there is the question of how to define [\*79] a "mercenary." Recent codification has tried to define a mercenary, in contradistinction to an international volunteer, by his motivations. <sup>n21</sup> In general, a mercenary is defined as a soldier-for-hire, primarily motivated by pecuniary interests, who has no national or territorial stake in a conflict and is paid a salary above the average for others of his rank. <sup>n22</sup> This definition has faced criticism from most of the members of the United Nations because of the ambiguity of "motivation." <sup>n23</sup> To many countries there remain subtle, if not artificial, distinctions between a mercenary and other types of combatants, such as "freedom fighters" motivated by ideology or foreigners enlisted in a national army, like the Gurkhas in the British Army or members of the French Foreign Legion.

International attention focused initially on the problem of mercenaries during the 1960s post-colonial era in Africa. Shortly after the Congo gained independence, the United Nations deployed a "peace-keeping" force, United Nations Operation in the Congo (ONUC), to suppress the Katangan secession, which was being aided by European mercenaries. <sup>n24</sup> Since that period, mercenaries have been involved in numerous tumultuous episodes in Africa in which they have tried to depose established regimes or otherwise fuel insurrection. <sup>n25</sup> These incidents have caused concern that colonial powers or those loyal to them were utilizing mercenaries to regain power in particular countries or to destabilize regimes that were seen by European countries as uncooperative.

As a result, the Organization of African Unity (OAU) galvanized a movement opposing the use of mercenaries, ultimately resulting in U.N. Security Council resolutions banning the recruitment, use, and training of mercenaries for the purpose of destabilizing nascent regimes or supporting national liberation movements. Because the resolutions ban only these particular uses of mercenaries, it is unclear whether the use of mercenaries to protect legitimate governments or "recognized" national liberation movements is illegal under international norms. Although the law against mercenaries seems absolute regardless of their employers or the purpose for which they are employed, the development of this body of law in the wake of African independence from colonial rule calls into question whether certain types of mercenaries may be legally acceptable depending on the legitimacy of the employer and the nature of the service provided. <sup>n26</sup> [\*80]

Furthermore, it is unclear whether a total ban on the use of mercenaries would conflict directly with a country's right to self-defense, codified in Article 51 of the U.N. Charter, when involved in an international conflict or when engaging an intrastate force that is being aided by a foreign power. <sup>n27</sup> Arguably, such a moratorium might also infringe on the nation-state's inherent right under Article 2(7) to control its own population in situations where a resistance movement does not qualify as a "movement of national liberation." <sup>n28</sup> Thus, there are inherent contradictions between a total ban on the use of mercenaries and the sovereignty rights of nation-states.

Finally, state practice, which in part determines the development of customary international law, does not give rise to an international norm absolutely banning the use of mercenaries. States have been lax in promulgating and enforcing

municipal laws that restrict their citizens' ability to serve as mercenaries. States also continue to hire mercenaries or contract foreigners to achieve their political and military needs.

The thesis of this Article is that the customary international law banning the use of mercenaries should not apply to SCs that are hired by legitimate governments or by internationally recognized movements of national liberation for either training or combat support. The international community has developed its laws on the use of mercenaries so as to avoid their involvement in attacking sovereign, legitimate states, suppressing movements of national liberation, or disrupting a population's right to self-determination. SCs cannot be considered "mercenaries" because their activities have not challenged the sovereignty of states or the right of populations to self-determination. Instead, SCs have restricted their contracts solely to work for legitimate regimes or organizations. The laws banning mercenaries do not apply to these companies when they are employed in such a capacity.

However, the geopolitical market may change so that the only available contracts for SCs are with disreputable governments involved in controversial conflicts or with insurgencies. In light of this possibility, national governments should design specific regulations for SCs in order to temper their potential disruptive effects.<sup>n29</sup> Licensing and registration procedures, in addition to periodic reporting requirements, will enforce a degree of transparency and link SCs' activities to their employing states. When governments exert control over SCs' profitability or ability to operate efficiently, SCs will become attuned to the needs of the state and will align their operations with the state's interests. For the international community, this means that there will be a greater degree of [\*81] accountability for SCs' actions; consequently, SCs will not pose the same threat as traditional mercenaries.

Part II of this Article will survey the history of mercenaries and examine where modern SCs fit into this evolution. It will show that modern SCs resemble Italian or free companies which surged during the Italian Renaissance under similar sociopolitical situations. Part III will examine the operations of SCs in depth. In particular, it will focus on EO and MPRI to give the reader a sense of how these companies function, what services they provide, where they have been successful, and their relationships with their respective governments. Part IV will analyze the international law regarding mercenaries. It will focus on the historical context of these laws and discuss the problematic nature of defining mercenaries by their motivation. Part V will confront the normative questions regarding the growth and popularity of SCs and whether regulation should be the responsibility of the international community or of individual states. It will provide some recommendations for the treatment of these companies. Part VI will examine the reaction to and regulation of SCs by their respective exporting countries. In particular, it will dissect the licensing procedure used by the United States to monitor companies providing defense services.

In sum, this Article will analyze the implications of the emergence of private military force in the form of SCs. In a world suffering from increased low-intensity warfare that threatens the nation-state system, the United Nations and the major powers have reacted slowly and ineffectively to the security needs of smaller states.<sup>n30</sup> This new world disorder has given birth to SCs, which act as surrogates for state power.<sup>n31</sup>

## II. History of Mercenarism<sup>n32</sup>

To understand the emerging forms of international security companies and place them in proper historical context, it is necessary to survey the evolution of mercenaries.<sup>n33</sup> SCs represent a reconstituted form of organized corporate mercenarism that is responding to the need [\*82] for advanced military expertise in escalating internal conflicts. SCs also present a new means of disguised efforts by their home states to influence conflicts in which the home states are technically neutral. In this sense, the emergence of SCs is not a revolutionary development in military and geopolitical strategy but a permutation of past forms of mercenarism adapted to the demands of the post-Cold War world.<sup>n34</sup>

In addition, the historical context of the development and modern existence of mercenary troops is essential to an understanding of the modern state response to mercenaries and the resolutions and conventions adopted by many countries to regulate or outlaw their activity. To some degree, this context will inform and dictate how states react to the

new SCs domestically and as members of the international community.

As long as humanity has waged war, there have been mercenaries; <sup>n35</sup> only in the twentieth century has the mercenary been vilified and outlawed. <sup>n36</sup> The forms of mercenarism have changed through the centuries, but the basic character of the soldier-for-hire has survived. Even in the twentieth century, when nation-states have monopolized the domestic and international uses of force by establishing conscription and the citizen-army, mercenaries have thrived. <sup>n37</sup> In general, mercenaries have appeared where there has been a breakdown of internal order in a country. <sup>n38</sup> For states or entities caught in tumultuous civil disorder or war, mercenaries have been a source of instant military force and expertise. Countries that produce mercenaries can affect the internal balance or regional composition of an area of the world while claiming neutrality.

The rulers and challengers of ancient empires and regimes used mercenaries. In *Anabasis*, Xenophon recorded the first account of mercenarism - the failed use of 10,000 mercenaries in 401 B.C. by Cyrus, a pretender to the Persian throne. <sup>n39</sup> During the fourth century B.C., Greek city-states introduced specialized noncitizen warriors into intra-Greek battles. <sup>n40</sup> The Macedonian successors to Alexander the Great **[\*83]** utilized highly trained mercenary armies to wage war. <sup>n41</sup> The Roman Empire relied on native populations like the Teutonic tribesmen to expand frontiers and control territory. <sup>n42</sup> The rulers of Byzantium and Carthage also depended on the military expertise of foreigners to fight their battles. <sup>n43</sup>

Kings and lords in the Middle Ages also hired mercenaries to fight for them. <sup>n44</sup> Since knights were only required to serve forty days a year and were not obligated to serve abroad, rulers were forced to hire soldiers when they wished to launch offensive military expeditions. <sup>n45</sup> In the twelfth century, the English king introduced the system of scutage which allowed individuals to buy their way out of military service, thereby giving the king the necessary funds to buy professional military forces; English kings thereafter contracted with noblemen to provide the service of their retainers beyond the customary feudal obligation. <sup>n46</sup> Kings also relied on private or royal subcontractors to raise and supply armies for them. <sup>n47</sup>

This continued reliance on hired soldiers spawned the creation of mercenary "free companies," which were bands of fighting men who offered their military skills jointly. <sup>n48</sup> The Byzantine Emperor hired the first such company, the Grand Catalan Company, to fight the Turks. The company's 6500 soldiers were recruited from the Aragon mountain region and were led by a German, Roger von Blum. <sup>n49</sup> In 1311 the Grand Catalan Company betrayed the Duke of Athens and established a duchy in Athens, where they survived for sixty-three years. <sup>n50</sup> Other free companies entered the mercenary market employing soldiers from all regions of Europe. <sup>n51</sup>

**[\*84]** In Italy, free companies phased out as the northern city-states prospered and began contracting with freelance commanders, or condottieri, to supply specific numbers of troops for particular military services. <sup>n52</sup> For the Milanese dukes, Venetian doges, the Queen of Naples, Florentine financiers, and the Pope, it became safer to hire professional outsiders, under business-like contracts called condotta, than to employ potential rivals from their respective domains. <sup>n53</sup> In addition, hiring well-equipped and trained professional fighters did not disrupt or distract the productive economy by forcing normal citizens into military service. <sup>n54</sup>

When waging war, the condottieri concentrated on taking prisoners, since their preoccupation was with raising ransom money. Generally, since they were ideologically and politically detached from their battles, the hired soldiers were not interested in killing per se; instead, they conducted themselves within the accepted professional strictures of warfare. <sup>n55</sup> As technological innovations like light firearms appeared and larger scale armies engaged in total warfare, the condottieri slowly gave way to national armies composed of citizens and independent mercenaries. <sup>n56</sup>

In the seventeenth and eighteenth centuries, European states began to hire soldiers and sailors from all regions to serve in their respective armed forces. <sup>n57</sup> The Swiss were a major supplier of troops and officers, **[\*85]** especially to France. <sup>n58</sup> Swiss cantons (political subdivisions) like Uri, Unterwald, and Schwyz developed a system in which foreign rulers would pay the canton directly for the services of cantonal armies. <sup>n59</sup> German princes similarly leased

their troops to foreign powers. <sup>n60</sup> The Dutch both employed and provided mercenary forces and created the Scots Brigade, a legion completely composed of foreigners. <sup>n61</sup> Britain also hired mercenaries, especially from Germany, to fight its battles in Scotland and on the continent. <sup>n62</sup> During the American Revolution, the British tried to hire Russian troops and the Scots Brigade, but their requests were rejected. <sup>n63</sup> The Crown instead employed German troops including Hessians, the most lethal and well-trained of the German mercenary forces. <sup>n64</sup> By the middle of the eighteenth century, there were three ways to obtain the services of mercenaries: direct enlistment, purchase or lease of regular army units, and the subsidization of another state's army. <sup>n65</sup>

In the nineteenth century, with the consolidation of central authority in most European states and the establishment of the notion of nation-state sovereignty, the recruitment of foreigners for duty in national armies declined. <sup>n66</sup> States began to pass neutrality laws which generally prohibited their citizens' enlistment in foreign armies, and citizen-armies became the norm. <sup>n67</sup> Nation-states therefore began to monopolize the authority to deploy force abroad and to accept responsibility for violence emanating from their own jurisdiction. <sup>n68</sup> Because of this, mercenaries were no longer seen as merely independent agents selling their services in the market but as parties "lending [their] skills in the [\*86] application of coercive force to some political cause." <sup>n69</sup> But by this period, mercenaries also had proven themselves unreliable, as some refused to fight and others deserted. <sup>n70</sup>

The last instance when a European state raised an army of foreigners to fight in a European war was in 1854, when Britain hired 16,500 Germans, Italians, and Swiss mercenaries to fight in the Crimean War. <sup>n71</sup> However, a tacit code against the use of mercenaries on the European continent did not stop European states from employing foreigners to wage their extra-continental battles. <sup>n72</sup> Since the defeat of Nepal and the Treaty of Segauli in 1816, the British have recruited Gurkhas into infantry regiments and used them in their colonial wars. <sup>n73</sup> In 1831, King Louis-Philippe of France enacted a law which established the Legion Etrangere, the Foreign Legion, composed of foreign volunteers. <sup>n74</sup> France has used these well-trained regiments of foreigners in many of her colonial battles, from Indochina to Africa. <sup>n75</sup>

In the twentieth century, aside from the enlistment of foreigners directly into nation-states' standing armies and the seconding <sup>n76</sup> of officers into the armed forces of ex-colonial regimes, there are two other ways in which foreign troops are employed in the twentieth century. The first is the hiring of another state's troops on a per capita basis, in which states negotiate the exchange and use of a specific number of national troops for a fixed price. For example, the United States hired Australian, New Zealand, Thai, Filipino, South Korean, and Chinese [\*87] troops to fight in Vietnam. <sup>n77</sup> The second and more popular form is when states contract directly with individual foreigners for their services in a particular conflict, with or without the consent of the exporting state. <sup>n78</sup> These independent mercenaries, commonly referred to as "soldiers of fortune," "wild geese," or les affreux ("the dreaded ones"), have been the focus of much attention since the 1960s, when they appeared in post-colonial Africa. <sup>n79</sup>

When they first appeared in Africa, these independent mercenaries, hired outside the constraints of the twentieth century nation-state system and seemingly motivated solely by pecuniary interests, were seen as a shocking anachronism. <sup>n80</sup> In addition, they presented a threat to the fledgling independence of the African state. <sup>n81</sup> It was only twelve days after gaining independence from Belgium that secessionist leader Moise Tshombe declared independence for the southern mining province of Katanga in the Congo and, supported by Belgium, hired white mercenaries to help him establish his regime and fight the Congo's main force, the Armee Nationale Congolaise (ANC). <sup>n82</sup> Those opposed to Tshombe's actions saw the Katangan secession as an attempt by Western capitalists to retain control of a mineral-rich region. <sup>n83</sup> In its first attempt at peace enforcement, the United Nations responded by sending U.N. troops to fight the mercenaries. <sup>n84</sup> The United Nations crushed the secession in [\*88] 1963 and departed in 1964. <sup>n85</sup> The mercenaries, however, had fought convincingly and forced the international community to take notice of the resurrection of the independent mercenary. <sup>n86</sup>

In Africa, the mercenary threat to weak nation-states struggling to establish their independence and legitimacy became very clear as independent mercenaries continued to influence intrastate conflicts. <sup>n87</sup> In the Congo, Tshombe, whom President Christophe Gbenye appointed prime minister, hired mercenaries to crush the Simba revolt in 1964. <sup>n88</sup>

Later, in November 1967, General Mobutu Sese Seko ended a mercenary revolt led by Bob Denard, an ex-officer in the French marines, and Jack Schramme, a Belgian, who were commanders of separate mercenary commando units in the Zairean armed forces. <sup>n89</sup>

In 1967, mercenaries joined both sides in the Nigerian Civil War. A Pretoria-based company, Mercenaire International, supplied mercenaries to the secessionist region of Biafra, which ultimately lost in 1970 after three years of intense fighting. <sup>n90</sup> Mercenaries entered the conflict in the southern Sudan in 1969. <sup>n91</sup> Portuguese-led mercenaries attacked the [\*89] socialist government of Guinea in November 1970. <sup>n92</sup> Also during that decade, mercenaries enlisted in the military forces of Holden Roberto's right-wing National Front for the Liberation of Angola (FNLA) and Dr. Jonas Savimbi's Union for the Total Independence of Angola (UNITA), while Cuban troops were sent to support the socialist government of President Agostinho Neto. <sup>n93</sup> Then the capture and trial of thirteen mercenaries galvanized the African movement against mercenarism yet again and forced supplier nations to take notice of the problem of recruitment. <sup>n94</sup>

There were several other dramatic coups and coup attempts involving mercenaries in the 1970s and 1980s, including the consecutive overthrows of the government of the Comoro Islands by Bob Denard in 1975 and 1978 and the attempted overthrow of the regime in the Seychelles by Mike Hoare in 1981. <sup>n95</sup> In 1976, opponents of President Mathieu Kerekou's regime in Benin (Dahomey) hired Denard to launch an attack and establish a new regime. <sup>n96</sup> Denard's Force Omega, composed of ninety mercenaries, failed to assassinate the president, were met by stiff public resistance, and ultimately were forced to abandon their million-dollar operation. <sup>n97</sup> The Organization of African Unity responded to all of these incidents with declarations of condemnation and called on all nations to outlaw the recruitment and use of mercenaries. <sup>n98</sup>

In most cases where mercenaries were involved, there seemed to be vital economic interests at stake, usually mining and oil interests. <sup>n99</sup> For African countries, this pattern further proved that mercenaries were simply tools of colonial powers who had economic interests vested in [\*90] their continent. With pressure from African countries, the U.N. Security Council passed several resolutions in the 1960s condemning the recruitment, use, or support of mercenary troops against newly independent countries or to suppress national liberation movements. <sup>n100</sup>

Even though there was general distaste for the reliance on foreigners, countries in Africa requested auxiliary troops from other nations to support their fledgling regimes. There developed a clear distinction between foreign support of legitimate African regimes and individualized mercenary attempts to wreak havoc in the region. For example, Great Britain sent its troops to restore order in Kenya, Uganda, and Tanzania in 1964, and France deployed forces to Gabon at the request of the ruling regime. <sup>n101</sup> In general, the reaction against the use of mercenaries, seen as unaccountable, self-interested henchmen of colonial states, has not been the same for nationally organized armed forces sent by foreign states to fight for an existing regime. <sup>n102</sup>

Since military expertise and demand for military manpower are often at a premium, the use of foreigners in national armies or in internal conflicts has persisted. In the Middle East, Pakistani officers and soldiers serve in several countries' armies, including Libya's Islamic Legion. <sup>n103</sup> Some former colonial countries continue to second their officers to the armed forces of their former colonies. <sup>n104</sup> In other cases, rulers still find it convenient to hire foreigners to act as guards so as to avoid arming their respective nationals and to prevent a challenge to their power. <sup>n105</sup>

In the 1980s and 1990s, aside from launching coup d'etats against small African regimes, mercenaries have provided military force to insurgencies and entities involved in civil conflicts. Mercenaries from Israel, the United States, Great Britain, and France have thrived in regions like Central America and Lebanon, where there is a general [\*91] deterioration of state control and a demand for fighting power. <sup>n106</sup> In Colombia, drug traffickers have hired Israeli and other mercenaries to protect their trade and enforce their de facto rule. <sup>n107</sup> British Petroleum has hired Colombian soldiers to guard its facilities against guerrilla attacks. <sup>n108</sup> In Haiti, the wealthy have recruited soldiers to form private family forces. <sup>n109</sup> Foreign corporations in Liberia create industrial gangs that extract natural resources. <sup>n110</sup> The trend of privatizing violence in conjunction with private security and commercial interests continues to grow.

Seemingly, as long as there is war, there will be a need for military expertise. Furthermore, those states from which the mercenaries are supplied have a vested interest in retaining the option to influence foreign conflicts by allowing mercenaries to sell their services with the possibility of denying responsibility for their actions.<sup>n111</sup> It is in this historical and current context that the emergence of the international private security company, in its varied forms, must be understood and analyzed. Without this background in mind, the legal developments regarding mercenary troops and state responses to the recruitment, use, and deployment of mercenaries cannot be understood completely.

### III. The Private International Security Company

The private international security company (SC) is a recycled form of past mercenary organizations, like the *condottieri* and the free companies, that contracted their soldiers out to foreign entities. Although in form resembling their antecedents, SCs have developed a *modus operandi* compatible with the needs and strictures of the post-Cold War, state-based international system.

[\*92] SCs primarily have responded to the geopolitical demands of smaller states which have been forced to seek alternatives for the containment of internal dissent or the development of military preparedness in the absence of superpower support.<sup>n112</sup> At the same time, SCs have restricted their employers either to recognized regimes in low-level conflicts in which the insurgency has not gained popular support or international recognition, or to regimes supported by their home states. Understanding the disaffection of the international community with the use of force by private actors, SCs have curtailed their military engagements and have strictly controlled the actions of their employees in the field. In addition, SCs have recognized that their survival hinges on the positive perceptions and approval of their actions by their home governments and by the international community; therefore, they have sought government approval for their activities and have conferred with officials during ongoing operations.

Consequently, SCs have become a type of state agent - tied to their home state by tacit or licensed approval for their activities and enlisted as contractors for the employing country. Hence, state responsibility for the actions of SCs seems to flow in two directions: responsibility toward the home state which tolerates and "exports" these companies' services, and responsibility toward the contracting state which enlists and directs the activities of the SC. States on both sides of the contract may attempt to disavow any connection to particular SCs, claiming that the SCs' activities are private. To the degree that connections between state acquiescence and SC activity may be drawn, the problem of lack of accountability for private actions in the international arena is vitiated.

As noted above, SCs have sprouted in countries with a large pool of military expertise, due to military downsizing, early retirement incentives, and the sheer profitability of such work compared to regular military pay. SCs have developed distinct market niches tied to the interests of their respective home states. They provide a range of services, from development of training manuals to actual combat service. The panoply of services defies classification, but they all involve the export of private military expertise in some fashion. The trend in the international sector is for SCs to provide military training to government troops involved in volatile (or potentially volatile) conflicts. Though this trend does not involve actual offensive engagement by SCs, this type of contract is controversial because it implicates the injection of private, foreign military expertise into a precarious arena, which could be determinative of that country's fate.

[\*93]

#### A. South African Security Companies<sup>n113</sup>

The most controversial of the SCs is South Africa-based Executive Outcomes (EO), founded in 1989 as a limited liability company registered in Great Britain and South Africa.<sup>n114</sup> The founder, Eeben Barlow, is a charismatic former 32[su'nd'] Battalion commander and former top official at the Civil Cooperation Bureau.<sup>n115</sup> EO offers general security services, military training, infantry troops, and air support, and its recent successes have led some to call EO

the "most deadly and efficient force operating in sub-Saharan Africa today [aside from the South African army]." <sup>n116</sup> A firm brochure states that EO provides "the most professional training packages currently available to armed forces, covering aspects related to land, air and sea warfare." <sup>n117</sup>

EO assembles teams of military personnel for each contract, garnered from a list of over 2000 former members of the apartheid-era South African Defense Force (SADF) and South African Police. EO selectively recruits former members of the notorious and feared special-forces units like the 32[su'nd'] Battalion, the Reconnaissance Commandos, the Parachute Brigade, and the paramilitary Koevoet force. <sup>n118</sup> These forces were often used by the apartheid regime to covertly destabilize neighboring countries and to thwart opposition internally. <sup>n119</sup> Former members of the SADF are attracted to employment with EO because it offers high salaries, medical and life insurance benefits, and the opportunity to use their military training. <sup>n120</sup> Though whites predominate in the officer corps of EO, approximately seventy percent of EO's soldiers are black. <sup>n121</sup>

**[\*94]** EO proclaims that it is an apolitical force that will work only for legitimate governments and not for rogue regimes like Sudan or patently unpopular regimes like the former Mobutu regime in Zaire. <sup>n122</sup> Though EO claims that it merely trains soldiers or engages in defensive pre-emptive strikes, EO has openly engaged in battles and introduced modern weaponry and tactics with devastating effects in two civil wars. <sup>n123</sup> In Angola and Sierra Leone, EO's superior technology, skill, and collective experience proved crucial in forcing the rebel movements in each country to negotiate respective settlements and in restoring social order. <sup>n124</sup>

In 1993, the Angolan government, controlled by the Marxist Movimento Popular de Libertacao de Angola (Popular Movement for the Liberation of Angola, or MPLA), hired EO for \$ 40 million to help its army defeat Jonas Savimbi's rebel movement, Uniao Nacional para a Independencia Total de Angola (National Union for the Total Independence of Angola, or Unita). <sup>n125</sup> After refusing to accept its defeat in the U.N.-sponsored elections in 1992, Unita resumed its battles against the government. These battles were a mere part of Angola's ongoing civil war which began in 1975 (ironically, the SADF had fought for Savimbi's Unita and against the MPLA and their Cuban allies during the Angolan civil war). <sup>n126</sup> However opportunistic the switch in allegiances appears, EO used the SADF experience with the Unita rebels to its advantage as it trained Angolan troops and coordinated offensives. EO introduced infrared capabilities (allowing night fighting), advanced communications, reconnaissance, fuel air bombs, and increased air power (in the form of Mi-8, Mi-17, and Mi-24 helicopter gunships and MiG-23 and MiG-27 fighters among other aircraft). <sup>n127</sup> Though EO claims that its contract merely involved training Angola's armed forces, the Forcas Armadas de Angolanas (Angolan Armed Forces, or FAA), EO admits that it engaged in defensive strikes alongside FAA troops which **[\*95]** resulted in approximately twenty EO casualties. <sup>n128</sup> Its involvement helped the FAA regain crucial mining and oil territory, turned the tide against Unita, and forced Savimbi to sign the U.N.-brokered Lusaka Protocol in November 1995. <sup>n129</sup>

As part of the agreement, Savimbi demanded that the MPLA expel EO, a testament to EO's feared presence. The United States and other foreign governments also pressured the MPLA to end its contract with EO. <sup>n130</sup> In early 1996, most of EO's fighters formally returned to South Africa. <sup>n131</sup> Even though it was forced to depart the Angolan market, EO sees itself as the company that was finally able to end the Angolan civil war, and the Angolan government continues to support EO. <sup>n132</sup>

Following its success in Angola, EO offered its services to the embattled government of Captain Valentine Strasser of Sierra Leone, then fighting the rebels of the Revolutionary United Front (RUF). <sup>n133</sup> The RUF had waged a campaign of social terror since 1991 against the people of Sierra Leone and had occupied valuable mining territory. <sup>n134</sup> Sierra Leone's army, the Republic of Sierra Leone Military Forces (RSLMF), comprised of 3000 poorly trained soldiers, was unprepared to repel the insurgency. <sup>n135</sup> Captain Strasser immediately recruited 7000 new, untrained soldiers, many of whom were youths. <sup>n136</sup> Economic Community of West African States' Military Monitoring Group (ECOMOG) forces stationed in Sierra Leone, including Nigerian, Ghanaian and Guinean troops, offered support but proved ineffective against the insurgency. <sup>n137</sup> In addition, Strasser enlisted the aid of British SCs, including the Gurkha Security Guards, to help train the new recruits, but they also were unable to stop RUF's advance. <sup>n138</sup>

[\*96] When Strasser's government hired EO in 1995, the country was in complete chaos (overrun by organized bandits), and it seemed likely that RUF would overtake the capital of Freetown. <sup>n139</sup> Though the government did not have the resources to pay EO immediately, it appears that Strasser offered EO mining concessions in return for its services. <sup>n140</sup> For Strasser, this form of payment served to tie EO's pecuniary motivations with its military success, since EO would have to liberate those strategic mining areas, like the diamond fields in the Kono district, in order to receive its pay. <sup>n141</sup>

EO sent approximately 120 military trainers to Sierra Leone to tutor the RSLMF and instill discipline in the motley group of government soldiers; as in Angola, it introduced nighttime operations, and it assumed operational control over offensives while using intelligence reports and sheer firepower to surprise and overpower the RUF's insurgency. <sup>n142</sup> EO launched air assaults against RUF bases with devastating effects, and Nigerian Alpha Jets, from its ECOMOG contingent, often provided tactical air support for EO operations. <sup>n143</sup> Some journalists reported that EO's employees machine-gunned civilians from their helicopters as they pursued rebels. <sup>n144</sup> However, EO has tried to restrain its employees and trainees and has gained a reputation among most of Sierra Leone's population for being efficient, reliable, and humane. <sup>n145</sup>

At the same time, EO threatened to withdraw its services if the Sierra Leone government did not honor its commitment to hold elections as promised. <sup>n146</sup> As the RUF forces retreated into Guinea and Liberia and EO retook key territories, the Sierra Leone government held parliamentary and presidential elections on February 27, 1996, and March 15, 1996, respectively. <sup>n147</sup> The new president, Ahmed Tejan Kabbah, negotiated a cease-fire agreement and engaged in peace talks with RUF. The rebel leadership admitted that EO was ultimately responsible for its defeat, and RUF demanded that EO, as well as the Nigerian forces, be expelled before negotiations continued. <sup>n148</sup> In December 1996, the [\*97] parties to the conflict signed the Abidjan Accord, calling for the demobilization and disarming of RUF and the cessation of all EO's activities. <sup>n149</sup>

EO also played a role in the internal politics of Sierra Leone. Besides tying its continued service during the civil war to the holding of elections, EO supported the Kabbah administration against disgruntled RSLMF officers whose illicit diamond trading was threatened by the new government. EO made it clear to all internal parties that it was contractually bound to the elected, legitimate government of Sierra Leone and declared that it would defend it against any coup attempt. <sup>n150</sup> This allegiance led Sierra Leone's envoy to Washington to state that "[t]he government of Sierra Leone believes EO can do a better job [providing security] than the Sierra Leone army." <sup>n151</sup> By throwing its support behind the newly elected government, EO was not only concerned with fulfilling its contractual obligations, but was laying the groundwork for stability and establishing its legitimacy in the eyes of future clients and the international community.

EO's humanitarian work in Sierra Leone distinguishes it from the stereotypical mercenary. EO coordinated and led the return of schoolchildren and teachers, who had been trapped in the capital due to the danger of travel, to their homes in the southern and eastern parts of the country. <sup>n152</sup> Thousands of other displaced residents have returned home since the elections. EO also organized the integration of hundreds of child-soldiers from both sides into a rehabilitation project. <sup>n153</sup> These services, in addition to the perceived incorruptibility of EO's forces, endeared the South Africans to most of the Sierra Leone public. <sup>n154</sup> By the time EO departed in February 1997, it had established itself as the company that restored order and democracy to Sierra Leone. <sup>n155</sup>

Since EO's departure, however, the nascent Sierra Leone democracy has fallen to a military coup, and the country is mired yet again in a state of destruction and banditry. <sup>n156</sup> The chaos which followed EO's departure is a testament to its effectiveness in maintaining order. It is also [\*98] evidence that the services SCs provide are not a cure for the many ills which plague war-torn countries.

In both Angola and Sierra Leone, EO conducted itself professionally and compiled a respectable human rights record, especially relative to other African armies. <sup>n157</sup> Its successes and popularity in Angola and Sierra Leone have allowed EO to proclaim that it is "trying to aid growth and democracy by bringing stability and foreign investment."

<sup>n158</sup> EO attracts considerable media and international scrutiny by continuously averring it will work only in a defensive/training context for legitimate governments. <sup>n159</sup> Though detractors may find it difficult to believe this rhetoric, EO has certainly constrained its employment options by avoiding hypocrisy thus far.

In late February 1997, the government of Papua New Guinea (PNG) entered into a \$ 36 million contract with Sandline International, a subsidiary of EO, to train and equip its soldiers in their nine-year battle against the secessionist Bougainville Revolutionary Army (BRA). <sup>n160</sup> The reported one-year contract called for Sandline to both be a "force multiplier" and lead the assault on BRA leaders. <sup>n161</sup> PNG's prime minister, Sir Julius Chan, approached EO because the Papua New Guinea Defense Force (PNGDF) was ill-disciplined, repeatedly engaged in human rights abuses, and was unable to force the BRA to negotiate a settlement. <sup>n162</sup>

Australia, PNG's former colonial master and current military benefactor, protested the Sandline contract fearing a loss of its influence and the introduction of South African "mercenaries" into the civil conflict. <sup>n163</sup> In recent years, Australia has vacillated in its foreign policy toward PNG, continuing to provide military and general aid (worth \$ 334 million combined annually) while denying the PNGDF any specialist training or sophisticated weaponry and blocking any equipment transfers from other Western states for their fight against the BRA. <sup>n164</sup> Chan's frustration with Australia's perceived lack of support and its ability to hinder [\*99] any other source of aid compelled the prime minister to search for military expertise in the private international market. <sup>n165</sup>

Though Chan's government felt the pressure of international criticism from Western states, its contract with Sandline faced greater opposition from its own military and the general population. The PNGDF commander, Brigadier General Jerry Singirok, refused to work with the hired trainers and demanded the resignation of the prime minister (although General Singirok had helped negotiate the Sandline contract). <sup>n166</sup> Chan sacked General Singirok, but the general remained in control of his troops and continued to demand Chan's resignation. Massprotests and social unrest forced Chan to cancel the contract and send home the EO soldiers who already had arrived in PNG. Chan ordered a judicial review of the Sandline contract, but he also appointed a replacement for General Singirok. After days of rioting on the streets of Port Moresby and continued allegiance on the part of the PNGDF troops to General Singirok, Chan temporarily resigned on March 26, 1997, awaiting the judicial inquiry into the Sandline contract. <sup>n167</sup>

The canceled PNG contract may lend insight into the future of the SC market. First, the protests lodged by foreign nations and internal opposition focused on the direct offensive role to be played by EO soldiers, especially the alleged plan to decapitate the BRA by assassinating its leaders. The international community and societies still cohesive enough to protest government decisions may be averse to the direct, aggressive involvement of foreigners in an ongoing civil strife. Second, the internal protest from the PNGDF may indicate that contracts for foreign military assistance may not be appropriate or acceptable in countries which still have a relatively well-structured military with the self-perceived capability of waging an effective war. Third, the international pressure may indicate that SCs provide small states with the independent capability to fight their own battles, without having to depend on a hegemon like Australia. More than likely, Australia feared a loss of influence in its former colony, and for that reason it adamantly protested the presence of EO. Therefore, international protests of SC involvement should be viewed through a realist's prism of large states versus small states.

Aside from its contracts in Angola and Sierra Leone and its canceled project in PNG, EO is involved in several African countries in various [\*100] capacities. <sup>n168</sup> EO forms part of a tangled, constantly shifting web of corporate interests organized under the Strategic Resources Group (SRG). <sup>n169</sup> These corporations, which include mining, oil, infrastructure, air transport, hospital construction, demining, water purification, computer software, and other businesses, feed off each other in symbiotic fashion. <sup>n170</sup> Several reports linked EO with British and Canadian companies and prominent U.K. business figures like Tony Buckingham and Sir David Steel, the former Liberal Party leader. <sup>n171</sup>

This veiled relationship with exploitative industries has led many to construe EO ("the Diamond Dogs of War") as part of a new brand of mercantile company, providing stability for countries in exchange for economic concessions and

control of productive territories. Its major contracts to date have been with countries attempting to regain valuable mining or oil installations, leading many to suspect that EO will fight only to gain concessions for its corporate brethren. Other observers fear that the corporate group's concentration of resources, which allows EO and its affiliates to act as a semi-sovereign force, poses grave dangers to weak African states beholden to capitalist interests. <sup>n172</sup> In addition, EO's ties to local security companies like Lifeguard allow members to remain in a country to provide commercial security for EO interests even after the EO contract has expired - which seems to have happened in Angola and Sierra Leone. Even so, in countries where the control of strategic economic resources is central to the retention of power, the marriage of EO's military services with corporate commercial concerns makes sense for contracting governments. Many foreign commercial interests scramble for access to valuable resources, so it seems no less egregious for EO and its related companies to take advantage of the concessions offered by the government in return for peace. <sup>n173</sup> Furthermore, EO's contracts are transient, but its commercial interests are long-term. EO has little market incentive to threaten a government with which it is working and has yet to turn on its employers. <sup>n174</sup>

EO's combination of military power, economic resources, and secretive operations is feared by many countries in Africa, which still **[\*101]** associate EO with the destabilizing apartheid-era forces of the interventionist SADF. Although EO claims to work only for legitimate governments, rumors continue to persist that EO is engaged in destabilizing activities. Many reports stated that EO helped Mobutu's forces in Zaire against the advancing rebel force of Laurent Kabila's Alliance of Democratic Forces for the Liberation of Congo-Zaire (ADFL). <sup>n175</sup> EO denied its involvement, and Eeben Barlow claimed that Zaire never approached the company. <sup>n176</sup> He averred that EO was constrained by its agreement with Angola never to work with the Angolan "opposition," which included Mobutu. <sup>n177</sup> In addition, Barlow claimed that EO does not enter conflicts where the populace does not support the army (in essence, when the government lacks any semblance of real legitimacy). <sup>n178</sup> However, Namibian Defense Minister Pillemon Malima claimed in April 1997 that he had documentary proof that EO was training Namibians in Sierra Leone in order to destabilize Namibia. <sup>n179</sup> EO denies the statement, and Malima has yet to prove any EO complicity.

All of this exposure has led the South African government to disavow the activities of EO and to propose new legislation to outlaw or severely restrict the activities of South African SCs. <sup>n180</sup> The legislation, a proposed amendment to the Defense Act called the Foreign Military Assistance Bill, would expand the definition of "mercenary" to include security services and military consulting and would only allow the export of South African military expertise with the express consent of the South African government. <sup>n181</sup> South African SCs have operated without the official consent of the South African government because their activities have not been considered "mercenary" under the provisions of the Defense Act and because their activities were conducted abroad, beyond South African jurisdiction. <sup>n182</sup>

**[\*102]** However, a British intelligence report links the African National Congress (ANC) government with EO and concludes that the ANC government sanctioned EO's foreign contracts, a link that both EO and the ANC deny. <sup>n183</sup> EO has clearly served the interests of President Nelson Mandela's regime by aiding its longtime allies in Angola and Sierra Leone. EO also gave the South African government valuable intelligence reports by briefing the SADF and South African intelligence of its operations, and it kept the government abreast of its contractual obligations. <sup>n184</sup>

EO also employed many of the ANC's former enemies from the SADF special forces and sent them abroad to work, thereby defusing any potential internal conflicts between the new ANC government and hard-line apartheid supporters. In many cases, EO's employees were actually active duty SADF members who were granted extended leaves of absence to serve abroad. <sup>n185</sup> In short, EO's and South Africa's interests have gone hand in hand, although it appears now that the government is seeking to ban EO's activities abroad, seeing them as an embarrassment to South Africa. <sup>n186</sup> If EO's challenge to the proposed legislation does not work, it may be forced to move its operations to another country in order to continue to offer its full range of services. <sup>n187</sup>

Regardless of the proposed legislation, the extreme success of EO and the worldwide respect for the military prowess of ex-SADF fighters and intelligence personnel has led others to consider mimicking EO's business concept. Since 1992, former SADF officers have planned the creation of an organization to compete with EO. They plan to offer

military expertise, obtained from thousands of soldiers made redundant by the SADF, to foreign governments and international organizations operating in war zones. <sup>n188</sup> Additionally, three leading officials from [\*103] South Africa's National Intelligence Service (NIS) have formed a private intelligence and security service, Panasec Corporate Dynamics (PANASEC). <sup>n189</sup> The company hopes to capitalize on its extensive government connections to retain a close working relationship with the South African government. Another company, Strategic Concept, hires ex-soldiers to serve as combat trainers. In general, South African SCs continue to grow by keeping a close relationship with the South African government for business and legal reasons.

#### B. United States Security Companies

Currently, no U.S. companies provide combat units for ongoing civil battles as does Executive Outcomes. There are, however, several U.S. companies which offer security-based services abroad. <sup>n190</sup> Two companies in particular provide military training and organization services to foreign governments.

During the Vietnam War, Vinnell Corp., a subsidiary of Virginia-based BDM International Inc., supported the U.S. military and built military bases, although some Army officers claim that Vinnell also operated clandestine programs such as providing rear security for retreating U.S. forces. <sup>n191</sup> Since 1975, Vinnell has trained the Saudi National Guard, which acts as a royal guard for the monarchy, and other branches of the Saudi military in weapons use, tactics, and logistical operations. <sup>n192</sup> The Saudi contract came under intense congressional scrutiny as the Senate Armed Services Committee held hearings to assess its policy implications, but Congress ultimately allowed Vinnell to contract with the Saudis. <sup>n193</sup> In 1979, the Saudi monarchy relied heavily [\*104] on Vinnell to help regain possession of the Grand Mosque at Mecca, which opposition forces had occupied. <sup>n194</sup> Allegations persist that since the Vietnam War, Vinnell has provided extralegal means of achieving U.S. security ends in Central America and the Middle East while avoiding the appearance of official U.S. involvement. <sup>n195</sup>

The second company, Virginia-based Military Professional Resources, Inc. (MPRI), specializes in military training, evaluations and assessments, war-gaming, doctrine, simulations, research, and analysis. Organized as a closely held corporation in 1987 by top-ranked retired U.S. generals, MPRI's product is U.S. military expertise. <sup>n196</sup> MPRI services governments and commercial employers by assembling strategic teams compiled from its database of over 2000 former U.S. military professionals. <sup>n197</sup> It has capitalized on the expertise of its employees and their professional and personal connections to the U.S. government and military to land contracts earning the company over \$ 12 million in annual revenue. <sup>n198</sup> The U.S. government has hired MPRI to create and implement military doctrine, training and education, war-gaming, weapons and systems testing, and logistics support development programs. <sup>n199</sup>

[\*105] Aside from these contracts, MPRI has entered the international market by contracting with the U.S. government for missions abroad and with foreign governments directly. In February 1992, the Department of State hired MPRI for its logistics management capabilities to provide humanitarian-relief supplies and equipment to the "Newly Independent States" of the former Soviet Union. As part of its contract, MPRI coordinated and supervised all aspects of the donation and delivery process while working with foreign governments and the United States. <sup>n200</sup> In another contract with the State Department, MPRI provided forty-five monitors along the Serbian-Bosnian border as part of an effort to enforce Belgrade's ban on the flow of arms and fuel to the Bosnian Serbs. <sup>n201</sup>

Most interesting, however, have been MPRI's contracts with foreign governments to provide military and technical training and force-modernization and -expansion programs. For foreign governments, MPRI represents a private channel through which to gain U.S. military expertise in conditions in which conventional U.S. military assistance programs are not appropriate for political or tactical reasons. Though understood to be a private agency, foreign governments also see MPRI as a quasi-official U.S. military body whose services can represent tacit support by the U.S. government. <sup>n202</sup> MPRI has worked with Sweden, Taiwan, Croatia, and the Bosnian Federation, and has been approached by former Eastern-bloc countries interested in creating U.S.-style military structures that are more compatible with NATO standards. <sup>n203</sup> Some observers claim that MPRI was also involved in Angola, but the company

flatly denies doing any work in that country. <sup>n204</sup> In 1996, MPRI negotiated with the Sri Lankan government about providing training to the newly created Special Boat Squadron, a Sri Lankan Navy special forces [\*106] unit. <sup>n205</sup> According to MPRI, negotiations broke down after Sri Lanka backed away from the deal. <sup>n206</sup>

MPRI's involvement in the Balkans with the approval of the U.S. government has been the most controversial of the company's foreign contracts because of MPRI's injection of military expertise into a region still torn by war. In March 1994, Croatian Defense Minister Gojko Susak sent a letter to the U.S. deputy secretary of defense requesting permission to negotiate with MPRI to obtain U.S. training "in military-civilian relations, program and budget" for its military leaders. <sup>n207</sup> The United States allowed Croatia to deal with MPRI as part of the U.S. Croatian Military Cooperation Agreement. <sup>n208</sup> On September 27, 1994, MPRI signed a contract with the Croatian government to democratize the Croatian military and reorganize its troop structure. <sup>n209</sup> Croatia also employed MPRI to design and implement institutional and organizational management structures for Croatia's Ministry of Defense. <sup>n210</sup>

The U.S. government reviewed and licensed both of these contracts and deemed them not in violation of the existing arms embargo since they did not involve battlefield strategy, tactics, or weapons. <sup>n211</sup> However, some observers of the region claim that MPRI's training, though seemingly innocuous, was pivotal in the resurgence of the Croatian military and the recapture of critical Croatian territory. <sup>n212</sup> When Croatia hired MPRI in the fall of 1994, the Serbs occupied thirty percent of Croatian territory. <sup>n213</sup> Shortly after MPRI began training Croatian military officials, the Croats experienced unprecedented success in their [\*107] campaign to regain territory. In May 1995, the Croats achieved their first important victories by retaking areas held by Croatian Serbs southwest of Zagreb. <sup>n214</sup> Later, the Croats engaged the Serbs in western Slavonia in a three-day offensive which resulted in the recapture of that region. <sup>n215</sup> In its most stunning offensive, the Croatian military launched Operation Storm in August 1995 to recapture the Krajina region, which had comprised twenty percent of Croat land. The Croats overwhelmed the Serbs with a quick, devastating offensive of 100,000 troops which, according to experts, resembled a U.S.-style attack. <sup>n216</sup> Croatia and the U.S. government deny that MPRI violated the arms embargo by involving itself with any aspect of the offensive. <sup>n217</sup> MPRI unequivocally denies its involvement and downplays its role in any of the Croatian offensives by emphasizing its strict adherence to the training contract and the license provisions under which it must operate. <sup>n218</sup> MPRI also points to the fact that it had only fifteen employees working in Croatia and that it had been in Croatia only a few weeks before the offensives began. <sup>n219</sup>

Though it does not seem likely that MPRI was actively engaged in preparing the respective Croatian offensives or in teaching offensive tactics, it does seem probable that U.S. leadership techniques and military organization lectures did help the Croats in their advance. Most observers note a dramatic organizational and attitudinal transformation in the Croatian forces after MPRI began its training, which [\*108] likely helped Croatian military morale and discipline. <sup>n220</sup> Combined with increased stockpiles of heavy arms and weapons garnered in violation of the arms embargo, the Croats undoubtedly used the organizational and leadership lessons learned in the MPRI classrooms to their advantage. By November 1995, the Croats had regained all but four percent of their land and had come to occupy twenty percent of Bosnia. <sup>n221</sup>

Tacitly, the United States affected the balance of power in the Balkans by allowing MPRI to train Croatian military officers and civilian officials - a role usually reserved for national militaries. Whether the training involved specific advice in regard to offensive campaigns or tactics is irrelevant to this point; MPRI must admit that its training, though characterized as long-term development, was meant to have some positive effect on the fighting efficiency of the Croatian forces or else the company would not have been hired. <sup>n222</sup>

In another sense, the perceived U.S. support of the Croatian military, in addition to the Croats' use of new weapons, may have affected troop morale on both sides of the battlefield as Croatia pushed to regain its territory. By licensing MPRI's contract with Croatia at a crucial period in the Balkan conflict, the United States retained its claim of neutrality while aiding its clandestine ally. In addition, NATO planes bombed key Serbian positions in August 1995, thereby forcing the Serbs to the negotiating table at Dayton. <sup>n223</sup>

Even more clearly, the United States proposed that a U.S. security company be used to supply arms to the Bosnian Federation and to train its integrated forces as part of the "Equip and Train Program." Under the provisions of the November 1995 General Framework Agreement for Peace in Bosnia and Herzegovina (Dayton Accords), Bosnian Federation forces were to be equipped and trained so as to equalize their perceived military disadvantage relative to the Serbs. <sup>n224</sup> The United States wanted [\*109] to equip Bosnia to defend itself once NATO troops and IFOR peacekeepers pulled out. <sup>n225</sup> The U.S. government also wanted to ensure the integration of Federation forces. <sup>n226</sup> Annex 1B of the agreement, addressing "Regional Stabilization," states the following:

Recognizing the importance of achieving balanced and stable defense force levels at the lowest numbers consistent with their respective security, and understanding that the establishment of a stable military balance based on the lowest level of armaments will be an essential element in preventing the recurrence of conflict, the Parties within thirty (30) days after this Annex enters into force shall commence negotiations under the auspices of the OSCE to reach early agreement on levels of armaments consistent with this goal. Within thirty (30) days after this Annex enters into force, the Parties shall also commence negotiations on an agreement establishing voluntary limits on military manpower. <sup>n227</sup>

According to U.S. Ambassador James Pardew, who helped negotiate the Dayton Agreement and who is the State Department's Special Representative for Military Stabilization in Yugoslavia, the parties to the accord understood that a private company would train and equip the Federation Armed Forces (FAF), comprised of Croats and Bosnians, in order to achieve the balance of power envisioned in the agreement. <sup>n228</sup> Three U.S. companies, SAIC, BDM International, and MPRI, bid for the right to train and supply the FAF, a process monitored by the State [\*110] Department but controlled by the Federation and its unofficial supporters in the United States. <sup>n229</sup> In May 1996, the Federation awarded MPRI a one-year, renewable contract to restructure and develop a modern armed force for the newly integrated forces and to introduce U.S. weapons and train the soldiers in their use. <sup>n230</sup> Though MPRI denies that it supplies weapons, many observers speculate that MPRI and Cypress International clandestinely work in tandem. <sup>n231</sup> Such an association could give MPRI much more leverage in the international security arena.

The Bosnians had to accomplish two goals before the United States would permit any arms shipments or allow MPRI to commence its training: passage of a Federation Defense Law and compliance with the Dayton Accords' provisions on the removal of all foreign forces. Compliance with the Dayton Accords forced the Sarajevo government to expel all foreign mercenaries, trainers, or volunteers - meaning the Iranian, Afghanistani, Pakistani, and Turkish mujahidin - and to cut military and intelligence ties to Iran. <sup>n232</sup> Concerned with the influence of the Balkans, the United States used MPRI as a political and military tool in promoting its clear interest in Bosnia. <sup>n233</sup>

Though the United States sought to affect the balance of military power and help the Federation forces integrate, it also wanted to retain its perceived neutrality as part of the NATO force in Bosnia in order to act as peace broker in the conflict. <sup>n234</sup> The U.S. government was cognizant of concerns that European troops on the ground would be [\*111] jeopardized by the partisan role played by a U.S. company training Federation forces with Western weaponry. Some Pentagon officials voiced concerns over endangering the U.S. troops still engaged in peacekeeping on the ground in Bosnia. <sup>n235</sup> With these concerns in mind, the United States recommended the use of a private company for a role usually reserved for the U.S. military: restructuring the Federation forces into a modern, professional fighting force. Without the badge of state action, the U.S. government hoped to mitigate many of the negative effects of the perception of U.S. favoritism toward the FAF. Consequently, MPRI is currently training and advising the Bosnian Federation.

Some observers claim that MPRI has entered Angola in the wake of EO's departure, due to U.S. pressure on the Angolan government, and has replaced EO as the leading SC in Angola. <sup>n236</sup> However, MPRI denies doing any work in Angola. <sup>n237</sup>

In the case of Sri Lanka, MPRI engaged in negotiations with the Sri Lankan government to train a Sri Lankan elite commando unit, to professionalize the military's command structure, and to assist in NCO training within the Sri

Lankan Army (SLA).<sup>n238</sup> Since 1983 the internationally recognized government, dominated by the Sinhalese Buddhist majority, has battled the northern rebellion of the Tamil Hindu/Catholic minority, led by the powerful and well-supported Liberation Tigers of Tamil Eelam (the "Tamil Tigers" or LTTE).<sup>n239</sup> In 1996, the Tamil Tigers launched devastating offenses against the SLA, prompting the Sri Lankan government to search for additional military expertise, especially in training its navy's special forces commandos.<sup>n240</sup> MPRI claims that the Sri Lankan government withdrew from negotiations with the company for such training and command restructuring.<sup>n241</sup>

A State Department source claims that the United States originally approved the license application for the Sri Lankan project because it comported with existing U.S. policy concerning neutrality in the [\*112] ongoing civil war, i.e., that the United States would not provide the government with "lethal training."<sup>n242</sup> It seems that the U.S. government withdrew its support from the project - thereby extinguishing the negotiations - only when its approval of the MPRI contract had been perceived as a change in U.S. policy toward the civil war and had attracted a great deal of media attention just prior to the November 1996 U.S. presidential elections.<sup>n243</sup> It also appeared that the SLA and the LTTE would construe the contract as clear evidence of U.S. support for the regime.<sup>n244</sup>

In general, U.S. security companies must obtain official U.S. government approval through the licensing procedure in order to work for foreign governments. Regardless of the amount of direct control or contact by the U.S. State Department or the Pentagon, U.S. security companies act as agents of U.S. foreign policy under the guise of private enterprise in addition to working for their employing countries.

### C. Other Companies Worldwide

There are several other SCs which have been operating in or which are being formed in countries that have a recognized level of military expertise and an oversupply of trained military professionals willing to advise, train, and fight for contracting governments or companies.<sup>n245</sup> In most cases, the exporting countries sanction the activities of their SCs either tacitly, through clandestine promotion, or officially, through licensing procedures.

In Great Britain, several SCs offer the services of former British special services agents and Gurkha soldiers.<sup>n246</sup> Defense Systems Ltd. [\*113] (DSL), founded in 1982 by former Special Air Service (SAS) commander Alastair Morrison, offers a range of services through the promotion of the British Foreign Office.<sup>n247</sup> DSL offers consultation to embassy security guards around the world, guards oil and mining installations in Angola, and trains counter-terrorism units in Indonesia and the Philippines and special forces teams in Jordan, Uganda, and Mozambique.<sup>n248</sup> DSL expanded its operations in the 1980s by acquiring other ex-SAS security companies such as Intersec and Falconstar.<sup>n249</sup>

Another British company, Gurkha Security Guards, offers the services of the legendary Gurkha fighters used by the British and Indian armed forces. Faced with rebellion and its own military ineptitude, the Sierra Leone government hired Gurkha Security Guards to train its army and to fight on its behalf.<sup>n250</sup> The Gurkhas suffered severe losses and were ineffectual against the RUF rebels.<sup>n251</sup> The British company was later replaced by the South African company EO.

The Israeli government licenses Israeli SCs to work for legitimate foreign governments and uses the services of such companies as a bargaining chip in negotiations with these governments.<sup>n252</sup> For example, after having reestablished diplomatic ties with the government of the Congo in 1991, Israel signed a military agreement in December 1993.<sup>n253</sup> As part of that agreement, Israel approved a \$ 50 million contract signed by the Israeli SC Levdan to train Congo President Pascal Lissouba's palace guard and to supply basic military equipment.<sup>n254</sup> Levdan is an Israeli SC and arms firm comprised of retired Israeli soldiers who have [\*114] served in Lebanon and the Occupied Territories.<sup>n255</sup> Opposition members of the Knesset criticized the proposed contract, claiming that Israel should not export military aid to Africa through a private company.<sup>n256</sup> After debates in the Knesset, the Israeli government approved Levdan's contract. The use of retired Israeli soldiers who are still members of the Israeli reserve forces implicates official Israeli

participation in any contract signed by Levdan or any other SC employing Israeli reservists. <sup>n257</sup>

Worldwide, other companies provide a multiplicity of services. For instance, COFRAS, a French SC, provides demining services and is currently contracted in Cambodia. <sup>n258</sup> IDAS, a Dutch Antilles company, and the German firm International Business Company offer troop training and weaponry. <sup>n259</sup>

In the months before the fall of President Mobutu Sese Seko's regime, the Israeli government, along with the Chinese government, sent advisers to Zaire to train thirteen commando brigades for Mobutu's [\*115] tottering regime. <sup>n260</sup> The Israelis sent official military staff to complete the project as opposed to licensing Levdan or another SC although the government's use of an SC would seem ideal in such a controversial conflict so as to avoid official involvement. <sup>n261</sup> Like other SCs that have avoided involvement in Zaire's escalating civil war, Levdan probably did not want to aid a regime which appeared to lack legitimacy and was fighting a losing war. It is also possible that the cash-strapped Mobutu regime could not afford an SC contract and instead was relying on political favors from allies like Israel to obtain needed military expertise. <sup>n262</sup>

#### D. Conclusion

There are many more SCs throughout the world, generated in the militarily advanced countries and employed by regimes in need of military expertise. Unlike rogue mercenaries, SCs provide military training and services in a quasi-official capacity, although their home states are likely to disavow their "private" activities.

The modern notion of the mercenary is that of "an international blight in their perpetration of acts of violence which ruin human lives, create material losses, hamper economic activity and extend terrorist attacks that have touched off or aggravated conflicts, with often catastrophic results for those affected." <sup>n263</sup> SCs, on the contrary, work with recognized states to professionalize militaries and restore a semblance of public order. Since they are registered companies, SCs are constrained not only by their employing states but by the legal obligations and reporting requirements of their home states, as well as by the desire to remain in the good graces of their home states. Market forces, in combination with the extensive media attention SCs receive, require that they maintain a professional reputation respectful of human rights and of their limited mandates. Furthermore, SCs are reluctant to enter arenas in which their governmental employers' legitimacy is unclear and where there is a likelihood of many casualties. In short, to the extent that SCs actually engage in offensive maneuvers, they do not represent the same threats that mercenaries do. Where SCs have entered conflicts, the ill-disciplined and vengeful national factions fighting for control of resources have been greater threats to the safety and economic well-being of the population.

[\*116] SCs fill a void by providing military aid in an age when governments do not have the resources or political will to enter internal skirmishes or civil wars on behalf of recognized regimes. At the same time, poor countries are susceptible to low-level guerrilla wars waged by bandits or disaffected members of society because of the countries' lack of military preparedness and public order. <sup>n264</sup> These regimes cannot create well-trained standing militaries or modernize antiquated forces because of high costs and the potential for military coups by existing military institutions.

In this geopolitical context, SCs supply military professionalism, modernization, and expertise to countries wracked by violence and plagued by social disorder. Given the international opprobrium facing foreigners who contribute directly to internal civil wars or unrest in other countries, SCs legitimate their activities and ensure the survival of their personnel by limiting their involvement to military training. In addition to geopolitical constraints, SCs are controlled by market forces which make it too costly in pecuniary terms to enter conflicts in which they might appear to destabilize governments or aggravate military conflicts. In general, the emergence of SCs represents a new form of state agency which will persist as long as governments need military aid.

#### IV. The International Legal Norms Regarding Mercenaries

Since the 1960s the international community has tried to deal directly with the perceived scourge of mercenarism in the Third World, especially in post-colonial Africa. Africans struggling to gain their independence and establish stable nation-states felt terrorized by the white mercenaries who exacerbated civil conflicts in the nascent states. To Africans, the mercenaries represented racist, exploitative, colonial interests that reveled in the chaos they created.<sup>n265</sup> In response to the gross human rights abuses committed by these rogues and the ignoble pecuniary and racist motives which fueled their participation in foreign battles, the international community reacted.

The customary international law prohibiting the recruitment, use, financing, and training of mercenary troops must be examined in light of the historical context of the resolutions and conventions of the Organization of African Unity (OAU) and the United Nations.<sup>n266</sup> This [\*117] Part examines the legality of SCs in light of the developing customary international law against mercenaries. SCs, as presently constituted, do not fall within the definition of mercenaries and their activities are not prohibited by recognized international norms. The prohibitions against mercenaries were not devised to deal with security corporations employed by recognized regimes. These restrictions were also not meant to supersede a sovereign state's right to employ foreign personnel to restore order or to provide security within their country. The use of SCs by numerous countries, especially by Nigeria, Angola, and other African nations which have led the charge against the use of mercenaries, further demonstrates that SCs are not illegal under international legal norms.

On February 20, 1997, the U.N. Special Rapporteur on the question of the use of mercenaries, Enrique Bernales Ballesteros, issued a report to the U.N. Economic and Social Council that discusses the emergence of SCs and their effect on the international norms regarding mercenaries.<sup>n267</sup> The report is important in that it reveals the tensions and problems associated with applying the law of mercenarism to SCs. The report calls for a united stance against the use of mercenaries and expresses concern about the popularity security companies, particularly Executive Outcomes, which has been most successful and is comprised of former "members of racist and extreme right-wing paramilitary organizations."<sup>n268</sup> The report describes the emergence of SCs in the following manner:

The establishment of companies to sell countries military advisory and training services and security services in return for money and mining and energy concessions, in particular, may involve the recruitment of mercenaries not only for military advisory and training tasks in the countries which conclude contracts with them, but also for assistance to the conventional forces of order and public security in combating armed opposition movements and carrying out tasks which should be performed by the police. Where such direct participation does [\*118] exist, these companies come to take control of the country's security and have considerable influence over production and economic, financial and commercial activities. Companies of this kind which market security internationally may acquire a significant, if not hegemonic, presence in the economic life of the country in which they operate.<sup>n269</sup>

As seen in the excerpt above, the report is concerned not necessarily with the type and quality of services provided by SCs (as opposed to those provided by individual mercenaries), but by the amount of influence gained by the SCs over contracting states. Throughout the analysis, the report states that mining and other concessions give SCs hegemonic powers.<sup>n270</sup> It fails, however, to explain if and how such hegemonic powers have functioned and how, once an SC contract expires, such influence differs from the power of other large mining and energy interests.<sup>n271</sup>

The report is unable to reconcile the putative ban on the use of mercenaries with the right of a state to make internal security decisions and pay for any services in whatever form it deems appropriate. As a means of resolving this tension, the report argues that internal security is a role reserved for the state only and should not be delegated to a foreign private company.<sup>n272</sup> The report is concerned with SCs' lack of accountability, and as a result the report claims that the "responsibility for a country's internal order and security are peremptory obligations which a State fulfils through its police and armed forces."<sup>n273</sup>

The report bemoans and acknowledges that attitudes toward mercenaries are changing, and it accepts the fact that

the existing international law regarding their use is incomplete and uncertain. <sup>n274</sup> It confronts the dilemma of the existence of SCs, which appear to be organized bands of mercenaries acting on behalf of capitalist interests, and the international community's apparent acceptance of them. The report continues by assessing the "new concept" regarding the employment of SCs by legitimate governments:

**[\*119]**

According to this new concept it would appear that any State is at liberty to buy security services on the international market from organizations composed of persons of various nationalities, united by their function and their ability to control, punish and impose the order desired by the Government which hires them, regardless of the cost of lives, in exchange for the delivery of a portion of its natural resources. Naturally, if this hypothesis is confirmed, mercenarism would no longer be considered as necessarily illicit, illegitimate or illegal; however, concepts such as that of State sovereignty and the obligations of States to respect and guarantee the enjoyment of human rights would be tremendously relativized. <sup>n275</sup>

What the report fails to recognize is that SCs are distinct from the post-colonial form of "wild geese" mercenaries, and the laws developed to deal with the disruptive force of individual, rogue mercenaries are not applicable to legally recognized SCs. The report asks rhetorically:

Can it be that the mercenaries' behaviour is changing so profoundly that they now constitute the rank and file of the personnel recruited by a private company in order to contract with African Governments to provide internal security services, safeguard public order, or even to put an end to internal armed conflicts? <sup>n276</sup>

Not only is the behavior of SCs and their employees qualitatively different from that of individual mercenaries, but the laws developed to hinder the use of individual mercenaries for disruptive purposes do not apply to SCs.

Though the international community has based the debate over the definition of "mercenary" on the issue of motivation and the vile effects that base motivations create, the crucial factors distinguishing acceptable and unacceptable types of military services offered by foreigners are transparency and state accountability. The primacy of these factors in determining the legality of SCs and of certain types of mercenaries is reflected in several rhetorical questions presented in the report:

Who will be responsible for any repressive excesses that the security companies may commit against the civilian population, especially where representatives of the political opposition are concerned? Who will take responsibility for any violations of international humanitarian law and of human rights that they may commit?... What will be the human rights consequences of entrusting internal order and control over the exercise of civil rights in a country to an international private security firm? Is the international community willing to accept and concur with the idea that the recruitment of mercenaries is illegal only in a **[\*120]** few very limited cases? When, and in what circumstances, should the recruitment of mercenaries be considered legal? <sup>n277</sup>

The purpose of this section is to help reconcile the apparent tension, engendered by the emergence of SCs, between the ban on the use of mercenaries and the rights of states to provide for their internal security. This Part will show that a total ban on the use of mercenaries does not exist in international customary law and that SCs fall outside those prohibitions that do exist. Therefore, in answer to the final question presented above, there are cases in which the use of mercenaries by recognized regimes or movements of national liberation is legal, and the international community is growing more willing to recognize this distinction.

### A. Private International Security Companies as Mercenaries?

One of the major obstacles to restricting the recruitment and use of mercenaries has been defining the "mercenary" and his acts accurately. <sup>n278</sup> States have differing interests in defining the term narrowly or liberally. Especially for those countries most involved in the mercenary market, finding an acceptable compromise is essential to the effectiveness of any regulation in the international system, where the subjects of the law often determine the development of the law through their compliance. There are three essential characteristics which distinguish a mercenary from other combatants: (1) the mercenary is not a citizen or resident of the state in which he is fighting; (2) the mercenary is not integrated (for the long term) into the national force; and (3) the mercenary does not have government support for his actions. <sup>n279</sup>

One could define a mercenary liberally as a foreigner serving in an organized armed force not his own; however, this definition may be too broad for the accepted practices of the international community. First, the British, French, Indians, the Vatican, and various countries in the Middle East would object to such a definition since their armed forces include foreign regulars. <sup>n280</sup> Second, the definition would include officers and contractors seconded to foreign armed forces, as occurs [\*121] between Great Britain and certain Gulf states. <sup>n281</sup> Third, it would include international volunteers who engage in foreign wars for ideological or political reasons, like the Lincoln Brigade in the Spanish Civil War. <sup>n282</sup>

Currently, the mercenary is defined primarily by his motivation: money. Focusing solely on a pecuniary motivation also creates an unworkable standard upon which to build an international legal norm because of the near impossibility of determining the motivations of combatants. <sup>n283</sup> The Diplock Report, commissioned in 1976 to study the issue of mercenaries, recognized this problem and concluded that mercenaries "can only be defined by reference to what they do, and not by reference to why they do it." <sup>n284</sup> On one hand, this interpretation captures the heart of the international concern over mercenaries - the potential negative effects of mercenary actions. <sup>n285</sup> These include human rights abuses, chaos, aggravation and prolongation of a conflict, and suppression of popular will. <sup>n286</sup> On the other hand, defining mercenaries by the effects of their actions is an ex post determination that produces an inconsistent and vague standard. <sup>n287</sup>

More importantly, this definition ignores state accountability, the pivotal element that makes a combatant legal or not. The tie between a state and an individual demarcates the dividing line between the criminal acts of a mercenary and the legal acts of a state player (legal acts that can be criticized under different standards). <sup>n288</sup> The international community's fear of mercenaries lies in that they are wholly independent from any constraints built into the nation-state system. <sup>n289</sup> The element of accountability is the tacit standard that underlies the international antipathy for mercenary activity and truly determines mercenary status.

Nevertheless, the international community has formally adopted motivation as the determining factor that characterizes a mercenary. In the Additional Protocols to the Geneva Convention of 12 August 1949 (Protocol II, Art. 49), a mercenary is defined as any person who:

- (a) is specifically recruited locally or abroad in order to fight in an armed conflict;
- (b) does, in fact, take a direct part in the hostilities;
- (c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid 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.  
n290

This definition is tightly constructed so as to exclude foreign nationals in other country's armed forces that the international [\*123] community is willing to tolerate. Additionally, Article 47 of Protocol II ignores those foreigners integrated into the armed forces of another state, those who are motivated by ideology or politics, and those who may not actually fight in the hostilities. n291 Trainers and advisors are also excluded, although they can affect the military situation just as much as, if not more than, actual combatants. n292 In the case of SCs, this is a crucial omission since most of the work SCs do involves training. The comments to Article 47 of Protocol II further note that foreign advisors and military technicians are prevalent throughout the world and are necessary given the technical character of modern weaponry. n293 The International Convention against the Recruitment, Use, Financing, and Training of Mercenaries ("International Convention"), which is not in force, adds to the Protocol II definition by including those persons who recruit, use, finance, or train mercenaries as offenders. n294 Though both definitions contain the element of motivation, they are primarily concerned with private acts of violence uncontrolled by any state.

Those who object to companies like EO claim that SCs fall under the Article 47 definition of mercenaries: The employees of SCs are foreign military soldiers specially recruited abroad and paid in excess of what the military personnel of the contracting state are paid; they engage in fighting; and they are not sent on official duty of the armed forces of another state. n295

SCs in general, however, fall outside the conjunctive definition of Article 47 since they tend to restrict their activities to training government troops only. Assuming, arguendo, that all SCs are like EO, which has in the past engaged in offensive maneuvers, the definition includes [\*124] additional distinctions. n296 First, section 1(a) requires that the combatant has to be recruited to "fight" in an "armed conflict." n297 If SCs are not contracted to "fight," and do so only in defense, then SCs would fall outside the purview of the definition. Furthermore, the definition of a situation of "armed conflict" is a subjective determination, and SCs' contracts could specify that the agreement involves the restoration of security as opposed to participation in an armed conflict. This could also support the argument that SCs fall outside the Article 47 definition. Second, most SCs integrate into the armed forces for which they work, as EO did in Sierra Leone, thereby fulfilling the requirement in 1(e). According to the comments to Article 47, "it is clear that enlistment in itself is sufficient to prevent the definition being met." n298 Third, it could be argued that an SC, which receives authorization from its home state to operate abroad (through a licensing process or more informally), is "sent by a State which is not a party to the conflict on official duty" and that the SC represents a member of that state's armed forces. n299 Under an extreme interpretation of section 1(f), SCs could be characterized as civilian contractors, although regarded as a member of the military force in the field. n300 This implies that SCs can be regarded as a contractor of their home states or of their employing states. In either case, SCs would be tied to state actors and would fall outside the definition of a mercenary in this aspect as well.

Even beyond the provisions of Article 47, it is clear that SCs are not mercenaries, particularly because state accountability is the key to distinguishing mercenaries from other combatants. SCs are tied to states in various unofficial ways. First, SCs are legal entities, bound to employing states by recognized contracts and to home states by laws requiring registration, periodic reporting, and licensing of foreign contracts in most cases. Second, most SCs are willing to share information with their home governments because the home governments tend to be large, repeat customers that appreciate voluntary cooperation. n301 Third, because of the importance of the home state, SCs try to act in their [\*125] home states' interest abroad, thereby making the SCs quasi-state agents. Fourth, since SCs are long-term market players (unlike most individual mercenaries), they are unlikely to engage in wanton violence that potentially could spark opposition in employing states or their populations, home states, or future customers.

All of these relationships presuppose that the home state has some control over the existence and profitability of SCs. At present, this control is tenuous in the case of South Africa's EO, although the ANC is proposing new legislation

to restrain EO's activities. With some home-state control over the profitability of the SC, the SC is linked inextricably with the state.

For these reasons, SCs are not mercenaries. Not only do SCs fall outside the technical definition of a mercenary, but their activities are not prohibited "in light of other provisions relating to mercenaries and the restrictive approach adopted in various United Nations resolutions which link mercenaries with concerted acts of violence aimed at violating the right of peoples to self-determination and undermining the constitutional order of a State or its territorial integrity...." <sup>n302</sup> The sine qua non of mercenarism, therefore, is not motivation or nationality, but the purpose for which a mercenary is employed. Often, the legitimacy of the mercenary's purpose is tied directly to the legitimacy of his employer. However, the mercenary can only exist if he violates the accepted norms of the state-based system.

"It is difficult to define what a mercenary is. This is because the word has had different meanings at different times. The different meanings it has acquired throughout history depended on the spirit of the age." <sup>n303</sup> With this in mind, it is essential to survey the development of the norm banning the recruitment and use of mercenaries in its modern historical context in order to understand the limitations of the ban.

#### B. Development of a Norm Against the Use of Mercenaries

The genesis of the international movement to ban the use of mercenaries followed the unsettling effects of mercenary activities in post-colonial Africa. Mercenaries were neocolonial soldier-bandits who helped subvert national movements of liberation against colonial regimes and served as instruments of foreign aggression against nascent regimes. <sup>n304</sup> The resolutions and conventions banning the recruitment and use of mercenaries developed in the context of mercenaries [\*126] who challenged the sovereignty of states and the independence of movements of national liberation. <sup>n305</sup>

Before 1945, the international community considered it an act of belligerence for a state to permit the recruitment or enlistment of mercenaries to attack another state. <sup>n306</sup> Article 2(4) of the U.N. Charter prohibits member states from utilizing "the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." <sup>n307</sup> The international community extended this obligation to include the duty of states to prevent the organization of bands or mercenary troops intending to attack the sovereignty or territorial integrity of another state. According to Chapter I of the Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land signed in 1907 at the Hague, neutral states during international wars cannot allow "corps of combatants" or "recruiting agencies opened on the territory of the neutral Power" to aid the belligerents. <sup>n308</sup>

The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States extended this duty in accordance with the Charter of the United Nations adopted in 1970: "Every 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>n309</sup> Other General Assembly resolutions reaffirm this obligation of states not to allow, either proactively or through inaction, organized groups to invade other countries. <sup>n310</sup> Even so, states do not have affirmative obligations under [\*127] traditional notions of international law to stop individuals from exiting their respective countries to join mercenary groups. <sup>n311</sup> From these traditional notions of neutrality, the international community has developed norms prohibiting the use of mercenaries.

In the modern international environment, restrictions on the use of mercenaries developed within colonial Africa. During the Katangan secession in the Congo, the Security Council passed several resolutions calling for the exit of all foreign personnel and sent U.N. troops, under the United Nations Operation in the Congo (ONUC), to combat the white mercenaries fighting on behalf of Katanga. <sup>n312</sup> The United Nations finally crushed the secession in 1963 and departed in 1964. <sup>n313</sup> Following the grave impact of Bob Denard, "Mad" Mike Hoare and other mercenaries in the Congo's numerous internal conflicts and the appearance of mercenaries in other countries like Nigeria, the OAU addressed this problem and began to codify the prohibition against mercenaries. <sup>n314</sup>

On several occasions in the 1960s and 1970s, the OAU passed resolutions condemning the presence of mercenaries in various conflicts throughout the continent. <sup>n315</sup> In Addis Ababa in 1971, the Assembly of Heads of State and Government of the OAU declared that mercenaries represented a threat to the "independence, sovereignty, territorial integrity and the harmonious development of Member States of the OAU" and condemned the use of mercenaries to jeopardize the sovereignty of member states. <sup>n316</sup> In 1972, the OAU's Council of Ministers' Committee [\*128] of Legal Experts drafted the Convention for the Elimination of Mercenaries in Africa, which the OAU finally signed in Libreville in 1977. <sup>n317</sup> This convention became the seminal codification of an international ban on mercenaries. <sup>n318</sup> Article 1 of the convention defined the mercenary by referring to the purpose of his employment. The mercenary's acts were also declared crimes against the peace and security of Africa:

[A] "mercenary" is classified as anyone who, not a national of the state against which his actions are directed, is employed, enrolls or links himself willingly to a person, group or organization whose aim is:

(a) to overthrow by force of arms or by any other means the government of that Member State of the Organization of African Unity;

(b) to undermine the independence, territorial integrity or normal working of the institutions of the said State;

(c) to block by any means the activities of any liberation movement recognized by the Organization of African Unity. <sup>n319</sup>

However, the OAU convention "does not explicitly forbid the employment of mercenaries." <sup>n320</sup> Article I prohibits governments from hiring mercenaries to suppress movements of national liberation, but the African countries carefully constructed the convention to allow legitimate governments to defend themselves from "dissident groups within their own borders" by hiring non-nationals. <sup>n321</sup> The major concern for African countries at this point was that mercenaries not be used against OAU-recognized liberation movements. <sup>n322</sup>

Although the colonial powers tried to avoid discussion of the issue, the United Nations (goaded by Second and Third World countries) was unable to avoid the topic since mercenaries were engaged in several countries and their acts were notoriously brutal. <sup>n323</sup> The United Nations followed the OAU's lead and passed several resolutions calling for measures to end the recruitment and use of mercenaries in a number of conflicts. <sup>n324</sup>

Throughout the late 1960s and 1970s, the Security Council responded to specific crises by calling for the removal of all mercenaries. <sup>n325</sup> For [\*129] example, the Security Council, on several occasions, condemned Portugal for allowing mercenaries to operate from its colonial territory. <sup>n326</sup> The General Assembly also passed numerous resolutions condemning the use of mercenaries for the destabilization of a regime or against a movement for national liberation. In 1968, the General Assembly declared:

The practice of using mercenaries against movements for national liberation and independence is punishable as a criminal act and [ ] the mercenaries themselves are outlaws, and [we call] upon the Governments of all countries to enact legislation declaring the recruitment, financing and training of mercenaries in their territory to be a punishable offence and prohibiting their nationals from serving as mercenaries. <sup>n327</sup>

The General Assembly followed this proclamation of criminality five years later by condemning the use of mercenaries by "colonial and racist regimes against the national liberation movements" as criminal. <sup>n328</sup> This resolution also gave movements of national liberation (groups fighting racist or colonial regimes) international status in terms of the Geneva Conventions of 1949 relating to the rights and duties of combatants. <sup>n329</sup> The United Nations, however, soon realized

that its sporadic pronouncements condemning the use of mercenaries in particular situations were not having the desired effect because states failed to restrain their citizens from enlisting in mercenary groups. <sup>n330</sup>

As a result, the Diplomatic Conference included the problem of mercenarism in its proposed amendments to the Geneva Conventions of August 12, 1949. <sup>n331</sup> On June 8, 1977, the Diplomatic Conference adopted the Additional Protocols I and II to the Geneva Conventions by [\*130] consensus. <sup>n332</sup> Article 47 of Protocol I defines a mercenary and strips all mercenaries of the right to claim prisoner-of-war status, a right presumed under Article 45(1) of Protocol I. <sup>n333</sup> Under this Protocol, states may still offer mercenaries prisoner-of-war status if they choose, but after 1977, mercenaries have no right to combatant status and can be tried as common criminals in the offended state. <sup>n334</sup>

Countries have used U.N. and OAU resolutions to prosecute mercenaries. <sup>n335</sup> The most visible trial occurred in Angola where thirteen white combatants were tried for the crime of mercenarism. In 1976, the Angolan government (the victorious MPLA) charged the mercenaries based on OAU, U.N., and other international resolutions although Angola at the time did not have a law prohibiting mercenarism. <sup>n336</sup> The Angolan courts sentenced nine of the mercenaries to prison terms and condemned the other four to death. <sup>n337</sup> The Angolan trial led to the drafting of the Luanda Convention on the Prevention and Suppression of Mercenaries by invited observers of the trial. <sup>n338</sup> Among other stipulations, the Luanda Convention stripped mercenaries of combatant status and formed the basis for parallel provisions in Additional Protocol II. <sup>n339</sup> These trials indicate that the international prohibitions reflected in the resolution have been accepted as universally applicable and binding on all member states. <sup>n340</sup>

[\*131] The continued use of mercenaries, despite the United Nations' constant protests, forced the international community to recognize the need for a multilateral convention. <sup>n341</sup> In 1980, the General Assembly resolved to include the drafting of an "International Convention against the Recruitment, Use, Financing and Training of Mercenaries" in the provisional agenda for the thirty-fifth session. <sup>n342</sup> During the session, the General Assembly formed a committee to draft the international convention. <sup>n343</sup> The committee spent several years assessing respective state proposals and developing the treaty. <sup>n344</sup> On December 4, 1989, the General Assembly presented the International Convention for signature and ratification. <sup>n345</sup>

The International Convention establishes a more expansive definition of mercenary yet still relies on motivation to distinguish mercenaries from other types of combatants. The recruitment, use, financing, and training of mercenaries are all offenses under the convention, and states are required to prevent these offenses. <sup>n346</sup> Although it appears to crystallize the customary international law regarding mercenaries, three main criticisms of the International Convention exist. First, states are given jurisdiction for the crime of mercenarism only when offenses are committed in their territories or by one of their nationals. <sup>n347</sup> Second, the International Convention fails to address the treatment of states in conflict by not allowing aggrieved states to proceed against offending states. Third, there is no monitoring mechanism, leaving implementation in the hands of the states. <sup>n348</sup>

In addition to the International Convention, the United Nations has continued to issue resolutions since the 1980s. These resolutions reflect the limited nature of the ban on the use of mercenaries and the [\*132] traditional concerns the international community regarding individual mercenaries. These resolutions deal with the following uses of mercenaries: (1) to destabilize neighboring states, as in the case of South Africa in the 1980s; <sup>n349</sup> (2) to spearhead coups in small states like the Seychelles; <sup>n350</sup> (3) to prevent the granting of independence to movements of national liberation; <sup>n351</sup> and (4) to violate human rights. <sup>n352</sup> In essence, the United Nations recognized in these resolutions that the activities of mercenaries are contrary to the fundamental principles of international law, such as "non-interference in the internal affairs of states" and "territorial integrity and independence." <sup>n353</sup> Marie-France Major describes this type of mercenarism as an "internationally wrongful act." <sup>n354</sup> The historical development of these norms supports the notion that only internationally wrongful acts are proscribed with respect to mercenary activity. The international community has only witnessed mercenaries in their destructive, rogue form and consequently has developed norms to deal with those particular types of activities. <sup>n355</sup>

Some scholars argue that the Security Council's repeated appeals for governments to restrict the supply and

demand for mercenaries is evidence that a "state has an obligation [that goes beyond the traditional [\*133] constraints of international law] to control the recruitment of its nationals in situations where a threat to peace and security exists." n356 However, the argument overlooks the fact that the Security Council resolutions addressed particular conflicts where the Security Council judged that mercenaries were aggravating conflicts and presenting threats to international peace and security. Much of the discussion also assumes that the General Assembly resolutions, which are broader in scope, reflect established customary international norms. Yet under the U.N. Charter, the General Assembly has no authority to enact, alter, or terminate rules of international law. n357 Therefore, General Assembly resolutions do not necessarily constitute international law. Instead, resolutions from the General Assembly or regional organizations like the OAU may only represent the crystallization of customary international law or evidence of state practice and opinio juris. n358

Furthermore, the International Convention has not been ratified by enough states for it to be in force. Given the tenuous nature of the definitive convention, it is difficult to argue that these norms extend to SCs. Of the sixteen signatories, three - Angola, the Congo, and Nigeria - have hired or dealt directly with SCs, while another, the Ukraine, is a major supplier of pilots to EO. Zaire, another signatory, has hired individual mercenaries to fight the powerful belligerents led by Laurent-Desire Kabila. n359 It is difficult, therefore, to claim that a standard exists beyond that inherent in the peremptory norms of international law.

### [\*134]

#### C. State Practice Regarding Mercenaries

The status of customary international law banning the use of mercenaries is unclear because of the lack of consistent state practice and evidence of opinio juris. There appears to be an international antipathy, evidenced in numerous U.N. resolutions and reports, toward the use of mercenaries to destabilize legitimate governments or to suppress recognized movements of national liberation. n360 However, the International Convention still has not entered into force, and "the laws of most countries do not make mercenary activities a criminal offence." n361 Many countries have regulations that restrict the recruitment, training, and use of mercenaries within their national territories, but most countries do not prohibit their citizens from traveling abroad and enlisting as combatants. These domestic legal positions reflect individual countries' concerns that private citizens will implicate their home states by violating the sovereignty of other states. n362 But most states have neither comprehensive legislation prohibiting mercenary activity by their citizens nor vigorous enforcement of the laws that do exist.

As international concern about the implications of private military force has grown, states have adopted neutrality laws that restrict private acts of violence. By the mid-nineteenth century, one-third of all states had enacted restrictions on foreign military service. n363 Current laws in most countries still reflect the principal objective of preventing state responsibility for the actions of private citizens. As a result, there are powerful proscriptions against mercenary activity which could jeopardize the neutrality or interests of home states, and less concentration on the absolute abolition of mercenary activity.

#### 1. The United States

The United States has passed several legislative acts restricting the potential recruitment and enlistment of its citizens as mercenaries for foreign agents: the Neutrality Act of 1794; the Foreign Relations Act; n364 the Immigration and Nationality Act; n365 and the Foreign Agents Registration Act. n366 The U.S. government first addressed the problem of private citizens launching hostile military expeditions in the Neutrality [\*135] Act of 1794 ("1794 Act"). n367 The 1794 Act was passed during George Washington's administration to prevent private citizens' engagement in the Anglo-French War and the possibility of U.S. involvement. n368 U.S. laws have undergone several transformations in response to various international conflicts in which U.S. citizens were involved, such as the Cuban rebellion against Spain and the Spanish Civil War. n369

The Foreign Relations Act regulates those activities of private citizens which may jeopardize U.S. foreign policy interests. <sup>n370</sup> Section 959 prohibits any person in the United States from enlisting, recruiting, or leaving U.S. territory in order to serve any foreign entity or agent in a military capacity. <sup>n371</sup> The key element that triggers the Foreign Relations Act is that the proscribed activity be conducted within U.S. territory. With respect to the crime of leaving U.S. territory with the intent of serving in a military capacity, the Supreme Court ruled that the government has no power to prevent its citizens from joining foreign armed forces when such acts are executed outside U.S. territory. <sup>n372</sup>

The Immigration and Nationality Act contains a provision which revokes the U.S. citizenship of any individual who undertakes certain activities "with the intention of relinquishing United States nationality." <sup>n373</sup> Under section 1481(a)(3), a U.S. citizen may be stripped of his citizenship for serving in a foreign armed force:

A person who is a national of the United States whether by birth or naturalization, shall lose his nationality by voluntarily...entering, or serving in, the armed forces of a foreign state if (A) such armed forces are engaged in hostilities against the United States, or (B) such persons serve as a commissioned or noncommissioned officer. <sup>n374</sup>

**[\*136]** This language reflects a concern on the part of the U.S. government to ensure that its international relations are not complicated by the independent acts of its citizens. Yet, the constitutionality of this provision has been called into question by the Supreme Court's ruling in *Afroyim v. Rusk*. <sup>n375</sup> In *Afroyim*, the Court held that under the Due Process Clause of the Fourteenth Amendment the government cannot divest a citizen of his citizenship for simply voting in a foreign election. <sup>n376</sup> The Court's general proposition that a U.S. citizen has "a constitutional right to remain a citizen in a free country unless he voluntarily relinquishes that citizenship," <sup>n377</sup> arguably could be extended to invalidate this subsection of the Immigration and Nationality Act. To date, no American citizen has been divested of his citizenship under this subsection. <sup>n378</sup>

Finally, the Foreign Agents Registration Act requires any agent of a foreign state to register with the federal government, including agents recruiting military personnel. <sup>n379</sup> Failure to register properly creates criminal liability; hence this law allows the government to control the recruitment of U.S. citizens or residents by foreign nations. <sup>n380</sup>

Allaoua Layeb argues that U.S. legislation is ineffective because it was designed to restrict U.S. citizen enlistment in foreign armed forces. The laws are not geared to restrict the use of modern mercenaries by interest groups or individuals fomenting conflict in other states. <sup>n381</sup> In general, "the laws are not aimed at preventing an individual from leaving the country with the intent of enlisting in a foreign army." <sup>n382</sup> Instead, "[t]he real purpose of these neutrality laws, is to prohibit the commission of unauthorized acts of war by private United States citizens because these unauthorized acts may lead to acts of reprisals against the whole nation, as well as to civil disunion." <sup>n383</sup>

Furthermore, "[t]he United States Government has long pursued a policy of non-enforcement with regard to its neutrality laws," as evidenced by the independent ventures of U.S. citizens in both world wars, the Spanish Civil War, the Cuban crisis, and the Angolan conflict. <sup>n384</sup> After the Angolan trial of thirteen mercenaries, which resulted in the execution of one American citizen and four British subjects, the House of Representatives Foreign Relations Committee held hearings to discuss **[\*137]** U.S. legislation and the recruitment of U.S. citizens to fight abroad. <sup>n385</sup> The Assistant Secretary of State for African Affairs denied U.S. government involvement in the recruitment of mercenaries to Angola and also denied that mercenarism (at the time) was a crime in international law. <sup>n386</sup> The Angolan experience did little to invigorate U.S. enforcement of its neutrality laws against mercenaries. The U.S. government has utilized its laws only on a few occasions which involved radical filibuster campaigns. In May 1981, ten white supremacists were stopped from invading Dominica in the "Bayou of Pigs" event. The U.S. also arrested fourteen mercenaries, led by former U.S. Customs Service agent Tommy Lynn Denley, who planned to overthrow the regime of Lieutenant Colonel Desi Bouterse in Suriname. <sup>n387</sup>

In short, U.S. laws are incomplete and ineffectively administered. This shows a lack of political will on the part of

the United States to condemn all mercenary activity given that the development of a total ban on mercenary activity would put U.S. citizens in danger of prosecution abroad.<sup>n388</sup> It is no surprise, therefore, that the U.S. government has not prosecuted U.S. security companies under these laws and does not consider SCs to be mercenary organizations. Other countries have followed a similar pattern.

## 2. The United Kingdom

As in the United States, the Angolan mercenary trials, in which ten British subjects were tried and three were executed, forced the British government to evaluate its antimercenary laws. In the Diplock Report, the Committee of Privy Counsellors appointed to inquire into the recruitment of mercenaries discussed the faults with its Foreign Enlistment Act of 1870 ("1870 Act") and the limitations of international laws restricting the use of mercenaries.<sup>n389</sup> The 1870 Act prohibits British subjects from recruiting for or enlisting in the armed forces of a "foreign state."<sup>n390</sup> It also creates a crime for leaving British territory by ship with the intent of accepting an illegal commission.<sup>n391</sup> There are exceptions to these prohibitions, such as government licenses, and anachronistic [\*138] loopholes, such as the absence in the statute of "airplanes" as a means of transport or attack.<sup>n392</sup> In general, a British citizen may be prosecuted only for acts committed within British jurisdiction.<sup>n393</sup>

The Diplock Report concluded that the international definition of "mercenary" based on the motivation of the combatant was unworkable.<sup>n394</sup> The Report concluded that "[t]o serve as a mercenary is not an offence under international law."<sup>n395</sup> As a result, the Privy Counsellors resolved that preventing British citizens from working abroad as mercenaries was an unjustified infringement on individuals' personal freedom.<sup>n396</sup> The report advocated the repeal of the unworkable provisions of the 1870 Act, and advised that any new legislation permit enlistment and service as mercenaries abroad.<sup>n397</sup> It recommended a legislative system in which the government would have the power to publish a list of those armed forces in which British citizens could not enlist.<sup>n398</sup> This legal regime would allow the government to determine what effect particular mercenary enlistments would have on Great Britain's international relations.<sup>n399</sup>

Since the issuance of the Diplock Report, the government has made no legal or practical changes. In the late 1980s, British mercenaries were employed by drug cartels, but the limitations of British law hindered the prosecution of these individuals.<sup>n400</sup> Great Britain remains the center of mercenary recruitment in the world.<sup>n401</sup> EO and Sandline International along with a host of British SCs are registered in Great Britain. British SCs operate freely under the licensing provisions of the British government.

## 3. South Africa

Presently, the regulation of mercenary activity in South Africa falls under the provisions of the South African Defence Act 44 of 1957 [\*139] ("Defence Act").<sup>n402</sup> Section 121A, inserted under section 15 of Act 34 of 1983, deals specifically with mercenaries but restricts its enforcement to those members of services created by the Defence Act, exempting South African police or citizens in general.<sup>n403</sup> This restriction, in addition to the fact that SCs like EO act extraterritorially, has prevented the Defence Act from limiting EO's activities.<sup>n404</sup> Even so, it is clear that the South African government has kept close tabs on EO's activities, including a 1994 attorney general investigation which concluded that EO's services abroad were completely legal.<sup>n405</sup>

The South African government has grown concerned with the popularity of EO and its image as a South African mercenary export. It has also been concerned with the domestic proliferation of private security companies, many of which are staffed by ex-SADF members. Chapter 11 of its new constitution, adopted by the Constitutional Assembly on May 8, 1996, regulates domestic security services:

(2) The defence force is the only lawful military force in the Republic.

(3) Other than the security services established in terms of the Constitution, armed organisations or services may be established only in terms of national legislation.

(4) The security services must be structured and regulated by national legislation.

(5) The security services must act, and must teach and require their members to act, in accordance with the Constitution and the law, including customary international law and international agreements binding on the Republic.  
n406

Though this chapter of the constitution seems to apply directly to domestic security companies, it is clear that SCs must be structured under existing national legislation. n407 In addition, the government of [\*140] South Africa is debating amendments to the Defence Act which would extend the definition of mercenary to "foreign military assistance." n408 The new legislation would require that any sale of military or intelligence services be approved by the South African government prior to export. n409 Until such legislation is passed, South African SCs will continue to operate with total independence from domestic laws which are limited in scope.

#### 4. Other Countries

Other countries have passed minimalist legislation and have failed to implement the legislation that does exist. France, for instance, outlaws the recruitment of mercenaries on behalf of a foreign power under Article 85 of its Penal Code, but it rarely enforces this policy as evidenced in recent forays by French mercenaries in Zaire. n410 It also allows SCs like COFRAS to operate relatively freely. The Ukraine and the Slovak Republic outlaw their citizens from serving as mercenaries without the approval of the appropriate government agencies. n411 In short, many countries outlaw the recruitment of their nationals to serve abroad without their governments' consent - negating the idea that states accept an absolute prohibition against the use of mercenaries.

#### 5. State Practice Toward SCs

State practice regarding mercenaries demonstrates that there is a general acceptance of the phenomenon of mercenarism while many states outlaw the recruitment or use of mercenaries within their own territories. Even regional organizations like the OAU have contributed to this development. The OAU Convention, the most aggressive codification of the criminality of mercenarism, envisioned the legitimate use of foreign military personnel to support regimes. Its own policy to support incumbent regimes facing internal challenges highlights the principle that the legitimate state is entitled to the use of foreign military expertise. The new norm developing with respect to SCs is that legally registered companies that provide security services for struggling yet legitimate regimes are not mercenaries.

For instance, the government of Angola finds no inconsistency between its previous prosecution of mercenaries and its employment of SCs. It does not consider EO to be a mercenary organization, and it [\*141] lauds EO for its devoted and professional service. n412 On November 25, 1996, Adriano Parreira, the Permanent Representative of Angola to the U.N. Office in Geneva, sent a letter to the Assistant Secretary-General for Human Rights expressing Angola's view on the problem of mercenaries. He simply wrote, "I have the honour to inform you, Sir, that as far as the Government is concerned, the question of mercenaries is no longer a problem in Angola." n413 Furthermore, other countries like Nigeria and Ghana have worked with EO to achieve mutual security goals. Humanitarian organizations have also utilized SCs' services, finding them to be effective, objective, and trustworthy. Even the OAU, the bastion of antimercenarism and the veritable font of antimercenary legislation, has leveled only muted criticism against EO and has even considered employing the firm for continent-wide peacekeeping. n414

Perhaps the persistent use of mercenaries and lax enforcement of existent prohibitions on their use reflect the utility of mercenaries in certain contexts: "Whatever the laws, whatever the international conventions, whatever the deterrents, mercenary activities will continue as long as governments or counter-governments see a use for mercenaries and as long as would-be mercenaries are themselves ready to be used." <sup>n415</sup> SCs seem to be an even more acceptable form of private military force that can be contained by market forces and state regulation. For this reason, state practice demonstrates that states consider SCs to be legitimate organizations performing useful services in the international arena. Even if it is argued that state practice historically reflects *opinio juris* for banning the use of mercenaries, the treatment of SCs as legal entities is evidence of a different attitude toward these organizations and a shift away from an absolute abolition of the use of independent foreign military personnel.

#### D. The Inherent Tension Between State Sovereignty and an Absolute Ban on the Use of Mercenaries

The development of the customary international law banning mercenaries cannot override the peremptory norms of international law. Two such norms clash directly with a ban on the use of mercenaries which prohibits recognized, legitimate states from employing private military expertise. First, Article 51 of the Charter reserves to the state the right to self-defense: "Nothing in this present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations." <sup>n416</sup> Second, [\*142] Article 2(7) restricts the authority of the United Nations to meddle in a state's internal affairs: "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state." <sup>n417</sup>

Article 3 of Protocol III expresses this limitation on the degree to which customary laws developed in treaties and resolutions may supersede peremptory norms regarding the rights of the state:

Nothing in this Protocol shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the government, by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State. <sup>n418</sup>

In addition, the International Convention is necessarily restricted to the "principles of international law such as those of sovereign equality, political independence, territorial integrity of States and self-determination of people." <sup>n419</sup> The operative term in Article 3's statement of nonintervention is "legitimate means." The question must, therefore, be raised whether the use of mercenaries or SCs in particular situations on behalf of a legitimate regime facing internal unrest is a legitimate means of restoring internal order. <sup>n420</sup>

The right to self-defense in a classical international conflict entitles the aggrieved state to defend itself in any way possible until the Security Council has taken "measures necessary to maintain international peace and security." <sup>n421</sup> In the case of a state that does not have recourse to a prepared standing army, it may be necessary to enlist the aid of allies or private military professionals. <sup>n422</sup> Usually the latter option is not used either because allies are willing to help or because there is no private military expertise available to repulse the invaders.

The right may also arise in an internal conflict in which the armed rebellion or insurgency is supported and aided by a foreign power. <sup>n423</sup> In the case of Sierra Leone, the RUF had the military, political, and strategic help of both Libya and Liberia. In such a scenario, Sierra Leone [\*143] would have been justified in hiring mercenaries or an SC to help it repel the attacks and restore internal order. (Of course, the employing state may not abdicate its responsibility to supervise the activities of the mercenaries or SC it hires.) Tanzania declared the right to request assistance: "[A]ny African state has the right to ask for assistance, either military or economic, from the country of its choice...[and it is] surely justified in seeking assistance to overcome a temporary crisis, and the donor country should not be accused of neo-colonialism for responding." <sup>n424</sup> Certainly that aid can come in whatever form as long as the aid does not violate

other established norms, like human rights and sovereignty principles. <sup>n425</sup>

The traditional maxim in international law is that whatever action the law does not expressly require or prohibit is left to the states. <sup>n426</sup> Even so, the increase in the number of small-scale wars and their spill-over effects, seen most graphically in the Great Lakes region of Africa, have forced the international community to view internal conflicts as potential international threats to peace and security. <sup>n427</sup> As a result, it is anachronistic and overly simplistic to state that regimes may do whatever they please within their borders. Regimes that are militarily challenged internally are constrained when their opponents reach the recognizable status of belligerents. <sup>n428</sup>

The OAU, however, has a standard policy to support its member governments in the case of civil wars, as opposed to remaining neutral. <sup>n429</sup> [\*144] If a resistance movement has not attained belligerent status or is not a movement of national liberation, then it is arguable that the incumbent regime may employ foreigners to help it regain control of the country. The OAU would certainly support the established regime, as long as it were not engaging in illegal practices in restoring its control. <sup>n430</sup> When it hired EO, Angola's democratically elected MPLA government acted within its right to restore order internally. The OAU offered restrained criticism and later began negotiations with EO to provide security services for its organization. <sup>n431</sup>

Yet, SCs could be seen as intervening agents of foreign states who are interfering with the internal political convulsions of other states. <sup>n432</sup> Arguably, SCs could then be seen as illegal per se if they interfere with the right of people to self-determination. <sup>n433</sup> But if SCs work for democratically elected or U.N.-recognized governments to suppress civil unrest, they cannot be characterized as illegitimate intervenors. In those cases, they are contractors for employing states and the vicarious agents of the popular will.

In general, a total ban on the use of mercenaries is inconsistent with superseding norms of international law. Recognized states may hire mercenaries or SCs to defend themselves from external attacks or to restore order internally. As long as these regimes do not violate other norms in the employment of foreign military expertise, they are justified under international law to avail themselves of the military aid they require.

#### E. Conclusion

It is ironic that states have needed to resort to private sources of military force to restore their own sovereignty. By delegating certain military and security duties to private companies or outsiders, states are abdicating responsibilities that are normally reserved for the state. Yet in so doing, they are injecting objective military strength, which is often what is lacking in chaotic situations. Much like the dukes who employed condottieri in Renaissance Italy, states like Sierra Leone are searching for experienced military professionals who will conduct their missions objectively and efficiently and will leave when they are told.

[\*145] The international law regarding mercenaries does not inhibit the right of states to employ mercenaries or SCs for legitimate ends, like restoring social order or defending against external aggression. Further, SCs do not fall within the international proscriptions banning the use or recruitment of mercenaries. SCs represent quasi-state actors in the international arena, which takes them outside the mercenary concerns of the international community. SCs can pose a danger if they are taken out of the state-controlled system; however, as presently operating, SCs are not mercenaries.

#### V. The Normative Considerations for the Existence of SCs

Although the current customary international law regarding mercenaries does not apply to SCs, the international community needs to determine if SCs should be regulated. In his 1997 Report, the United Nations Special Rapporteur on the question of the use of mercenaries wrote that "it would be...appropriate for the Commission on Human Rights and other United Nations bodies to discuss the international lawfulness of allowing the free market to include completely unrestricted competition from companies selling security services." <sup>n434</sup> This Part presents the central

questions necessary to decide whether the community of nation-states should ban or regulate SCs or allow the market to exist without any legal interference.

Since the 1960s, independent mercenaries have gained the reputation of being amoral, ruthless thugs who merely aggravate conflicts, threaten struggling regimes, commit human rights atrocities, and serve the interests of colonial or capitalist entities. The international community and some national legislators have responded to this perception. Now, however, SCs have emerged, and countries are trying to understand their character and motives. The Special Rapporteur has recognized that the "mercenary" market is changing, but he has concluded that the changes have created a greater danger for state sovereignty and international peace and security.<sup>n435</sup> As a result, he has called on the international community to ban mercenary activity in all its forms, including SCs.<sup>n436</sup> Unfortunately, his conclusions about the new "dangers" are incomplete because he has failed to analyze the nature and dynamics of the international market forces to which the SCs are responding.

Although the Special Rapporteur admits that SCs seem to fall outside the prohibitions of international treaties and national laws banning the use of mercenaries, his report refers to SCs as "mercenaries" and attributes criminal behavior to them.<sup>n437</sup> In general, he believes that SCs are a "threat to the self-determination of peoples and an obstacle to the enjoyment of human rights by peoples who have to endure their presence," and a threat to state sovereignty.<sup>n438</sup> In order to include SCs as "mercenaries," the report expands the traditional definition of these "crimes" with the following: (1) a "threat to self-determination" does not simply signify interference with a movement of national liberation or with a national election, but an intervention of any sort in the internal affairs of a state, regardless of the threat faced by the government or the population; (2) an "obstacle to the enjoyment of human rights" means any use of armed force, regardless of how it is used or against whom it is directed; and (3) a "threat to state sovereignty" means the assumption by foreigners of any duties previously reserved to the state, not just an attack on the legitimate government of the state.

#### A. Negative Consequences

There are several potential negative consequences from the emergence of SCs. To the Special Rapporteur, EO presents the best example of the new threats posed by SCs. First, EO is not accountable to any state since it has no formal connections with the South African government.<sup>n439</sup> Second, EO is comprised of ex-members of the most notorious and ruthless commando units of the apartheid regime, used in "mercenary" fashion to attack the sovereignty of southern African countries.<sup>n440</sup> In the past, these individuals acted without concerns of accountability or human rights.<sup>n441</sup> Third, the company engages in actual combat, raising questions of accountability in the field, undue influence on the internal conflicts of a state, and potential human rights abuses. EO's involvement in the field also raises the possibility that it will act solely for its own benefit against all actors (including EO's employers) in the conflict, much as Denard and Schramme led their infamous mercenary revolt in the Congo in 1967.

[\*147] Fourth, EO and other SCs are closely tied to other companies with diverse economic interests, such as arms dealers, energy and mining companies, and construction firms. As a result, EO and other companies appear to be engaging in African and other conflicts solely as a means of obtaining concessions and related contracts for their corporate brethren. By aiding struggling regimes willing to grant valuable concessions, EO and its parent SRC could then gain hegemonic power in the countries, leading a vanguard for the "neocolonialism of the twenty-first century."<sup>n442</sup> Not only does this type of corporate association represent an amalgam of concentrated economic and military power reminiscent of the mercantile companies of the eighteenth century, but it creates the opportunity for greater corruption and influence on the internal dynamics of the employing states.<sup>n443</sup>

Fifth, SCs could fuse their power with that of arms traffickers, drug dealers, and terrorist groups, thereby creating an unholy alliance of non-state agents with the economic, military, and political power to overwhelm states and the state system in general.<sup>n444</sup> They could also assist rogue states unable to receive military aid through the international state system. Sixth, SCs could switch sides in an ongoing conflict based on the highest bidder.<sup>n445</sup> Seventh, SCs could turn

on their home state and represent a challenge to the legitimate use of force in that society. <sup>n446</sup> In the least, SCs are competitors for the best military talent in the home state. <sup>n447</sup> Eighth, SCs could aggravate conflicts and give military life to illegitimate regimes that would otherwise have to settle their conflicts peacefully. <sup>n448</sup> In this sense, SCs could be agents of the status quo, aiding only those governments with enough money to retain power while suppressing potentially legitimate resistance movements. Ninth, the supply of SCs gives incumbent regimes an incentive not to prepare their defense forces properly and to cede their internal security duties to private agents.

Tenth, SCs could fight each other or their own countries' national forces in third-party countries. Even if this scenario does not appear likely, there is the possibility that SCs could drag their home states into conflicts or force them to come to the SCs' assistance with national [\*148] military power. Also, former clients could use the skills learned from SCs against SCs' home states. <sup>n449</sup> Eleventh, SCs may allow countries to supersede public debate about involvement in foreign countries by subcontracting their foreign policy to private companies. Twelfth, SCs also could be used as covert agents. Finally, SCs simply legitimate the profession of mercenarism, thereby unleashing the dangerous threat of mercenaries in general. All of these negative effects represent a potential challenge to the nation-state system and the traditional powers of the state.

## B. Market Forces

These problems, however, are rectified to a great extent by state regulation and the market itself. SCs are legal, registered companies often subject to some form of national regulation. In many countries, the government must license each SC contract, thereby imposing some form of state regulation and accountability for the terms of employment. This reduces the potential for conflicts between the home state and the SC. SCs are profit-making organizations with an interest in appearing legitimate and cooperative with the home state in which they are registered. <sup>n450</sup> In many cases, as with EO and MPRI, much of SCs' revenue originates from their home governments, who are long-term clients; therefore, SCs want to adhere to the policies and interests of their home states. For this reason, SCs usually share information with their home states regarding ongoing contracts even though such revelations are not required by domestic law. SCs' directors and employees are often former members of the home states' military or security institutions. These ex-military members rely on their personal contacts to secure contracts and the good graces of the government. They therefore retain allegiances for both personal and business reasons and will not challenge the authority or policies of these military and social institutions at home or abroad. <sup>n451</sup>

SCs limit their employers to legitimate governments and do not engage in ambiguous civil conflicts in which the population's loyalty is in question, as in Zaire. <sup>n452</sup> Even if not restricted by the government licensing process, SCs restrict themselves in this manner so as to avoid the technical classification as mercenaries, which would result if they worked for insurgencies or rogue states, and to avoid intensified government [\*149] and international scrutiny. <sup>n453</sup> EO has reiterated that its company is devoted to the advancement of legitimate African states and that it contracts with these governments "in order to do work designed to strengthen the self-determination of peoples, their internal stability and thus the possibility of putting economic development policies into practice." <sup>n454</sup> In addition, because of fear for the loss of their personnel, SCs are unlikely to enter extremely violent conflicts that appear unwinnable. Involvement in controversial wars and loss of personnel have economic consequences (higher compensation for survivors and loss of expertise), morale implications (difficulty in future recruiting), and an impact on reputation (less likely to be hired by future customers).

SCs face an economic pressure to remain loyal to their employers. An employing government will not deliver the entire fee until the contract is fulfilled; therefore, an attack on the employer means that the SC will not be paid in full. Furthermore, the employer may represent long-term benefits by renewing its contract, signing new security deals, or requiring the services of an SC's corporate allies, especially in the rebuilding of a country. Also, SCs do not want to be known in the international market as unreliable companies willing to turn on their employers at any point. For example, EO refused to negotiate with Mobutu Sese Seko of Zaire in part because of its contractual obligations to the MPLA government in Angola.

SCs have little incentive to commit wanton human rights violations. Since they are outsiders to the conflict, they tend to be apolitical and less passionate than those with personal stakes. <sup>n455</sup> Instead, SCs try to maintain a "hearts and minds policy" which makes their work in the field easier. <sup>n456</sup> Furthermore, contracting states are not likely to order SCs to perpetrate human rights abuses if the governments are trying to regain the support of the population and the respect of the international community. SCs employ elite military professionals who have worked together in the past, not ragtag miscreants. <sup>n457</sup> SC training forces or combat units, then, are "well-drilled, disciplined force[s]" most often employed to professionalize a country's forces. <sup>n458</sup> [\*150] SCs' ties to other corporate interests give them an economic stake in the peace and stability of a country and region. <sup>n459</sup> Businesses cannot grow amidst chaos, and lucrative rebuilding contracts cannot be signed while wars continue. This runs counter to the notion that mercenaries and SCs profit from the aggravation of war. Moreover the growing market for SCs is in the provision of quick, specialized training for government troops, not in combat engagement; therefore, many of the concerns over battlefield conduct relate only to those marginal SCs which deploy offensive troops. <sup>n460</sup>

In general, the market tempers and dictates SC behavior in such a way that most of the negative ramifications envisioned do not materialize. In addition to market forces, SCs are sensitive to international and domestic attention from the press, nongovernmental organizations, regional groups, their employers, and their home states. As a result of these market and political pressures, SCs have aligned their activities with the interests of their home states and have created a level of accountability.

### C. Advantages

SCs fulfill an important role in international peace and security - a role which has been abdicated by states in many cases. SCs professionalize militaries and restructure officer corps, training them to function within democratic, civilian regimes and to fight under internationally accepted principles of engagement. Such training makes human rights abuses by native forces less likely. The training also diminishes the need for outside intervention in future conflicts since it makes the national forces self-sufficient. SCs allow small, struggling states to obtain quick and effective military expertise when other states are unwilling to devote their national forces or resources to aid besieged governments in their internal conflicts. Rather than being a threat to small states as mercenaries were in the past, SCs give small states a degree of independence from large state support or reliance on regional or international intervention. In part, this explains the attempt by the Papua New Guinea government to hire Sandline International to provide military training and guidance against the BRA. In addition, SCs give governments the military capability to bargain from a position of strength and bring an opposition movement to the negotiating table. <sup>n461</sup> The expense of SCs' [\*151] services forces rulers to make cost-benefit determinations as to the value of continuing to fight versus negotiating settlements. <sup>n462</sup>

Though SCs have economic stakes in the outcome of conflicts, they tend to be objective and apolitical since they are not personally entangled in the internal conflicts fueling the battles. Since most of the professional soldiers and trainers have other jobs and are paid well by SCs directly, they do not volunteer in order to maraud or plunder the countryside. In a situation of social chaos, as appeared in Sierra Leone, such dispassionate agents may be the only way of restoring order.

Low-scale civil conflicts represent a mixture of banditry and civil war fought for control of economic resources. They easily disintegrate into social chaos and spill over into neighboring countries, as seen in the Great Lakes region, West Africa, and the Sudan-Uganda border region. SCs provide the stabilizing, objective internal force that the United Nations and the OAU (among other regional organizations) cannot offer. <sup>n463</sup> In addition, these companies protect humanitarian aid agencies and regional organizations, as seen with EO in Sierra Leone and with MPRI in the former Soviet Republics. EO's effectiveness in providing stability and security has prompted the OAU to consider contracting with EO for continent-wide peacekeeping. <sup>n464</sup>

In sum, the SC market has developed because there is a need for such services in the world. <sup>n465</sup> SCs provide valuable services in restoring order and preventing internal conflicts from becoming international in scope in countries

often ignored by the rest of the world. Yet, SCs have no role in countries with strong, consensual political and social institutions - one reason why EO's presence in PNG was rejected. <sup>n466</sup> SCs professionalize militaries, promoting jus in bello principles and preserving the rights of noncombatants.

For exporting states, SCs are a means of aiding a regime or ally without committing national forces or compromising neutrality. Also, the SC gives ex-military officers, who could be a threat to their home [\*152] states, a professional outlet for their services. SCs are an efficient tool for smoothing trouble spots in the international community, and can be vanguards for peace and stability.

#### D. Conclusion

Even though market forces currently seem to control many of the potential threats presented by the SC market, the market may evolve. The market may become saturated by SCs arising in the former Soviet Republics, other Western states, or Islamic states. This would force SCs to compete for controversial and risky contracts in more volatile environments. The home states of the new SCs may be less restrictive or may encourage SCs to work for rogue allies. SCs might then work for pariah regimes or brutal insurgencies. They could also resort to executing clandestine operations for third states. Similar results could be seen if legitimate employment opportunities diminish. However, given that at least thirty-four countries have contacted EO for its general training services, it does not seem that the legitimate market will shrink soon. <sup>n467</sup>

Regardless of what happens in the SC market, the potential problems with SCs are their lack of accountability and lack of transparency. The latter presents the greatest problem with EO, allowing speculation as to what its activities involve. <sup>n468</sup> SCs are important agents in a changing world order, and their potential excesses must be eliminated. However, total abolition of the services would simply drive organized mercenary activity underground and would result in the excesses hypothesized. <sup>n469</sup>

As a possible solution, SCs must continue to be tied to states. The best way of attaching SC activity to state responsibility is for each SC contract to be licensed by the exporting government. Several countries currently utilize export license regulations to monitor the defense service market, which includes SCs. Through domestic regulation and other state action, it must be made clear that SCs are just as much the responsibility of their home states as that of their contracting states. <sup>n470</sup> This may be the most effective way of controlling and monitoring SCs.

By allowing SCs to exist and not driving their services into a black market, states can regulate their activities and ensure that they are not used in illegitimate ways such as for challenging the sovereignty of states [\*153] or to commit human rights violations. Regulation can isolate mercenaries employed by insurgencies and illegitimate regimes, the real threats to international peace and security. These rogue mercenaries are the unaccountable foreign soldiers that the international community has detested and tried to eradicate since the 1960s. <sup>n471</sup> Isolating these mercenaries would also serve to highlight the illegitimacy of the regimes or organizations employing them, as in the case of Mobutu's regime in Zaire. In contrast, legitimate SCs could profit from regulation of the market. <sup>n472</sup> EO's Eeben Barlow said he would welcome South African regulation of the industry: "There are too many cowboys and fly-by-nights, sometimes using our name, who are giving the industry a bad name." <sup>n473</sup>

Regulating SCs, however, would remove the advantage of giving small states independence from large state support. To a certain extent, the proliferation of SCs would ameliorate this problem. Regulation would also eliminate the advantage to exporting states of appearing neutral in countries where its SCs operate. Creating a licensing regime for defense services would formalize the relationship that already exists between states and their SCs. SCs would become quasi-state agents, the actions of which home states would be responsible for.

#### VI. Licensing Procedures as a Means of Regulating SCs

SC licensing procedures like those currently used by the United States and other countries can provide a model for countries in the regulation of their respective SCs. As noted above, SCs provide valuable services and have proven effective in creating stability and security in chaotic environments. The market forces that currently restrain the behavior of these companies, however, may shift so as to make their services threaten the sovereignty of states and the rights of peoples to self-determination. By regulating the international security market via licensing regimes, the international community would create a market for legitimate SCs while ostracizing rogue mercenaries and dangerous SCs.

There are other viable, yet less effective, options to control the SC market. The United Nations could attempt to formulate an [\*154] international convention to regulate the market. Though there would probably be a general consensus among states as to the legitimacy of SCs, attempts to formulate an international convention would trigger innumerable disputes revolving around definitions, range of services, and inconsistent national laws. Even assuming that a convention could be formulated, the construction could take years, while the market continued to evolve without regulation.

Another avenue by which to control SCs is bilateral agreements between home states and contracting states. Generic treaties linked to aid packages could be signed between larger home nations and potential customer states. On the other hand, contract-specific treaties could explicitly delegate responsibility for SC activities and responsibilities. Countries could use these treaties to lock out SCs considered undesirable or dangerous for international security. Countries that see a potential need for SCs, however, are not likely to enter into limiting bilateral agreements unless induced by other advantages like increased military or economic aid from the exporting country. Such countries will desire to keep their options open so as to have the best selection of SCs; therefore, they are not likely to lock out specific SCs.

The most effective way of regulating the SC market is to assign responsibility to exporting states. Countries could pass legislation prohibiting particular types of activities or the export of defense services to certain regions or countries, as envisioned in the Diplock Report. The same definitional problems would persist under this approach. To best achieve state responsibility and SC transparency, states should regulate the SCs through national registration and contract-specific licensing regimes. This would clarify SCs' role as quasi-state agents, and states could take advantage of the efficiencies of the SCs in their foreign policy. Home states would be responsible for the excesses of their SCs and unregistered SCs could be sanctioned with civil and criminal penalties.

For example, the United States and Israel, among other countries, already apply to their SCs legislation adopted for arms and technology transfer. <sup>n474</sup> In the United States, the export of defense services is regulated under the provisions of 22 U.S.C. 120-130, entitled "International Traffic in Arms Regulations." Section 38 of the Arms Export Control Act authorizes the President to control the import and export of defense articles and defense services. <sup>n475</sup> Section 120.9 defines defense service as the following:

(1) The furnishing of assistance (including training) to foreign persons, whether in the United States or abroad in the design, development, engineering, manufacture, production, [\*155] assembly, testing, repair, maintenance, modification, operation, demilitarization, destruction, processing or use of defense articles; or

(2) The furnishing to foreign persons of any technical data controlled under this subchapter (see 120.10), whether in the United States or abroad. <sup>n476</sup>

Any company that either manufactures or exports defense articles or provides defense services must register with the State Department's Office of Defense Trade Controls (DTC). <sup>n477</sup> Exporters must obtain a license pursuant to section 123 in order to conduct business abroad. <sup>n478</sup> The licensing procedure is handled by DTC, but Congress must be notified of certain types of exports, such as those of major defense equipment defined in section 120.8. <sup>n479</sup> In the

course of approving a license application, DTC will obtain the advice of relevant agencies like the Department of Defense or country desks at the State Department. <sup>n480</sup> DTC resolves any disputes in accordance with larger U.S. policy goals. <sup>n481</sup> [\*156] Firms may appeal adverse decisions by the DTC. <sup>n482</sup> The licenses are valid for four years or for the duration of the completion of the contract, whichever occurs first, and they may be amended as long as there are no material changes to the elements of the contract. <sup>n483</sup>

In addition to registration and licensing procedures, there is U.S. government oversight of SC activity at various stages. The "Blue Lantern Program" is a program that monitors the registration of companies, while the State Department maintains post-license, pre-shipment checks. The level of continued regulation depends on the nature of the contract and whether there are specific laws relevant to the contract. At all phases, the U.S. government promotes its interests by controlling U.S. exporters.

The Israeli government follows a similar procedure. In order for a national security company to work abroad, the company must have the approval of the Ministry of Defence. <sup>n484</sup> Export legislation controls military know-how, including "services relating to military equipment including information, instruction, training ... military organization, operation, defense policy, [and] combat theory." <sup>n485</sup> There is a two-stage licensing process for the export of controlled goods: the negotiation of the permits, and the determination of the appropriateness of export permits (licenses).

The foreign policy objective of Israeli defense export controls is "[t]o restrict the export of defense goods and technology where necessary to further the foreign policy of Israel, and to fulfill international obligations." <sup>n486</sup> The Ministry of Defence will only approve licenses for export to legitimate governments and to governments whose activities are in accord with the foreign policy goals of Israel. <sup>n487</sup> Israel views the export of its military expertise as just as worthy of control as the export [\*157] of military equipment. Israel clearly uses the export of its military expertise, including SCs, to further its interests abroad. The government ensures that SCs do not challenge or jeopardize its international relations by subjecting SCs to rigorous export controls tied directly to policy considerations.

In South Africa, the government is currently debating legislation, the Foreign Military Assistance Bill, which would subject SCs like EO to export controls similar to those imposed on arms exports. The National Conventional Arms Control Committee would control registration and licensing procedures, while the Ministry of Defence would offer its opinion on the desirability of particular contracts. <sup>n488</sup> The bill provides for a maximum penalty of ten years or a fine of one million rand (approximately \$ 225,000). <sup>n489</sup> In this way, the South African government is attempting to harness the growing power of EO in Africa and quell the international concern over the resurgence of South African military dominance on the continent. <sup>n490</sup>

The canceled PNG contract proved especially embarrassing for the Mandela government since Australia, New Zealand, and the United States (and the PNG military) protested the injection of "South African" military power into the ongoing conflict in Bougainville. A potential problem with the legislation is that it might be designed too strictly so as to destroy the native SCs, thereby driving EO and other companies to other countries. EO, like most other SCs, would prefer to stay in its home state where it feels more comfortable, can recruit more easily and can retain close ties with its home government, a major client. However, if the restrictions become too onerous, EO could easily resettle in other countries willing to house such a successful and stabilizing firm. <sup>n491</sup>

This type of legislation reflects the reality that governments must face. In the international community, SCs represent the military expertise of their home state and implicate the presence of the home state regardless of how distanced the SC appears to be. The Mandela government has become aware that the activity of EO in Africa represents a "South African" presence. In addition, SCs are the repositories of valuable national information such as military strategy and "know-how." Allowing such vital information to flow freely throughout the international market threatens the sovereignty of the exporting state. As a result, states realize that they must regulate and monitor SCs. Countries [\*158] have used defense export controls and licensing procedures to harness the positive attributes of SCs while curbing the potential excesses.

The development of these laws and standards eventually will form an international norm in which states are expected to regulate the export of SC expertise. In such a regime, home states will begin to hold each other responsible for any excesses of their respective SCs. Although responsibility for SCs' actions will be shifted to contracting states, it is clear, given current state practice, that home states realize the implications of SC contracts. SCs implicate their home states, and state responsibility flows from their activities abroad.

## VII. Conclusion

In 1991, the military historian Martin van Creveld wrote a book entitled *On Future War*. He predicted that future conflicts are likely to take the form of small-scale wars waged by "groups we today call terrorists, guerrillas, bandits, and robbers, but who will undoubtedly hit on more formal ties to describe themselves." <sup>n492</sup> He describes this transformation as follows:

The spread of sporadic small-scale war will cause regular armed forces themselves to change form, shrink in size, and wither away. As they do, much of the day-to-day burden of defending society against the threat of low-intensity conflict will be transferred to the booming security business; and indeed the time may come when the organizations that comprise that business will, like the condottieri of old, take over the state. <sup>n493</sup>

To some degree, van Creveld's predictions are proving correct. In Africa, bands of armed profiteers wage low-intensity battles over valuable economic resources. Weak and disorganized states are ill-equipped to contain the chaos these bandits spread. Larger, more capable states and the international community are usually unwilling to commit their national troops to help restore the internal order of collapsing states. Instead, weak states have found it more convenient, efficient, and reliable to hire foreign SCs which offer effective, objective, and immediate military expertise. The success and popularity of firms like EO and MPRI and the continued expansion of this market are a testament to the need for their services. Indeed, SCs are a modern-day permutation of condottieri built into the nation-state system.

However, SCs have not overtaken the state. The SCs' reliance on their respective home states and contracting states for their economic survival have forced SCs to restrain their contracts. SCs work only for recognized regimes and act professionally in the field. They work in conjunction with international aid organizations and have not posed any threat to the sovereignty of states. On the contrary, SCs have reinforced the sanctity of the nation-state system by providing stability to faltering, [\*159] yet legitimate regimes. They have fought the agents of chaos and have worked as restorers of the state. With their services, SCs quell the threats to the integrity of the international system and international peace and security which include undisciplined and untrained national troops, roving bandits, and terrorist groups. Ironically, SCs, as quasi-state agents, have become the nation-state system's bulwark against destabilization, a role SCs have played effectively and diligently.

There is a debate in the international community about how to deal with SCs. The numerous U.N. resolutions and the International Convention regarding mercenaries were developed in response to the emergence of destabilizing mercenary forces in post-colonial Africa. The customary international law that has developed, therefore, reflects the international community's concern with the unbridled violence of unaccountable individuals who could thwart movements of national liberation, launch coups, or aggravate ongoing civil unrest. The gravamen of the international community's concern has been the accountability and transparency of these private actors. But these laws have not restrained the use of mercenaries:

Beyond formal resistance or the adoption of a stance of denying or minimizing the number of mercenaries and shared responsibility for their use, it is a fact that they are a resource used with a pragmatism that is morally and legally

unacceptable because of what "mercenary" means and what a mercenary is worth as a professional of war and violence. Despite the condemnations contained in the resolutions of several United Nations bodies, Governments whose power is illegitimate, armed insurgent groups and Powers acting through covert operations have been responsible for the existence of mercenary activities, with a heavy toll on the peoples whose lives they affect. <sup>n494</sup>

The illegitimate employers of mercenaries - including terrorists, arms traffickers, drug cartels, alien governments, insurgencies - represents a union of nonstate actors that poses a direct threat to the state-based system. <sup>n495</sup> In this context, mercenary activities can only exist (as defined) within an illegitimate context. Foreigners hired by these types of organizations are mercenaries because their employers are illegitimate in the eyes of the state-based system.

Yet, in the case of SCs, there is a two-fold problem that has dovetailed into an international dilemma. First, SCs constitute a legal, corporate form of military service devoid of many of the negative consequences endemic in the deployment of "wild geese" mercenaries. Second, SCs have only worked for legitimate governments which are either democratically elected or are recognized by the United Nations. Therefore, although they in some ways resemble mercenaries, SCs operate professionally within the legitimate, state-based system. The regulation of mercenaries is limited to rogue military professionals who work for [\*160] unaccountable bodies within the state system. Mercenaries, therefore, are distinguished from legitimate fighters or advisors by the illegitimacy of their employer.

Unlike the soldiers of fortune feared by all, SCs have promoted stability by empowering weak states against chaotic forces and have gained widespread public approval in the contracting countries. As repeat market players, SCs are constrained by profit motives and have accumulated an admirable human rights record. <sup>n496</sup> They have been accountable to their home states as a matter of good business, and their legal status has forced them to be fairly transparent.

However, there is no guarantee that the market forces that currently shape SC behavior in accordance with accepted norms of the international state system will not change. Companies like EO which are unconstrained by specific national regulations could become a destructive force and come to resemble an organized form of classical mercenarism. As a result, all states should regulate their SCs through licensing procedures that align SCs' contracts with the policies of their home states. In this manner, SCs would become agents of the state and, therefore, accountable to the international community for their actions. Widespread adoption of these regulations would help create a new customary international law which would define SCs as contractors of the home and employing states.

Small states have taken it upon themselves to provide for their own security and not wait for the benevolence of larger states or the international community. In this sense, SCs have acted as a strike force for the United Nations in countries where the United Nations would like to intervene but has been unable to do so. The international community has already begun to consider directly taking advantage of the efficiencies these SCs provide. The United Nations and regional security organizations may consider using SCs as peacekeepers given the difficulty international organizations currently have of reacting quickly to escalating conflicts.

Several authors have proposed that the United Nations enlist former Gurkhas or the Foreign Legion to do its dirty work since these groups have a reputation of being efficient, effective, and objective in their services - traits often lacking in national troops sent as peacekeepers. <sup>n497</sup> There is widespread agreement that the United Nations must react more quickly to festering conflicts and that it is constrained by institutional and logistical shortcomings. <sup>n498</sup> As a result, the United Nations has been [\*161] forced to sacrifice its objectivity by subcontracting some of its duties to regional hegemony in order to achieve its peacekeeping goals. In Haiti, Rwanda, Georgia, and Bosnia-Herzegovina, the United Nations has acquiesced to regional powers who have volunteered to lead peacekeeping missions. <sup>n499</sup> Some U.N. policymakers have proposed the creation of a U.N. Legion, comprised of volunteers, which could react quickly and independently of state donations of national troops. <sup>n500</sup> SCs seem to fill a void in an international market thirsty for stability and security. Other international groups and NGOs like humanitarian aid organizations and missions in Sierra Leone and the former Soviet Republics may find it useful to contract with SCs to ensure that their aid is delivered properly and their workers are protected. <sup>n501</sup>

In a world where roving mobs can threaten the political integrity of a nation-state and threaten the tranquillity of the state's neighbors, SCs provide a useful service that should be harnessed. In places like Uganda, where teenage thugs terrorize the northern farmlands and render the area uninhabitable, SCs may prove effective in restoring security and order.

Martin van Creveld stated the following about state security:

The most important single demand that any political community must meet is the demand for protection. A community which cannot safeguard the lives of its members...is unlikely either to command their loyalty or to survive for very long. The opposite is also correct: [A]ny community able and, more importantly, willing to exert itself to protect its members will be able to call on those members' loyalty even to the point where they are prepared to die for it. <sup>n502</sup>

SCs help states provide the security they need to retain order in an age of low-scale conflict. As a result, a new hybrid of the dog of war has [\*162] evolved. What has emerged is a private organization that operates as a quasi-state agent to restore the sovereignty of the state, not to destroy it. It has been said that "[m]ercenaries are a product of a world which believes in the efficacy of force." <sup>n503</sup> Similarly, SCs are a product of a world that needs security.

### Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law  
Foreign Businesses  
General Overview  
International Law  
Sources of International Law  
International Law  
Sovereign States & Individuals  
General Overview

### FOOTNOTES:

n1. Many authors have analyzed the disintegration of the bipolar international security system. See, e.g., Joseph S. Nye, Jr., Peering into the Future, *Foreign Aff. Jul./Aug. 1994* at 82, 87. According to Nye, the Cold War dynamic has evolved into a complex power structure similar to a three-dimensional chess game. At the top level is a military board which is unipolar and dominated by the United States. In the middle is an economic board on which three blocs - the United States, Japan, and the European Union - dictate the terms of the world economy. The bottom level consists of "diverse transnational relationships outside the control of governments," including terrorism, environmental degradation, financial flows, and drug trafficking. See *id.* at 87.

n2. Nye refers to this trend as the "return of history," in which conflicts that the Cold War blocs had previously frozen begin to thaw. See *id.* at 86. In using the term the "return of history," Nye is responding to the "end of history" theory expounded by Francis Fukuyama. See Francis Fukuyama, *The End of History and the Last Man* (1992). Fukuyama argues that with the collapse of the Soviet Union and the demise of communism as a legitimate alternative to the Western model of market-oriented democracy, the world has reached the "end of history" in the sense that there are no longer any real alternatives to the pervasive Western sociopolitical and economic model. See *id.* at 48-50. According to Samuel Huntington, the new world is "multipolar and multicivilizational." Samuel Huntington, *The Clash of Civilizations and the Remaking of World Order* 29 (1996). He argues that "the most pervasive, important, and dangerous conflicts will [be]...between peoples belonging to different cultural entities." *Id.* at 28.

n3. See Edward N. Luttwak, *Where Are the Great Powers? At Home with the Kids*, *Foreign Aff. Jul./Aug. 1994*, at 23. Historically "great powers" were those states which were strong enough to "successfully wage war without calling on allies." *Id.*

n4. These include Israeli, U.S., French, British, South African, Ukrainian, and Russian companies. Growing isolationism and tighter national budgets have spurred the downsizing of militaries throughout the world and the closure of U.S. military bases. The withdrawal of the United States from Clark Base and Subic Base in the Philippines indicates the willingness of the United States to close bases which were previously considered vital to its own security. See generally Implications of the U.S. Withdrawal from Clark and Subic Bases: Hearing Before the Subcomm. on Asian and Pacific Aff. of the House Comm. on Foreign Aff., 102d Cong. 13 (1992).

n5. Several countries have contracted with foreign SCs. SCs also provide standard corporate security services for multinational companies. The focus of this Article, however, will be on the use of SCs by foreign governments to provide military-related services.

n6. More SCs are sprouting in militarily developed countries as established SCs enter into lucrative deals with foreign governments.

n7. See discussion *infra* Part III.A.

n8. See discussion *infra* Part III.B.

n9. See, e.g., Elizabeth Rubin, An Army of One's Own, Harper's Mag., Feb. 1997, at 44, 54.

n10. See Herbert Howe, South Africa's 9-1-1 Force, Armed Forces J. Int'l, Nov. 1996, at 38. See also discussion *infra* Part III.A.

n11. See *id.*

n12. See Robert Fox, Fresh War Clouds Threaten Ceasefire: Secret U.S. Military Advice Helps 'Cocky' Croats Push Towards Eastern Slavonia, Sunday Telegraph, Oct. 15, 1995, at 26. See also discussion *infra* Part III.B.

n13. The European Community has complained vigorously to the United States about the Equip and Train Program. See discussion *infra* Part III.B.

n14. There are several characteristics which make mercenaries repulsive to the modern international community. First, individuals who volunteer to fight in foreign wars are seen as insipid assassins who lack morals or restraint and who have a pecuniary interest in the prolongation of wars. Second, since they are unaccountable to any state or international authority, they are unrestrained in the tactics they use, including humanitarian abuses. Third, the lack of state accountability allows states to use such combatants covertly as cannon fodder without worrying about international or domestic protest. Fourth, mercenaries simply aggravate war by introducing additional force.

n15. In addition, SC contracts are one-time business transactions which create no political debt to repay, unlike more formal nation-state aid. SCs provide a semblance of objectivity that is lacking in national troops, as seen with the French mission in Rwanda and the ECOMOG intervention in Liberia.

n16. This is a recurrent criticism of mercenary behavior. See discussion *infra* Parts II, III.

n17. "Movements of national liberation" are rebellions against oppressive racist or alien regimes. See G.I.A.D. Draper, *Wars of National Liberation and War Criminality*, in *Restraints on War: Studies in the Limitation of Armed Conflict* 135, 158 (Michael Howard ed., 1979); see also discussion *infra* Part IV.B.

n18. See Roundtable Discussion in *Executive Outcomes: 911 Emergency Call?*, Center for Strategic & Int'l Studies (Washington, D.C.), Herbert Howe, Professor, School of Foreign Service, Georgetown University (Jan. 23, 1997).

n19. See discussion *infra* Part III.

n20. See Report 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, submitted by Mr. Enrique Bernales Ballesteros, Special Rapporteur, pursuant to Commission Resolution 1995/5 and Commission Decision 1996/113, U.N. ESCOR, 53d Sess., Agenda Item 7, P 89, U.N. Doc. E/CN.4/1997/24 (1997) [hereinafter *Mercenaries Report*].

n21. An "international volunteer is a person who enlists in a foreign force to take part in its operations, for a variety of reasons." Pietro Verri, *Dictionary of the International Law of Armed Conflict* 120 (Edward Markee & Susan Mutti trans., 1992).

n22. See discussion *infra* Part IV.A.

n23. See *id.*

n24. See discussion *infra* Part IV.B.

n25. Some examples include the Nigeria-Biafra Civil War, the Seychelles, the Comoros Islands, Benin, the Sudan, and Angola.

n26. There is an acceptance in the international community of certain types of foreign combatants such as Gurkhas and members of the French Foreign Legion. See John Laffin, *The French Foreign Legion* 156 (1974).

n27. Article 51 of the U.N. Charter states: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security." U.N. Charter art. 51. See discussion *infra* Part IV.D.

n28. U.N. Charter art. 2(7).

n29. In most countries, SCs are regulated to varying degrees. In the United States, where regulation is most stringent, defense service companies and those who transfer technical equipment or information must register with the U.S. government. In South Africa, the legislature is debating strict legislation which would require state approval for any defense service contract. See discussion *infra* Part IV.

n30. "Low-intensity conflict" or "low-intensity warfare" can be defined as actions that "occupy a gray area on the spectrum of conflict, representing a state that is neither peace nor war." Mark Uyeda, *Presidential Prerogative Under the Constitution to Deploy U.S. Military Forces in Low-Intensity Conflict*, 44 *Duke L. J.* 777, 827 (1995).

n31. Max Weber defined the state as that political organization which has a "monopoly of the legitimate use of physical force in the enforcement of its order." Max Weber, *Economy and Society* 54 (Guenther Roth & Claus Wittich eds., 1978).

n32. "Mercenarism" refers to the forms and development of mercenary practices. For the purposes of this Part, a mercenary will be defined broadly as a person serving in a combat role for a state or entity other than his home country. See generally Peter Tickler, *The Modern Mercenary: Dog of War or Soldier of Honour* 15 (1987). For an extensive discussion of the definition and attendant problems with the standard definition of mercenaries, see discussion *infra* Part IV.A. By consensus on June 8, 1977, the United Nations adopted the Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflicts (ProtocolII), 16 *I.L.M.* 1391 (1977) [hereinafter ProtocolII or Additional ProtocolII]. ProtocolII entered into force on December 7, 1978

n33. " For though history in a general sense may not do so, mercenary history most certainly does repeat itself." Anthony Mockler, *The New Mercenaries* 9 (1985).

n34. " Mercenaries continue to be used on an ad hoc basis for 'small' wars, though their participation is often more in response to their home states' political goals than to the blind forces of an international market for the mercenaries." Janice E. Thompson, *State Practices, International Norms, and the Decline of Mercenarism*, 34 *Int'l Stud. Q.* 23, 30 (1990).

n35. Mercenarism is not the only mutation of nonstate force. Privateering, pirating, and other forms of the use of violence, sanctioned or not by a country, have existed. The distinctions between such alternative forms of nonstate violence and SCs will be explored briefly below.

n36. " So strong has this almost instinctive feeling become that to be a mercenary is in itself immoral that it is generally forgotten how comparatively recent and illogical this sentiment is." Mockler, *supra* note 33, at 7.

n37. See Thompson, *supra* note 34, at 23-24. In the late twentieth century, 90% of the nation-states recruit exclusively within their home territory. In the eighteenth century, this pattern was reversed: there were large contingents of foreigners in most European armies. The typical army of officers and troop contingents were 20% to 30% foreign. See Janice E. Thompson, *Mercenaries, Pirates, and Sovereigns: State Building and Extraterritorial Violence in Early Modern Europe* 95-96 (1994).

n38. See Mockler, *supra* note 33, at 16.

n39. See Tickler, *supra* note 32, at 15.

n40. See Josiah Ober, *Classical Greek Times*, in *The Laws of War: Constraints on Warfare in the Western World* 12, 23 (Michael Howard et al. eds., 1994).

n41. See *id.* at 25.

n42. See Marie-France Major, *Mercenaries and International Law*, 22 *Ga. J. Int'l & Comp. L.* 103, 104 (1992); see also Chief R.O.A. Akinjide, *Mercenarism and International Law* 3 (1986). The Gothic and Vandal adventurers Alaric and Stilicho began their military careers as mercenary generals for the Romans. See Geoffrey Trease, *The Condottieri: Soldiers of Fortune* 12 (1970).

n43. See Mockler, *supra* note 33, at 5. Carthage recruited mercenaries from sub-Saharan Africa for its wars with Rome. See Akinjide, *supra* note 42, at 3.

n44. See Robert C. Stacey, The Age of Chivalry, in *The Laws of War: Constraints on Warfare in the Western World* 27, 32 (Michael Howard et al. eds., 1994).

n45. See Thompson, *supra* note 37, at 27.

n46. See *id.*

n47. See Trease, *supra* note 42, at 17; see also Thompson, *supra* note 37, at 27. Royal retinues included knights, men-at-arms, mounted archers, and other fighters. Each had a different pay scale, and the contracts divided booty and ransom money between the troops, the commander, and the king. See Trease, *supra* note 42, at 17. By the sixteenth century, any hostile act required the order of a sovereign authority, and in order to share in the booty, a soldier's name had to appear on the official lists of the victorious army. See Stacey, *supra* note 44, at 39.

n48. See Mockler, *supra* note 33, at 9.

n49. See *id.* at 10.

n50. See *id.*; see also Thompson, *supra* note 37, at 27-28.

n51. One such company was the White Company, led by Albert Sterz and later by Sir John Hawkwood, which offered the service of archers and of knights with their pages. See Mockler, *supra* note 33, at 11-12.

n52. See Joseph Jay Deiss, *Captains of Fortune 15-17* (1966); see also Trease, *supra* note 42, at 17-18. The history of the condottieri coincides with the Italian Renaissance, which stretched from the early thirteenth century to the early sixteenth century. The condotta itself varied according to the needs of the employer. There could be retaining fees, troop number specifications, operational details, or restrictive

covenants not to fight against the employer for a certain period of time. See *id.* at 17-18. Machiavelli wrote the following regarding the origin of the condottieri: "So Italy having fallen almost completely into the hands of the Church and of a few republics, and the priests and other citizens being unused to military service, they started to hire outsiders as soldiers." *Id.* at 8.

n53. See Trease, *supra* note 42, at 25. The problem of chronic internal dissension and party conflicts in Italian city-states led rulers to distrust their subjects and to hire outsiders with no parochial interests. Another example of this distrust was the podesta, the chief magistrate of a city. The city-state hired an eminent foreigner to serve as the podesta for a single year, providing an attractive salary and restricting his socializing, so as to avoid impartiality or corruption. See *id.* at 22.

n54. See *id.* at 23.

n55. See *id.* at 342.

n56. See *id.* at 331-32.

n57. Besides mercenarism, states utilized other forms of nonstate violence. Mercantile companies like the Dutch East India Company and the Hudson Bay Company acted as semi-sovereign entities. They were given trade monopolies and full sovereign powers: the power to raise armies and navies, to build forts, to declare war, to coin their own money, and to govern their "nationals." Some companies, like the Dutch West India Company, used military force to attack other nations' shipping or other interests. See Thompson, *supra* note 37, at 32-33. Privateering, which grants the owner of a private sailing vessel a commission of war, was yet another tool used by states to allow nonstate actors to engage in violence abroad. The privateer was required to post a bond to ensure that he complied with the government's instructions, and his commission was subject to inspection by public warships. See *id.* at 22-23. A good example of the use of privateers is the English "sea dogs" - Drake, Cavandish, Clifford, and Raleigh - in the New World. See *id.* at 23. Thompson argues that the states could exploit these nonstate entities to colonize, conquer, and control other parts of the world without having to accept responsibility if their ventures failed. The notion of "plausible deniability" died out in the eighteenth century when states started to consolidate the use of force abroad and began to hold each other responsible for the actions of their respective nationals. See *id.* at 21, 32-33, 84-88.

n58. See Thompson, *supra* note 34, at 24.

n59. See Thompson, *supra* note 37, at 30-31; see also Mockler, *supra* note 33, at 8.

n60. See Thompson, *supra* note 37, at 28; see also David Potter, The International Mercenary Market in the Sixteenth Century: Anglo-French Competition in Germany, 1543-50, 111 *Eng. Hist. Rev.* 24, 58 (Feb. 1996). German princes dominated the supply in the mercenary market, and those states which retained close diplomatic ties to German princes and captains were able to recruit mercenaries more easily. See *id.* at 24-25. The nature of the German contracts is instructive to the development of mercenarism. Based on the credit of the employer, a colonel would sign a contract. He would then hire as many captains as necessary to recruit the appropriate number of men.

The captains would in turn recruit men under a license. See *id.* at 27.

n61. See Thompson, *supra* note 37, at 29.

n62. See *id.*

n63. See Mockler, *supra* note 33, at 5.

n64. See Harold E. Selesky, Colonial America, in *The Laws of War: Constraints on Warfare in the Western World* 59, 77 (Michael Howard et al. eds., 1994). The German states of Hesse, Hanover, Baden, Brunswick, and Waldeck became the major suppliers for the English Crown. See Thompson, *supra* note 34, at 24. The British also hired certain Indian tribes to attack the Americans. For the Americans, the British use of mercenaries was an appalling practice that left a lasting impression on their national psyche. See Mockler, *supra* note 33, at 5.

n65. See Thompson, *supra* note 34, at 24.

n66. See Thompson, *supra* note 37, at 19.

n67. See *id.* at 56. The United States in 1794 passed the Neutrality Act, which, among other things, forbade citizens from accepting foreign commissions or enlisting in the service of other states. This law set an international standard for neutrality, and several countries followed suit, such as Great Britain in 1819. For a list of those states that passed some form of regulation from 1794 to 1938, see *id.*, tbl. 4.2 at 81. For a more detailed discussion of the countries' laws, see *infra* Part IV.B.

n68. See Thompson, *supra* note 37, at 4.

n69. See Thompson, *supra* note 34, at 34. For example, in 1870, the Belgian king requested that French legionnaires of Belgian extraction withdraw from their participation in the Franco-Prussian War. The Belgian monarch feared that the participation of Belgian nationals would jeopardize his country's neutrality. See Yves Debay, *The French Foreign Legion Today* 46 (1992).

n70. See Thompson, *supra* note 37, at 54.

n71. See Thompson, *supra* note 34, at 26.

n72. See Mockler, *supra* note 33, at 7.

n73. In addition to other rights, the March 4, 1816 Treaty of Segauli gave the British the right to recruit Nepalese subjects. The Nepalese government did not actively aid in the recruitment of its own subjects until a change in the Durbar in 1886. See Byron Farwell, *The Gurkhas* 29-31, 73 (1984). Currently, Gurkhas serve in the British and Indian national armies and were used with deadly effect in the Falkland Island/Malvinas War with Argentina. See *id.* at 12, 32. In recent years the British have reduced the number of Gurkha battalions from seven to two, one located in Brunei and the other in Britain. See Ignatius Stephen, *Gurkhas to Stay on in Brunei to Protect Oil Fields*, *The Straits Times* (Singapore), Feb. 27, 1997, at 23.

n74. The French have traditionally used foreign soldiers in their armies. The National Assembly created the Foreign Volunteer Legion in 1792 in the face of a feared Prussian invasion. Napoleon used foreign troops to wage his wars, but his legions were disbanded in 1815. This group of foreign soldiers reappeared as the Royal Foreign Legion and then as the Regiment of Hohenlohe. See Erwan Bergot, *The History of the Legion*, in *The French Foreign Legion: The Inside Story of the World-Famous Fighting Force 9, 9* (John Robert Young ed., 1984).

n75. See James Wellard, *The French Foreign Legion* 21 (1974).

n76. See Thompson, *supra* note 37, at 89-90. "Seconding" refers to the practice of temporarily assigning an officer to serve in a similar capacity in the armed forces of a second country, which pays for his services. The British, French, and Belgians have all engaged in this practice with their respective ex-colonies. See Gerry S. Thomas, *Mercenary Troops in Modern Africa* 2 (1986). For example, the Sultan of Oman used British troops in the 1969 Dhofar War to suppress a communist rebellion. In this arrangement, the Sultan paid not only for the use of the troops but for their replacement and for their prior training. See Tickler, *supra* note 32, at 124-26.

n77. See Stanley Robert Larsen & James Lawton Collins, Jr., *Allied Participation in Vietnam* 2-3 (1975).

n78. Such individuals are different from international volunteers like the 35,000 foreigners who fought in the International Brigades for the Republican side in the Spanish Civil War, as the volunteers enlisted for little or no remuneration for their ideological cause. See Thompson, *supra* note 37, at 93. The issue of motivation as a definitional marker for distinguishing between mercenaries and volunteers will be discussed *infra* in Part IV.A.

n79. There are many theories as to why mercenaries in this form appeared in Africa during decolonization. Most theories point to the

withdrawal of the traditional regional powers from direct military involvement and the absence of centralizing forces to unify diverse ethnic and tribal communities. In addition, the tenuous legitimacy of the ruling regimes combined with ineffective militaries led many fledgling states and challengers to employ outside military expertise, usually European. See Thomas, *supra* note 76, at 14-27; see also Colin Legum, *Communal Conflict and International Intervention, in Africa in the 1980s: A Continent in Crisis* 23, 23-24 (Catherine Gwin ed., 1979).

n80. See Mockler, *supra* note 33, at 37.

n81. See *id.*

n82. See *id.* at 40. Tshombe received the service of 20 French officers, among other foreign troops and officers. There was an ample supply of French troops from the 1<sup>st</sup> [su'er] Regiment Etrangere de Parachutistes, which had been disbanded in April 1962 after its generals took power in Algeria in violation of French orders to withdraw. See Tickler, *supra* note 32, at 18-19.

n83. There has been speculation as to the connection between the mercenaries and the mining company Union Miniere. See Mockler, *supra* note 33, at 54.

n84. The name of the U.N. force was United Nations Operation in the Congo (ONUC). See discussion *infra* Part IV.B. From 1960 to 1964, 34 nations contributed to the U.N. peacekeeping force, which acted more like an aggressive peace-enforcement contingent than a traditional peacekeeping force. See Thomas, *supra* note 76, at 3. Among other operations, the U.N. force controlled important lines of communication and prevented the Katangese from conducting military operations. See *id.* Classical peacekeeping actions in the interstate context are governed by three main norms: (1) the requirement of the consent of the parties; (2) neutrality of the U.N. force; and (3) the use of force only in self-defense. See Abram Chayes, *Notes on International Law and the Control of Deadly Conflict* (Discussion Paper prepared for the Carnegie Commission on the Prevention of Deadly Conflict), at 5. According to Chayes, the U.N. operation in the Congo broke with the mold of previous U.N. interventions in that it lacked a well-defined interstate element. See *id.*

n85. See Mockler, *supra* note 33, at 55-56.

n86. Independent mercenaries also operated in other regions such as the Middle East, where the withdrawal of the British left a military vacuum filled by mercenaries and seconded officers from the British armed forces. In Yemen, the Royalists of El Badr hired former Congo mercenaries Bob Denard and Goosens, who trained soldiers during the conflict. See Tickler, *supra* note 32, at 122-23.

n87. According to Thomas, mercenaries have played three roles in Africa since 1960: (1) as "operational maneuver groups" acting under the direct control of heads of state; (2) as "coup strike forces" financed to overthrow existing governments; and (3) as "internal paramilitary security" popular in South Africa as defensive ranch-and-range security forces for private farms. See Thomas, *supra* note 76, at 6-7.

n88. See Tickler, *supra* note 32, at 20-21. Tshombe asked Mike Hoare to create the Five Commando group, composed of mercenaries, which would become a permanent part of the Congo's armed forces. See Sudanese Ambassador Mohed Omer Beshir, *Mercenaries in Africa* 5 (1972). In November 1965, General Mobutu Sese Seko seized control of the government from President Kasavubu, who had previously exiled Tshombe. Mobutu enlisted the help of the French Foreign Legion to suppress the Shaba uprising. The Organization of African Unity supported Mobutu's decision to ask for French help. See Thomas, *supra* note 76, at 3. Israelis began to train the Congolese army after Tshombe departed. See Beshir, *supra*, at 6.

n89. The two mercenaries joined forces after Mobutu ordered Hoare to disarm Schramme, who had amassed great individual influence in the Marienna region, where he owned a large plantation. Denard instead sided with Schramme, and they attempted to overthrow Mobutu. See Beshir, *supra* note 88, at 6; see also Tickler, *supra* note 32, at 25. This revolt is reminiscent of the betrayal of the Duke of Athens in 1311 by the Grand Catalan Company as described in *supra* text accompanying notes 49-50. These examples point to the danger of mercenaries acquiring resources and influence within a particular country that can challenge the authority and power of the existing regime. See discussion *infra* Part III.A. Following the mercenaries' retreat to Rwanda, there was a major controversy as to what to do with them. The OAU formed a committee of ten states to determine a course of action, and the mercenaries were eventually allowed to return to Europe. See Beshir, *supra* note 88, at 8-9.

n90. Much like a modern condottieri, the existence of a company or agency like Mercenaire International that contracted out mercenaries on an independent basis seems to be a predecessor of the modern SC. See Thompson, *supra* note 37, at 93-94; see also Tickler, *supra* note 32, at 117-21. Britons, Egyptians, Rhodesians, and South Africans fought for the federal side, while Americans, Germans, French, and South Africans fought for the Biafrans. See Thompson, *supra* note 37, at 93-94.

n91. See Beshir, *supra* note 88, at 22.

n92. See *id.* at 18.

n93. See Wilfred Burchett & Derek Roebuck, *The Whores of War: Mercenaries Today* 16 (1977); see also Thompson, *supra* note 37, at 93-94; Tickler, *supra* note 32, at 62-64.

n94. See Tickler, *supra* note 32, at 62-64. Eventually, four men were executed by the Angolan government - three Britons and one American. See Thompson, *supra* note 37, at 94. See generally *Mercenaries in Africa: Hearing Before the Special Subcomm. on Investigations of the House Comm. on Int'l Relations, 94th Cong., 2d Sess. 10 (Aug. 9, 1976)* [hereinafter *Hearings*].

n95. See Mockler, *supra* note 33, at 235-57, 298-309; see also Thompson, *supra* note 37, at 93-94, 100-03. In 1978, the deposed president of the Comoro Islands hired Denard to restore him to the presidency. After returning to power, the president named Denard Defense Minister, Commander-in-Chief of the Army, and Chief of Police. Under extreme international pressure, Denard was later forced to resign although he had converted to Islam and had become a Comoro Island citizen, taking the name Colonel Said Mustapha M'hadju. See *id.* at 94; see also Mockler, *supra* note 33, at 256-57. For a complete list of attempted coups after 1975, see Thomas, *supra* note 76, app. B at 7. It is argued that France and South Africa supported the mercenary activities against the Marxist regimes in the Comoro Islands and the Seychelles. See *id.* at 133.

n96. See Mockler, *supra* note 33, at 239-40. General Eyadema of Togo and President Bongo of Gabon supported the coup attempt along with Beninois opposition leaders, and King Hassan of Morocco allowed Denard to train his troops on a Moroccan military base. See *id.* at 243.

n97. See *id.* at 244-47.

n98. See Beshir, *supra* note 88, at 10-13. For a more complete discussion of the OAU, see discussion *infra* Part IV.B.

n99. In Angola, for example, the United States, Britain, and Portugal had important oil and diamond interests at stake. See Burchett & Roebuck, *supra* note 93, at 16. There were valuable interests at stake in Biafra and Katanga as well: At the time, Katanga produced 60% of Congo's GNP, while Biafra contained Nigeria's most productive oil fields. See Thomas, *supra* note 76, at 12-14.

n100. See Beshir, *supra* note 88, at 7. For a thorough discussion of the resolutions passed, see discussion *infra* Part IV.B. For a definition of "national liberation movements," see Draper, *supra* note 17, at 158.

n101. See Thomas, *supra* note 76, at 3. African countries have also helped other African regimes when requested. Among other deployments, the Moroccans sent troops to help Mobutu in Zaire in 1978, and Senegalese troops helped Gambia in 1981. See *id.*

n102. For example, the OAU applauded Mobutu Sese Seko's call on the French to support his regime in 1978, while the United Nations fought against the mercenaries hired by the Katanganese in their battle against the Congo's ANC. The international community condemned the use of mercenaries by the Biafrans in their secessionist battle in Nigeria, while African countries did not reproach Nigeria for its employment of mercenaries. See *id.*

n103. The United Arab Emirates relies almost exclusively on mercenaries from Oman, Yemen, Jordan, Pakistan, and Great Britain. The Omani and Quatari armies are composed of Pakistanis and Britons. The Solomon Islands hires soldiers from Fiji and Great Britain. Ghana's army includes volunteers from francophone states. See Thompson, *supra* note 37, at 90-91.

n104. Great Britain seconds its officers to the Sultan of Oman, the Sultan of Brunei, and to Qatar. Greece seconds its officers to Cyprus. French officers serve in the armies of the Ivory Coast and Cameroon. Under the 1950 Taejon Agreement, the U.N. unified command, under U.S. control, runs the South Korean armed forces. See *id.* For a list of foreigners in current standing armies, see *id.*, tbl. 4.6 at 92.

n105. See Mockler, *supra* note 33, at 15. The Saudi Arabian monarchy hires Pakistani officers to serve in its army, national guard, and palace guard. See Thompson, *supra* note 37, at 90-91. Even the Vatican uses the Swiss Guard to guard its territory and the Pope. See Mockler, *supra* note 33, at 15.

n106. In Zaire, at least two hundred French, Belgian, British, and South African mercenaries in addition to Serbian and Ukrainian mercenaries began fighting for Mobutu against Laurent Kabila's rebel movement, the Alliance of Democratic Forces for the Liberation of Congo-Zaire (ADFL). See *Waiting for the Rebels*, *Economist*, Mar. 8, 1997, at 43; see also *Fortune of Soldiers*, *Hous. Chron.*, Feb. 28, 1997, at 38. The mercenaries have been unable to help the Zairean army withstand the major offensive by the rebels moving west. See Marcus Mabry, *Soldiers of Misfortune*, *Newsweek*, Feb. 24, 1997, at 40. For a general discussion of the mercenary presence on both sides of the conflict in Zaire, see Sean Boyne, *Rebels Repel Zaire Counter-Offensive*, *Jane's Intelligence Rev.*, Apr. 1, 1997, at 183.

n107. See Arich O'Sullivan, *Israeli Mercenaries in Congo May Face Fellow Israelis*, *AP Worldstream*, Feb. 3, 1994, available in LEXIS, News Library, AP News File. See also Tim Kennedy, *Israeli Legislators Seek to Halt Export of Arms, Mercenaries to Congo*, *Moneyclips*, Feb. 24, 1994, available in LEXIS, News Library, Moneyclips File. The U.N. has expressed its concern "at new unlawful international activities linking drug traffickers and mercenaries in the perpetration of violent actions which undermine the constitutional order of States." *International Convention Against the Recruitment, Use, Financing and Training of Mercenaries*, G.A. Res. A/44/34, U.N. GAOR, 44th Sess., 72nd mtg. (1989) [hereinafter *International Convention*].

n108. See Rubin, *supra* note 9, at 54.

n109. See *id.*

n110. See *id.*

n111. See Burchett & Roebuck, *supra* note 93, at 7. Christopher Robbins argues that the CIA maintained large corporations, including a group of airlines, that served as fronts for CIA and mercenary operations. Air America, which included Civil Air Transport, Intermountain, Air Asia, and Southern Air Transport among others, was the largest airline in the world at one point. See Christopher Robbins, *Air America* 16-17 (1979).

n112. For a general discussion of the growth of the security market, see Sudarsan Raghavan, *Africa Puts Its Money Where Its Fear Is*, *Bus. Wk.*, Jul. 15, 1996, at 52.

n113. In South Africa, the ranch-and-range security force model has been employed for years. These domestic, paramilitary security forces

are independent and well-organized companies devoted to the defense of large farms from terrorists and bandits. Traditionally, these contracts tend to be short in duration. See Thomas, *supra* note 76, at 7.

n114. There are several companies registered as security companies in South Africa: Combat Force, Investment Surveys, Honey Badger Arms & Ammunition, Shield Security, Kas Enterprises, and Longreach Security. Most offer commercial or private security services, although Longreach Security worked for the government of the Seychelles in 1986. See Report, *supra* note 20, P 65.

n115. The South African military intelligence formed the Civil Cooperation Bureau as a covert assassination and espionage unit to eliminate enemies of the apartheid state. See Rubin, *supra* note 9, at 44. Eeben Barlow and his deputy, Lafras Luitingh, are no longer associated with EO. Nick Van den Bergh, a former Parabat, is the new CEO. He was responsible for EO's operation in Angola and headed its aborted operation in Papua New Guinea. See *id.*

n116. Michael Ashworth, *Africa's Army for Hire*, 43 *World Press Rev.* 36 (Dec. 1996). EO provides ranch-and-range security for foreign companies in Sudan, like the Canadian oil concern Arakis International, and for South African farmers concerned with their safety. See *Arakis to Hire Mercenaries to Protect Sudan Oil Fields*, *Afr. News*, Oct. 17, 1996, available in LEXIS, News Library, Africa News Service File; see also *Former Apartheid Soldiers Hired to Protect Farmers*, *Xinhua News Agency*, Dec. 17, 1996, available in LEXIS, News Library, Xinhua News File.

n117. Michael Ashworth, *Privatising War*, by the Executives, *Indep.*, Sept. 16, 1996, at 1.

n118. See Howe, *supra* note 10, at 38. EO uses Ukrainian and South African pilots, but the rest of its staff presently comes from the SADF or South African Police. See *id.* at 39.

n119. See generally Jeremy Harding, *The Mellow Mercenaries*, *Guardian*, Mar. 8, 1997, at 32.

n120. According to some estimates, salaries may range from \$ 2000 to \$ 13,000 per month; a captain in EO earns four times as much as a captain in South Africa's elite Parabat Brigade, a special unit in the SADF. See Howe, *supra* note 10, at 39.

n121. See *id.* at 39.

n122. EO's spokesperson in Sierra Leone stated that EO "sees itself as a force for stability in Africa. We hope to create, by establishing a balance of power, the conditions for free and fair elections." *We're the Good Guys These Days*, *Economist*, Jul. 29, 1995, at 32; but see Howard W. French, *Now for Hire: South Africa's Out-Of Work Commandos*, *N.Y. Times*, May 24, 1995, at A3 ("Experts in African

military affairs say there are indications that the group [EO] has opened talks with the Sudan, Somalia, Mozambique and Malawi.").

n123. See *We're the Good Guys These Days*, supra note 122, at 32; see also Chris Erasmus, *Corporate Army Commander Denies the Dogs of War Tag*, USA Today, Mar. 4, 1997, at 4A.

n124. In reference to the impact of EO on both conflicts, Philip van Niekerk wrote: "Beyond dispute is that the South Africans - who handle intelligence, logistics, communications, training, and planning - have made all the difference between a fighting force and an ill-disciplined band." See Howe, supra note 10, at 38.

n125. EO's original contract with Angola involved the recapture and protection of the oil town of Soyo, the site of oil installations belonging to the government-controlled Sonagol company. EO's success in that mission led to the larger contract. See Michael Ashworth, *Africa's New Enforcers*, *Indep.*, Sept. 16, 1996, at 2 [hereinafter Ashworth, *Enforcers*]; see also Danielle Gordon, *No Peace for South Africa's Wand'ring Warriors*, 52 *Bull. Atom. Scientists* 5 (May 1996).

n126. The civil war has cost Angola over 500,000 lives, displaced thousands, littered the country with landmines, and destroyed the economy and infrastructure. See Al J. Venter, *Anguish in Angola*, *Soldier of Fortune*, Dec. 1996, at 63 [hereinafter Venter, *Anguish in Angola*]; see also Bob Drogin, *Hired Guns Turn Tide in Angola*, *L.A. Times*, Oct. 29, 1994, at A10.

n127. See Howe, supra note 118, at 38.

n128. See Judith Mbuya, *Soldiers-for-Hire Also Advise Governments on Rebellions*, *Wash. Times*, Mar. 6, 1997, at A12; see also David Tucker, *Guns for Hire in Angola After War's End*, *Reuters World Service*, Jan. 25, 1996, available in LEXIS, News Library, Reuters News File.

n129. A retired SADF brigadier stated that EO "made an invaluable contribution to the operations of MPLA in the field. If Unita had not signed the cease-fire, one could easily conceive of them having been wiped out." French, supra note 122, at A3; see also *We're The Good Guys these Days*, supra note 122, at 32.

n130. See Harding, supra note 119, at 32.

n131. See Venter, *Anguish in Angola*, supra note 126, at 56.

n132. See Mbuya, *supra* note 128, at A12.

n133. See Phillip Van Niekerk, *Africa's Diamond Dogs of War*, *Observer*, Aug. 13, 1995, at 19.

n134. See *id.*

n135. EO complained of soldiers addicted to drugs and alcohol and a general lack of discipline. See Al J. Venter, *Sierra Leone's Mercenary War Battle for the Diamond Fields*, 28 *Int'l Def. Rev.* 65, 67 (1995) [hereinafter Venter, *Diamond Fields*]. Furthermore, Sierra Leone soldiers were known to moonlight as rebel troops. These soldiers became known as "sobels" (soldiers by day, rebels by night), and their banditry added to the chaos in the country. See Rubin, *supra* note 9, at 49.

n136. For a general discussion of the state of the RSLMF and EO's military participation in the civil war, see Venter, *Anguish in Angola*, *supra* note 126, at 65-68.

n137. See Jim Hooper, *Peace in Sierra Leone: A Temporary Outcome?*, *Jane's Intelligence Rev.*, Feb. 1997, at 91.

n138. See Venter, *Anguish in Angola*, *supra* note 126, at 66. For a discussion of the Gurkha Security Guards, see discussion *infra* Part III.C.

n139. RUF was twelve miles away from the capital in May 1995 when the first EO troops arrived. See Van Niekerk, *supra* note 133, at 19. For a description of the tactics used by RUF, see Alan Rake & Sheku Saccoh, *Sierra Leone - Hijacked*, *New Afr.*, Apr. 1995, at 9.

n140. See Kevin Whitelaw, *Have Gun, Will Prop Up Regime*, *U.S. News & World Rep.*, Jan. 20, 1997, at 46, 46-47; see also Van Niekerk, *supra* note 133, at 19.

n141. By early 1995, RUF had captured Sierra Leone's major revenue-generating regions: the alluvial diamond fields in Kono, the titanium oxide ore mine at Gbangbatok, and the bauxite mine at Mokanji. See Hooper, *supra* note 137, at 91.

n142. See Whitelaw, *supra* note 140, at 46.

n143. See Hooper, *supra* note 137, at 91.

n144. See Rubin, *supra* note 9, at 48; see also Donald G. McNeil, Jr., *Pocketing the Wages of War*, N.Y. Times, Feb. 16, 1997, at 4.

n145. See generally Ashworth, *Enforcers*, *supra* note 125, at 2; see also Rubin, *supra* note 9, at 52-54.

n146. The Chief of Staff, Brigadier Julius Maada Bio, deposed Captain Strasser on January 16, 1996, partly because of Captain Strasser's unwillingness to hold elections. See Hooper, *supra* note 137, at 91.

n147. See *id.*

n148. See *id.*

n149. Clause 12 of the Accord specifies that EO had to cease its operations and be confined to its barracks, although President Kabbah wanted to retain its training services. See *id.* For a discussion of the peace accords and the problems with their implementation, see generally *Sierra Leone: Peace, Perhaps*, *Economist*, Dec. 7, 1996, at 41.

n150. See Hooper, *supra* note 137, at 91.

n151. Whitelaw, *supra* note 140, at 46.

n152. See *Mercenaries and Troops Escort Schoolchildren Back Home*, *Agence France Presse*, Oct. 9, 1996, available in LEXIS, News Library, *Agence France Presse* File.

n153. EO helped the charity Children Associated With War with the project. See Harding, *supra* note 119, at 32; see also Roundtable Discussion, *supra* note 119.

n154. See Lansana Fofana, *Sierra Leone-Politics: Mercenary Exit Leaves Some Hearts Heavy*, Inter Press Service, Feb. 10, 1997, available in LEXIS, News Library, Inter Press Service File; see also Al J. Venter, *Not RUF Enough, Soldier of Fortune*, Dec. 1995, at 36 (describing a Sierra Leone ticker-tape parade with which EO was greeted upon its arrival as an indication of the population's desperation); Rubin, *supra* note 9, at 53-54.

n155. A Canadian U.N. negotiator stated that "E.O. gave us this stability. In a perfect world, of course, we wouldn't need an organization like E.O., but I'd be loath to say they have to go just because they are mercenaries." Rubin, *supra* note 9, at 48.

n156. See Stefaans Brummer, *The Forces of Freetown*, Mail & Guardian, June 6, 1997, available in LEXIS, News Library, Africa News Service File.

n157. See Howe, *supra* note 118, at 39; see also Roundtable Discussion, *supra* note 119.

n158. Van Niekerk, *supra* note 133, at 19 (quoting EO director Lafras Luitingh).

n159. Eeben Barlow has even stated that EO takes the human rights record of the potential employing country into consideration before accepting a contract. See Erasmus, *supra* note 123, at 4A.

n160. See Michael Ashworth, *PNG's Private Army Spurs Australia into Action*, *Indep.*, Mar. 13, 1997, at 45 [hereinafter Ashworth, *Action*]. PNG won independence from Australia in 1975. The Bougainville secessionist movement became violent when landowners were displeased with the environmental impact and financial package given to Australia's CRA mining company at the Panguna copper mine. Bougainville is a mineral-rich island. An estimated 10,000 people have died in the nine-year uprising, and 35,000 have been displaced. See Lachlan Colquhoun, *Australia Blunders Further into Bougainville Minefield*, *Asia Times*, Mar. 3, 1997, at 9.

n161. See Ashworth, *Action*, *supra* note 160, at 11; see also *Papua New Guinea Hires Mercenaries*, *Wash. Times*, Feb. 28, 1997, at A16. The contract stipulated that Sandline "direct, participate in and conduct" operations to render the BRA "militarily ineffective." Line in the Sand, *Economist*, Mar. 29, 1997, at 40.

n162. See Ashworth, *Action*, *supra* note 160, at 11.

n163. See *id.*

n164. See *id.*

n165. See *Australia Pushes New Plan for PNG's Troubled Bougainville*, Deutsche Presse-Agentur, Mar. 10, 1997, available in LEXIS, News Library, Deutsche Presse File. As an inducement to PNG, Australia agreed to train PNGDF soldiers to fight in Bougainville if Sandline were not allowed into Bougainville. See *id.* Sir Julius Chan stated: "I think the Australians have let us down. I just can't imagine really why the Australians are not coming spontaneously to help us to bring all this to a conclusion." PNG PM, Orogen Co. Distance Mining Industry from Row, Asia Pulse, Feb. 26, 1997, available in LEXIS, News Library, Asia Pulse File.

n166. General Singirok's public opposition to the contract, which he had helped negotiate, may have been a political move to save his position, which was in jeopardy after major military bungles in Bougainville. See Ashworth, *Action*, *supra* note 160, at 45.

n167. See *Line in the Sand*, *supra* note 161, at 45.

n168. EO and its affiliates are apparently involved in Malawi, Zambia, Ghana, Uganda (and maybe Algeria) serving in various capacities from military training to installing phone systems. See generally *An African Success Story?*, *Foreign Rep.*, Jan. 30, 1997, available in LEXIS, News Library, Jane's Information Group File.

n169. Some reports estimate that EO's corporate network includes up to 80 companies. See Philip Winslow, *The Business of War*, *MacLean's*, Nov. 6, 1995, at 36; see also Howe, *supra* note 118, at 38.

n170. See generally *Harding*, *supra* note 119, at 32 (discussing EO's vast corporate ties).

n171. See generally *Diamond Dogs of War*, *The Fifth Estate*, CBC, Transcript #46415-2, Feb. 4, 1997 (focusing on EO's ties with DiamondWorks, Carson Gold, and Branch Energy); see also Talifdeen, *Mercenaries Capitalize on Mineral Resources*, *Jane's Def. Wkly.*, Nov. 13, 1996, at 5.

n172. See Howe, *supra* note 118, at 39; see also Roundtable Discussion, *supra* note 119; Mercenaries Report, *supra* note 20, P 109.

n173. For example, foreign mining interests from South Africa, Canada, and the United States have already begun to negotiate with Laurent-Desire Kabila for the right to mine the valuable mineral reserves of eastern and southern Zaire. See Robert Block, *As Zaire's War Wages, Foreign Businesses Scramble for Inroads*, *Wall St. J.*, Apr. 14, 1997, at 1.

n174. See Howe, *supra* note 118, at 39.

n175. Mercenaries have fought in Zaire, but these apparently do not include EO members. These mercenaries, instead, are the typical "wild geese" hired as individuals. Serbians, French, Belgians, and other Western mercenaries have failed to help Mobutu's forces, and some have committed grave humanitarian violations. France has been accused of organizing these forces and sending its own troops to help Mobutu, its ally. See Paul Webster, *Mercenaries Head for Zaire*, *Guardian*, Jan. 8, 1997, at 13.

n176. See Marcus Warren, *Mobutu's Rebel War Goes Out to Tender*, *Sunday Telegraph*, Dec. 15, 1996, at 23. Since EO has become so well-known, any sighting of a white mercenary is presumed to connote the presence of EO. See Roundtable Discussion, *supra* note 119.

n177. Barlow stated that "if [EO] started to work for the Zairean government against the wishes of the Angolan government then we would lose credibility and probably existing contracts we have with other governments." Mary Dejevsky and Michael Ashworth, *Officers Accused Over "White Legion"*, *Indep.*, Jan. 8, 1997, at 8.

n178. See Mabry, *supra* note 106, at 40, 41.

n179. See *Executive Outcomes Accused of Hiring Mercenaries to Destabilize Namibia*, *BBC Summary of World Broadcasts*, Apr. 11, 1997, from SAPA News Agency, Johannesburg.

n180. See Mercenaries Report, *supra* note 20, P 98 (describing the South African government's disavowal of connections to EO).

n181. See Khareen Pech, *South Africa Tries to Ban Mercenaries*, *Jane's Intelligence Rev.*, Feb. 1, 1997, at 13. For a more detailed discussion of this proposed legislation, see discussion *infra* Part VI.

n182. See South African Defence Act 44 of 1957, reprinted in JUTA Statutes, vol. 1, at 3-90; see also Pech, *supra* note 181, at 13.

n183. See Nicola Byrne, *Uneasy Pretoria Attempts to Put Leash on Dogs of War*, *Scotland on Sunday*, Feb. 2, 1997, at 11.

n184. See *Gunning for Mercenaries*, *Indian Ocean Newsl.*, No. 753, Feb. 15, 1997, available in LEXIS, News Library, Indian Ocean Newsletter File. In my interview with Colonel Chris Gildenhuis of the South African Embassy in Washington, D.C., he discussed the frequent meetings and reciprocal sharing of information between the SADF and EO. He reiterated, however, the South African government's disapproval of EO's activities and its desire to pass new legislation to control EO. Interview with Colonel Chris Gildenhuis, South African Military Attache Officer, at South African Embassy, Washington, D.C. (Jan. 24, 1997).

n185. See Roundtable Discussion, *supra* note 119; Interview with Colonel Gildenhuis, *supra* note 184. It is unclear whether the SADF realized why the leaves of absence were being requested, since ten-year veterans can request an extended leave of 60 days for study, sickness, job interviews, or overseas travel. See *id.*

n186. Eeben Barlow stated:

I'm not sure how we can be an embarrassment. The fact is that we have brought stability into Angola through the training of its armed forces. We have helped bring stability to Sierra Leone. We have employed a large number of people who were not employed...taken them out of circulation in terms of them not posing a threat.

Lynne Duke, *South Africa's Ex-Soldiers Becoming "Dogs of War," Hous. Chron.*, Mar. 24, 1996, at A29.

n187. Three countries have offered a new home to EO. See *An African Success Story?*, *supra* note 168.

n188. See Peter Alexander, *South Africa's Veterans Recruit Army of Outlaws*, *Sunday Telegraph*, Apr. 6, 1997, at 28.

n189. See *New Career for Spies*, *Intelligence Newsl.*, No. 284, Mar. 21, 1996, available in LEXIS, News Library, Intelligence Newsletter File.

n190. For example, Science Applications International Corp. (SAIC) provides military training as a supplement to the sale of its equipment and technology. SAIC is a San Diego-based government contractor that touts itself as an authority on national security, reactor physics, and telecommunications projects. See *Employees Protected: RHCs Sell Bellcore Unit to Defense Contractor for \$ 700 Million*, *Comm. Daily*,

Nov. 22, 1996, at 1.

n191. Founded in 1931, Vinnell Corp. began as a Los Angeles-area construction company but later evolved into a military intelligence firm. For a general history of Vinnell, see William D. Hartung, Inc. Mercenaries, *Progressive*, Apr. 1996, at 26. According to several reports, former U.S. Secretary of State James A. Baker III and former U.S. Defense Secretary Frank Carlucci are members of a partnership that controls Vinnell. See *Africa and the Mideast*, *Orange County Reg.*, Mar. 23, 1997, at A3. Vinnell's parent company, BDM International, is also a defense contractor and has researched issues like the use of microwave weapons to destroy enemy radar. See Tony Capaccio, *Air Force Moving Forward with Microwave Weapons Research*, *Def. Wk.*, Sept. 25, 1995, available in LEXIS, News Library, IAC Newsletter File. BDM International primarily employs engineers, scientists, and computer experts as consultants, and 50% of BDM's work is defense related. See Richard Whittle, *U.S. Officials Plan to Train Bosnia Troops*, *Dallas Morning News*, Jan. 20, 1996, at 1A.

n192. The initial contract signed in February 1975 was worth \$ 77 million. The current contract is worth \$ 163 million. The total cost of the package to train, equip, and modernize the Saudi National Guard is estimated to cost \$ 5.6 billion. See Dana Priest and John Mintz, *Bomb Spotlights U.S. Aid to Saudis*, *Int'l Herald Trib.*, Nov. 15, 1995, at 5. BDM and Vinnell together use about 1000 employees to fulfill their many contracts to train the Saudi National Guard, Royal Air Force, and Royal Land Forces as well as to develop Saudi computer software and maintain their equipment. See *id.*

n193. See Hartung, *supra* note 191, at 26.

n194. See *id.*

n195. See *id.*

n196. MPRI's founders are all retired U.S. military leaders and most serve as corporate officers of MPRI. The following is a list of the founders and a sampling of their most significant positions: General Frederick J. Kroesen (Chairman of the Board), Commander-in-Chief of U.S. Army Europe, Commander U.S. Army Forces Command, and Vice Chief of Staff of the Army; Major General Vernon B. Lewis, Jr. (President, CEO), Director of Requirements on the Army Staff and Assistant Commandant of the Field Artillery School; General Robert C. Kingston, Commander-in-Chief of U.S. Central Command and Commander of the Rapid Deployment Joint Task Force; Lieutenant General Richard D. Lawrence (Member of Board of Directors), President of the National Defense University and Commandant of the Army War College; General Robert W. Sennewald, Commander-in-Chief of U.N. Command and Commander of U.S. Army Forces Command in the United States; and Lieutenant General Richard L. West (Corporate Treasurer), Comptroller of the Army and Director of the Army Budget. In addition to the impressive credentials of the company's founders, its current corporate staff is comprised of some of the most impressive former U.S. military experts and leaders: Lieutenant General Harry E. Soyster (Vice President of International Operations), Director of Defense Intelligence Agency and Commander of U.S. Army Intelligence and Security Command; General Carl E. Vuono (Vice President and General Manager of the International Group), Chief of Staff of the U.S. Army and Commander of Training and Doctrine Command; and Rear Admiral Richard A. Appelbaum (Vice President of Maritime Programs), Chief of the Office of Law Enforcement and Defense Operations and Chief of the Office of Navigation Safety and Waterway Services in Coast Guard Headquarters. For a discussion of MPRI's impressive roster of U.S. military expertise, see generally Fred Bayles, *Firm Offers Generals for Rent*, *Rocky Mountain News*, Nov. 26, 1995, at 5A.

n197. See Stan Crock, *Trouble Is Our Business*, Bus. Wk., Nov. 20, 1995, at 52. The company has 160 full time employees and over 2000 officers on call in its database. See Mark Thompson, *Generals for Hire*, Time, Jan. 15, 1996, at 34 [hereinafter *Generals for Hire*].

n198. See *Generals for Hire*, supra note 197, at 34. Some estimates gauge the company's annual revenues at over \$ 15 million. In its corporate brochure, MPRI promotes its ties to the U.S. government by stating that its "[c]orporate offices are in Alexandria, Virginia, with ready access to the Pentagon and other Government facilities. MPRI has business cells and/or field representatives at several military installations across the United States and in overseas locations." MPRI Corporate Brochure. MPRI spokesperson, retired Lieutenant General Harry E. Soyster, readily admits that MPRI inevitably benefits from the expansive personal and professional networks of its retired military corporate officers. Interview with Lieutenant General Harry E. Soyster, Vice President of International Operations for MPRI, in Alexandria, VA (Jan. 23, 1997).

n199. For an exhaustive list of MPRI's contracts to date, see MPRI Corporate Experience Report, 4th Quarter 1996. It should be noted that most of MPRI's government contracts have been awarded after competitive bidding.

n200. See *Military Talent for Sale*, Intelligence Newsl., No. 277, Dec. 7, 1995, available in LEXIS, News Library, Intelligence Newsletter File. By 1994, MPRI had shipped more than \$ 380 million worth of humanitarian assistance to republics of the former Soviet Union. See generally Joni Balter, *Charities Urged to Try to Keep Donations from Going Overseas*, Seattle Times, Dec. 17, 1994, at A1.

n201. See Bradley Graham, *U.S. Firm Exports Military Expertise*, Wash. Post, Aug. 11, 1995, at A1; *Generals for Hire*, supra note 197, at 34.

n202. MPRI's foreign contracts must be licensed by the State Department. See discussion infra Part VI; Interview with General Soyster, supra note 197 ; Interview with Ambassador James Pardew, U.S. Special Representative for Military Stability in Yugoslavia, in Washington, D.C. (Jan. 17, 1997) (stating that the players in the Balkan conflict saw MPRI as an agent of the United States despite the fact that MPRI had no official status).

n203. See Bayles, supra note 196, at 5A. Hungary in particular has expressed interest in hiring MPRI as a means of modernizing its military forces, thereby making its forces more capable of being integrated into NATO forces and facilitating Hungary's entry into the defense alliance. Hungary has yet to hire MPRI, however, partly because it would like the U.S. government to pay for MPRI's services. See Interview with General Soyster, supra note 197 (explaining the interest of Eastern European countries in U.S. military know-how).

n204. Though MPRI denies involvement in Angola, some reports assert that MPRI has contracted to train FAA troops and to open a training academy for noncommissioned officers. See Al J. Venter, *U.S. Forces Guard Angolan Oilfields*, Mail & Guardian, Oct. 10, 1997, available in LEXIS, Nexis News, Africa News Service File.

n205. See generally Anthony Davis, *Sri Lanka Steps Up Naval Special Forces Training*, Jane's Def. Wkly., Aug. 28, 1996, at 18. General

Soyster claims that MPRI's proposal did not involve working with a Special Boat Squadron, nor did the company ever expect to conduct such work. See Interview with General Soyster, *supra* note 197.

n206. See Interview with General Soyster, *supra* note 197.

n207. See Graham, *supra* note 201, at A1.

n208. See Charlotte Eagar, *Invisible U.S. Army Defeats Serbs*, *Observer*, Nov. 5, 1995, at 25. Many critics of U.S. policy in the Balkans point to the U.S. acquiescence to MPRI training of Croatia's military as one of several maneuvers by the U.S. government to aid the Croats tacitly in violation of the arms embargo. These critics claim that the United States stopped policing the embargo in fall 1994 and turned a blind eye to arms shipments to the Croats by grounding AWACS when arms drops were being made. Claims of U.S. support of the Croats have been buttressed by allegations that C-130's have periodically dropped shipments near Tuzla and that the United States has shared photos taken by its unmanned spy planes. See *id.* at 25; see also *Croatia: Tudjman's New Model Army*, *Economist*, Nov. 11, 1995, at 48.

n209. MPRI calls the program it initiated in Croatia the "Democracy Transition Assistance Program" (DTAP), which includes training officers and civilian officials in the areas of leadership, management, and civil-military operations within a democratic framework. Its current contract extension, dubbed DTAPII, extends through Oct. 14, 1998. See MPRI Corporate Experience Report, 4th Quarter, 1996, at 6-7.

n210. This contract is called the "Long Range Management Program" (LRMP).

n211. See Roger Cohen, *U.S. Cooling Ties to Croatia After Winking at Its Buildup*, *N.Y. Times*, Oct. 28, 1995, at 1.

n212. Several news reports attempt to link the increased aggressiveness of the Croatian military to the introduction of MPRI training. Some of the reports point to the personnel utilized by MPRI in Croatia, led by General Carl Vuono and General Crosbie E. Saint, Commander of the U.S. Army in Europe from 1988 to 1992. Some U.N. civil and military officers believe that MPRI played a direct role in the Croatian offensives which regained much of Croatia's territory. See Fox, *supra* note 12, at 26.

n213. See Cohen, *supra* note 211, at 1.

n214. See Alan Cowell, *Conflict in the Balkans*, *N.Y. Times*, Aug. 1, 1995, at A6.

n215. See Fox, *supra* note 12, at 26.

n216. See Samantha Knight et al., *The Croatian Army's Friends*, U.S. News & World Rep., Aug. 21, 1995, at 41. According to U.N. officers, the Croatian commando crossing of the River Una into Serb-held Bosnia was a "textbook U.S. field manual river crossing. The only difference was the troops were Croats." Eagar, *supra* note 208, at 25.

n217. U.S. sources have stated the following: MPRI does

not do anything involving military tactics or operations; they focus on the professional relationship between officers and men, human rights abuses, military justice and accountancy. There is no sense in thinking fifteen retired American generals can be responsible for Croatia's military successes. In fact, it's rather flattering for people to assume they can make such a difference.

Interview with General Soyster, *supra* note 197. Eagar, *supra* note 208, at 25. General Soyster of MPRI disputes the allegation that MPRI had 15 generals in the region. Soyster states that MPRI had 13 officers, one of whom was a general, and two noncommissioned officers in total involved in DTAP.

n218. See Graham, *supra* note 201, at A1. MPRI argues that it is not in its business interest to breach the terms of its license, since such a violation would harm its reputation and jeopardize future license applications or contracts with the U.S. government. MPRI also avers that it retains strong allegiances to the United States and would never engage in any activity that would subvert or undermine U.S. policy or regulations. See Interview with General Soyster, *supra* note 197. The question remains whether the U.S. government tacitly approved of the license violation and if MPRI would run the risk of having its violation exposed. MPRI states that its contract in Croatia has "no connection whatsoever with American intelligence [and] we do nothing in this contract for the U.S. government." Jeremy L. Milk, *Ex-U.S. General Denies Role in Croat Advances*, Daily Yomiuri, Aug. 16, 1995, at 4.

n219. See *Generals for Hire*, *supra* note 197; MPRI Corporate Brochure, *supra* note 197; Interview with General Soyster, *supra* note 197. General Soyster, as MPRI's spokesperson, denied any involvement in the Croatian offensive: "We [MPRI] were not in the field with the Croatian forces, nor involved in strategic planning, nor asked to be." Fox, *supra* note 12, at 26.

n220. Defense analyst Paul Beaver of Jane's Defense Publications stated the following in reference to the Croatian military's transformation: "They are organized as a proper army. If you look at television footage they are wearing American uniforms, they are looking very smart, they have a rank structure...regiments, brigades. All that contributes to war ability." Maggie Fox, *Croatian Army Had Ex-Soviet Weapons*, U.S. Training, Reuters N. Am. Wire, Aug. 7, 1995, available in LEXIS, News Library, Reuters News File.

n221. See Cohen, *supra* note 211, at 1.

n222. One commentator has stated that the Croats' increased battlefield prowess was linked to MPRI's training and constituted a "vital element in the shift of political balance between the warring parties of Croatia and Bosnia." Fox, *supra* note 12, at 26.

n223. See Paul Harris, *The Secret War that Forced the Accord 13* (1995). It appears that the United States operated with the understanding that "[m]ight is right and the force of military arms was what would ultimately bring the parties to the table." *Id.*

n224. The United States pledged \$ 100 million in surplus arms, uniforms, and radio gear to the Bosnian Federation. Turkey agreed to provide \$ 2 million in training to the Bosnians, and it hosted an aid conference for the purchase of material. See Vago Muradian, *United States to Transfer Tanks, Helicopters to Bosnia*, *Def. Daily*, Jun. 7, 1996, available in LEXIS, News Library, Defense Daily File. At the Turkey Conference on March 15, 1996, donors from the Middle East (including Egypt, Saudi Arabia, Kuwait, and the United Arab Emirates), Malaysia, and Pakistan pledged between \$ 700 and \$ 800 million for the acquisition of tanks, armored personnel carriers, anti-tank weapons, and night-vision glasses and for the training costs of Federation forces. See Elizabeth Sullivan, *United States Fired Up Over Training Bosnian Forces*, *Plain Dealer*, Mar. 3, 1996, at 8A; see also John Barnham, *United States and EU Split Over Bosnian Rearmament*, *Fin. Times*, Mar. 15, 1996, at 18; *Generals for Hire*, *supra* note 197, at 34. Given the arms embargo, shipments of different classes of armaments were exported according to the phased-out restrictions of the embargo. For example, heavy weaponry such as tanks, large artillery, and planes could not be exported to Bosnia until June 11, 1996, while small firearms could be exported after Mar. 13, 1996. See Daniel Nelson, *Arms Flows Threatens Balkan Peace*, *Def. News*, March 25/31, 1996, at 27.

n225. In the words of U.S. Senator Joseph Biden (D-Delaware), "[The United States] will not be able to leave [the Balkans] unless the Bosnian government is armed and prepared to defend itself." *Generals for Hire*, *supra* note 197, at 34.

n226. Assistant Secretary of State for European and Canadian Affairs John Kornblum stated the following: "One of the important things that we're achieving through the train-and-equip is to push the defense structures in the federation, the Muslims and the Croat, into one single structure." *Nightline: Program Arms, Trains Bosnians* (ABC television broadcast, Nov. 19, 1996) [hereinafter *Program Arms, Trains Bosnians*]. The Federation agreed to a Force Structure for the Federation Armed Forces on January 11, 1997, which established an integrated joint Muslim-Croat army of approximately 30,000 to 35,000 troops. The United States has continued to use the allure of U.S. weaponry to force the Bosnians and Croats to integrate. See generally John Pomfret, *Bosnia's Croats and Muslims, Threatened with Loss of U.S. Arms*, *Merge Defense*, *Wash. Post*, Oct. 3, 1996, at A25. For an overview of the integration of the forces, see generally Norman Erik, *The HVO: A Credible Force*, *Jane's Intelligence Rev.*, Apr. 1, 1997, at 150.

n227. *General Framework Agreement for Peace in Bosnia and Herzegovina*, Nov. 21, 1995, Annex 1B, art. IV ("Measures for Sub-Regional Arms Control"), P 1, I.L.M. at 110 [hereinafter *Dayton Agreement*] (emphasis added).

n228. Interview with Ambassador Pardew, *supra* note 202. Before the parties signed the Dayton Agreement, President Clinton made a commitment to the Senate majority leader that the United States would lead an international effort to train and arm the Bosnian army. The U.S. Senate Arms Committee publicly reiterated Clinton's commitment to the Bosnian forces. Most observers thought that MPRI would bid for the contract. See Eagar, *supra* note 208, at 25. The State Department stated that an "[e]stablishment of this balance [expressed in the Dayton Agreement] requires improving the armed forces of the Federation to offset Bosnian Serb advantages in heavy weapons, military

organization, experience, training, and their geographic continuity with Serbia." Training and Equipping the Bosnian Federation Military, Train and Equip Fact Sheet, Office of Military Stabilization in the Balkans, U.S. Department of State Doc. #002-96.

n229. See Paul Harris, *Military Advising Is Growth Industry*, Wash. Times, Aug. 26, 1996, at 12. BDM International has an \$ 11.7 million contract with the Army to provide interpreters to peacekeeping personnel in Bosnia. See Whittle, *supra* note 191, at 1A.

n230. See Harris, *supra* note 229, at 12. The "Equip and Train" program (or "Military Stabilization Program") operated by MPRI resembles the International Military Education and Training (IMET) program administered by the State Department and Department of Defense, which provides professional military training to promote democratic institutions and human rights in fragile democracies. See John A. Cope, *International Military Education and Training: An Assessment 1* (1995). The IMET program also promotes the use and sale of U.S. military hardware. See *id.* at 40. For a comprehensive list of the weapons supplied by the United States to the FAF, see Muradian, *supra* note 224.

n231. See Gregory Copley, *Croatia Prepares for War on Eastern Slavonia*, Def. & For. Aff. Strategic Pol'y, Oct. 1995, at 3; see also Harris, *supra* note 229, at 12.

n232. See generally Richard Whittle, *Iranian Presence May Cloud U.S. Plans to Arm Bosnians*, Dallas Morning News, Feb. 15, 1996, at 20A; *Generals for Hire*, *supra* note 197, at 34. The United States forced Bosnia to dismiss its deputy defense minister, Hasan Cengic (who had strong ties to Iran), before it would allow the Equip and Train program to commence. See Bradley Graham, *U.S.'s Training of Bosnians: Smoothing Its Exit?*, Int'l Herald Trib., Jan. 30, 1997, at 1.

n233. Ambassador Pardew states that the Bosnians would not expel their foreign volunteers and terminate past security relationships unless they were given some assurance that they would receive military support. See Interview with Ambassador Pardew, *supra* note 202. The United States may have used MPRI to counter Russian moves to strengthen the Serbs when Russia unilaterally lifted sanctions in February 1996. Also, the expulsion of Iranians from the European arena may have been done to appease Turkey, which is concerned with Iranian expansion of power. See Sullivan, *supra* note 224, at 8A.

n234. The United States will have 8500 troops committed to the IFOR peacekeeping process until June 1998. It is possible that the U.S. government preferred the employment of MPRI over other U.S. companies as a way of assuaging Croatian fears of Bosnian military resurgence, since the Croats are still dealing with MPRI and feel comfortable with the company. See Interview with Ambassador Pardew, *supra* note 202.

n235. See *Program Arms, Trains Bosnians*, *supra* note 226.

n236. See *Educated Guess*, Fin. Times, Apr. 9, 1996, at 17. Former U.S. Undersecretary of State for African affairs Herman Cohen and a former Department of Defense official in charge of African Affairs, James Woods, formed a private consulting firm, Cohen and Woods, to advise companies working in Africa. They currently advise MPRI with respect to its work in Angola and proposed contracts in Mozambique.

See Cohen, Woods, and Others, *Indian Ocean Newsl.*, Oct. 19, 1996, available in LEXIS, News Library, Indigo Pub. File.

n237. See Interview with General Soyster, *supra* note 197.

n238. See *id.*; see also Paul Harris, *Ghosts of Vietnam Haunt the "Resplendent Land,"* *Wash. Times*, Aug. 5, 1996, at 15.

n239. The Tamil Tigers have been fighting for a homeland in the north and east. Over 50,000 people have been killed in the war. The Tamil Tigers are extremely well-connected to about 440,000 foreign donors, mostly expatriates residing in foreign countries. They operate 38 offices or cells in these foreign countries, including the United States, Australia, the United Kingdom, and Canada, where they collect funds to buy and ship arms. See *Top Guns in Tiger Hunt, Scotland on Sunday*, Jul. 14, 1996, at 17.

n240. See Davis, *supra* note 205, at 18. For a complete discussion of Tamil Tiger operations in 1996, see generally Paul Harris, *Bitter Lessons for the SLA*, *Jane's Intelligence Rev.*, Oct. 1, 1996, at 466.

n241. See Interview with General Soyster, *supra* note 197.

n242. Interview with State Department source, in Washington, D.C. (Jan. 17, 1995); see also U.S. Sending Experts to Train Sri Lanka Soldiers, *Reuters*, Apr. 30, 1996, available in LEXIS, News Library, Reuters News File. For a detailed discussion of the licensing process, see *infra* Part VI.

n243. See Harris, *supra* note 229, at 12. MPRI claims that the U.S. government has never withdrawn, modified, or altered the license for the work proposed in Sri Lanka. See Interview with General Soyster, *supra* note 197.

n244. The Tamil Tigers issued a warning to the United States that continued assistance to the Sri Lankan government "would trigger an expansion of the war." Gaston De Rosayro, *U.S. Rejects Tamil Tiger Appeal*, *S. China Morning Post*, Aug. 12, 1996, at 1. In addition to the reports of the impending contract with MPRI, news articles reported that the United States was changing its policy toward Sri Lanka by sending U.S. Special Forces to help the SLA combat the Tamil Tigers. See, e.g., *Top Guns in Tiger Hunt, Scotland on Sunday*, Jul. 14, 1996, at 17; see also Uli Schmetzer, *Tide Runs Against Sri Lankan Rebels*, *Chicago Trib.*, Aug. 8, 1996, at 10. The United States maintains that its policy has not changed and that any U.S. personnel present in Sri Lanka form part of "nonlethal" military missions consistent with all prior missions in Sri Lanka. See Interview with State Department source, *supra* note 242.

n245. Currently, there is heavy growth of security companies in general in the former Soviet Union. Some are venturing into the international market to provide Soviet-style military expertise, and others, like Moscow-based Alpha, are entering into agreements with other

security companies in order to expand their operations. Alpha was founded in 1991 by former KGB special forces personnel and currently serves 1000 clients, including businessmen and foreign trade representatives. Alpha recently entered into an agreement with Defense Systems Ltd. (DSL), a British SC. See *British-Russian Security Venture*, *Intelligence Newsl.*, No. 304, Jan. 30, 1997, available in LEXIS, News Library, *Intelligence Newsletter File*.

n246. For example, the British security company Keeni Mini Services employs former special forces soldiers. See David Tucker, *Guns for Hire in Angola After War's End*, *Reuters World Service*, Jan. 25, 1996, available in LEXIS, News Library, *Reuters News File*.

n247. See *British-Russian Security Venture*, *supra* note 245.

n248. See *id.* DSL trains U.S. embassy security guards in the Persian Gulf area and consults other Middle Eastern and South Asian security groups. See *id.*

n249. See *id.*

n250. See generally *Fofana*, *supra* note 154.

n251. See *Venter, Diamond Fields*, *supra* note 135, at 66.

n252. The Israeli Ministry of Defense controls the export of military technology and services. Any Israeli SC that works abroad must obtain a license from the Ministry of Defense. See Tim Kennedy, *Israeli Legislators Seek to Halt Export of Arms, Mercenaries to Congo*, *Moneyclips*, Feb. 24, 1994, available in LEXIS, News Library, *Moneyclips File*. In some cases, as in the *Levdan* contract with Congo, the prime minister's office will review the license application. See *Israel Approves Deal to Train Congo Troops*, *Chicago Trib.*, Feb. 18, 1994, at 8.

n253. From 1993 to 1995, rebels attacked the government of Pascal Lissouba, resulting in 2000 deaths. The government and the rebels signed a peace agreement in December of 1995. For a discussion of the peace process, see Louis Okamba, *Congo - Politics: Fears of Ethnic and Political Unrest Increase*, *Inter Press Service*, Mar. 14, 1996, available in LEXIS, News Library, *Inter Press Service File*. The Congolese government sought training for its special forces as a means of ending the civil war. According to Congo Minister of the Interior Martin Mberi, "The main cause of this latent civil war is the decaying of the state, in other words the fact that the public order force that we have is no longer a force adapted to the needs of the moment." *Minister Admits Presence of Israeli Military Experts*, *BBC Summary of World Broadcasts*, Feb. 18, 1994, available in LEXIS, News Library, *BBC News File*.

n254. See Clyde Haberman, *Some Israelis Fret as Congo Hires Ex-Soldiers*, N.Y. Times, Feb. 17, 1994, at A13. The Israeli offer of greater security cooperation, including the services of Levdan, may have been rewarded with oil concessions from the Congolese government. See David Makovsky & Batsheva Tsur, *Congo Wants Oil-for-Arms Exchange*, Jerusalem Post, Oct. 10, 1994, at 12. The French government sent military aid, equipment, and trainers to the Congolese armed forces. See *Congo Denies Trading Oil for Arms with Israel*, Reuters World Service, Oct. 13, 1994, available in LEXIS, News Library, Reuters News File.

n255. Reserve Brigadier General Zeev Zacharin is the managing director of Levdan and led the mission in the Congo, which included veteran commandos and members of the Shin Bet security forces. See Arieh O'Sullivan, *Israeli Mercenaries in Congo May Face Fellow Israelis*, AP Worldstream, Feb. 3, 1994, available in LEXIS, News Library, AP News File. Levdan is also the parent company of Lordone Congo, a coffee growing and export company with interests in the Congo. See Nana Rosine Ngangoue, *Congo - Economy: Foreigners Brew Coffee Comeback*, Inter Press Service, Oct. 11, 1995, available in LEXIS, News Library, Inter Press Service File. Levdan also currently holds a 50% stake in a joint venture that holds two offshore oil exploration permits from the Congolese government. See *Isramco Acquires 50% of Congo Venture for \$ 2.7M*, Energy Alert, vol. 31, No. 49, Sept. 9, 1997.

n256. See Richard Beeston, *Mercenaries Spark Knesset Row*, Times, Feb. 9, 1994, available in LEXIS, News Library, The Times File; see also MPS Demand Rabin Halt Congo Military Trainers, Reuters N. Am. Wire, Feb. 7, 1994, available in LEXIS, News Library, Reuters News File. Naomi Hazan, a representative from the dovish Meretz Party, stated the most common objection: "If the government of Israel wants to give military aid it should do so through the government and not through a private company." *Congo Pays \$ 50 Million for Israeli Military Trainers*, UPI, Feb. 9, 1994, available in LEXIS, News Library, UPI News File.

n257. Section 7(a) of the Israeli Defense Service Law states: "A person of military age [any male resident from age 18 to 49 and female resident age 18 to 34] who has been found fit for service and who is not serving on regular service, shall belong to the Reserve Forces of the Defence Army of Israel and shall be liable to reserve service as specified hereunder." Defense Service Law, 5709-1949, reprinted in *Fundamental Laws of the State of Israel 94* (Joseph Badi ed., 1961). Israel's ambassador to the Congo, Avital Shlomo, stated that the mission had nothing to do with the Israeli government but said the following in reference to Levdan: "We're talking about officers in the reserve of our army who have a mission to train the Congolese army and not of mercenaries recruited to fight in the streets." Louis Okamba, *Legislator Charges White Mercenaries Training Army for Ex-Dictator*, AP Worldstream, Apr. 19, 1994, available in LEXIS, News Library, AP News File. This statement highlights the conflicts inherent in the use of Israeli SCs (and SCs in general). Israel wants to disavow any connection to the private company so as to appear disengaged from the conflict, while it also wants to legitimate the SC's activity by claiming that it remain accountable to the state in some fashion.

n258. Cf. Kate Taylor and Terry J. Gander, *Mine Clearance in Cambodia*, Int'l Def. Rev., Feb. 1, 1996, at 5.

n259. PNG originally negotiated a contract with International Business Company to provide training and heavy weaponry totaling \$ 24 million. The PNG government eventually rejected this contract and employed Sandline International instead. See Abby Yadi, *PNG Mercenary Tale Straight from Pages of Thriller*, Reuter Asia-Pac. Bus. Rep., Apr. 19, 1997, available in LEXIS, News Library, Reuters News File.

n260. See Arieh O'Sullivan, *Israel Said Helping Mobutu's Regime*, Jerusalem Post, Feb. 4, 1997, at 1. Morocco, Togo, and Chad, old Zairean allies, have sent troops to help President Mobutu while Egypt has offered to send military equipment. See id.

n261. See *id.*

n262. Israel has supported Zaire and Jonas Savimbi's Unita rebel movement against Marxist regimes like Angola's MPLA. Traditionally, the MPLA has supported Israel's enemies, such as the Palestine Liberation Organization, Iran, Cuba, and Libya. See Al J. Venter, *Mercenaries Fuel Next Round in Angolan Civil War*, *Int'l Def. Rev.*, Mar. 1, 1996, at 63.

n263. *Rights of People to Self Determination and Its Application to Peoples under Colonial or Alien Domination or Foreign Occupation*: Report submitted by Mr. Enrique Bernales Balleteros, U.N. ESCOR, 51st Sess., U.N. Doc. A/51/392 (1996).

n264. In his congressional testimony, Dr. Will Reno, Professor of Political Science at Florida International University, stated that the future of conflict in small, mineral-rich countries like Liberia will be about "looting resources and controlling people to make war leaders rich," as opposed to being political or ideological battles. See *Hearings*, *supra* note 94 (statement of Dr. Will Reno).

n265. "[Mercenaries] are associated with the colonial wars which Western Europe waged directly or indirectly against the newly independent African states either before or after independence....[T]hey are being used or are using the secessionists to destroy the independence and territorial integrity of certain African countries." Beshir, *supra* note 88, at 1-2. "[T]he mercenary represents to the African everything he fights to defeat: namely, racism and colonialism." Riley Martin, *Mercenaries and the Rule of Law*, 17 *Rev. Int'l Community Jurists* 51, 52 (1976).

n266. Article 38(1)(b) of the Statute of the International Court of Justice defines customary international law as "international custom, as evidence of a general practice accepted as law." 59 *Stat.* 1055, T.S. 993, 3 *Bevans* 1179. Two elements, therefore, comprise the development of this type of law: evidence of state practice, and a belief that the practice is obligatory by existence of rule of law (known as *opinio juris*). The major problem with deciphering the specific normative context of these laws is identifying the customary rules that are consistently applied by states as a matter of law. See G.M. Danilenko, *Law-Making in the International Community* 75, 81 (1993). Acts of international organizations and "negative" practices are also recognized as state practice. See *id.* at 83-86.

n267. See *Mercenaries Report*, *supra* note 20. The report states the following regarding its purpose:

Although military assistance is always a sensitive issue, such advisory services do exist and, when clearly demarcated, are not contrary to international law or national constitutional provisions. What this report does want to draw attention to are the dangerous grey areas and the limits which need legal safeguards in order to prohibit such advisory services from becoming active armed participation in internal conflicts or in matters of the internal security of citizens that are connected with the exercise of the rights and political freedoms provided for in international human rights instruments.

*Id.* P 107.

n268. Id. P 9.

n269. Id. P 121.

n270. See id. P 121.

n271. For example, U.S.-based American Mineral Fields signed a \$ 1 billion deal with Zairean rebel leader Laurent-Desire Kabila for the joint exploitation of Shaba region mineral resources. The rebels say that they will use the money to help prosecute their war against Mobutu's regime. See What's News: World-Wide, Wall St. J., Apr. 17, 1997, at 1.

n272. See Mercenaries Report, supra note 20, P 122.

n273. Id. P 109. The massive proliferation of private security agencies for the domestic market (for neighborhoods, communities, and commercial properties) throughout the world challenges the report's assumptions about the inalienable responsibility of domestic security. For a discussion of the legal issues regarding private security in the United States, see generally Leo F. Hannon, *The Legal side of Private Security* (1992); Charles P. Nemeth, *Private Security and the Law* (1994).

n274. See Mercenaries Report, supra note 20, P 107. "It is obvious that the ambiguity of existing provisions, the gaps in national legislation and the insecurity which prevail in many countries, as well as the end-of-century tendency to privatize everything in sight, have created the conditions for the establishment of this new type of company...." Id.

n275. Id. P 122. The report discusses Angola's contract with EO as a major shift in international attitudes, since Angola had suffered the ravages of mercenarism. See id. P 96.

n276. Id. P 93.

n277. Id. P 93.

n278. The term "mercenary" will be used pejoratively, meaning that it will refer to those combatants illicitly involved in a conflict.

n279. See Thomas, *supra* note 76, at 6. The report argues that:

[T]he aim of [customary international and treaty law] is to condemn a mercenary act as the buying and selling of criminal services in order to interfere with the enjoyment of human rights, sovereignty, or the self-determination of peoples; and that there is international jurisprudence condemning interference by one State, not to speak of individual organizations, in the internal affairs of another State and in the lives of its people.

Mercenaries Report, *supra* note 20, P 77.

n280. See Tickler, *supra* note 32, at 15. There is a general acceptance of foreigners serving in regular armies. "It would be absurd to regard [foreigners enlisted in armies] as mercenaries under international law." Akinjide, *supra* note 42, at 6-7. This is because state responsibility is the essential element in regulating individual soldiers.

n281. See Thompson, *supra* note 37, at 26-27.

n282. The "international volunteer" is a nonlegal term that is used to describe a broader category of foreign fighter than "mercenary." See Verri, *supra* note 21, at 120. For a general discussion of international volunteers, see generally Ian Brownlie, *Volunteers and the Law of War and Neutrality*, 5 Int'l & Comp. L.Q. 571 (Oct. 1956); Manuel R. Garcia-Mora, *International Responsibility for Hostile Acts of Private Persons Against Foreign States* 75-76 (1962); Eric David, *Mercenaires et volontaires internationaux en droit des gens* (1977). The Special Rapporteur's report refers to voluntary service as "altruistic voluntary enlistment" which cannot be considered criminal. See Mercenaries Report, *supra* note 20, P 75. Why does the international community allow "altruistic volunteers" to engage in activities that may have the same destructive effect as "mercenary" behavior? The international community has identified international volunteers with movements of national liberation and legitimate governments - like the Spanish Republic fighting Franco's Fascists - and therefore, as legitimate. In addition, there is an assumption that such individuals will not be serving their self-interest and will therefore be less ruthless and more restrained in their pursuit of a noble ideal.

n283. The fighter may have economic, personal, ideological, and political motives for entering a foreign conflict. See Akinjide, *supra* note 42, at 6-7.

n284. Report of the Committee of Privy Counsellors Appointed to Inquire into the Recruitment of Mercenaries ("Diplock Report"), Cmnd. 6569, at 2 (Aug. 1976).

n285. The Special Rapporteur's report concludes:

[T]here are usually two circumstances that determine the actual use of mercenaries: on the one hand, the existence of a body, organization, State or party to a conflict which, in order to carry out operations that are not in conformity with the law or with international obligations of non-interference, resorts to hiring mercenaries as a way of achieving its goals. On the other hand, there are organizations that recruit and people who, for high pay, will agree to serve as mercenaries in the knowledge that they will be performing acts prohibited by national laws and international treaties protecting human rights, State sovereignty and the right of peoples to self-determination. Thus, a criminal alliance is established between recruiter and recruit.

Mercenaries Report, *supra* note 20, P 74.

n286. "[M]ercenary activities are a threat to the self-determination of peoples and an obstacle to the enjoyment of human rights by peoples who have to endure their presence." *Id.* P 83.

n287. It could be argued that if the international community is solely concerned with war in general, the aggravation of a conflict, or the increased ability of a party to a conflict to wreak havoc, then all international volunteers and foreigners enlisted and serving as advisors should be outlawed. The Gurkhas in the British Army certainly give the British additional fighting capacity, as in the Malvinas War. The enlistment of men in the French Foreign Legion allows France to send these troops into foreign territory without compunction. The Pakistanis in Libya's Islamic Legion gave Libya great influence in Lebanon. If the effects of foreigners engaged in battles were the real motivation behind the laws banning mercenaries, then these troops would be included as mercenaries. Instead, states are willing to accept the effects of these troops and foreign nationals' involvement. What the international community is more concerned with is the lack of accountability for mercenaries and the potential for the wanton escalation of a conflict if they become engaged.

n288. The lack of transparency as to the nature of an individual's employment for a legitimate government is also a problem for the international community. Nontransparency can be seen as an attempt to deny state accountability:

Criminal activities are turned over to mercenaries for various reasons: military professionalism; criminal experience; concealment of the real mastermind; greater safety in acting without directly assuming the consequences; the comparatively low cost, in terms both of money and of endangering the lives of one's own military personnel; and so on. The reality is that there are people disposed to become mercenaries and that, ultimately, they are disposed because of the pay they receive for conducting unlawful activities in a country other than their own; their intervention is directly motivated by financial gain.

Mercenaries Report, *supra* note 20, P 73.

n289. "It is this essentially private, non-governmental nature of the intervention which seems to be the basic problem which is raised by the use of mercenaries." H.C. Burmester, *The Recruitment and Use of Mercenaries in Armed Conflicts*, 72 Am. J. Int'l L. 37, 38 (1978).

n290. Protocol II, *supra* note 32, art. 47. (emphasis added).

n291. For an extensive criticism of the definition, see Edward Kwakwa, *The Current Status of Mercenaries in the Law of Armed Conflict*, 14 *Hastings Int'l & Comp. L. Rev.* 67, 70 (1990).

n292. See *id.* at 71. Training is politically dangerous because it often creates an allegiance to the leader of the faction or government for whom the soldiers are fighting. See *Tickler*, *supra* note 32, at 126.

n293. See *Commentary to the Additional ProtocolI*, P 1806, at 579.

n294. See *International Convention*, *supra* note 107, art. 2. The *International Convention* deleted the requirement in Article 47's definition in 1(1) that a mercenary actually "take a direct part in the hostilities." It also adds to this definition in Article 1(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.

*Id.*

n295. See *Mercenaries Report*, *supra* note 20, P 105.

n296. For the sake of argument, assume that SCs only work for legitimate governments or movements of national liberation, since any other type of employment would violate Article 1(2) of the *International Convention* and the customary international law regarding mercenaries. See discussion *infra* Part IV.B. Assume also that the trend in the international security market is toward more companies like EO as opposed to companies like MPRI.

n297. *ProtocolII*, *supra* note 32, art. 47, 1(a).

n298. Commentary to ProtocolI, supra note 32, art. 47, P 1813 at 581. In his report, the Special Rapporteur questions whether the international community may reach behind the veil of nationality to determine whether the individual is a mercenary who became a national for the sake of avoiding the distinction of being a mercenary. See Mercenaries Report, supra note 20, PP 80-81. This, however, is a different situation than with EO, whose personnel were integrated into Sierra Leone's armed forces but did not become citizens.

n299. ProtocolI, supra note 32, art. 47, 1(f).

n300. For a detailed discussion of the status of civilian contractors, see Major Brian H. Brady, Notice Provisions for U.S. Citizen Contractor Employees Serving with the Armed Forces of the United States in the Field: Time to Reflect Their Assimilated Status in Government Contracts, 147 Mil. L. Rev. 1, 2 (1995) (noting that "[i]nternational law recognizes that the U.S. citizen contractor employees serving with the Armed Forces of the United States in the field have military status").

n301. This tendency was seen in EO's briefing of South African government officials regarding EO operations in Angola and Sierra Leone.

n302. Mercenaries Report, supra note 20, P 106.

n303. Beshir, supra note 88, at 1.

n304. "[Mercenaries] were neo-colonialism's last card...a faceless...reserve of cannon fodder, not identifiable with governments and their policies, immune to public criticism and debate. The perfect substitute for the expeditionary forces." Burchett & Roebuck, supra note 93, at 17.

n305. See Burmester, supra note 289, at 40. "Movements of national liberation" are "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination." ProtocolI, supra note 32, art. 1(4).

n306. See James L. Taulbee, Myths, Mercenaries and Contemporary International Law, 15 Cal. W. Int'l L.J. 339, 343 (1985).

n307. U.N. Charter art. 2, para. 4. See generally Howard S. Levie, Recent Development in the Humanitarian Law of War, 4 Pub. L. F. 369, 373 (1985).

n308. Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, Oct. 18, 1907, 36 Stat. 2310, T.S. No. 540, art. 4. Article 6 states that "[t]he responsibility of a neutral Power is not engaged by the fact of persons crossing the frontier separately to offer their services to one of the belligerents." *Id.*

n309. G.A. Res. 2625 (XXV), U.N. Doc. A/8082 (1970), reprinted in Dietrich Schindler and Jiri Toman, *The Laws of Armed Conflict* 337, 339 (1988). In the General Assembly's "Definition of Aggression," acts of aggression include the following:

(f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State; (g) The 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 of such gravity as to amount to the acts listed above, or its substantial involvement therein.

G.A. Res. 3314 (XXIX), U.N. GAOR, Definition of Aggression, art. 3 (1974), reprinted in Schindler and Toman, *supra*, at 393.

n310. See, e.g., Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations, G.A. Res., U.N. GAOR, 42nd Sess., U.N. Doc. A/42/22 (1987). There is a distinction between the movement of organized groups and unorganized individuals. State responsibility does not necessarily flow from the actions of its citizens acting as individuals, as long as the state did not act negligently in allowing the individual to attack another state. Some experts want a strict liability standard for state responsibility arguing that the size of the group or its organization should not determine state accountability. See S.G. Kahn, *Private Armed Groups and World Order*, 1 N.Y. Int'l L. 32, 47 (1970); see also Garcia-Mora, *supra* note 289, at 29-30.

n311. "The limited extent of the customary international law obligation imposed on states to prevent the recruitment of volunteers and armed bands reflects the hesitation of traditional law to impute responsibility to a state for the actions of individuals except in certain limited circumstance." Burmester, *supra* note 289, at 44. See also Kahn, *supra* note 310, at 42.

n312. Security Council Resolution 143 (July 14, 1960) authorized military assistance for the government of the Republic of the Congo. See U.N. SCOR, U.N. Doc. S/4387 (1960), reprinted in U.N. Resolutions: Resolutions and Decisions of the Security Council 5 (Dusan J.D. Jonovich ed., 1960); U.N.S.C. Res. 145, U.N. SCOR, U.N. Doc. S/4405 (1960), reprinted in U.N. Resolutions: Resolutions and Decisions of the Security Council 16 (Dusan J.D. Jonovich ed., 1960); U.N.S.C. Res. 146, U.N. SCOR, U.N. Doc. S/4426 (1960), reprinted in U.N. Resolutions: Resolutions and Decisions of the Security Council 16-17 (Dusan J.D. Jonovich ed., 1960); S.C. Res. 161, U.N. SCOR, U.N. Doc. S/4741 (1961), reprinted in U.N. Resolutions: Resolutions and Decisions of the Security Council 40-41 (Dusan J.D. Jonovich ed., 1961); U.N.S.C. Res. 169, U.N. SCOR, U.N. Doc. S/5002 (1961), reprinted in U.N. Resolutions: Resolutions and Decisions of the Security Council 41-43 (Dusan J.D. Jonovich ed., 1961).

n313. See Mockler, *supra* note 33, at 34-55.

n314. See Paul Mourning, *Leashing the Dogs of War: Outlawing the Recruitment and Use of Mercenaries*, 22 Va. J. Int'l L. 589, 599 (1982).

n315. With respect to mercenaries in the Congo, the OAU passed resolutions in 1964 and 1967. See O.A.U. Doc. ECM/Res. 5 (III) (1964) (Addis Ababa) and O.A.U. Doc. AHG/Res. 49 (IV) (1967), reprinted in Robert E. Cesner, Jr. & John H. Brant, *Law of the Mercenary: An International Dilemma*, 6 Cap. U. L. Rev. 339, 363-66 (1990). The OAU condemned the presence of Portuguese mercenaries threatening the Republic of Guinea in 1970. See Beshir, *supra* note 88, at 18-19; O.A.U. Doc. ECM/Res. 17 (VII) (1970) (Lagos), reprinted in Robert E. Cesner, Jr. & John H. Brant, *Law of the Mercenary: An International Dilemma*, 6 Cap. U. L. Rev. 339, app. at 365 (1990).

n316. See O.A.U. Declaration on the Activities of Mercenaries in Africa, reprinted in Cesner & Brant, *supra* note 315, at 365-66.

n317. See Major, *supra* note 42, at 107-08.

n318. See Mourning, *supra* note 314, at 600-01.

n319. O.A.U. Doc. CM/433/Rev.L, Annex 1 (1972), reprinted in Mourning, *supra* note 314, at 613.

n320. Taulbee, *supra* note 306, at 347.

n321. See *id.*

n322. See *id.* at 350.

n323. See Bozidar Jelicic, *The United Nations and the Problems of Mercenaries*, *Rev. Int'l Aff.*, 1986, at 11.

n324. See Akinjide, *supra* note 42, at 8-9.

n325. For example in 1970, the Security Council demanded the "immediate withdrawal of all external armed forces and mercenaries, together with the military attack against the territory of the Republic of Guinea." U.N.S.C. Res. 289 (Nov. 1970), reprinted in Cesner &

Brant, *supra* note 315, app. II at 363. In light of the invasion of Benin in 1977, the Security Council condemned states that continued to permit and tolerate the recruitment of mercenaries "with the objective of overthrowing the Government of Member States." It also called on all states to take all "necessary measures" to prevent the use of their territory by mercenaries or recruiters so as to prevent "the planning of subversion and recruitment, training and transit of mercenaries designed to overthrow the Government of any Member State." U.N.S.C. Res. 405, 32 U.N. SCOR, U.N. Doc. S/INF/33 (1977), reprinted in Kwakwa, *supra* at 291, at 84 n.91.

n326. See U.N.S.C. Res. 226, U.N. SCOR, 1306th mtg. (1966), reprinted in U.N. Resolutions: Resolutions and Decisions of the Security Council 1966-67 21 (Dusan J.D. Jonovich, ed., 1968); S.C. Res. 239, U.N. SCOR, 1367th mtg. (1967) reprinted in U.N. Resolutions: Resolutions and Decisions of the Security Council 1966-67 47 (Dusan J.D. Jonovich, ed., 1968); U.N.S.C. Res. 241, U.N. SCOR, 1378th mtg. (1967) reprinted in U.N. Resolutions: Resolutions and Decisions of the Security Council 1966-67 (Dusan J.D. Jonovich, ed., 1968); Beshir, *supra* note 88, at 7-8.

n327. Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 2465 (XXIII), P 8 (1968), reprinted in Cesner & Brant, *supra* note 315, app. at 363.

n328. Basic Principles of the Legal Status of the Combatants Struggling against Colonial and Alien Domination and Racist Regimes, G.A. Res. 3103 (XXVIII), art. 5 (1973), reprinted in *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions, and Other Documents* No. 51, 601, 603 (Dietrich Schindler and Jiri Toman eds., 1988).

n329. See *id.* art. 3.

n330. It is arguable that no government is willing to punish individuals for a violation of antimercenary domestic laws because doing so establishes that country's commitment to that norm and consequently evidences *opinio juris*. See Garcia-Mora, *supra* note 289, at 195.

n331. See Jelacic, *supra* note 323, at 11-12.

n332. See generally Additional Protocol II, *supra* note 32; Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 16 I.L.M. 1442 (1977) [hereinafter Protocol III] (which entered into force on December 7, 1978).

n333. See discussion *infra* Part IV.A. for definition. Article 45(1) requires that the holding party presume POW status for any prisoner if it is unclear whether he is entitled to such status. Article 75 demands that all persons, regardless of POW status, "be treated humanely in all circumstance." See Additional Protocol II, *supra* note 32; see also Akinjide, *supra* note 42, at 6.

n334. See Akinjide, *supra* note 42, at 12. Some argue that Article 47 violates both the letter and spirit of the preamble, which provides that individuals who participate in war should not be discriminated against on the basis of their motive for engaging in combat. See L. Lynn Hogue, *Identifying Customary International Law of War in ProtocolI: A Proposed Restatement*, 13 *Loy. L.A. Int'l & Comp. L.J.* 279, 285 (1990).

n335. The known trials have occurred in Guinea (1970), Sudan (1971), Angola (1976), and the Seychelles (1981). See Major, *supra* note 42, at 134-36. In addition, Major argues that the *Military and Paramilitary Activities in and Against Nicaragua* decision rendered in 1986 by the International Court of Justice (ICJ) shows that the crime of mercenarism is accepted in international law. See *id.* at 137-38. In that case, the ICJ ruled that by organizing armed groups to destabilize Nicaragua, the United States had violated its obligations under customary international law to refrain from infringing on another state's sovereignty. The ICJ rejected the United States' defense that the use of these groups constituted collective self-defense against Nicaragua's covert intervention in El Salvador's civil war. See *Military and Paramilitary Activities (Nicar. v. United States)*, 1986 I.C.J. 14.

n336. See Cesner & Brant, *supra* note 315, at 341; see also Major, *supra* note 42, at 134-37.

n337. See Major, *supra* note 42, at 135.

n338. See Kwakwa, *supra* note 291, at 78 n.62; see also Mourning, *supra* note 314, at 601-05 (discussing the Angolan mercenary trial and the Luanda Convention). For a text of the Luanda Convention, see Geoffrey Hinds, *The Legal Status of Mercenaries: A Concept in International Humanitarian Law*, 52 *Phil. L.J.* 395, 419 (1977).

n339. See Taulbee, *supra* note 306, at 348. Taulbee argues that the OAU Convention and the Luanda Convention created a definition of a mercenary "in instances where there is opposition to movements for self-determination or liberation." *Id.* at 350.

n340. The Angolan court defined mercenarism as a common, material crime that need not be defined explicitly in the domestic laws of every nation. See Major, *supra* note 42, at 136.

n341. See Kwakwa, *supra* note 291, at 84.

n342. See G.A. Res. 34/140, U.N. GAOR, 34th Sess., U.N. Doc. A/Res/34/140 (1980).

n343. See G.A. Res. 35/48, U.N. GAOR, 35th Sess., U.N. Doc. A/Res/35/48 (1980).

n344. See, e.g., Report on 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/Res/37/43 (1982). Nigeria's proposal for the Convention formed the basis for debate for the final U.N. treaty. Western states objected to the proposed heightened level of responsibility derogated to states on the basis of individuals' actions. For a discussion of the negotiations, see Mourning, *supra* note 314, at 608-11. For a list of the preparatory reports from the Ad Hoc Committee through 1987, see Allaoua Layeb, *Mercenary Activity: U.S. Neutrality Laws and Enforcement*, 10 N.Y.L. Sch. J. Int'l & Comp. L. 269, at 272 n.9 (1989).

n345. Pursuant to Art 19(1), the International Convention is not in force due to a lack of the twenty-first instrument of ratification or accession. As of December 31, 1996, only sixteen countries had signed the treaty and only eleven parties have ratified. Angola, the Congo, Zaire, the Ukraine (which ratified as well), and Nigeria have signed the International Convention. This is significant because Angola and the Congo have employed SCs, Nigeria has supported EO's operations, Ukrainians represent a healthy supply of ex-Soviet military expertise (as seen in the employment of Ukrainian pilots by EO), and Zaire has recently employed individual mercenaries from Western Europe and Serbia. Perhaps this reflects their interpretation of the International Convention. See *Multilateral Treaties Deposited with Secretary-General*, Status as of Dec. 31, 1996.

n346. See International Convention, *supra* note 107, arts. 2, 3.

n347. See *id.* art. 9. Article 9(a) gives states jurisdiction over acts committed on board ships or aircraft registered in that country.

n348. For a complete discussion of the criticisms of the International Convention, see Major, *supra* note 42, at 132-33.

n349. See S.C. Res. 581, U.N. SCOR, 2662nd mtg., U.N. Doc. S/Res/581 (1986); G.A. Res., U.N. GAOR, 37th Sess., 90th mtg., P 8, U.N. Doc. A/Res/37/43 (1982) (the General Assembly "[s]trongly condemns the establishment and use of armed terrorist groups by South Africa with a view to pitting them against the national liberation movements and destabilizing the legitimate Governments of southern Africa..."); S.C. Res. 507, U.N. SCOR, 2370th mtg., U.N. Doc. S/Res/507 (1982). Many of the resolutions dealing with mercenaries condemn South Africa for its support of bands terrorizing southern African states. South Africa's history of covertly using mercenaries to destabilize its neighbors explains in part the high level of suspicion most observers have for EO. It is understandable, therefore, for the Special Rapporteur not to recognize a qualitative difference between SADF forces and EO employees. For a description of the "conversion" that EO employees have undergone because of their entrance into the private security field, see Rubin, *supra* note 9, at 53.

n350. See U.N.S.C. Res., U.N. SCOR, 2314th mtg., U.N. Doc.S/Res/496 (1981); G.A. Res. 51, U.N. GAOR, 44th Sess., 78th mtg., U.N. Doc. A/RES/44/51 (1989) (referring to the 1988 attempted invasion of Maldives); G.A. Res. 31, U.N. GAOR, 49th Sess., 83rd mtg., U.N. Doc. A/Res/49/31 (1995) (emphasizing the vulnerability of small states to the external threat of mercenaries and "[c]ondemning all such acts of aggression").

n351. See G.A. Res. 33, U.N. GAOR, 45th Sess., 44th mtg. P 17, U.N. Doc. A/Res/45/33 (1990); G.A. Res. 79, U.N. GAOR, 44th Sess., 78th mtg. P 34, U.N. Doc. A/Res/44/79 (1989) (interposing the term "mercenaries" with "armed terrorists").

n352. The General Assembly condemns the continued recruitment and use of mercenaries "for the purpose of destabilizing and overthrowing the Governments of African States and of other developing States and fighting against the national liberation movements of peoples struggling for the exercise of their right to self-determination." G.A. Res. 89, U.N. GAOR, 46th Sess., 74th mtg., U.N. Doc. A/Res/46/89 (1992).

n353. G.A. Res. 89, U.N. GAOR, 46th Sess., 89th mtg., U.N. Doc. A/Res/46/89 (1992).

n354. Major, *supra* note 42, at 117.

n355. The inclusion of the crime of mercenarism in the International Law Commission's Draft Code of Crimes against the Peace and Security of Mankind ("Draft Code") further supports this argument. Under paragraph 1 of Article 23, the Draft Code defines an offense based on the target of the mercenaries' activities. An offense is committed "only if such activities are directed against another state or are carried out for the purpose of opposing the legitimate exercise of the right of self-determination." Timothy 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, 45 (1994). The offenses defined in the Draft Code and the international norms regarding mercenaries are not coterminous. For instance, the crime only extends to agents or representatives of states, leaving out many actors who engage in the mercenary market. See *id.* at 44-45.

n356. Burmester, *supra* note 289, at 50. This argument could be extended to claim that the prohibition on the use of mercenaries is a peremptory norm of international law, from which (by definition) no derogation is permitted. See Vienna Convention on the Law of Treaties, 1969 art. 53, 1155 UNTS 331; see also Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, art. 53, 1986, U.N. Doc. A/Conf.129/15, art. 53 (1986). Given the incomplete nature of U.N. resolutions, the lack of an enforceable international convention, and inconsistent, contradictory state behavior, the ban on the use of mercenaries cannot be said to have reached the status of a peremptory norm. In addition, it would appear that a complete ban would conflict directly with other peremptory norms such as the right of a state to defend itself or provide for its own security.

n357. See Danilenko, *supra* note 266, at 203-05; Cesner & Brant, *supra* note 315, at 349 ("These resolutions, taken collectively, are declarations rather than laws.").

n358. See J.A. Frowein, *International Law in the Period After Decolonization 2* (1988). For a discussion of customary international law, see generally Danilenko, *supra* note 266. The U.N. Special Rapporteur's report claims that an international customary international law can be identified:

Since the General Assembly has repeatedly condemned mercenary activities, as have such other United Nations organs as the Economic and Social Council and the Commission on Human Rights, and since in addition Member States have condemned such activities and some

countries have national laws making the use of mercenaries a crime, where there are no laws or only inadequate laws, a case can be made for the existence of customary international law that rejects, condemns and prohibits mercenary activities based on the nature of the acts and not on the fact of having a different nationality.

Mercenaries Report, *supra* note 20, P 78.

n359. The Security Council has called for an end to hostilities in Zaire and a withdrawal of all mercenaries. See U.N. SCOR, U.N. Doc. S/PRST/1997/5 (1997).

n360. One legal scholar argues that "[c]urrent international law, as represented by U.N. resolutions, and the United States [sic] own admissions, would dictate that a member of the international community take the necessary domestic steps to eradicate mercenaries." Grant E. Courtney, *American Mercenaries and the Neutrality Act: Shortening the Leash on the Dogs of War*, 12 J. Legis. Notre Dame L. Sch. 175, 182 (1985).

n361. Mercenaries Report, *supra* note 20, P 87.

n362. See Courtney, *supra* note 360, at 183.

n363. See Thompson, *supra* note 34, at 82. Thompson argues that the neutrality laws formed part of the state strategy to monopolize the use of violence and the allegiance of its citizens in the international sphere. See *id.* at 86.

n364. 18 U.S.C. 959 (1988).

n365. 8 U.S.C. 1481 (1988).

n366. 22 U.S.C. 611-621 (1988).

n367. Act of June 5, 1794, ch. 50, 1, 1 Stat. 381, 381-82. For a detailed discussion of the 1794 Act and its use, see Layeb, *supra* note 344, at 272. See also Thompson, *supra* note 34, at 77 (discussing the historical context behind the formulation of the Neutrality Act).

N368. See Layeb, *supra* note 344, at 272 n.10.

n369. See generally Cesner & Brant, *supra* note 315, at 355. For a complete discussion of U.S. neutrality laws, see Jules Lobel, *The Rise and Decline of the Neutrality Act: Sovereignty and Congressional War Powers in U.S. Foreign Policy*, 24 *Harv. Int'l L.J.* 1 (1983). See also Note, *Nonenforcement of the Neutrality Act: International Law and Foreign Policy Powers Under the Constitution*, 95 *Harv. L. Rev.* 1936 (1982).

n370. See 18 U.S.C. 956-960 (1988).

n371.

Whoever, within the United States, enlists or enters himself, or hires or retains another to enlist or enter himself, or to go beyond the jurisdiction of the United States with intent to be enlisted or entered in the service of any foreign prince, state, colony, district or people as a soldier or as a marine or seaman on board any vessel of war, letter of marque, or privateer, shall be fined under this title or imprisoned not more than three years, or both.

18 U.S.C. 959 (a). Section 959(b) exempts citizens who enlist in the army of a U.S. ally in time of war, and subsection (c) exempts foreigners not residing in the United States. See Burchett & Roebuck, *supra* note 93, at 214-15.

n372. *Wiborg v. United States*, 163 U.S. 632, 655-56 (1896). For a discussion of *Wiborg* and other relevant cases, see Layeb, *supra* note 344, at 276. The right of the state to restrict the enlistment of its citizens in foreign forces abroad often conflicts with the individual's right to travel. For a discussion of this issue, see generally Courtney, *supra* note 360.

n373. 8 U.S.C. 1481 (1988).

n374. 8 U.S.C. 1481(a)(3) (1988).

n375. 387 U.S. 253 (1967).

n376. See *id.* at 267.

n377. *Id.* at 268.

n378. See Rob Krott, *Lethal and Legal, Soldier of Fortune*, Dec. 1993, at 36, 74. This article concludes that the Supreme Court has ruled 8 U.S.C. 1481(a)(3) unconstitutional, which is technically incorrect since the Supreme Court has not directly addressed the constitutionality of this section. See *id.*

n379. See 22 U.S.C. 612 (1988).

n380. See *id.* 618(a)(2); see also Burchett & Roebuck, *supra* note 93, at 217; Layeb, *supra* note 344, at 280-81.

n381. See Layeb, *supra* note 344, at 270.

n382. Cesner & Brant, *supra* note 315, at 358.

n383. Layeb, *supra* note 344, at 281.

n384. *Id.* at 293.

n385. See Hearings, *supra* note 94 (statement of Hon. Lee H. Hamilton, Chairman of Subcommittee).

n386. See *id.* at 2-3. (statement of Hon. William E. Schaefe, Jr.).

n387. See Krott, *supra* note 378, at 39.

n388. The lack of enforcement may also be a function of the perceived utility and flexibility that mercenaries provide to countries unwilling to commit regular troops to a particular conflict. See Tickler, *supra* note 32, at 220. Some might say that U.S. mercenary involvement in Central America in the 1980s was an example of this covert foreign policy agenda.

n389. See Diplock Report, *supra* note 284, at 7. The Privy Counsellors were Lord Diplock, Sir Derek Walker-Smith, and Sir Geoffrey de Freitas.

n390. See Foreign Enlistment Act, sec. 4. Section 30 defines "foreign state" broadly to include "any person or persons exercising or assuming to exercise the powers of government in or over any foreign country, colony, province, or part of any province or people." *Id.* This definition does not include guerrilla movements that have failed to acquire territory or criminal organizations. See Jason Jaconelli, *The Recruitment of Mercenaries and the Foreign Enlistment Act 1870*, Pub. L. 337, 340 (1990).

n391. See Act of 1870, sec. 5.

n392. See Jaconelli, *supra* note 390, at 338.

n393. See *id.*

n394. The Diplock Report suggested that mercenaries be defined by "reference to what they do, and not by reference to why they do it." Diplock Report, *supra* note 284, P 7.

n395. *Id.* P 10.

n396. The Diplock Report argued that only an important public interest can justify the infringement of an individual's right to enlist abroad. It identified the principal public interest at risk when British citizens serve as mercenaries as "the maintenance of good international relations...." *Id.* P 12.

n397. See *id.* PP 44-46.

n398. See *id.* PP 49-50.

n399. See *id.* P 50. This proposal highlights the desire to tie mercenary activity to state accountability. By allowing the use of mercenaries generally, the British government would be making a policy judgment allowing intervention on behalf of its citizens. By affirmatively denying particular regions or parties the potential service of British mercenaries, the British government would also be making a negative policy decision to affect international affairs with its private citizens. Regardless, the Diplock Report reflects the British government's general acceptance of mercenarism.

n400. See Jaconelli, *supra* note 390, at 337.

n401. See Tickler, *supra* note 32, at 219.

n402. See South Africa Defence Act 44 of 1957, reprinted in JUTA Statutes, vol. 1, at 3-90.

n403. Section 121A, entitled "Prohibition of certain acts in connection with service as mercenaries," states:

(1) any person who - (a) is a member of the South African Defence Force or the Reserve or an auxiliary or voluntary nursing service established in terms of this Act and who binds himself to service or renders service as a mercenary; or (b) makes any utterance or performs any act or does anything with intent to advise, encourage, assist, incite, instigate, suggest to or otherwise persuade any member referred to in paragraph (a) to bind himself to serve or to render service as a mercenary shall be guilty of an offence.

*Id.*

n404. See Harding, *supra* note 119, at 32.

n405. See Mercenaries Report, *supra* note 20, P 42.

n406. S. Afr. Const., ch. 11, art. 199, as adopted by the Constitutional Assembly on 8 May 1996, available in South African Constitutional Assembly Database.

n407. Article 198(b) states that "[t]he resolve to live in peace and harmony precludes any South African citizen from participating in armed conflict, nationally or internationally, except as provided for in terms of the Constitution or national legislation." S. Afr. Const., ch. 11, art. 198(b), as adopted by the Constitutional Assembly on 8 May 1996, available in South African Constitutional Assembly Database. This section seems to pave the way for a more comprehensive registration and licensing regime.

n408. See Pech, *supra* note 181, at 13. The regulation of SCs under the new amendments would be administered by the National Conventional Arms Control Committee (NCACC) and the Ministry of Defence.

n409. See *id.* The new legislation will likely contain provisions that will exclude any former SADF to reenter the official armed forces after having served with an SC. See Gunning for Mercenaries, *supra* note 184.

n410. See Mockler, *supra* note 33, at 356. For a discussion of French, Swedish, British, U.S., and Belgian antimercenary laws, see Burchett & Roebuck, *supra* note 93, at 213.

n411. See Mercenaries Report, *supra* note 20, PP 20-22.

n412. The Angolan Embassy spokesperson in Washington, D.C., Armando Francisco, distinguishes mercenaries from EO, which he characterizes as "non-military people in a legal organization dealing with other nations in military affairs." He states: "Elected governments can ask for advice from a corporation or any other government in any issues, legal or military, if they so choose." Mbuya, *supra* note 128, at A12.

n413. Mercenaries Report, *supra* note 20, P 23.

n414. See Ashworth, *supra* note 117, at 1.

n415. Mockler, *supra* note 33, at 357.

n416. U.N. Charter art. 51.

n417. U.N. Charter art. 2, para. 7.

n418. ProtocolII, supra note 332, art. 3, at 692.

n419. International Convention, supra note 107.

n420. The governments that have used SCs and mercenaries have "denied that they were recruiting mercenaries or justified the recruitment and hiring of foreigners on the grounds of national interest or for reasons of State." Mercenaries Report, supra note 20, P 28.

n421. U.N. Charter art. 51.

n422. Under Article 2(4) intervention constitutes a use of force "against the political independence" of the state in question because it interferes with its people's right to determine their own political destiny. Consequently, collective self-defense could allow a state to give military aid in a civil war if another foreign power is already giving military aid to the opposite side.

Oscar Schachter, In Defense of International Rules on the Use of Force, 53 U. Chi. L. Rev. 113, 137 (1986).

n423. "[A]n internal attack on a government's sovereignty often merges with an external undermining of that sovereignty through foreign intervention. The increase in civil warfare has thereby resulted in the erosion of national sovereignty, the heart of the nonintervention and neutrality doctrines." Lobel, supra note 369, at 53.

n424. President Julius Nyerere, Foreign Troops in Africa, Afr. Rep., Jul./Aug. 1978, at 13. Burrus M. Carnahan stated:

Objectively there is little reason why a small but rich country should not be able to redress the military weakness resulting from its limited population by hiring foreign military experts on whatever basis those experts wish to serve. Small, rich countries have always been especially tempting to aggressors, and use of mercenary troops would appear to be an effective way for them to carry out their legitimate self-defense, yet this is precisely what Article 47 seems to prohibit. At a minimum is [sic] needlessly limits the terms and conditions under which this right can be exercised [sic].

Burrus M. Carnahan, Customary Law and Additional ProtocolII to the Geneva Conventions for Protection of War Victims: Future Directions in Light of the U.S. Decision Not to Ratify, Proc. Ann. Meeting. Am. Soc'y Int'l L., 26, 37 (1987). Article 47 cannot infringe the inherent right to self-defense codified in Article 51.

n425. " [I]nternational law allows aid to a widely recognized government if illegal assistance has been given to insurgents." John Norton Moore, *Legal Standards for Intervention in Internal Conflicts*, 13 Ga. J. Int'l & Comp. L. 191, 196-97 (1983).

n426. See Garcia-Mora, *supra* note 289, at 197.

n427. " [A] position has been reached where the acts of small groups can endanger the peace and security of the whole world." Kahn, *supra* note 310, at 33. For a discussion of the changing standards in the international notion of intervention in the context of the U.N. mission in Somalia, see Mark Hutchinson, Note, *Restoring Hope: U.N. Security Council Resolutions for Somalia and an Expanded Doctrine of Humanitarian Intervention*, 34 Harv. Int'l L.J. 624, 625 (1993).

n428. In order for a group to reach belligerent status, which under traditional notions of belligerency entitles it to international assistance, it must have attained widespread popular support and operate with a respect for human rights. See Robert W. Gomulkiewicz, *International Law Governing Aid to Opposition Groups in Civil War: Resurrecting the Standards of Belligerency*, 63 Wash. L. Rev. 43, 44 (1988). It is arguable that Laurent-Desire Kabila's insurgency has reached belligerency status. It is not surprising, therefore, to discover that Kabila is receiving aid from Rwanda and Uganda.

n429. See Legum, *supra* note 79, at 40. The OAU supported the military government in Nigeria in its fight against the Biafrans. The post-independence civil war in Angola was unique because there was no recognized government or incumbent power. All factions were vying for power. The OAU's policy stems from two concerns: (1) a need to support African regimes against external aggression, often manifested in civil wars; and (2) a desperate need to solidify regimes especially right after independence.

n430. In general, the international community supports legitimate states in their battles against nonrecognized movements. For instance, the OAU applauded Mobutu Sese Seko's call on the French to support his regime in 1978, while the United Nations fought against the mercenaries hired by the Katangese in their battle against the Congo's ANC. The international community condemned the use of mercenaries by the Biafrans in their secessionist battle in Nigeria, while African countries did not reproach Nigeria for its employment of mercenaries. See Thompson, *supra* note 37, at 89-90.

n431. See Roundtable Discussion, *supra* note 119.

n432. For a general discussion on state responsibility for the "export" of armed groups directed against other states, see Ian Brownlie, *International Law and the Activities of Armed Bands*, 7 Int'l & Comp. L.Q. 712, 734 (1958).

n433. See generally Schachter, *supra* note 422.

n434. Mercenaries Report, supra note 20, P 110.

n435. See id. P 94.

n436. The Special Rapporteur, who has been following conflicts and situations with a mercenary component for ten years, is compelled to reiterate his viewpoint to the Commission on Human Rights and to maintain that, no matter how they are used or what form they take to acquire some semblance of legitimacy, mercenary activities are a threat to the self-determination of peoples and an obstacle to the enjoyment of human rights by peoples who have to endure their presence.

Id. P 83.

n437. See id. P 91.

n438. Id. P 83. "Because mercenary activities and the conduct of the mercenary himself can seriously impair the enjoyment of human rights, the self-determination of peoples, the stability of constitutionally established Governments and international peace and security, mercenary activities and the mercenary career must be clearly and unequivocally banned." Id. P 117.

n439. "[I]t is not a company with links to, or which is close to, the current Government of South Africa." Id. P 98. This is a disputable claim given reports of close links between ANC officials and EO, South Africa's employment of EO in other capacities, and the frequent briefings that EO provides the South African military and security forces. See McMillan, supra note 155, at 7.

n440. See Mercenaries Report, supra note 20, P 9. Numerous General Assembly and Security Council resolutions, for instance, have condemned South Africa for its destabilizing influence in Africa. See, e.g., S.C. Res. 581, U.N. SCOR, 2666nd mtg., U.N. Doc. S/Res/581 (1986). It is interesting that in this context, the troops of South Africa, albeit an illegitimate regime in the eyes of the international community, are considered mercenaries although they were carrying out covert actions on behalf of the state. This implies that mercenaries are marked more by the illegitimacy of their employer and the acts the mercenaries commit, than by their nationality or their motivation.

n441. According to the British human rights group International Alert, EO is an "assortment of former assassins, spies, saboteurs and scoundrels." Whitelaw, supra note 140, at 46.

n442. Mercenaries Report, *supra* note 20, P 109. This relationship between SCs and other types of companies has evolved from the need of foreign firms to secure their economic interests or territory within volatile regions: "Foreign firms investing in countries with significant natural resources are reportedly demanding that the security of the areas where their investment is concentrated should be provided by personnel recruited, trained and made available by the companies that sell security internationally." *Id.* P 95.

n443. See *id.* P 121.

n444. See *id.* P 90.

n445. South African Deputy Foreign Minister Aziz Pahad has expressed concern over the allegiance of such companies. See Philip Winslow, *Why Africa's Armies Open Arms to Elite Fighters from South Africa*, *Christian Sci. Monitor*, Oct. 19, 1995, at 1.

n446. See Weber, *supra* note 31, at 54.

n447. In the case of South Africa, the SADF is having difficulty retaining many of its soldiers because the pay for security officers is at least five times that of a state officer. See Interview with Colonel Gildenhuis, *supra* note 184.

n448. See generally Hugh Dellios, *Today's Mercenaries: Soldiers of Fortune 500*, *Chi. Trib.*, Jan. 25, 1997, at 1.

n449. See *Mercenary Military Retirees*, *Wash. Times*, Dec. 15, 1996, at B5.

n450. Eeben Barlow, EO's spokesperson and general manager, claims that it is "profit-driven, and [its] profit depends on the satisfaction of the client." Drogin, *supra* note 126, at A10.

n451. See Interview with General Soyster, *supra* note 197.

n452. Eeben Barlow states that EO will only work for democratically elected governments or governments recognized by the United Nations. See Dellios, *supra* note 448, at 1. According to Barlow, EO will not "get involved in countries where atrocities or genocide is being committed, we won't get involved in religious wars, we won't get involved in conflicts where we don't understand the particular politics of

that conflict." Winslow, *supra* note 448, at 1.

n453. "Of course, the directors of Executive Outcomes strongly deny that they qualify as mercenaries and it is a well-known fact that they are spending time and money on a campaign to create a business image that will get them out from under the disparaging shadow of mercenary activity." Mercenaries Report, *supra* note 20, P 67. EO's concern for its image translates into strict monitoring of its employees' behavior in the field. In terms of its business, EO cannot afford to be classified as a group of thugs who engage in banditry and human rights abuses.

n454. *Id.* P 103.

n455. EO points to its apolitical standing as an asset that governments seek when hiring security services. See Harding, *supra* note 119, at 32.

n456. EO "argues that behaving in an undisciplined and underhand manner is bad for business. It has been as ruthless to the government units that have been involved in looting and banditry as it has been to the rebels." Ashworth, *supra* note 117, at 3. EO claims that its military advisors are a "stabilizing force" and do not fight, loot, or maraud. See Drogin, *supra* note 126, at A1.

n457. See Richard Meares, Private-Sector War Blooms in Africa, Reuters World Service, Jan. 10, 1997, available in LEXIS, News Library, Reuters News File.

n458. Ashworth, *supra* note 117, at 2. EO's troops "have uniforms, badges of rank, and are paid well." *Id.* Most SCs employees are drawn from a pool; therefore, these individuals have other jobs and are less likely to enter risky employment. See Christopher Munnion, South Africa Tries to Stop the Trade in Guns for Hire, Daily Telegraph, Mar. 28, 1997, at 20.

n459. EO is diversifying beyond security services, and it is searching for "post-conflict work" in the "enormously lucrative logistics of rehabilitation." This includes businesses in water projects, road-building, housing, tourism, conservation, clinical care, medical supply, and farming. See Harding, *supra* note 119, at 32.

n460. "The real value of mercenaries nowadays is not to fight so much as to train and support. They give ill-trained Third World forces a strength and expertise they would never otherwise possess, plus communications systems that usually outmatch anything the locals can provide." John Simpson, Why Soldiers of Fortune Are a Maligned Force, Sunday Telegraph, Mar. 23, 1997, at 31.

n461. This is the role EO played in Sierra Leone and Angola, where the resistance was weakened to the point of being forced to negotiate

for survival. This was the purported plan with the use of EO in PNG. Some experts believe that a complete victory over the BRA is impossible and that a negotiated settlement is the only means of ending the conflict. See Vivek Chaudhary, Mercenary Faced Rebel Death Threats, *Guardian*, Apr. 11, 1997, at 2.

n462. See McNeil, *supra* note 144, at 5. It could be argued that SCs allow the market to determine the legitimacy of regimes and opposition movements. SCs have to make cost-benefit and risk assessments before entering a conflict; therefore, SCs determine the "legitimacy" of parties to a conflict, which must have popular support, the means to pay the SC, must control a territory, and be in a position to win the war. This argument fails if the market shrinks or becomes saturated with SCs willing to take high-level risks.

n463. The United Nations has consulted with private security companies like London-based Defence Systems Ltd. (DSL) for its operations. It has considered using private force in its aid missions when U.N. members are unwilling or unable to provide troops. See Moyiga Nduru, Africa: Leaders Urged to Stop Recruiting Mercenaries, *Inter Press Service*, June 18, 1997, available in LEXIS, News Library, Global Information News File.

n464. See Ashworth, *supra* note 117, at 1.

n465. The private domestic and international security markets, usually the preserve of the state and local police, are growing in unison. See Guards and Gumshoes, *Economist*, Apr. 19, 1997, at 23; Raghavan, *supra* note 112, at 52. See generally Welcome to the New World of Private Security, *Economist*, Apr. 19, 1997, at 21 (discussing the resort to private security in many societies).

n466. See Harding, *supra* note 119, at 32.

n467. See generally Khareen Pech & David Beresford, Corporate Dogs of War Who Grow Fat Amid the Anarchy of Africa, *Observer*, Jan. 19, 1997, at 19.

n468. EO claims client confidentiality does not allow it to reveal all of its contracts, which makes many observers suspicious.

n469. The South African Minister of Water Affairs and Forestry and President of the Arms Control Commission, Mr. Kader Asmal, believes that the complete prohibition of international security services would be ineffective. Mr. Asmal instead suggests that such services be subject to the approval of the state, like the regulation of the arms market. See *Mercenaries Report*, *supra* note 20, P 44.

n470. Countries have not made clear statements as to whether or not they consider themselves responsible for SCs registered in their countries. The South African government has disavowed any connection to EO, but it does not regulate EO's activity at all under present

legislation. See discussion of South African legislative proposals to regulate EO and other SCs, *infra* Part VI.

n471. Operators selling shoddy service have infiltrated the SC market: "Lack of proper regulatory controls has allowed shady characters to enter the business." Raghavan, *supra* note 112, at 52.

n472. Since there is a disparity in the stringency of regulation in different countries, those SCs registered and operating in nations with stricter controls are prejudiced because they are prevented from competing for certain contracts by their home state. See Interview with General Soyster, *supra* note 197 (commenting that MPRI's business interests coincide with U.S. licensing procedures even though MPRI appears to be at an apparent disadvantage since other competitors do not have to abide by similar licensing laws). This is not unlike the international arms sales market. Cf. Holly Burkhalter, A Call for an Arms Sales Code of Conduct, *Legal Times*, June 26, 1995, at 22. A balancing of the regulatory system around the world would prevent a race to the least restrictive state, although the location of SCs is a consideration affected by several other business factors such as recruiting capabilities, government and personal networking, infrastructure, and the like.

n473. Munnion, *supra* note 458, at 20.

n474. Today, all states, including those which uphold a private enterprise system, have no hesitation in imposing numerous export restrictions, foreign exchange controls, and other government supervision over contracts and enterprises involving the export of war materials. This illustrates the growing recognition by states that they cannot ignore activities by their nationals which may affect world peace and security.

Burmester, *supra* note 289, at 45.

n475. 22 U.S.C. 2778. The President, through the Secretary of State, designates those items which are to be placed on the Munitions List (121). See 22 U.S.C. 2778(a), 2794(7).

n476. 22 U.S.C. 120.9(a).

n477. See 22 U.S.C. 122.

n478. See 22 U.S.C. 123.

n479. See 22 U.S.C. 123.15. For a discussion of the U.S. constitutional separation-of-powers issues with respect to U.S. involvement in covert or low-intensity conflicts, see generally Jules Lobel, *Covert War and Congressional Authority: Hidden War and Forgotten Power*, 134 U. Pa. L. Rev. 1035 (1986); see also Uyeda, *supra* note 30, at 777.

n480. According to a State Department official, approximately 25% of all license applications are sent to other departments or agencies like the Office of Defense Trade Services, the Office of Politico Military Affairs, and the Office of Arms Transfer and Export Control Policy. See Interview with State Department official, PM/ATEC Officer, in Washington, D.C. (Jan. 23, 1997).

n481. The White House has issued a memorandum listing the "Criteria for Decisionmaking on U.S. Arms Exports" (Feb. 17, 1995). DTC uses these general criteria to determine the appropriateness of granting a license:

All arms transfer decisions will take into account the following criteria:

- . Consistency with international agreements and arms control initiatives.
- . Appropriateness of the transfer in responding to legitimate U.S. and recipient security needs.
- . Consistency with U.S. regional stability interests, especially when considering transfers involving power projection capability or introduction of a system which may foster increased tension or contribute to an arms race.
- . The degree to which the transfer supports U.S. strategic and foreign policy interests through increased access and influence, allied burdensharing, and interoperability.
- . The impact of the proposed transfer on U.S. capabilities and technological advantage, particularly in protecting sensitive software and hardware design, development, manufacturing, and integration knowledge.
- . The impact on U.S. industry and the defense industrial base whether the sale is approved or not.
- . The degree of protection afforded sensitive technology and potential for unauthorized third-party transfer, as well as in-country diversion to unauthorized uses.
- . The risk of revealing system vulnerabilities and adversely impacting U.S. operational capabilities in the vent of compromise.
- . The risk of adverse economic, political or social impact within the recipient nation and the degree to which security needs can be addressed by other means.
- . The human rights, terrorism and proliferation record of the recipient and the potential for misuse of the export in question.
- . The availability of comparable systems from foreign suppliers.
- . The ability of the recipient effectively to field, support, and appropriately employ the requested system in accordance with its intended end-use.

Criteria for Decisionmaking on U.S. Arms Exports, White House Memorandum (Feb. 17, 1995).

n482. See 22 U.S.C. 128.

n483. See *id.* 123.21, 123.25.

n484. See Israeli Commodities and Service Control Act (1957) and Export-Import Ordinance (1979). The latter law authorizes the Ministry of Defence to exercise control over the export of defense items and know-how. There are other proclamations and orders which reinforce government control over the export of defense know-how. See Proclamation of Commodities and Services (1986); Commodities and Services Control order (1991); see also Tim Kennedy, Israeli Legislators, Moneyclips, Feb. 24, 1994, available in LEXIS, News Library, Moneyclips File.

n485. See List of Controlled Items and Know-How Under the Proclamation of Commodities and Services (1986).

n486. Israeli Ministry of Defence publication.

n487. The Ministry also considers the following criteria: (1) compliance with U.N. resolutions; (2) adherence to foreign country legislation; (3) adherence to international control regimes; and (4) exporter credibility. See Ministry of Defence publication at 5.

n488. See generally Pech, *supra* note 181.

n489. See South Africa Seeks to Bar Mercenary Actions Abroad, Apr. 30, 1997, Reuters N. Am. wire, available in LEXIS, News Library, Reuters News File.

n490. Recent reports indicate that the threat of the new law has vastly increased the number of contracts being signed by South African security companies. After the introduction of the bill in August of 1997, South African companies rushed to sign security contracts with foreign companies. It remains to be seen if the law will be applied retroactively. See Khareen Pech, SA "Soldiers" Sent Home, Mail & Guardian, Oct. 10, 1997, available in LEXIS, News Library, Africa News Service File.

n491. Eeben Barlow has stated that "three other African countries have offered us a home and a big European group has even proposed buying us out." African Success Story?, *supra* note 168.

n492. Martin van Creveld, *On Future War* 197 (1991).

n493. *Id.* at 207.

n494. Mercenaries Report, *supra* note 20, P 72 (emphasis added).

n495. *Id.* P 71.

n496. See Roundtable Discussion, *supra* note 119.

n497. For instance, international observers argue that the national troops contributing to ECOMOG in Liberia have performed poorly and have been far less than objective in their service. For a discussion on the United Nations' potential use of Gurkhas and Foreign Legion troops, see Keeping the Peace, *Asiaweek*, Mar. 3, 1995, at 20; see also Fred Coleman, Colonial Grunts No Longer, *U.S. News & World Rep.*, Nov. 1, 1993, at 74.

n498. For a discussion of the United Nations' problems, see Edwin Smith, Collective Security and Collective Defense: Changing Conceptions and Institutions, in *The United Nations in a New World Order* 23-24 (1994). For a more general discussion of U.N. intervention and the effects on state sovereignty, see Michael G. Schechter, The United Nations in the Aftermath of the U.N.'s Handling of Article 2(7) on the United Nations, in *The United Nations in a New World Order* 49-91 (1994).

n499. The United States, France, Russia, and NATO, respectively, have led the U.N. interventions in these countries. For a discussion of France's role in Rwanda, see Michael Littlejohns, U.N. Backs French Troop Deployment in Rwanda: Security Council Reluctantly Approves Deployment, *Fin. Times*, June 23, 1991, at 4. For a discussion of U.S. and Russian influence, see James Bone, U.S. and Russia Carve Out "Spheres of Influence," *Fin. Times*, Sept. 27, 1994, available in LEXIS, News Library, Financial Times File.

n500. See Brian Urquhart, For a U.N. Volunteer Military Force, *N.Y. Rev. of Books*, June 10, 1993, at 3-4.

n501. Aid organization workers abroad have faced increasing threats to their safety. In December 1996, six Red Cross personnel were killed in the worst single attack on the Red Cross in its history. See generally Rom Elif Kaban, Aid Agencies Pull Out of Chechnya, *Herald*, Dec. 12, 1996, at 12; see also Christopher Bellamy & Phil Reeves, Murders Force Aid Agencies to Quit Anarchy of Grozny, *Indep.*, Dec. 18, 1996, at 7. In the 1990s, Red Cross volunteers have faced attacks and threats in Somalia, Burundi, and Sierra Leone. See Laura Meckler, Aid Workers: Under the Gun While Overseas, *Record*, Dec. 22, 1996, at 1. Other aid workers have been killed, harassed, and threatened by militias in Liberia and Zaire and have been forced to leave their missions. See, e.g., Peter Beaumont, Do Nothing, and Other People Die, *Observer*, Dec. 22, 1996, at 3; Frank Wright, Danger Is Never Far Away for Aid Workers, *Star Trib.*, Dec. 19, 1996, at 28A; Aid Workers Leave Liberian Towns After Harassment, *Agence France Presse*, Dec. 18, 1996, available in LEXIS, News Library, Agence France Presse File.

n502. Van Creveld, *supra* note 492, at 198.

n503. Tickler, *supra* note 32, at 220.