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GUNS FOR HIRE – DEATH ON DEMAND?

PRIVATE MILITARY COMPANIES AS

STATE SURROGATES FOR LICIT TARGETED KILLINGS©

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Abstract

History is replete with examples of so-called private military companies (PMCs), private military firms (PMFs), privateers, mercenaries and others hired to conduct targeted killings and to become "force multipliers" to existing uniformed military forces and governmental paramilitary elements.

Popular opinion – and to a certain extent, political decision-making – is incorrectly influenced by two incorrect assertions: that PMC/PMF contractors are mercenaries and only standing national armies can legitimately engage in warfare throughout the entire spectrum of operations, including but not limited to targeted killings. PMC/PMF contractors are not, in fact, mercenaries. For that matter, current international law makes it unlikely that any tribunal would categorize PMC/PMF personnel as mercenaries. International instruments on point enjoy little support, and contrary state practice places a dubious shadow over whether those instruments are true

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codifications of customary international law. As to national armies as the only legitimate combatants, their existence is a recent innovation. Mercenaries, however, have existed as long as recorded history.

Under US domestic law, as well as international law, these targeted killings may be legally conducted by governmental elements under certain circumstances, but PMCs and others may encounter additional limitations in wartime, in conflicts "between war and peace," as well as peacetime.

Assassinations and Licit Targeted Killings – Distinctions With a Difference?

The *Oxford English Dictionary* describes the term Assassin as a noun, denoting "a murderer of an important person in a surprise attack for political or religious reasons," with the term arriving in the "mid 16th century: from French, or from medieval Latin *assassinus*, from Arabic *ḥašīšī* 'hashish eater'."[1] While "surprise attack for political or religious reasons" may have abounded in the times prior to recorded history, William Shakespeare may well have made the first written use of the term "assassination" in the tragedy MacBeth: "If th' Assassination Could trammell up the Consequence, and catch With his surcease, Successe."[2]

[1] Assassin. (2011). *Oxforddictionaries.com.* Oxford University Press. Retrieved March 15, 2011, available at http://oxforddictionaries.com/view/entry/m_en_us1223335?rskey=JTTTi1&result=2#m_en_us1223335.002. It goes on to note, the term comes from an Arabic word for "hashish-eater" and in English referred to "Certain Muslim fanatics in the time of the Crusades, who were sent forth by their sheikh, the 'Old Man of the Mountains,' to murder the Christian leaders." *Id.*

[2] William Shakespeare, MACBETH (1603), Ed. Horace H. Furness, Jr., 1873Act 1, sc. Vii, at 95, available at http://books.google.com/books?id=8z8OAAAAIAAJ&pg=PA95&lpg =PA95&dq=If+the'+Assassination +Could+trammel+up+the+Consequence,+and+catch+With+his+surcease,+Successe&source=bl&ots=CH8CO1d90 S&sig=wNflcZkjWkcJ2l7kJZg1e4_DdI&hl=en&ei=e_h_Tb_TIOOX0QHYz4WNCQ&sa=X&oi=book_result&ct=r

Due to the complexity of "surprise attack for political …reasons," such killings, licit and illicit, rarely occur without political repercussion, operational complexity,[3] or the absence of an historical context.[4] In these and other matters, in contemporary times, U.S. presidents have prescribed or proscribed various forms of targeted killings, and related to such prescriptions and proscriptions, delegated limited presidential functions,[5] both by executive order and by presidential memorandum or directive.[6] Both an executive order and a presidential directive remain effective upon a change in administration, unless otherwise specified in the document, and both continue to be effective until subsequent presidential action is taken.[7] Relevant to this

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esult&resnum=5&ved=0CDgQ6AEwBA#v=onepage&q&f=false, *cited with authority in* Mark Peters, What Do You Call an Assassination?, Good Education, July 26, 2010 12:00 pm PDT available at http://www.good.is/post/what-do-you-call-an-assassination/ For an explanation of what, perchance, Shakespeare meant by this obscure passage, see, e.g., Horst Breuer, How to Trammel up the Consequence and Catch Success: "Macbeth" 1.7.3-4, *Modern Philology* Vol. 99, No. 3 (Feb., 2002), pp. 376-378.

[3] Glenn W. Johnson, Mortus Discriminatus: Procedures in Targeted Killing, Naval Postgraduate School (NPS) MS thesis, June 2007, at I, available at http://edocs.nps.edu/npspubs/scholarly/theses/2007/Jun/07Jun_Johnson.pdf. Johnson's Abstract noted that as of 2007, at least in the unclassified realm " no widely established standard or published set of guidelines and planning considerations exist for operational planners to conduct targeted killing operations. Due to the political complexity intertwined with targeted killing these types of operations rarely occur without repercussion. Operational planners need to understand that targeted killing operations cannot exist solely at the operational level because their consequences have strategic and political ramifications. By utilizing a case study analysis, this thesis will identify the operational planning considerations that need to be addressed to successfully conduct a targeted killing mission." *Id.*, at i.

[4] Johnson, at *Id.*, 23-42, examines in a non-exclusive, non-chronological order, the successful and unsuccessful efforts at targeted killings of: A. Ahmed Jibril (1980s through present (?) – unsuccessful), Pablo Escobar (July 2, 1994 – successful); Israel's Wrath Of God (1972 – successful); Obergruppenführer Reinhard Heyrich (October 28, 1941 – ultimately successful); Hamas Terrorists (various dates – varying success); and, Admiral Isoroku Yamamoto (April 18, 1943 – successful).

[5] Note: Regarding Presidential delegation of authority, consider generally that Article II, section 1 of the Constitution reads, in part, *"The executive power shall be vested in a president of the United States of America."* And, Article II, section 3 asserts that, *"The President shall take care that the laws be faithfully executed..."* U.S. Const. art. II, §§ 1, 3, available at http://www.usconstitution.net/

[6] Legal Effectiveness Of A Presidential Directive, As Compared To An Executive Order, Memorandum For The Counsel (sic) Counsel To The President, January 29, 2000, available at http://www.justice.gov/olc/predirective.htm. In this memorandum, Randolph D. Moss, Acting Assistant Attorney General, gives examples; *compare* Delegation of Authority Under Section 1401(b) of the National Defense Authorization Act for Fiscal Year 2000 (Public Law 106-65), 65 Fed. Reg. 3119 (2000), *with* Exec. Order No. 10,250 (1951) (delegation of functions to the Secretary of the Interior), *reprinted as amended in* 3 U.S.C. § 301 app. (1994).

[7] *Id.*

article, came the December 4, 1981 Executive Order 12333, issued by President Ronald Reagan, "United States Intelligence Activities."[8] Section 2.11 of the order provides, with brevity albeit ambiguity, the following:

> "Prohibition on Assassination. No person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination."[9]

Section 2.12 of E.O 12333 prohibits indirect participation in activities prohibited by the order, stating: "Indirect participation. No agency of the Intelligence Community shall participate in or request any person to undertake activities forbidden by this Order."[10]

While E.O. 12333 remains in legal effect and is still in force, post September 11, 2001 legislation has "opened the door" to a reinterpretation or redefinition of the assassination ban, if not repealing it entirely. On Friday, September 14, 2001, both the House and the Senate passed joint resolutions, S.J. Res. 23 and H.J. Res. 64, authorizing the President to:

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[8] Executive Order (E.O.) 12333 of Dec. 4, 1981, 46 FR 59941, 3 CFR, 1981 Comp., p. 200, available at http://www.au.af.mil/au/awc/awcgate/whitehouse/eo12333.htm

[9] E.O. 12333 was the last of three executive orders banning assassination. For a detailed yet accessible review of this subject, see Elizabeth B. Bazan, Assassination Ban and E.O. 12333: A Brief Summary, Congressional Research Service (CRS) Report RS21037, Updated January 4, 2002, at 1-2, available at http://www.fas.org/irp/crs/RS21037.pdf
bans. Bazan notes that the first, "Executive Order 11905, Sec. 5(g), 41 Fed. Reg. 7703, 7733 (President Gerald Ford, 2/19/76), was part of an executive order issued by President Ford in response to concerns raised in the 1970's with respect to alleged abuses by the U.S. intelligence community. This section of E.O. 11905 stated, "Prohibition of Assassination. No employee of the United States Government shall engage in, or conspire to engage in, political assassination." condemned assassination and rejected it as an instrument of American policy." Id., at 1-2. Bazan also notes that "the assassination ban in E.O. 11905 was superseded by Executive Order 12036, Sec. 2-305 (assassination prohibition) and Sec. 2-309 (indirect participation prohibition),3 43 Fed. Reg. 3674, 3688, 3689 (President Jimmy Carter, 1/26/78). The pertinent provisions in President Reagan's E.O. 12333, in turn, superseded those in President Carter's order." *Id.,* at 2.

[10] E.O. 12333, *supra* note 3.

> "Use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons."[11]

The Congressional Research Service's Elizabeth B. Bazan has noted that although this law makes no explicit reference to the assassination ban in E.O. 12333, if the assassination ban were to be interpreted to cover U.S. responses to terrorist attacks on U.S. soil, "the breadth of the authority provided by these joint resolutions might be viewed as sufficient, insofar as U.S. responses to the events of September 11, 2001 are concerned, to encompass actions that might otherwise be prohibited under the assassination ban."[12]

Published reports in popular media[13] as well as governmental sources[14] have suggested that in

[11] Note: The Senate passed S.J.Res. 23, before 11:00 a.m. on Friday, September 14, 2001. The House passed it late Friday evening, September 14, 2001. The President signed it into law on Tuesday, September 18, 2001 as P.L. 107-40, 115 Stat. 224 (2001). For a detailed discussion of authorizations of the use of U.S. military force see Jennifer K. Elsea and Richard F. Grimmett, Congressional Research Service (CRS) Report RL31133, Declarations of War and Authorizations of Use of Military Force: Historical Background and Legal Implications, Updated March 8, 2007, available at http://www.fas.org/sgp/crs/natsec/RS22357.pdf

[12] Bazan, *supra* note 7, at 6. Note: Legislation has been introduced – but has "died in committee" since 2001 to expressly revoke the express prohibition against assassination in the Ford, Carter, and Reagan executive orders. *See, e.g*., H.R. 19 (introduced January 3, 2001 and referred to House Committee on International Relations), available at http://www.govtrack.us/congress/bill.xpd?bill=h107-19.

[13] *See, e.g.,* Siobhan Gorman, CIA Had Secret Al Qaeda Plan, The Wall Street Journal, July 13, 2009, available at http://online.wsj.com/article/SB124736381913627661.html#mod=djemalertNEWS, cited with authority in Marc Ambinder, What Was That Secret CIA Operation? Targeted Assassinations?, The Atlantic, Jul 13 2009, 7:46 AM ET, available at http://www.theatlantic.com/politics/archive/ 2009/07/ what-was-that-secret-cia-operation-targeted-assassinations/21144/

[14] See, e.g., Alfred Cumming, *Covert Action: Legislative Background and Possible Policy Questions*, Congressional

the wake of the 9/11 terrorist attacks, the Pentagon has expanded its counter-terrorism intelligence activities as part what the George W. Bush Administration termed the "global war on terror[ism]." In some cases these activities have been acknowledged and attributed to U.S. forces or civilians accompanying the forces; in other instances, there may be so-called "clandestine" and "covert" operations. The term "clandestine" has been repeated consistently since it first appeared in Art. 29 of the 1899 Hague Regulations,[15] but in state practice, a change in terminology has occurred. At the present time, it is common to distinguish between "clandestine" and "covert" operations. Clandestine operations are those that are conducted in a fashion intended to assure secrecy or concealment. For instance, an aircraft may fly at night or below radar coverage to conceal the fact that a flight has even occurred. By contrast, covert operations are "designed to conceal the identity of the individual or equipment conducting the operation, and sometimes even the identity of the State sponsoring it. As an example, an aircraft which is falsely marked would be engaging in a covert operation." [16] Clandestine operations are those "which are conducted in a fashion intended to assure secrecy or concealment. For instance, an aircraft may fly at night or below radar coverage to conceal the fact that a flight has even occurred."[17] By contrast, covert operations are "designed to conceal the identity of the individual or equipment conducting the operation."[18] The Congressional Research Service's Alfred Cumming has asserted, "the Department of Defense (DOD) may have been conducting certain

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Research Service (CRS) Report RL33715, July 6, 2009, *available at* http://www.fas.org/sgp/crs/intel/RL33715.pdf

[15] Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 29 July 1899, available at http://www.icrc.org/IHL.NSF/FULL/150

[16] Commentary to Harvard Humanitarian Policy and Conflict Research (HPCR) Manual on International Law Applicable to Air and Missile Warfare, Version 2.1 March 2010, at 258, *available at* http://www.icrc.org/IHL.NSF/FULL/150.

[17] *Id.,* at 258.

[18] *Id.*, at 258, available at http://www.icrc.org/IHL.NSF/FULL/150.

kinds of counterterrorism intelligence activities that would statutorily qualify as "covert actions,"[19] and thus require a presidential finding and the notification of the congressional intelligence committees."[20]

In Sections 601-604 of the 1991 Joint Explanatory Statement of the Committee of Conference, H.R. 1455, significant provisions were set forth regarding congressional oversight of intelligence activities, including requirements relating to the authorization of covert actions by the President and the reporting of covert actions to the Congress. These provisions had for the first time in statute imposed the following requirements:

> A finding that determines such an action is necessary to support identifiable foreign policy objectives of the United States and is important to the national security of the United States must be in writing.
>
> A finding may not retroactively authorize covert activities which have already occurred.
>
> The President must determine that the covert action is necessary to support identifiable

[19] Id., at 258, citing Joint Explanatory Statement of the Committee of Conference, H.R. 1455, Jul. 25, 1991, available at http://www.fas.org/irp/congress/1991_cr/h910725-ia.htm. As set forth by the Committee of Conference, the definition of `covert action' applies only to activities in which the role of the United States Government is not intended to be apparent or acknowledged publicly. Therefore, the definition of `covert action' does not apply to acknowledged United States government activities which are intended to misled a potential adversary as to the true nature of United States military capabilities, intentions, or operations. Likewise, the definition of `covert action' does not apply to acknowledged United States government activities which are intended to influence public opinion or governmental attitudes in foreign countries. As noted by Cumming, *supra* note 14, at 6, in approving a statutory definition of covert action, "Congress also statutorily stipulated four categories of activities that would not constitute covert action. They are: (1) activities the primary purpose of which is to acquire intelligence, traditional counterintelligence activities, traditional activities to improve or maintain the operational security of U.S. government programs, or administrative activities; (2) traditional diplomatic or military activities or routine support to such activities; (3) traditional law enforcement activities conducted by U.S. government law enforcement agencies or routine support to such activities; and (4) activities to provide routine support to the overt activities (other than activities described in the first three categories) of other U.S. government agencies abroad."

[20] *Id.,* at i.

foreign policy objectives of the United States.

A finding must specify all government agencies involved and whether any third party will be involved.

A finding may not authorize any action intended to influence United States political processes, public opinion, policies or media.

A finding may not authorize any action which violates the Constitution of the United States or any statutes of the United States.

Notification to the congressional leaders specified in the bill must be followed by submission of the written finding to the chairmen of the intelligence committees.

The intelligence committees must be informed of significant changes in covert actions.

No funds may be spent by any department, agency or entity of the Executive Branch on a covert action until there has been a signed, written finding.[21]

According to the Wall Street Journal's Siobahn Gorman, "a secret Central Intelligence Agency initiative terminated by Director Leon Panetta was an attempt to carry out a 2001 presidential authorization to capture or kill al Qaeda operatives, according to former intelligence officials familiar with the matter."[22] Gorman also claimed that "Amid the high alert following the Sept. 11 terrorist attacks, a small CIA unit examined the potential for targeted assassinations of al Qaeda operatives," and that President Bush "issued the finding that authorized the capturing of several top al Qaeda leaders, and allowed officers to kill the targets if capturing proved too dangerous or

[21] Cumming, supra note 14, at 5, *citing* Sec. 503 of the National Security Act of 1947 [50 U.S.C. 413b].
[22] Siobhan Gorman, supra note 1.

risky."[23] Such activities since 2001 may have included but not limited to an operation in 2002, where a group of Special Forces operators were purportedly conducting counterterrorist operations on the Horn of Africa to kill or capture Qaed Salim Sinan al-Harethi, a top tier al Qaeda member and USS Cole bombing suspect; on November 5, 2002, al-Harithi and his al Qaeda companions were killed with a Hellfire missile destroyint the vehicle in which they drove.[24]

The activity of each component of the United States Government that will be involved in a particular area must be examined to determine if the activity of that component is a covert action. It may be that an activity that is not a covert activity may be supported by a component of the government, or even a contractor, and while an operation conducted by the uniformed military forces may not be a covert action, the unattributable efforts of the CIA or another governmental agency to support that activity might be a covert action.[25] So what if it were true, as Blackwater Worldwide (a/k/a Xe Services) founder Erik Prince claimed that his private contractors worked with the CIA on secret programs targeting top al-Qaeda leaders, "to give the agency 'unattributable capability" in sensitive missions?"[26] This article's next segment will examine the authority and the liability for unclassified and classified contractor activity.

Not Just Mercenaries By Another Name – Private Military Firms and Private Military

[23] *Id.*
[24] Walter Pincus, "U.S. missiles kill al Qaeda suspects," Washington Post ; 6 November 2002; available at http://www.theage.com/au/articles/2002/11/05/1036308311314.html*cited with authority in* Johnson, *supra* note 3, at 1.
[25] See, e.g., Joby Warrick, Blackwater founder says he aided secret programs, The Washington Post, December 3, 2009, available at http://www.washingtonpost.com/wp-dyn/content/article/2009/12/02/AR2009120203469.html
[26] *Id.*

Corporations

Peter Singer's masterwork of *Corporate Warriors,*[27] to be oft-cited later in this article, is an encyclopedic examination of present-day Private Military Firms (PMFs) or Private Military Contractors (PMCs) like Xe Services (formerly Blackwater Worldwide), corporate bodies that specialize in the provision of military skills, including combat operations.[28] PMFs operate globally, often with strategic impact on both the process and outcome of conflicts.[29] They have also become integral to the peacetime security systems of wealthy and impoverished states alike.[30]

A significant clarification rates commentary here: PMF contractors are not mercenaries[31] and forces other than standing national armies can also legitimately engage in warfare.[32] PMF contractors have a legal distinction which sets them apart from mercenaries,[33] and it is unlikely

[27] P. W. SINGER, CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY 8 (2003). Peter Singer is a National Security Fellow at the Brookings Institute and is widely published in his critiques against the privatization of warfare.
[28] *Id.,* at 8. See also Kevin H. Govern and Eric C. Bales, Taking Shots at Private Military Firms: International Law Misses its Mark (Again), 32 Fordham Int'l L.J. 55 (2008). A variety of terms have been used for such private military entities. Hereinafter, this article will refer to Private Military Firms (PMFs) for such entities.
[29] *Id.*
[30] *Id.*
[31] Special Rapporteur José Luis Gomez del Prado, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of People to Self-Determination*, ¶ 56, *delivered to the Human Rights Council*, U.N. Doc. A/HRC/7/7 (Jan. 9, 2008), *available at* http://www2.ohchr.org/english/issues/mercenaries/docs/A.HRC.7.7.pdf ("[The Working Group] is of the opinion that many . . . such manifestations are new modalities of mercenary-related activities."); Alexander Higgins, *US Rejects UN Mercenary Report*, USA TODAY, Oct. 17, 2007 ("[The] U.N. report . . . said the use of private security guards like those involved in the [Nusoor Square] shooting . . . amounted to a new form of mercenary activity.").
[32] *See* Shawn McCormack, *Private Security Contractors in Iraq Violate Laws of War*, 31 SUFFOLK TRANSNAT'L L. REV. 75, 98 (2007) (claiming contractors violate their status as noncombatants whenever they use force).
[33] Wm. C. Peters, *On Law, Wars and Mercenaries: The Case for Courts-Martial Jurisdiction over Civilian Contractor Misconduct in Iraq*, 2006 B.Y.U. L. REV. 315, 324 (2006) ("[O]ne of the most fervent and skeptical

that any nation or tribunal could successfully establish who is a mercenary under current international law at present,[34] and the long-standing customary international law on the use of mercenaries and whether or not each is applicable to PMF contractors.[35]

In Singer's estimation, hiring of private individuals to fight battles "is as old as war itself."[36] The contemporary notion that war was fought exclusively by standing armies of sovereign nation-states is erroneous,[37] and the "monopoly of the state over violence is the exception in world history, rather than the rule."[38] Singer assesses that the sovereign nation-state is a "new" model that throughout its 400-year existence has availed itself of the private sector to build and maintain public power.[39]

Singer's assertions are proved by history; the earliest recorded use of mercenaries rests with King Shulgi of Ur (2094–2047 B.C.).[40] Thereafter, King Ramses II is chronicled as leading an army whose ranks swelled with Numidian mercenaries in the Battle for Kadesh in 1294 B.C.[41]

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critics of [PMFs], the former U.N. Special Rapporteur on Mercenaries, Enrique Ballesteros, has implicitly acknowledged that it is necessary to distinguish [PMFs] and their personnel from actual mercenaries.").

[34] Professor Geoffrey Best argues that any individual who could not exclude himself from the poorly drafted definition(s) of mercenary deserves to be shot—and his attorney with him! GEOFFREY BEST, HUMANITY IN WARFARE: THE MODERN HISTORY OF THE INTERNATIONAL LAW OF ARMED CONFLICT 328 n.83 (1980).

[35] Todd Milliard's exhaustive research on the experiences of post-colonial Africa in shaping international law on mercenarism provides an oft-cited template that largely informs the analysis in this article. *See generally* Todd S. Milliard, *Overcoming Post-Colonial Myopia: A Call to Recognize and Regulate Private Military Companies*, 176 MIL. L. REV. 1 (2003).

[36] SINGER, *supra* note 2827, at 19.

[37] *Id.*

[38] JANICE THOMSON, MERCENARIES, PIRATES AND SOVEREIGNS (1994).

[39] SINGER, *supra note 27*, at 20.

[40] *Id.*

[41] R. ERNEST DUPUY & TREVOR N. DUPUY, THE ENCYCLOPEDIA OF MILITARY HISTORY FROM 3500 B.C. TO THE PRESENT 6 (2d ed. 1986).

King David used mercenaries to drive out the Philistines in 1000 B.C.[42] Most ancient Greek city-states relied on mercenaries—save Sparta and a few others—as force multipliers.[43] Alexander the Great invaded Persia with one-third of his army constituting mercenaries.[44] By the end of the conquest of Persia, almost his entire army was made up of mercenaries.[45] The vast majority of Caesar's cavalry were mercenaries,[46] as were the *feoderati* of Justinian's East Roman Army.[47] Even at its height, the Roman Empire continued to use hired foreign troops, eventually resulting in its legions being more Germanic than Roman.[48] Mercenaries were also heavily relied upon during the Norman Conquest,[49] by Italian city-states during the Renaissance,[50] and by Britain in her attempt to put down the rebellion that became the American Revolutionary War.[51]

As a corporate entity, the PMF model can be traced back as early as the Byzantine Empire, which made use of Norse mercenaries that later formed the Varangian Guard.[52] The Byzantine Empire also employed the services of the Grand Catalan Company, the longest-lasting "free company."[53] Free companies flourished in Europe for over 150 years until their wealth and

[42] Milliard, *supra* note **Error! Bookmark not defined.**~~19~~, at 2.
[43] G.T. GRIFFITH, THE MERCENARIES OF THE HELLENISTIC WORLD 4 (Groningen ed., 1968)).
[44] *Id.* at 12–13.
[45] SINGER, *supra note 27*, at 21.
[46] DUPUY, *supra* note 41~~25~~, at 98.
[47] Milliard, *supra* note **Error! Bookmark not defined.**~~19~~, at 2 (*citing* LYNN MONTROSS, WAR THOUGH THE AGES 109 (3d ed. 1960)).
[48] SINGER, *supra note 27*, at 21 (*citing* HANS DELBRUCK, HISTORY OF THE ART OF WAR 250 (1975)).
[49] Milliard, *supra* note **Error! Bookmark not defined.**~~19~~, at 2 (*citing* E.A. FREEMAN, HISTORY OF THE NORMAN CONQUEST 232 (1876)).
[50] *Id.* at 2.
[51] ANTHONY MOCKLER, THE NEW MERCENARIES 6 (1985). *See also* ROBERT Y PELTON, LICENSED TO KILL 3, 284 (2006) (Colonial American forces also resorted to mercenaries).
[52] DUPUY, *supra* note 41~~25~~, at 303–06, 382.
[53] *Id.* at 387–88; MOCKLER, *supra note 53*, at 9–10.

power was too much for European nobility.

The first blow leading to the demise of the free companies came in the fifteenth century at the hands of King Charles VII of France. The French solution was to establish a standing army that absorbed many of the free companies and vanquished the others.[54] This provoked the neighboring Duke of Burgundy to follow suit, and so began a trend across Europe.[55] Those mercenaries surviving the turn-out in France moved into Italy and its *condottiere* companies.[56]

The Italian city-states continued the use of mercenaries because their use was a more efficient and expedient manner of warfare. This enabled the nobles to avoid the disruption of mobilizing the entire population of a city-state militia and allowed the productivity of its merchant class to continue relatively unabated.[57] The Italian city-states mitigated free-company power through craftily dividing contracts among "mutually jealous" captains and by bestowing honors on the loyal and successful ones, integrating them into Italian society and minimizing the risk of coups.[58] After a time, however, entrepreneurs within individual city-states replicated the free company model and obviated the need for foreign mercenaries.[59] Consequentially, some "local companies" became so powerful they seized control of their employing city-states.[60]

As standing armies became the norm in Europe, mercenary use declined but did not altogether disappear. The Swiss, for example, specializing in fielding entire units rather than individual

[54] SINGER, *supra note 27*, at 26.
[55] *Id.*
[56] DUPUY, *supra* note 41~~25~~, at 409.
[57] SINGER, *supra note 27*, at 22 (*citing* PHILLIPE CONTAMINE, WAR IN THE MIDDLE AGES 158 (1984)).
[58] *Id.* at 23.
[59] *Id.* at 26.
[60] MICHAEL HOWARD, WAR IN EUROPEAN HISTORY 26 (1976).

warriors, supplied sovereigns throughout Western Europe with experienced pike men and other unique units.[61] The Swiss were so renowned for their skill in battle that Pope Julius II formed the Papal Guard from available Swiss units in the sixteenth century, and maintains that force through the present day.[62]

The business of PMFs has thrived since 1600s, when war had become Europe's largest industry.[63] As a result a new generation of entrepreneurs sprang up to recruit, equip, train and lease entire units of mercenaries to the highest bidder.[64] Among the most successful were Louis de Greer (providing Sweden with an entire navy, including its sailors), Count Ernst von Mansfeld (raising an entire army for Frederick V, Elector Palatine) and Bernard von Weimar (fielding armies for Sweden and France).[65] Count Wilhelm von Schaumburg even established an international military academy for officers of all nations in order to train and pass on the laws of war to the next generation.[66]

The use of mercenary forces continued through the Thirty Years War (1618–1648),[67] but it became painfully clear to the employing sovereigns that mercenary units devastated the countryside by living off the land at the expense of the populace, making fiscal cost-benefit not worth the high social costs.[68] In the end, the Peace of Westphalia brought the greatest

[61] MOCKLER, *supra note 53*, at 74–104.
[62] Milliard, *supra* note **Error! Bookmark not defined.**~~19~~, at 10.
[63] HOWARD, *supra* note 60~~44~~, at 131.
[64] SINGER, *supra note 27*, at 28.
[65] *Id.* (*citing* CONTAMINE, *supra* note 57~~41~~, at 159).
[66] *Id.* at 33 (*citing* VAN CREVELD, THE RISE AND DECLINE OF THE STATE 288 (1999)).
[67] HOWARD, *supra* note 63~~47~~, at 29.
[68] JEREMY BLACK, EUROPEAN WARFARE 1453–1815 54, 61 (1999).

suppressing blow to the free companies by formally ushering in the era of sovereign states and heralding the preference of standing national armies.[69]

Mercenarism acquired a new legitimacy and authority after Westphalia,[70] most notably in the guise of the Trade Companies of the eighteenth century. These corporate warriors in their employ did not serve the interests of the state but instead those of the shareholders. Joint-stock companies like the Dutch East India Company were given exclusive trade rights within geographic regions and invested with a kind of sovereignty and dominion that gave it absolute power to "make [] peace and war at pleasure, and by its own authority; administer[] justice to all; . . . settle colonies, build[] fortifications, lev[y] troops, maintain[] numerous armies and garrisons, fit[] out fleets, and coin[] money."[71] In this vein, the British East India Company fielded an army of 100,000 foreign troops that surpassed King George II's standing army.[72]

Chains of responsibility and liability often were tested to the breaking point; the Trade Companies disregarded instruction from their sovereigns and waged politically expensive, but economically profitable, war upon other Trade Companies.[73] Eventually, however, the Trading Companies became victims of their own success, suffocating beneath the financial weight of an enormous military apparatus that had become largely unnecessary with the elimination of

[69] SINGER, *supra note 27*, at 28.
[70] SINGER, *supra note 27*, at 33.
[71] *Id.* at 34.
[72] *Id.* at 35.
[73] *Id.* at 35–36.

competitors and local dissent.[74] The English crown only continued to subsidize The British East India Company because it was uncertain how else to maintain effective rule in India. The Sepoy mutiny in 1857, which cost 11,000 European lives and required regular British troops to suppress it, brought the dissolution of the British East India Company a year later.[75] The last two private companies governing colonial territories (Rhodesia, now Zimbabwe, and Mozambique) came to an end in the early twentieth century.[76]

The end of the Cold War was the catalyst for the growth of modern mercenarism.[77] As the United States and the Soviet Union began downsizing, the "market" was flooded with soldiers highly skilled in combat arms.[78] With the thaw in relations with the Soviet Union, the superpowers were less concerned about maintaining dominating influence around the globe. The combination of shrinking militaries and their diminishing commitment to regional security sustained the mercenary trade by leaving an unfilled security need, particularly in Africa.

The backers of mercenaries operating in Africa were colonial powers looking to maintain their influence during decolonization in the 1950s and 1960s.[79] The most damning link for mercenarism was with Apartheid. From this and similar uses, mercenaries became synonymous with the suppression of self-determination movements and international opinion quickly turned

[74] THOMSON, *supra* note 3822, at 39.
[75] SINGER, *supra note 27*, at 36.
[76] *Id.* at 37.
[77] Ryan Scoville, *Toward an Accountability-Based Definition of "Mercenary"*, 37 GEO. J. INT'L. L. 541, 542 (2006).
[78] *Id.*
[79] SINGER, *supra note 27*, at 37.

against what had been the long-accepted practice of private actors in warfare.[80] Arguably, some "meritorious mercenarism" also took place in Africa. In 1994, Executive Outcomes was hired by the Angolan government to prevent its overthrow by the rebel National Union for the Total Independence of Angola ("UNITA").[81] Executive Outcomes decimated UNITA, allowing Angola's government to remain in control and consolidate its power. In 1995, Executive Outcomes did much the same for Sierra Leone when it dislodged the Revolutionary United Front ("RUF") from the diamond fields and forced them to negotiate a peace settlement with the government.[82] Nevertheless, due in large part to the cruel behavior of mercenaries in the decolonization conflicts, many countries moved to restrict and/or prohibit mercenarism.[83] Chief among these efforts are Protocol Additional to the Geneva Convention Relating to the Protection of Victims of International Armed Conflicts ("Protocol I") and the International Convention Against the Recruitment, Use, Financing and Training of Mercenaries ("U.N. Convention Against Mercenaries").

The Paradigm Shift from Mercenarism to PMF

By the nineteenth century, strong national armies had diminished the need and the opportunity for mercenaries,[84] but the diminishing interest of the superpowers in the security of weaker states

[80] *See, e.g.*, The Secretary General, *Report on the Question of the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of People to Self-Determination, delivered to the Commission on Human Rights and the General Assembly*, U.N. Doc. A/49/362 (Sep. 6, 1994).
[81] Thomas K. Adams, *The New Mercenaries and the Privatization of Conflict*, 24 PARAMETERS 109 (1999).
[82] *Id.*
[83] Wm. C. Peters, *On Law, Wars and Mercenaries: The Case for Courts-Martial Jurisdiction over Civilian Contractor Misconduct in Iraq*, 2006 B.Y.U. L. REV. 315, 321–22 (2006)
[84] Milliard, supra note **Error! Bookmark not defined.**~~19~~, at 10.

created an opportunity for unemployed soldiers to once again band together and fill an unmet need for countries unable to provide effectively for their own security.[85] It was not until the events of September 11, however, that mercenarism experienced its Renaissance.[86] Shortly after September 11, President George W. Bush signed a presidential finding that authorized the Central Intelligence Agency ("CIA") to kill Osama bin Laden and his cohorts.[87]

Finding itself short on paramilitary operators, the CIA hired private contractors for combat operations in Afghanistan.[88] During the initial stages of the campaign, over half of the 100 CIA paramilitary operators in Afghanistan were contractors.[89] The CIA also contracted security services from PMFs like Blackwater.[90] The majority of Blackwater's security operations occurred at the Kabul Airport and the Ariana Hotel, but a small detachment was stationed at "Fort Apache," the firebase from which Task Force 11 operated.[91]

The "Renaissance" has come largely in the form of Private Military Firms ("PMF") conducting stationary and convoy security in active combat zones rather than outright combat operations. PMFs have or are currently operating in: Africa (Angola, Congo, Ethiopia, Sudan, Algeria, Kenya and Uganda); Europe (Croatia, Bosnia, Kosovo); Former Soviet Union (Chechnya, Azerbaijan, Armenia, Kazakhstan); Middle East (Afghanistan, Saudi Arabia, Kuwait); Asia (Papua New Guinea, Taiwan, Cambodia, Burma, Philippines, Indonesia); and,

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[85] Tina Garmon, *Domesticating International Corporate Responsibility: Holding Private Military Firms Accountable Under the Alien Tort Claims Act*, 11 TUL. J. INT'L & COMP. L. 325, 326–27 (2003).
[86] Eugene B. Smith, *The New Condottieri and U.S. Policy: The Privatization of Conflict and Its Implications*, 32 PARAMETERS 104, 107–08 (2002).
[87] PELTON, *supra* note 5153 *supra* note 5153, at 30.
[88] *Id.* at 30–31.
[89] *Id.* at 32 (the other half were CIA employees or Special Forces operators "on loan" to the CIA).
[90] *Id.* at 31, 37.
[91] *Id.* at 38–39 (Task Force 11 is the special forces unit tasked to operate in the Afghanistan-Pakistan border region and neutralize Osama bin Laden).

The Americas (Columbia, Haiti, Mexico, United States).[92] In Iraq and Afghanistan there are presently 182,000 civilian contractors; up to 30,000 of them provide protective security functions,[93] making private contractors collectively the second-largest armed component in Iraq.[94] As to Xe (the former Blackwater), in 2006 it had deployments of: 800 in Iraq, 300 in New Orleans, 200 in Afghanistan and hundreds of others performing logistics, training and guarding static posts.[95]

Absorbing the surplus of highly trained, professional soldiers, PMFs are largely staffed by veterans of First World armies.[96] Collectively, the PMFs offer a full range of military services.[97] In fact, Blackwater has the capability of fielding a 1700 man brigade of private soldiers with its own cadre of helos and cargo planes.[98] Clients can also hire private gunships, intelligence gathering, aerial surveillance, armored cars, remote-controlled blimps and fast-attack aircraft.[99] That said, the United Kingdom's Foreign and Commonwealth Office reported in *Private Military Companies: Options for Regulation* that few PMFs are actually capable or willing to provide

[92] SINGER, *supra note 27*, at 8–17. *See also* Jon D. Michaels, *Beyond Accountability: The Constitutional, Democratic, and Strategic Problems with Privatizing War*, 82 WASH. U. L.Q. 1001, 1024–37 (2004).
[93] David A. Wallace, The Future Use of Corporate Warriors with the U.S. Armed Forces: Strategic Considerations and Concerns, at 4 (Mar. 3, 2008) (unpublished thesis, Naval War College) (on file with author).
[94] J.T. Mlinarcik, *Private Military Contractors & Justice: A Look at the Industry, Blackwater & the Fallujah Incident*, 4 REGENT J. INT'L L. 129, 133 (2006).
[95] PELTON, *supra note 53*, at 2.
[96] UNITED KINGDOM FOREIGN & COMMONWEALTH OFFICE, PRIVATE MILITARY COMPANIES: OPTIONS FOR REGULATION ¶ 23 (H.C. 577, Feb. 12, 2002), *available at* http://www.fco.gov.uk/Files/kfile/mercenaries,0.pdf (last visited Apr. 27, 2008) (pointing out that Executive Outcomes' successes in Angola and Sierra Leone were exceptional and unlikely to be repeated) [hereinafter U.K. GREEN PAPER].
[97] Milliard, *supra* note **Error! Bookmark not defined.**~~19~~, at 11 (*citing* KEN SILVERSTEIN, PRIVATE WARRIORS (2000)).
[98] PELTON, *supra note 53*, at 4 (2006).
[99] *Id.*

private military forces for actual combat operations.[100]

Some attempt to brand PMF contractors as mercenaries because of their high salaries. The fact of the matter is "mercenary" is a term of art that cannot be applied to most actual mercenaries and even fewer PMF contractors. Still, some commentators persist because of the misconduct of their predecessors.[101]

Authority and Liability – International and Domestic Law

The negative historical connotations of mercenary use in post-colonial Africa resulted in a push for criminalizing mercenarism,[102] regardless of whether such privately-retained fighting forces were acting within or outside the scope of the laws of armed conflict, let alone conducting assassinations or targeted killings. Resulting international provisions, however, fail to adequately define mercenaries and remain ineffective in establishing a regulatory scheme that could be plausibly applied to mercenaries, let alone modern PMFs.[103]

By way of review, this article should and will explore whether and how international law becomes binding. The sources of international law are: (1) treaties, (2) customary international law, (3) *jus cogen* principles ("preemptory norms") recognized by civilized nations and (4)

[100] U.K. GREEN PAPER, *supra* note 9680, at ¶¶ 9–10, 24.
[101] E.L. Gaston, *Mercenarism 2.0? The Rise of the Modern Private Security Industry and Its Implications for International Humanitarian Law Enforcement*, 49 HARV. INT'L. L.J. 221, 230 (2008).
[102] *Id.* at 230–31.
[103] DUPUY, *supra* note 4125, at 335.

judicial decisions of the International Court of Justice.[104] For purposes of this article, only treaties and custom are discussed in detail.

Treaties are definitive sources of international law.[105] Binding treaties are those between states that are memorialized in writing, intend to convey legal obligations or create reliance and are subject to governance under international law.[106] There is no legal distinction between the various written instruments—treaties, conventions and protocols all carry the same weight.[107] While treaties are generally regarded as binding upon only those states party to them, a treaty can nevertheless bind non-party states insofar as it is declaratory of customary international law.[108]

Some commentators differentiate treaties codifying customary international law from those promulgating innovations.[109] The attempt is to explain whether new treaties are likely to garner sufficient international support.[110] While near unanimity can be indicative of customary international law, a high number of accessions alone is not dispositive when state practice is contrary to a treaty,[111] but even treaties with few accessions (and non-binding resolutions) serve more than a rhetorical purpose—they often signal the opening stages of a drive toward *creating* customary international law.[112]

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[104] Statute of the International Court of Justice, art. 38, June 26, 1945, 59 Stat. 1031, 33 U.N.T.S. 993.
[105] DAVID J. BEDERMAN, INTERNATIONAL LAW FRAMEWORKS 26 (2d ed. 2006).
[106] *See* Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 (1969).
[107] BEDERMAN, *supra* note 10589, at 26.
[108] *See* THOMAS BUERGENTHAL & SEAN D. MURPHY, PUBLIC INTERNATIONAL LAW 107 (4th ed. 2007).
[109] BEDERMAN, *supra* note 10589, at 27.
[110] *Id.*
[111] Jean-Marie Henckaerts, *Study on Customary International Humanitarian Law*, 857 INT'L REV. OF THE RED CROSS 175, 183 (2005).
[112] BEDERMAN, *supra* note 10589, at 27. *See also* Beatrice Jarka, 30 Years from the Adoption of Additional

Custom is evidence of a general practice among states that is accepted as law. The formation of customary international law rests on two key elements: states following the norm in general practice (*usus*) and doing so under a sense of obligation of law (*opinion juris sive necessitatis*).[113] General practice is considered to be a "source of signal strength" for custom.[114]

The "general practice" element involves an objective inquiry: do international actors follow the rule consistently? [115] In showing general practice what states *do* is far more important than what states *say*. Still, practitioners rely on correspondence, publications and media accounts to demonstrate past practice.[116] The "sense of obligation" element is a subjective inquiry of whether past observation comes from a sense of legal duty or merely because they were politically expedient[117] Those actions undertaken for expedience are not considered performed under a sense of obligation. There is no temporal requirement for lengthy observation before a rule can become binding custom.[118] Popular practices can enjoy immediate recognition.[119] It is the consistent and uniform observance by most (if not all) of the international community that confirms a rule as a "general practice."[120] An important note is the presumption in customary

Protocols I and II to the Geneva Convention, at 1–2, 4–5 (unpublished dissertation, Universitatea Nicolae Titulescu), *available at* http://lexetscientia.univnt.ro/ufiles/3.%20Romania.pdf (last visited Apr. 25, 2008) (admitting that Protocol I inserted innovations to try to change then-existing laws of war on mercenarism).

[113] BEDERMAN, *supra* note 10589, at 16; Henckaerts, *supra*, note 11195at 178.

[114] BEDERMAN, *supra* note 10589, at 16.

[115] *Id.* at 16.

[116] *Id.* at 17.

[117] *Id.*

[118] *Id.* at 19.

[119] *Id.*

[120] *Id.*

international law that *silence* equates acceptance.[121] If a state truly disagrees with a practice, it is incumbent upon it to protest loudly and often.[122] Otherwise, *new* practices can become the rule, rather than the exception.

The Hague Conventions represent the first attempt to codify customary international law on the use of mercenaries.[123] Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land ("Hague V") sought to clarify the rights and duties of neutral states toward belligerent states during war by regulating mercenary recruitment. Its drafters distinguished between active recruitment of mercenaries *by a state* within its own territory and "the acts of individual citizens leaving to join a [mercenary] force of their own accord."[124] Specifically, Article 4 precludes a neutral state from opening recruitment centers within its borders and raising armies for the benefit of a party to an armed conflict.[125] On the other hand, Article 6 expressly communicates that a state is *not required* to prevent its citizens nor foreign nationals from crossing its frontier to join the ranks of a belligerent's army.[126]

While a neutral state is required to refrain from domestic recruitment or staging of mercenaries, Hague V does not outlaw mercenarism. Thus, a nation's own citizens can freely choose to become mercenaries. Furthermore, foreign nationals are free to transit through a neutral country en route to serve as a mercenary for a belligerent.

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[121] *Id.* at 22.
[122] *Id.* at 23.
[123] H.C. Burmester, *The Recruitment and Use of Mercenaries in Armed Conflicts*, 72 AM. J. INT'L L. 37, 41 (1978).
[124] *Id.*
[125] Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, art. 4, Oct. 18, 1907, 26 Stat. 2310 [hereinafter Hague V].
[126] *Id.*, art. 6.

The Hague Convention do not apply to PMFs because they are private corporations, not the state actors at whom Hague V is aimed. If one were to postulate that PMF contractors are the functional equivalent of mercenaries, the Hague Convention places no burden on the individual and, frankly, no burden on neutral states to prevent their citizens or those of foreign countries from entering the fray. The only thing Hague V would preclude is the establishment of a wholly-owned PMF corporation by a nation's government.

The Geneva Convention Relative to the Treatment of Prisoners of War ("Geneva III") is applicable whenever parties conduct themselves as belligerents—a declaration of war is not necessary.[127] Geneva III establishes, *inter alia*, the protections due to prisoners of war ("POW"), setting out six qualifying classes in Article 4A: (1) members of an armed force; (2) members of a militia or similar volunteers, provided they operate under a designated leader, wear a fixed, distinct emblem recognizable from a distance, openly carry arms and conduct military operations within the laws of war; (3) members of an armed force of a government not recognized by one of the parties; (4) civilian staff providing logistical support to an armed force; (5) civil air crews of a state who is party to the conflict; and (6) civilians who partake in a spontaneous uprising to repel an invading force.[128] Combatant immunity from reprisal[129] and prosecution for acts not violative of international law (read: engaging in hostilities)[130] hinge upon membership in one of these classes. A full survey of specific POW protections is beyond the scope of this paper, but

[127] Geneva Convention (III) Relative to the Treatment of Prisoners of War, art. 2, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva III].
[128] *Id.*, art. 4A
[129] *Id.*, art. 13.
[130] *Id.*, art. 19.

they can be found in Articles 12 to 121 of Geneva III.

Nowhere in Geneva III are mercenaries mentioned. While there has been much scholarly debate as to whether or not the drafters intended to consider mercenary status, most agree that the Convention's drafters made no adjustments to mercenaries.[131] Mercenaries were regularly incorporated into the military during the period immediately preceding the enactment of the Geneva Conventions.[132] The debate on protected status aside, the collective Geneva conventions in no way criminalizes or marginalizes mercenarism.[133]

The question that immediately comes to mind is whether or not PMF contractors are affiliated with the military sufficiently to qualify for POW protections and combatant immunities, provided the activities they are engaged in are not prohibited by International Humanitarian Law. An argument that can be made for extending these protections is that individual contractors of a PMF are a sort of militia or partisan, as described in Article 4A of Geneva III. Lindsey Cameron of the University of Geneva's Faculty of Law argues application of protection to PMF

[131] *See* Milliard, *supra* note **Error! Bookmark not defined.**~~19~~, at 35 nn. 191–200 (tracing the scholastic debate and general consensus that no perceptible change was made).
[132] Before the United States formally entered World War II, U.S. citizen-mercenaries were incorporated into the war effort. The "Flying Tigers" was a group of American fighter pilots operating under the CAMCO Corporation who "shot down Japanese planes and targeted infrastructure for three times what regular aviators made, plus a bonus for every downed plane." PELTON, *supra note 53*, at 3.
[133] *See* Geneva Convention (I) on Armed Forces in the Field, Aug. 12, 1949, arts. 49–50, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva I]; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, arts. 50–51, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva II]; Geneva III, arts. 129–30; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, arts. 146–47, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva III].

contractors vis-à-vis Article 4A(2) runs contrary to the intended purpose of the provisions.[134] "The historical purpose," Cameron writes, "was to allow continued partisan fighting by remnants of a defeated force or groups seeking to liberate an occupied territory."[135] This is likely correct. The Commentary to Geneva III makes a single but striking reference: the term "partisan" "preclude[s] any abusive interpretation which might have led to the formation of armed bands such as the 'Great Companies' of baneful memory."[136] That is, the "[m]ercenaries who devastated France in the 14th century, during the peaceful periods of the Hundred Years War."[137] Begrudgingly, Professor Cameron concedes there is "some basis" for some PMF contractors in Iraq to classify as lawful combatants under international humanitarian law.[138] Not going out of the way to specify what that basis might be, Cameron cautions that denying protections to contractors could create a disincentive to continued observance of humanitarian law by PMFs, and, as a matter of public policy, it might be best to extend the protection(s) to contractors.[139] If PMF contractors cannot be established as combatants under the Geneva context, they likely stand exposed as civilians engaged in hostilities. The Geneva Conventions are clear that a civilian loses his or her protected status when they commit, *inter alia*, espionage, sabotage or homicide against the personnel or equipment of the enemy.[140]

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[134] Lindsey Cameron, *Private Military Companies and Their Status Under International Humanitarian Law*, 863 INT'L REV. RED CROSS 573, 586 (2006)
[135] *Id.* at 586.
[136] INT'L COMM. OF THE RED CROSS, COMMENTARY ON GENEVA CONVENTION (III) RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 63 (Jean de Preux ed., 1960), *available at* http://www.icrc.org/IHL.nsf/WebList?ReadForm&id=375&t=com (last visited Apr. 30, 2008).
[137] *Id.* at 63, n.42.
[138] Cameron, *supra note 27*, at 586. She goes on to write, "[a]dmittedly, there is a historical argument for the use of mercenaries since the first recorded war." *Id.* at 580.
[139] *Id.* at 586.
[140] *See* Geneva IV, art. 68.

The legal fate of individual contractors turns entirely on what is meant by "direct participation" in hostilities.[141] Because of inconsistent practice among states, the question must be taken up case-by-case.[142] This has prompted the International Committee of the Red Cross to clarify the notion of "direct participation" by commissioning expert meetings that began in 2003,[143]with lingering uncertainty even eight years later.[144] In the meantime one might look to Article 51 of the Charter of the United Nations for guidance, which permits individual and collective self-defense in response to an armed attack.[145] Analogizing PMFs as agents of the government on official duty, it is plausible that the principle of self defense and defense of third parties (if not other theories) would come into play should a prosecution be attempted in light of the Geneva Conventions.[146]

As the Geneva Conventions were being drafted, the Charter of the United Nations ("U.N. Charter") was enacted, recognizing the sovereignty of Member States[147] and establishing a collective method of addressing threats to international peace and security.[148] This included the

[141] Henckaerts, *supra* note 11195, at 190.
[142] *Id.*
[143] *See, e.g.*, INT'L COMM. ON THE RED CROSS, REPORT ON THE DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW (2003).
[144] Convened in 2003 by the International Committee of the Red Cross, the Working Group on the Direct Participation of Civilians in Hostilities will produce, "after a final meeting in Geneva," a publication of interpretative guidelines. CHATHAM HOUSE, CIVILIANS AT WAR: DECONSTRUCTING THE 21ST CENTURY BATTLEFIELD 1 (2007), *available at* http://www.chathamhouse.org.uk/files/10161_il011107.pdf (last visited Apr. 25, 2008).
[145] U.N. Charter, art. 51.
[146] A prosecution is arguably permissible, by analogy, against a "civilian" *with* the occupying force who takes up hostilities as an unlawful combatant. *See* Geneva IV, art. 68 (allowing prosecution of protected persons who take up hostilities against an occupying force). *See also* Protocol Additional to the Geneva Conventions Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 51, adopted June 8, 1977, 1125 U.N.T.S. 3 (explaining that civilians lose their protections when they take up hostilities) [hereinafter Protocol I].
[147] U.N. Charter, art. 1(1).
[148] *Id.*, art. 2(1).

requirement that Member States "refrain from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the [p]urposes of the United Nations."[149]

Commentators refer to either "aggression" or "intervention" when referring to states' "threat or use of force." "Aggression" is common parlance while "intervention" is reserved for discussions on the use of force in relation to the principles of neutrality law under the Hague Convention.[150] However aggression is defined, the U.N. Charter significantly limits resort to force[151] making limited exceptions for self-defense in the face of an armed attack[152] and collective use of military force authorized by the U.N. Security Council.[153] Several "non-binding" U.N. resolutions[154] issued between the Charter's entry into force and the adoption of the U.N. Convention Against Mercenaries purportedly place additional restrictions on state authority to use force, including the use of mercenaries;[155] whether the PMF "distinction with a difference" would exempt PMF activities from this Convention's application has yet to been litigated.

In 1965 the U.N. General Assembly unanimously adopted Resolution 2131, the Declaration on

[149] *Id.*, art. 2(4).
[150] Milliard, *supra* note **Error! Bookmark not defined.**~~19~~, at 23.
[151] U.N. Charter, art. 2(4).
[152] *Id.*, art. 51.
[153] *Id.*, arts. 39, 42.
[154] *See supra*, text accompanying note 112~~96~~ (non-binding resolutions and treaties with few signatories may signal the opening salvo in an attempt to bring a new rule into general practice, later creating a binding customary international law). *See also infra*, note **Error! Bookmark not defined.**~~139~~.
[155] Françoise Hampson, *Mercenaries: Diagnosis Before Prescription, in* 3 NETH. Y.B. INT'L L. 1, 20 (1991) ("General Assembly resolutions, [while] not binding as such in [the area of resort to armed force], may nevertheless represent an encapsulation of customary international law. This is particularly likely to be the case where they are adopted by large majorities, especially if the majority includes the Security Council veto powers.").

the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty.[156] Resolution 2131 bars, for any reason, direct and indirect intervention by one state into the internal or external affairs of another state.[157] In language particularly germane to this paper, states were also admonished not to "organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities *directed towards the violent overthrow of . . . another state* or interfere in civil strife of any other state."[158]

While Resolution 2131 does not expressly reference mercenaries, or PMFs, an argument can be made that its exhortation to not "tolerate" any "armed activity" prohibits state recruiting, organizing, financing or sending mercenaries to intervene in another state's affairs.[159] This conceivably includes prevention of a nation's own citizens from privately undertaking mercenary preparations. Though enjoying broad support, Resolution 2131 is unlikely to stand for the proposition that mercenarism is a prohibited activity. Beyond its failure to specifically mention mercenaries, "no subsequent UN declaration and *few* scholars have cited the resolution as authority for this proposition."[160] Rather, Resolution 2131 restricts state behavior toward other states without regard to *who* the state intended to use for the interference. Resolution 2131 appears entirely inapplicable to PMFs because they are not state actors. It is only state recruitment for the purposes of unjustly intervening in another state's affairs that are proscribed. As private corporations, Resolution 2131 simply does not reach PMFs.

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[156] G.A. Res. 2131, Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty, U.N. GAOR, 20th Sess., Supp. No. 14, at 11, U.N. Doc. A/6014 (1965) [hereinafter G.A. Res. 2131].
[157] *Id.* ¶ 1.
[158] *Id.* ¶ 2 (emphasis added).
[159] Milliard, *supra* note **Error! Bookmark not defined.**~~19~~, at 24.
[160] Hampson, *supra* note **Error! Bookmark not defined.**~~139~~, at 20–21.

Three years later Resolution 2465, the Declaration on Granting of Independence to Colonial Countries and Peoples,[161] was adopted by the General Assembly with a bare majority—fifty-three yeas, eight neas and forty-three abstentions.[162] Regarding mercenarism, the resolution attempted to make the use of mercenaries "against movements for national liberation and independence" a criminal act, brand mercenaries themselves as "outlaws" and compel Member States to enact domestic legislation to prevent their citizens from serving as mercenaries and punish "the recruitment, financing and training of mercenaries in their territory." [163] Having garnered a majority by only two votes, Resolution 2465 cannot be said to represent a widely accepted international principle.[164] This may explain why the same provision called on Member States to enact domestic legislation to make the edict enforceable.[165]

By this language, mercenarism was pronounced, under limited circumstances, to be a crime *per se*. This did not reflect then-existing international law on mercenarism.[166] Rather, it was an attempt by some Member States to put their aspiration against mercenarism into motion.[167] Even in the most generous reading, Resolution 2465 limits itself by applying only to mercenary

[161] G.A. Res. 2465, Declaration on Granting of Independence to Colonial Countries and Peoples, U.N. GAOR, 23d Sess., Supp. No. 18, at 4, U.N. Doc. A/7218 (1968) [hereinafter G.A. Res. 2465].
[162] *Id.*
[163] *Id.* ¶ 8.
[164] *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 103 (1987) (resolutions evidence customary international law only when adopted by large majorities).
[165] G.A. Res. 2465 ¶ 8.
[166] Milliard, *supra* note **Error! Bookmark not defined.**~~19~~, at 26.
[167] *Id.* (*citing* Hersch Lauterpacht, *Codification and Development of International Law*, 49 AM. J. INT'L L. 16, 35 (1955) (distinguishing an aspirational principle from an emerging rule of customary international law)).

activity aimed at suppressing "national liberation and independence movements."[168] Such language makes Resolution 2465 largely irrelevant outside of the post-colonial context.[169] If contemporary PMFs could be pigeon-holed into the mercenary label, Resolution 2465 would conceivably apply only in anti-liberation contexts. Thus the PMF use by the black-majority governments of Angola and Sierra Leone in the 1990s was entirely outside of the scope of this resolution, whether the participants were mercenaries or mere contractors.

The General Assembly issued Resolution 2625, the Declaration of Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, in 1970.[170] This measure differs from the previous resolutions in two material respects. First, it does not limit itself to national independence movements. Second, the language softened from earlier resolutions by not condemning state toleration of mercenarism when it spoke only of a *state's* "duty to refrain from organizing or encouraging . . . mercenaries, for incursion into the territory of another State."[171]

With Resolution 2625, the pendulum swung against *state-sponsored* organization or encouragement of mercenarism, regardless of the context. Toleration by the state, however, was not proscribed by the terms of this resolution. Like those before it, Resolution 2625 is aimed squarely at the state as a consumer of mercenary services. The restriction is inconsequential—it

[168] G.A. Res. 2465 ¶ 8.
[169] Milliard, *supra* note **Error! Bookmark not defined.**~~19~~, at 27.
[170] G.A. Res. 2625, Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, 123, U.N. Doc. A/8028 (1970).
[171] *Id.*

only prohibits state organization and incitement of mercenarism. In this regard it is like the Hague Convention which only proscribed official sponsorship and recruitment. Consistent with the principles of neutrality embodied in Hague V, Resolution 2625 "stands out because of its consistency with international law and its lack of political overtones, two characteristics that may explain the resolution's unanimous approval and its explicit incorporation into customary international law by a subsequent decision of the International Court of Justice."[172] Resolution 2625 does not purport to prevent private corporations from recruiting, training and conveying individuals for intervention in the territories of a sovereign state. This is all the more true when PMFs provide security services for non-state clients; whether this would be true for PMFs conducting targeted killings is uncertain.

With Resolution 3103, the Declaration on Basic Principles of the Legal Status of the Combatants Struggling Against Colonial and Alien Domination and Racist Regimes,[173] the General Assembly again took up mercenarism in the context of post-colonialism. Returning to the political rhetoric of earlier resolutions, it reads: "The use of mercenaries by colonial and racist regimes against the national liberation movements struggling for their freedom and independence from the yoke of Colonialism and alien domination is considered to be a criminal act and the mercenaries should accordingly be punished as criminals."[174]

[172] Milliard, *supra* note **Error! Bookmark not defined.**~~19~~, at 27 (referring to the case of *Nicaragua. v. United States*, 1986 I.C.J. 14, (1986)).
[173] G.A. Res. 3103, Declaration on Basic Principles of the Legal Status of the Combatants Struggling Against Colonial and Alien Domination and Racist Regimes, U.N. GAOR, 28th Sess., Supp. No. 30, at 142, U.N. Doc. A/9030 (1973).
[174] *Id.*, art. 5.

Like its predecessors, Resolution 3103 speaks to the criminality of *being* a mercenary except it used "should be punished as criminals," as compared to describing mercenaries as "outlaws."[175] Resolution 3103 has been described as a "novel and unsupported declaration" that in no way criminalizes state use of mercenaries.[176] This is true because a non-binding resolution cannot amount to customary international law unless "approved by wide majorities and *affirmed by subsequent state practice*."[177] The trend toward regulation is manifest in the broader affirmation of Resolution 3103 (eighty-three yeas, thirteen nays and forty-three abstentions) as compared to Resolution 2465 (fifty-three yeas, eight nays and forty-three abstentions).[178] State practice, however, continued to go against the grain of Resolution 3103.[179]

In order to apply this resolution to PMFs, one would have to show their client to be a racist regime bent on suppressing a self-determination movement. If both elements were present, Resolution 3103 would be offended but nothing more. The resolution does nothing to criminalize the actions of the state or the mercenary. Rather, it implores Member States to enact domestic law on point.

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[175] *Compare* Res. 3103 ¶ 5, *with* Res. 2465 ¶ 8.

[176] Frits Kalshoven, *Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts: The First Session of the Diplomatic Conference, Geneva, 20 February - 29 March 1974, in* 5 NETH. Y.B. INT'L L. 3, 24 (1974) (concluding Resolution 3103 was neither an accurate nor authoritative statement on the law).

[177] Milliard, *supra* note **Error! Bookmark not defined.**~~19~~, at 30 (*citing* Wil D. Verwey, *The International Hostages Convention and National Liberation Movements*, 75 AM. J. INT'L L. 69, 81 (1981) ("[D]oubt seems to prevail as to whether the claim formulation in [Resolution 3103] has in the meantime developed into a rule of customary law.")).

[178] *Id.* at 28.

[179] It appears that since the 1960s, numerous African nations hired mercenaries with some regularity in spite of their professed disdain. Joseph Wheatley, *The Wages of War*, 1 J. of Int'l L. & Pol'y (2004) (*citing* Kevin A. O'Brien, *Private Military Companies and African Security: 1990–98*, *in* MERCENARIES: AN AFRICAN SECURITY DILEMMA 46–48, 62–63 (Abdel-Fatau Musah & J. Kayode Fayemi eds., 2000)), *available at* http://www.law.upenn.edu/groups/jilp/1-1_Wheatley_Joseph.pdf (last visited May 2, 2008).

An important resolution that enjoyed wide support was Resolution 3314, the Draft Definition of Aggression.[180] The resolution describes "aggression" as the "use of armed force by a state against the sovereignty, territorial integrity or political independence of another state, or in any other manner inconsistent with the Charter of the United Nations."[181] The unjust use of force can occur via a state's armed forces or by utilizing "mercenaries, which carry out acts of armed force against another [s]tate" or substantially aid a state in the aggression.[182]

With its adoption by consensus in 1974, it is apparent that Member States accepted it as customary international law.[183] By its terms, then, Resolution 3314 identifies *all* state use of mercenaries to affect "[unjust] force against the territorial integrity of political independence of [another] state" as an act of aggression, in violation of Article 2(4) of the U.N. Charter.[184] The context of the state's action is not a relevant criterion (read: not limited to post-colonial struggles). The affected parties of this resolution are not mercenaries or PMFs. Rather it is the state that commits an unjust aggression by any of the condemned means. The fate of the individual warriors was not addressed by the Resolution.

The Way Ahead Under International and Domestic Laws

When one surveys the aforementioned resolutions, a trend toward restricting mercenarism is

[180] G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 31, at 143, U.N. Doc. A/9631 (1974).
[181] *Id.* ¶ 1.
[182] *Id.* ¶ 3(g).
[183] Milliard, *supra* note **Error! Bookmark not defined.**~~19~~, at 30.
[184] G.A. Res. 3314, art. 1.

apparent and evidences an emerging concept of customary international law.[185] These restrictions, however, apply to the *state* organization, encouragement or conveyance of mercenaries.[186] Despite this restriction, states are not precluded from tolerating mercenary activities that lead to a use of armed force in other states.[187]

The Protocol Additional to the Geneva Convention Relating to the Protection of Victims of International Armed Conflicts ("Protocol I") builds on Geneva III by proffering a definitive statement on mercenaries.[188] Accompanying the definition is a provision discouraging mercenary activity but not one prohibiting it—the result of political compromise.[189] The Working Group that drafted Article 47 carried the sentiment that mercenaries should not enjoy the "Fundamental Guarantees" of Article 75 of the Protocol.[190] Ironically, one of the only representatives putting forth a defense of the historic and contemporary use of mercenaries and demanding the allowance of the Fundamental Guarantees was the Holy See.[191]

Though ratified by 85% of the Member States of the United Nations, Protocol I's efficacy is limited because the states most active in international armed conflicts, particularly the United

[185] Milliard, *supra* note **Error! Bookmark not defined.**~~19~~, at 30.
[186] *Id.* at 31.
[187] *Id.*
[188] Protocol I, art. 47.
[189] Milliard, *supra* note **Error! Bookmark not defined.**~~19~~, at 32 (*citing* 15 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS, GENEVA (1974-1977) 189–202, 481 (CDDH/III/GT/82, May 13, 1976) [hereinafter OFFICIAL RECORDS]).
[190] *Id.* at 32–33.
[191] *Id.* at 33 (*citing* OFFICIAL RECORDS ¶ 87 (CDDH/SR.41, May 26, 1977) (arguing that Article 75's Fundamental Guarantees should be extended to mercenaries, "whatever their faults and their moral destitution.")).

States, are not party to it.[192] Of course, provisions of a convention can nevertheless be applicable against a non-party state when those rules represent customary international law,[193] but this necessitates consistent state practice—something even the champions of Article 47 have failed to observe.[194]

While Protocol I is widely accepted as a codification of customary international law, the categorization of mercenaries as unlawful combatants in Article 47 was *not*.[195] The strictures of Article 47 are so contentious that universal acceptance is unlikely, and it risks becoming virtually irrelevant to armed conflicts involving one or more non-contracting parties.[196] One legal commentator gives the prognosis that continued disregard of Article 47 will lead even contracting states to disregard it.[197] The Working Group discussion leading to Article 47 focused heavily on the use of mercenaries in Africa since 1960 and their effect upon post-colonial struggles for self-determination.[198] Looking not much further than this brief decolonization period, the Diplomatic Conference ignored more than three millennia of mercenary use and codified the utility of mercenarism as solely for the suppression of liberation movements.[199] Article 47 proposes to redress two *decades* of past grievances by breaking with 3000 *years* of history by stripping combatant immunities and prisoner of war protections from mercenaries.

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[192] Henckaerts, *supra* note 11195, *at* 177.
[193] *Id.* *See also* Shawn McCormack, *Private Security Contractors in Iraq Violate Laws of War*, 31 SUFFOLK TRANSNAT'L L. REV. 75, 93–94 (2007). The International Court of Justice takes great stock in the near-universal ratification of instruments like the United Nations Charter. Case concerning Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States*), Merits Judgment, 1986 I.C.J. 14, 99–100 § 188 (1986). *But see* Henckaerts, *supra* note 11195, at 183 (wide popularity is not in and of itself dispositive).
[194] *See supra* text companying note 179163.
[195] Henckaerts, *supra* note 11195, at 187. *See also* Jarka, *supra* note 11296, at 1–2, 4–5.
[196] *See* Yoram Dinstein, *Comments on Protocol I*, 320 INT'L REV. OF THE RED CROSS 515 (1997).
[197] *Id.*
[198] Milliard, *supra* note **Error! Bookmark not defined.**19, at 33.
[199] Protocol I, arts. 1(3), 1(4).

Article 47 of Protocol I reads:

> 1. A mercenary shall not have the right to be a combatant or a prisoner of war.
> 2. A mercenary is any person who:
>
> (a) is specially recruited locally or abroad in order to fight in an armed conflict;
>
> (b) does, in fact, take a direct part in hostilities;
>
> (c) is motivated to take part in hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
>
> (d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
>
> (e) is not a member of the armed forces of a Party to the conflict; and
>
> (f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.[200]

Article 47 undoubtedly condemns mercenary activities and seeks to remove the protections otherwise afforded to them.[201] This is a significant departure from customary international law which traditionally gives "mercenaries the same status as the members of the belligerent force for which they [are] fighting."[202] Professor Cameron justifies the diminishment of rights solely on what she describes as "the shameful character of mercenary activity."[203]

What Article 47 *did not* do is criminalize mercenarism. Statements made during and after the Working Group make it clear that Article 47 falls well short of criminalizing mercenarism.[204]

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[200] *Id.*, art. 47.
[201] *Id.*, art. 47(1).
[202] Burmester, *supra* note 123~~107~~, at 55.
[203] Cameron, *supra note 27*, at 580 (*citing* COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 ¶ 1794 (Y. Sandoz, C. Swinarski, & B. Zimmerman eds., 1987)).
[204] Milliard, *supra* note **Error! Bookmark not defined.**~~19~~, at 40 (*citing* 6 OFFICIAL RECORDS 159 (CDDH/SR.41, May 26, 1977) ("The aim of the article was to *discourage* mercenary activity and prevent irresponsible elements from getting the rights due to a combatant or prisoner of war.") (emphasis added)).

While mercenaries might now face domestic prosecution, "[t]he mere fact of being a mercenary is not . . . a criminal act [under Article 47]."[205] The Soviet Union's closing statement reinforces this conclusion: "We hope that this article . . . will provide an incentive to Governments to adopt domestic legislation prohibiting . . . the use of mercenaries."[206] Proponents of Article 47 argue that this deprivation represents recent developments in customary international law.[207] Additionally, regional developments—most notably within the African Union (formerly the Organization for African Unity or "OAU")—are cited as evidence.[208] Immediately after the adoption of Protocol I, Mr. Clark, the Nigerian representative who first proposes Article 47, is reported to have said:

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

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[205] Burmester, *supra* note 123~~107~~, at 55.

[206] Milliard, *supra* note **Error! Bookmark not defined.**~~19~~, at 40 (*citing* 6 OFFICIAL RECORDS 204 (CDDH/SR.41, May 26, 1977) (statement of the Union of Soviet Socialist Republics)).

[207] *See* Part IV.C.6, *supra*, discussing the emerging trend discernable from U.N. General Assembly Resolutions.

[208] Milliard, *supra* note **Error! Bookmark not defined.**~~19~~, at 36 (referencing the flurry of Conventions and Resolutions within the African Union on the subject of mercenarism). The following were issued in short order by the Organization of African Unity: Resolution on the Activities of Mercenaries, AHG/Res. 49 (IV) (1967); International Commission of Inquiry on Mercenaries, Draft Convention on the Prevention and Suppression of Mercenarism (1976) (Luanda Convention); Convention for the Elimination of Mercenarism in Africa, OAU Doc. CM/817 (XXIX), Annex II (3d rev. 1977).

. . .

> By adopting [Article 47], the Conference had once and for all denied to all mercenaries any such rights [as] lawful combatants or prisoners of war. The new article [thus] represent[s] an important new contribution to humanitarian law.[209]

Many observers dispute the notion that Article 47 is a natural evolution of customary international law,[210] not the least of which includes the United States.[211] The United States is not alone in its concern with Article 47. Burmester disputed Mr. Clark's analysis:

> The exaggerated assertions . . . do not appear to reflect the consensus of the international community. Nevertheless, the removal of even certain protections from combatants who would otherwise qualify for such protections must be viewed with some concern. [While] extending protection under the laws of war to guerillas, it seems inconsistent to be taking it away from other combatants . . . . Once protection is denied to one class of persons the way is left open for other classes to be similarly denied protection. If states consider foreign participation in national liberation struggles against colonial and racist regimes to be of such gravity as to require that certain protections not be accorded mercenaries, it seems only logical . . . that such protections should not be accorded to *any* private foreign participants.[212]

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[209] *Id.*at 36–37 (*citing* 6 OFFICIAL RECORDS 157–58 (CDDH/S.R. 41, May 26, 1977) (emphasis added)).
[210] *E.g.*, Hampson, *supra* note **Error! Bookmark not defined.**~~139~~, at 9.
[211] Michael J. Natheson, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. J. INT'L L. & POL'Y 419, 426 (1987).
[212] Burmester, *supra* note 123~~107~~, at 55–56.

Echoing this concern, Cotton observed "if guerillas and other classes of unconventional combatants are to be included in the [Geneva] Convention's [Article 4] protections through the Protocols, then mercenaries should also be included."[213]

The definition in Article 47 of Protocol I is viewed as unworkable because of its six cumulative elements that must be met in tandem.[214] If any one of the six criteria is not met, the definition fails. Perhaps the most unworkable element of the mercenary definition in Article 47 is the showing of an individual mercenary's motivation.[215] By necessity a prosecutor daring to attempt to show financial gain as the chief motive must include a "comparison to the motivations of individuals who join states' armies, many of whom join because of relatively attractive compensation and benefit packages."[216] It is unlikely anyone is prepared to argue members of national armies are, in reality, members of a nationalized free company motivated by health insurance benefits. If an individual could actually be shown to meet all six criteria, s/he would be barred from claiming POW protections or combatant immunities.[217] S/he would nevertheless enjoy the *fundamental guarantees* of Article 75 of Protocol I.[218] The only criminal liability would come from existing domestic law.[219] Modern PMF contractors, however, *do not meet all*

[213] Milliard, *supra* note **Error! Bookmark not defined.**~~19~~, at 38 (*citing* John R. Cotton, Comment, *The Rights of Mercenaries as Prisoners of War*, 77 MIL. L. REV. 143, 148 & n.26 (1977)).
[214] Cameron, *supra note 27*, at 578.
[215] Protocol I, art. 47(2)(c). The subjectivity of Article 47(2)(c) will be extremely difficult to prove. Burmester, *supra* note 123~~107~~, at 38 (*citing* REPORT OF THE COMMITTEE OF PRIVY COUNSELORS APPOINTED TO INQUIRE INTOTHE RECRUITMENT OF MERCENARIES ¶ 7 (1976)).
[216] MOCKLER, *supra note 53*, at 16. *See also* Cameron, *supra note 27*, at 580 ("many soldiers enlist for strictly, or at least primarily, for financial motives").
[217] Cameron, *supra note 27*, at 579.
[218] *Id.* (*citing* Protocol I, art. 45 (extending protections to unlawful combatants)).
[219] *See* Geneva IV, art. 68 (prosecuting civilians for the post-occupation commission of, *inter alia*, homicide when directed at the personnel of the enemy's armed forces).

six elements of the definition of a mercenary under Protocol I and cannot, therefore, be summarily stripped by Article 47 of combatant immunities and prisoner of war protections.[220] A more plausible argument against Geneva protections, discussed below, is that PMF contractors are civilians engaged in hostilities. As to the application of Article 47, three of the six elements are unlikely to ever be proven.

The notion of PMFs engaging in targeted killing is a serious problem because ordinarily the role of PMF contractors is far from being recruited to fight in an armed conflict. They are not recruited to fight if they predominately engage in the protection of diplomats, which by its very nature seeks to avoid hostilities and only returns fire long enough to extricate the protectee from the danger zone and then break contact.[221] If the use of force by PMFs is to flee from an ambush, rather than to create an ambush, then that effort can hardly be described as direct participation in the war effort. Admittedly, Protocol I considers *any* military hostilities, whether offense or defense, to be "participating in hostilities,"[222] which the International Committee of the Red Cross understands to be acts "likely to cause actual harm to the personnel and equipment of the enemy armed forces,"[223] but direct participation does *not* include everything that is merely helpful to one side over the other.[224] It is evident the concept of "direct participation" is a murky one, and its scope remains an open question;[225] one that is unresolved at present as to whether targeted killing may constitute "direct participation." It is inconceivable, however, that when

[220] McCormack, *supra* note 3215, at 94.
[221] *E.g.*, PHILLIP HOLDER, THE EXECUTIVE PROTECTION PROFESSIONAL'S MANUAL 15, 26–27, 43–48, 59–73 (1997).
[222] Protocol I, art. 49(1) (defining "attacks" as violence against an adversary, "whether in offense or in defense").
[223] Cameron, *supra note 27*, at 588 (*citing* ICRC COMMENTARY ON GENVA III ¶ 1944; Protocol I, art. 51(3)).
[224] *Id.*
[225] *See* Part IV.B.3.

resolved the term would completely preclude self-defense or the defense of third persons. Finally, most contractors with PMFs *are* nationals of a party to the conflict, at least in Iraq and Afghanistan.[226] Some contractors working with PMFs are *not* nationals of a party to the conflict, but this is of little real concern when all six elements must be met in tandem. The failure of criteria one and two will preclude their classification as a mercenary as well.

The United Kingdom's Foreign and Commonwealth Office recently concluded Article 47's mercenary definition is completely unworkable.[227] Undeterred, the General Assembly incorporated these shortcomings into its latest plink at mercenaries: the International Convention Against the Recruitment, Use, Financing and Training of Mercenaries ("U.N. Convention Against Mercenaries").[228] As discussed, *infra*, the U.N. Convention Against Mercenaries falls flat, *inter alia*, because of the same definitional problems as Article 47. The U.N. took up the question of mercenarism again in 1980 in response to dissatisfaction among Member States with Protocol I's shortcomings,[229] and so began the challenges[230] in the creation of a comprehensive instrument for the "eradication of these nefarious activities. . . ."[231] The convention was adopted in 1989 and opened for signatures,[232] but did not become effective until 2001.[233]

[226] McCormack, *supra* note 3215, at 94.
[227] U.K. GREEN PAPER ¶ 6.
[228] G.A. Res. 44/34, Annex, U.N. Doc. A/RES/44/34 (Dec. 4, 1989).
[229] Milliard, *supra* note **Error! Bookmark not defined.**19, at 57.
[230] Hampson, *supra* note **Error! Bookmark not defined.**139, at 30.
[231] U.N. Ad Hoc Committee on the Drafting of an International Convention Against the Recruitment, Use, Financing and Training of Mercenaries, *Report of the Sixth Committee*, U.N. Doc. A/44/766 (Nov. 22, 1989).
[232] Milliard, *supra* note **Error! Bookmark not defined.**19, at 58.
[233] Press Release, U.N. General Assembly, Mercenaries Often a Presence in Terrorist Attacks, Special Rapporteur Tells Third Committee as It Begins Discussions on Self-Determination, U.N. Doc. GA/SHC/3650 (Oct. 31, 2001).

The U.N. Mercenary Convention provides a primary and secondary definition of "mercenary." The primary definition incorporates the largely unworkable elements of Protocol I, Article 47.[234] However, two distinctions need be addressed. The primary definition applies to *all* armed conflicts, not just *international* armed conflicts.[235] Also, "direct participation in hostilities" was removed as a definitional element and made an enumerated offense.[236] Having already discussed the failings of the Article 47 definition, the primary definition is bypassed in favor of analysis of the secondary definition. The secondary definition of the convention reads:

> A mercenary is also any person who, in any other situation [who]:
>
> (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

[234] International Convention Against the Recruitment, Use, Financing and Training of Mercenaries, art.1(1), Dec. 4, 1989, 2163 U.N.T.S. 75 [hereinafter U.N. Convention Against Mercenaries].
[235] *See id.*, art. 16(b).
[236] *Id.*, art. 3

act is undertaken.[237]

The convention goes on to articulate four categories of persons criminally liable: (1) anyone "who recruits, uses, finances or trains mercenaries";[238] (2) a mercenary "who participates directly in hostilities or in a concerted act of violence";[239] (3) anyone who attempts to commit the offenses in (1) or (2);[240] and (4) anyone who is an accomplice to any offense (1) through (3).[241]

The Convention Against Mercenaries also establishes states' responsibilities. Article 5 provides that states "shall not recruit, use, finance or train mercenaries" for any purpose, and specifically, states shall not do so "for the purpose of opposing the legitimate exercise of the inalienable right of peoples to self-determination."[242] Thus, states are purported to have an affirmative obligation to "prohibit" such activities, in general, and specifically "prevent" them if they are intended to oppose a self-determination movement.[243] The U.N. Convention Against Mercenaries makes an unmistakable distinction for the first time in international law: all *states* shall refrain from using mercenaries.[244]

A strong argument exists that the Convention Against Mercenaries is irrelevant and freely

[237] *Id.*, art 1(2)
[238] *Id.*, art. 2.
[239] *Id.*, art. 3(1).
[240] *Id.*, art. 4(a).
[241] *Id.*, art. 4(b).
[242] *Id.*, arts. 5(1), 5(2).
[243] Milliard, *supra* note **Error! Bookmark not defined.**~~19~~, at 63.
[244] *See* U.N. Convention Against Mercenaries, art. 5.

ignored. Enacted in 1989, it did not become "effective" until 2001,[245] when the requisite twenty-second state party ratified the convention.[246] As of April 2008, only eight other states have acceded to its terms, bringing to thirty the total number of Member States that have ratified the Convention.[247] Ironically, only one African Union state that advocated and signed the U.N. Convention Against Mercenaries has ratified it.[248] At least two of the African signatories—Angola and the Democratic Republic of the Congo—subsequently hired mercenaries.[249] Low accession and contrary practice militate against the Convention being a true codification of customary international law, and therefore the convention is not binding.

Conventional wisdom holds that mercenaries are not motivated by political or noble causes.[250] Lawmakers attempting to regulate (or ban) mercenaries repeatedly point out this inherent trait as an "evil."[251] The secondary definition echoes this theme but lowers the threshold by describing the requisite compensation as "significant private gain" doing so without providing a benchmark.[252] The evidentiary problems remain insurmountable for the unfortunate prosecutor

[245] Press Release, U.N. GAOR 3d Comm., 56th Sess., 3d mtg., U.N. Doc. GA/SHC/3650 (2001).
[246] U.N. Convention Against Mercenaries, art. 19.
[247] For a current list of contracting states, see http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty6.asp (last visited Apr. 21, 2008).
[248] Milliard, *supra* note **Error! Bookmark not defined.**~~19~~, at 65. "The original signatories were Angola, Republic of the Congo (formerly Congo-Brazzaville), Democratic Republic of Congo (formerly Zaire and before that the Democratic Republic of the Congo), Cameroon, Morocco, and Nigeria." *Id.* at 65 n.371.
[249] *Id.* at 65. Up to eighteen African nations in all have hired mercenaries since the 1960s. Wheatley, *supra* note 179~~163~~, at 10 n.60 (*citing* HERBERT HOWE, AMBIGUOUS ORDER: MILITARY FORCES IN AFRICAN STATES 228 (2001)).
[250] Milliard, *supra* note **Error! Bookmark not defined.**~~19~~, at 60 (*citing* 15 OFFICIAL RECORDS 196 (CDDH/III/SR.57, Apr. 29, 1977) (statement of Mr. Alkaff, Yemen: "Mercenaries [have] always been attracted by the hope of gain")).
[251] Milliard, *supra* note **Error! Bookmark not defined.**~~19~~, at 60.
[252] U.N. Convention Against Mercenaries, art. 1(2)(b).

tasked with proving illicit motivation.[253] Even if proven, the illegality of *being* a mercenary under the convention has no enforcement mechanism beyond domestic legislation that each contracting state was to enact[254]—something they were free to do before the convention.

The secondary definition of the U.N. Mercenary Convention most likely does not apply to PMF contractors.[255] This is true because PMF contractors are not recruited to participate in a "concerted act of violence" aimed at overthrowing or undermining a state.[256] Also, it is a herculean task to prove the motive for contracting is financial gain.[257] With at least two of the five criteria falling short, PMFs as they are currently operating will not find themselves afoul of the Convention anytime soon. Without exception, the Convention purports to prohibit individual and state use of mercenaries.[258] With only a paltry sixteen percent of the Member States of the United Nations party to it and wide-spread state practice contrary to its terms, though, the Convention cannot reasonably be argued as indicative of customary international law. Accordingly the 162 Member States *not* party to the convention are free of its strictures.

Though only a handful of the U.N. instruments discussed truly reflect customary international law with regards to the use of mercenaries, all of them in tandem begin to reshape the field in this area. The numerous non-binding resolutions and even the off-the-mark conventions whittle

[253] Milliard, *supra* note **Error! Bookmark not defined.**~~19~~, at 61 n.338.
[254] Gaston, *supra* note 10185, at 232 (*citing* U.N. Convention Against Mercenaries, art. 3(1)).
[255] *Id.* at 233 (*citing* Emanuela-Chiara Gillard, *Business Goes to War: Private Military/Security Companies and International Humanitarian Law*, 863 INT'L REV. RED CROSS 525, 568–70 (2006) (discussing why most PMFs do not meet the six-point cumulative definition of "mercenary").
[256] Peters, *supra* note **Error! Bookmark not defined.**~~16~~, *On Law, Wars and Mercenaries: The Case for Courts-Martial Jurisdiction over Civilian Contractor Misconduct in Iraq*, 2006 B.Y.U. L. REV. 315, 323 (2006).
[257] Gaston, *supra* note 10185, at 233 (*citing* Protocol I, art 47(2); U.N. Convention Against Mercenaries, art. 1(a)).
[258] U.N. Convention Against Mercenaries, arts. 2, 5.

away at the traditional law of war. In this, a handful of Member States have been successful in laying a foundation upon which future accessions and restrictions can be built.

The sage counsel of Burmester[259] and Cotton[260] cautioning against the reduction of protections has fallen upon deaf ears. Though Professor Cameron admits "weakening of protection for a group of persons is highly unusual and goes against the tenor of . . . humanitarian law," she promotes the practice, "[in order to] discourage would-be mercenaries from putting themselves in a vulnerable situation . . . ." [261] In other words, if the diminished protection discourages mercenaries from entering the field of battle, then *mission accomplished*.

An incorrect but often repeated claim is that PMF contractors operate outside the law. Whatever their ultimate status in international law, U.S. citizens and nationals who fill the ranks of PMFs are almost always subject to the criminal jurisdiction of the United States for any crimes they allegedly commit, regardless of where they might occur. Personal jurisdiction is had by three different mechanisms: the Special Maritime and Territorial Jurisdiction of the United States ("SMTJ"), the Military Extraterritorial Jurisdiction Act ("MEJA") and most recently the amendment of Article 2(a)(10) of the Uniform Code of Military Justice ("UCMJ"). An exercise of jurisdiction under MEJA or SMTJ rests with the United States Attorney General through the respective U.S. Attorney's Office. An exercise of jurisdiction under the UCMJ places contractors under court-martial jurisdiction of military commanders in the field if the Justice

[259] *See supra* text accompanying note 212~~196~~.
[260] *See supra* text accompanying note 213~~197~~.
[261] Cameron, *supra note 27*, 579–80.

Department opts not to take the case first.[262]

The SMTJ creates nine specific circumstances where the U.S. can exercise jurisdiction outside of its territorial borders. The two that are most germane to a discussion of PMF contractors are those offenses committed by or against a U.S. national in a location outside the jurisdiction of any nation, or within the land, building or residence used by overseas diplomatic or military missions of the United States.[263]

MEJA builds upon the SMTJ by extending its jurisdiction to crimes committed by personnel employed by or accompanying the U.S. military outside of U.S. territory—provided the offense is punishable by more than one year's imprisonment.[264] The provisions of MEJA expressly allow concurrent court-martial jurisdiction, if applicable.[265] Any custodial actions must be executed by Department of Defense law enforcement officers with transfer to a foreign criminal justice system or removal to the United States only by order of a federal judge or an order by the Secretary of Defense because of military necessity.[266] "Employees" are the civilian staff of the DOD and its contractors.[267] "Accompanying" under MEJA refers only to dependents of military personnel and those of the civilian employees/contractors.[268]

[262] *See* Memorandum from Robert Gates, Sec. of Defense to Secs. of the Military Dep'ts et al. (Mar. 10, 2008) (on file with author) [hereinafter Gates Memo].
[263] 18 U.S.C. §§ 7(7), 7(9).
[264] 18 U.S.C. § 3261(a)(1).
[265] 18 U.S.C. § 3261(c).
[266] 18 U.S.C. §§ 3262–3264
[267] 18 USC § 3267(1).
[268] 18 USC § 3267(2).

The most recent change to extraterritorial *in personam* jurisdiction causing the greatest buzz is the insertion of four simple words into Article 2(a)(10) of the UCMJ: "or a contingency operation."[269] The military always enjoyed court-martial jurisdiction over contractors in its employ during declared wars but never outside of that.[270] The recent amendment changes all of this and now brings PMF contractors within the reach of military convening authorities during operations such as those continuing today in Iraq.[271] This includes specific standards of military conduct like failure to obey an order of a military commander.[272]

How military commanders might use this new-found authority and whether Article III courts would tolerate the procedural deprivations inherent with it has only been speculated upon until now.[273] The case of Alaa Mohammad Ali, a contract interpreter who stabbed another contractor in the chest after an argument, is the first use of the expanded courts-martial jurisdiction.[274] The case is expected to create important precedent that may eventually reach American security

[269] UCMJ, art. 2(a)(10), 10 U.S.C. § 802(a)(10) ("The following persons are subject to this chapter . . . [i]n time of declared war *or a contingency operation*, persons serving with or accompanying an armed force in the field.") (emphasis added). *See also* Peter W. Singer, *Frequently Asked Questions on the UCMJ Change and its Applicability to Private Military Contractors*, Brookings Institute (Jan. 12, 2007), *available at* http://www.brookings.edu/opinions/2007/0112defenseindustry_singer.aspx?p=1 (last visited Apr. 22, 2008).

[270] *United States v. Averette*, 41 C.M.R. 363, 365 (C.M.A. 1970) (reversing the court-martial conviction of a civilian contractor because the version of § 802(a)(10) then in effect applied only in cases of declared war).

[271] *See generally*, Gates Memo, *supra* note 262~~246~~ (discussing the amendment to give convening authorities jurisdiction over U.S. civilians operating in their areas of responsibility).

[272] Michael J. Navarre & John O'Connor, Steptoe & Johnson LLP, International Law Advisory: Contractors "In the Field" Now Subject to Military Justice (Mar. 12, 2007), http://www.steptoe.com/publications-4325.html (citing the applicability of Article 92 of the UCMJ).

[273] *Id.* at n.3:

> [S]ervice members do not have the right to a jury trial under the Sixth Amendment or the right to presentment and indictment under the Fifth Amendment. See generally United States v. Leonard, 63 M.J. 398 (C.A.A.F. 2006) (no Sixth Amendment right to a jury trial); U.S. Constitution, Amendment V, in part, "No person shall be held to answer for a capital, or otherwise infamous, crime unless on a presentment or indictment of a Grand Jury, except in cases arising in the land and naval forces...."

[274] Michael R. Gordon, *U.S. Charges Contractor at Iraq in Stabbing*, N.Y. TIMES, Apr. 5, 2008, at A6.

contractors.[275] The military attorney representing Ali intends to contest jurisdiction altogether on the theory that Congress specifically intended the expanded court-martial authority to reproach only security contractors, not interpreters, and should therefore be thrown out.[276] How the Ali case will play out remains to be seen, but it invariably will impact whether and how military commanders bring charges against contractors in the future.

As discussed, the MEJA-enhanced jurisdiction of the United States's SMTJ jurisdiction applies expressly to DOD civilian employees, DOD contractors and the dependents who have accompanied them to overseas posts. This plausibly covers many PMFs if they are engaged in activities in support of the war effort for the DOD. PMF contractors are covered more expressly by the recent changes to the UCMJ. The courts-martial jurisdiction now includes, as of March 10, 2008, matters of *discipline* under the UCMJ, not just criminal acts.[277] If there were any lingering doubts of where the buck stops, the question has been resolved.

Conclusion

Despite the historic use of mercenaries in warfare, their use and conduct during the decolonization period of the 1950s and 1960s turned international opinion against their use by state actors. To date those international instruments that address mercenarism are largely ineffective at regulation because they lack broad support from the Member States of the United Nations, and/or contrary state practice militates against the rules becoming norms under

[275] *Id.*
[276] Michael R. Gordon, *Military Role Overseeing Contractors Tested in Iraq*, N.Y. TIMES, Apr. 6, 2008, at A16.
[277] Gates Memo, *supra* note 262~~246~~.

customary international law. Even if there was broader consensus and the conventions, protocols and resolutions represented the will of the international community, the definitions themselves are doomed from poor draftsmanship.

What cannot be denied is the developing trend in international opinion against mercenarism and the use of PMFs in security work; if such organizations were involved in assassinations or even in licit targeted killings, the opinion would be even less likely to improve. Events like the Qaed Salim Sinan al-Harethi targeted killing, whether supported by Blackwater/Xe and their like – or not – will be a certain point of contention within the international community to condemn PMFs as modern day mercenaries deserving to be regulated out of existence.