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Cover Page Footnote
J.D. Candidate, 2006, Fordham University School of Law. Many thanks to Professor Thomas H. Lee for his guidance. I would also like to thank my family and friends for their support, and Ben and Mathew for Africa.

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PRIVATE MILITARY FIRMS IN THE NEW WORLD ORDER: HOW REDEFINING “MERCENARY” CAN TAME THE “DOGS OF WAR”

Ellen L. Frye*

“War is far too important to be left to the generals . . . . [It] is also far too important to be left to the C.E.O.s.”

INTRODUCTION

At the Harare airport on March 7, 2004, Zimbabwean authorities held a cargo plane registered to the British firm Logo Logistics, Ltd., and detained its sixty-four passengers on suspicion of mercenary activity. Zimbabwean authorities announced that the plane originated near Pretoria, South Africa, and that the men on board included South Africans, Angolans, and Namibians. A senior executive of Logo Logistics claimed the men were en route to the Democratic Republic of Congo to work as private security for a mining operation. The South African government announced that if

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6. See LaFraniere, supra note 2.
any of its nationals aboard the plane had engaged in “mercenary” activity they were in violation of South African law.\(^7\)

Several days later, the government of Equatorial Guinea detained fifteen men, including South Africans and Armenians, on suspicion of mercenary activity in connection with the Zimbabwe detainees.\(^8\) Equatorial Guinean officials maintained that the two groups intended to overthrow President Teodoro Obiang Nguema Mbasogo and planned to install opposition leader Sevoro Moto\(^9\) in an attempt to gain control of Equatorial Guinea’s oil reserves.\(^10\) Nick du Toit, leader of the Equatorial Guinea detainees,\(^11\) claimed that he was hired by Simon Mann, leader of the Zimbabwe detainees.\(^12\) Mann helped found the now-defunct South African private military firm (“PMF”)\(^13\) Executive Outcomes.\(^14\)

In relation to the March 2003 incident at the Harare airport, Mann was convicted in Zimbabwe, in September 2004, of illegally


\(\text{\textsuperscript{11}}\) Du Toit was sentenced to thirty-four years in prison in Equatorial Guinea. See Thatcher Fined, supra note 9.


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attempts to purchase weapons, and sentenced to seven years imprisonment. The sixty-three men arrested with Mann were acquitted on weapons charges but convicted of breaking immigration laws and sentenced to twelve months imprisonment. Sir Mark Thatcher, son of former British Prime Minister Margaret Thatcher, and a “good friend and Cape Town neighbor” of Simon Mann was implicated in the plot, and detained by South African police. In January 2005, Thatcher pleaded guilty to violating the Regulation of Foreign Military Assistance Act (“RMFAA”), South Africa’s anti-mercenary law.

On March 31, 2004, four American men were ambushed and killed in Fallujah, Iraq. The bodies of two of the men were mutilated, dragged through the streets, and hung from a bridge over the Euphrates River. Eventually their bodies were cut down, burned, dragged behind a cart, tied to a car, and driven away. These men were not soldiers but civilians serving as private contractors in Iraq, employed by the American firm Blackwater Security Consulting.

Estimates of the total number of private security personnel in Iraq range from 15,000 to 20,000. Some of these civilians carry high-end weapons, fly helicopters, and operate their own intelligence-gathering

20. See Thatcher Fined, supra note 9. Thatcher was fined $500,000 and received a four-year suspended sentence. Thatcher then left South Africa. Id.
22. See Chan, supra note 21.
23. Id.
units. Civilians provided security for L. Paul Bremer III, chief of the Coalition Provisional Authority, escorted supply convoys, and defended locations including the Green Zone in Baghdad. The United States acknowledges that civilian contractors in Iraq have engaged in combat on several occasions.

These March 2004 incidents in Africa and Iraq expose some of the complexities surrounding the use and activities of both PMFs and "soldier-of-fortune"-type mercenaries. At present, there is little law—international or domestic—regulating the activities of PMFs or soldiers of fortune. International conventions purport to condemn mercenaries, but the relevant treaties and customary norms contain neither serviceable definitions of mercenaries nor clear guidance as to what sorts of mercenary conduct are prohibited. Some soldier of fortune and PMF "source" countries, like South Africa, have domestic laws aimed at curtailting mercenaries, but domestic regulation has limited extraterritorial force. The body of international law on mercenaries is perceived as being definitionally narrow, prompting the observation that "any mercenary who cannot exclude himself... deserves to be shot—and his lawyer with him!"

Some have criticized this legal state of affairs and recommended more thorough regulation or outright prohibition in part to prevent violence from becoming a commodity. A few scholars advocate

27. See Barstow, supra note 26.
29. See Barstow, supra note 26; Carter, supra note 28; Priest & Flaherty, supra note 26.
30. See infra Parts I.B, II.B (discussing the state of current international and domestic law); see also Singer, supra note 1, at 525-26.
31. See Milliard, supra note 13, at 4, 64-65; Singer, supra note 1, at 525.
32. See infra Part II.B.2.b (discussing domestic regimes); see also Milliard, supra note 13, at 84; Juan Carlos Zarate, The Emergence of a New Dog of War: Private International Security Companies, International Law, and the New World Disorder, 34 Stan. J. Int'l L. 75, 139 (1998). Many scholars think there are significant problems with prohibiting the entire industry. See Milliard, supra note 13, at 76 ("[A] consensual military transfer between two legitimate states violates none of the peremptory norms imposed by international legal principles of neutrality or non-intervention."); Singer, supra note 1, at 547 ("While... a system of international regulation would certainly provide much greater transparency in the PMF industry, it fails to answer a number of concerns.").
35. See Sapone, supra note 34, at 43 (arguing that while military skill and violence are "incompletely commodified," open commodification of military power "would make the ideal of nonmonetized death impossible").
substantial restrictions on mercenaries and PMFs, while others believe mercenaries to be an inevitable feature of the present world order and propose reliance on market mechanisms to regulate them.\textsuperscript{36} Still others steer a middle course, advocating permissive regulation to channel, rather than to eliminate, the operation of irresponsible market forces.\textsuperscript{37}

This Note proposes a different sort of compromise solution—one that puts great faith in the law but with due regard for the particular features of the mercenary problem in the twenty-first century. The solution is twofold. First, it articulates a new definition of "mercenary"—one that can serve as a practical, enforceable means of delimiting certain actors to regulate.\textsuperscript{38} This redefinition of mercenary bolsters existing and proposed international and domestic conventions, laws, and regulations aimed at mercenaries and PMFs. Second, it suggests specific supplemental prohibitions to target the most egregious aspects of mercenary activity today, namely, the mortgaging of valuable natural resources in exchange for mercenary services and the substitution of mercenaries for state armies in core military functions.\textsuperscript{39}

Part I.A of this Note describes the different fighting forces that might be considered mercenaries,\textsuperscript{40} and gives examples of their typical actions and engagements. Part I.B analyzes the existing international and domestic laws aimed to curtail, deter, or regulate mercenary activity.\textsuperscript{41} Part II.A examines the current definition of a mercenary found in international and domestic law. Part II.B considers problems and criticisms of current legal regimes. Part II.C weighs proposals for reform of present regulatory regimes and new solutions. Part III.A proposes a new definition of a mercenary, and Part III.B recommends measures to deter and prevent private violence and the most reprehensible actions of PMFs and soldiers of fortune.

\textsuperscript{36} See, e.g., Zarate, supra note 32, at 161 (finding that PMFs "may prove effective in restoring security and order").

\textsuperscript{37} Milliard, supra note 13, at 79-84; Singer, supra note 1, at 544-46.

\textsuperscript{38} See infra Part III.A (proposing a redefinition of "mercenary").

\textsuperscript{39} See infra Parts III.B.2.a-b (proposing prohibition of assignment of natural resources and calling for heightened public awareness of the use and status in combat of private forces).

\textsuperscript{40} This Note’s categorization of the forces that might be considered mercenaries closely tracks that of Anthony Mockler, who put mercenaries into four groups: (1) lone adventurers; (2) elite guards protecting heads of state, such as the Swiss Papal Guard; (3) groups of professional soldiers, such as the Free Companies of the 16th and 17th centuries; and (4) “respectable” mercenaries, portions of one state’s army loaned to another state. Anthony Mockler, The New Mercenaries: The History of the Hired Soldier from the Congo to the Seychelles 15-16 (1985).

\textsuperscript{41} These laws include the Hague Regulations, Geneva Conventions, U.N. Resolutions, international conventions, and domestic statutes. See infra Part I.B.1 (discussing current international law).
I. MERCENARIES: DEFINITION AND REGULATION

Mercenary activity is unsettling to a world organized by nation-states, as the image of a soldier of fortune loyal to no state disrupts the current state-oriented hegemony. Mercenaries operate now, however, as they have for thousands of years throughout the history of warfare. Soldiers have fought for states not their own in many of the twentieth century's conflicts, large and small. Some of these individuals fought for political or religious reasons; some fought for money. Sometimes payment was made to a fighter's home state, sometimes to his private employer, and sometimes directly to him.

Since at least the nineteenth century, however, states have sought to monopolize violence. The dissolution of the mercantile companies, such as the English East India Company, the campaign against piracy, and the laws of neutrality are all instances of states' attempts to monopolize violence. Indeed the nation-state regime of the last several centuries depended, at least ideologically, on this monopoly,

42. It must be noted, however, that the nation-state world order of today is by no means as longstanding as the profession of mercenarism. The emergence of nation-states is conventionally traced back to the 1648 Treaty of Westphalia. See, e.g., Edith B. Weiss, The Rise or the Fall of International Law?, 69 Fordham L. Rev. 345, 346 (2000). But see Stephen D. Krasner, Pervasive Not Perverse: Semi-Sovereigns as the Global Norm, 30 Cornell Int'l L.J. 651, 652 (1997) (arguing that nation-states existed before Westphalia).

43. Cf. Nduru, supra note 10. For an exploration of why mercenaries have garnered so much negative attention in the latter half of the twentieth century, see Sapone, supra note 34.

44. For a history of mercenaries in war, see Singer, supra note 14, at 19-39.


47. Sandline International's aborted contract with Papua New Guinea was worth $36 million (following a $1,370,000 "package price reduction"). Singer, supra note 14, at 253-54.


49. See supra note 47 and accompanying text.

50. In 1975, opposition groups in the Comoros Islands hired Bob Denard to overthrow the president, which he successfully did. Three years later, the president that Denard had deposed hired him, and Denard successfully reinstated him. See Thomson, supra note 48, at 93.

51. Privateering was banned in the 1856 Treaty of Paris. Declaration Respecting Maritime Law, Apr. 16, 1856, art. 1, 115 Consol. T.S. 1, 2; see Thomson, supra note 48, at 70-75.

52. See Thomson, supra note 48, at 69-142 (detailing the suppression of private violence).
and enforced it through large citizen armies. Since the end of the Cold War, however, many states have scaled back their national armies and become less willing to intervene in conflicts to which they are not party. Some states have struggled to maintain their sovereignty. Others have failed in this struggle, and at least one country has collapsed. In response, the supply of private soldiers grew and the PMF industry arose.

The emergence of PMFs starkly exposed the vacuum of regulation and subsequently renewed calls for regulation of this sort of private violence. Part III.A argues that to effectively regulate mercenaries, including PMFs and soldiers of fortune, a solid definitional foundation must exist. Thus, this Note begins with an exploration of the existing definition of a mercenary.

A. Who Is a Mercenary?

The definition of a mercenary is unsettled in international law. The precise definition carries serious consequences for those it covers, because mercenaries are not afforded prisoner-of-war ("POW") status


54. Milliard analogizes the end of the Cold War to the end of the Peloponnesian War, both of which "produced a surplus of highly trained, professional soldiers in search of employment opportunities." Milliard, supra note 13, at 11.

55. See, e.g., id. at 16. Milliard notes that the international community is now generally unwilling "to intervene in the early stages of internal armed conflict" for fear of "risk of casualties, or lack of national support and political will," among other concerns. Id.

56. Rotberg defines nation-states as entities that "exist to deliver political goods—security, education, health services, economic opportunity, environmental surveillance, a legal framework of order and a judicial system to administer it, and fundamental infrastructural requirements such as roads and communications facilities." Rotberg, supra note 53, at 87; cf. Krasner, supra note 42, at 651 ("The whole notion of sovereignty appears fragile, incorporeal, undefinable, and perhaps inconsequential for the modern world."). For a contrast of legal sovereignty (sovereignty in name) with behavioral sovereignty (sovereignty in fact), see generally Richard H. Steinberg, Who Is Sovereign?, 40 Stan. J. Int'l L. 329 (2004).

57. Rotberg notes that "[f]ailed states honor these obligations [of providing 'political goods'] in the breach." Rotberg, supra note 53, at 87. Failed states include Afghanistan, Angola, Burundi, Democratic Republic of Congo, Liberia, Sierra Leone, and Sudan. Id. at 90. Both Angola and Sierra Leone employed EO in the 1990s. See infra notes 128-39 and accompanying text. Rotberg names Somalia as a collapsed state. Rotberg, supra note 53, at 90.

58. See Singer, supra note 14, at 8-17.

59. See infra Part II.C (discussing scholars' proposals for new regulation regimes); see also Singer, supra note 1, at 522-24.

60. See infra Part III.A (redefining "mercenary").

61. See infra Part II.A (discussing the current definitions found in international law). Attempting to regulate mercenaries, "drafters struggled to define adequately the ancient profession." Milliard, supra note 13, at 4. Most commentators agree that they have failed to do so. See, e.g., Singer, supra note 1, at 524 (lamenting the definitional problems attendant to mercenary regulation).
by the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts ("Protocol I"), and so mercenaries may not receive the treatment required by that treaty if captured during a conflict. International agreements regulating mercenaries contain many specifics of who is a mercenary, including measures of such actors' subjective motivation.

A full exploration of any force that might be considered mercenary requires an examination of who mercenaries are and how they are regulated. This Note starts from *The Oxford English Dictionary* definition: A mercenary is "a professional soldier serving a foreign power" in exchange for "payment for his services." In literal terms, a mercenary is "one who fights for an employer other than his home state and whose motivation is economic." A soldier fighting for his country is not a mercenary. Four categories of fighter could fit the dictionary definition of a mercenary: state-loaned soldiers, state-recruited foreigners, corporate actors, and soldiers of fortune.

1. State-to-State Loan

Throughout history states loaned their armies, in whole or in part, to other states in exchange for money. Beginning in the sixteenth century, Swiss cantons hired their soldiers out to foreign armies, and Swiss soldiers still guard the Pope in the Vatican. Emulating the Swiss, German states and Austria entered the army-for-hire market

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64. Scholars have spent considerable time defining mercenaries. *See, e.g.*, Singer, supra note 14, at 41; Milliard, supra note 13, at 6-7.


67. This categorization of forces that may be considered mercenaries is similar to that of Mockler. See Mockler, supra note 40, at 15-16.

68. Pharaoh Ramses II hired Numidians to serve in his army; Greek city-states specialized in certain war skills; and the Roman Empire hired Numidians, Balearics, Gauls, Iberians, and Cretans. Singer, supra note 14, at 20-22.

69. *Id.* at 27.

70. The first lease of a German regiment occurred by Venice. Thomson, supra note 48, at 28.
in the seventeenth century.\textsuperscript{71} Later, the British, feeling the strain of controlling their colonies around the world, hired nearly 30,000 German soldiers, many from the state of Hesse-Cassel,\textsuperscript{72} to fight the Americans in the Revolutionary War.\textsuperscript{73}

State-to-state loan of soldiers continued in the twentieth century and not solely in the ceremonial form of the Swiss Papal Guard.\textsuperscript{74} During the Vietnam War, the United States contracted with several countries to send soldiers to fight in South Vietnam in exchange for direct payments to the soldiers and to their home states.\textsuperscript{75} The United States employed South Korean,\textsuperscript{76} Filipino, and Thai troops, paying "an overseas allowance, a per diem for each soldier, plus an additional allowance according to rank," and "basically all expenses associated with deploying these forces," to include the cost of replacing these soldiers in their home army.\textsuperscript{77} Pakistani soldiers serve in the armies of several Middle Eastern countries,\textsuperscript{78} including Libya.\textsuperscript{79} The United Kingdom may loan its soldiers to some of the former British colonies in the Middle East.\textsuperscript{80} Some commentators claim that the United Nations employs mercenaries, arguing that "at least some countries who contribute to U.N. peacekeeping do so largely for financial reasons."\textsuperscript{81}

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\textsuperscript{71} Singer, \textit{supra} note 14, at 27. In the seventeenth century, the armies of Europe were not citizen-national armies, but were forces of many different nationalities. Different nationalities had their own specialties. For example, Eastern Europeans were renowned as light cavalry and Scots as infantry. Singer observes that "[f]or the most part, 'patriotism' was a meaningless concept to the average soldier of the period." \textit{Id.} at 28.

\textsuperscript{72} \textit{Id.} at 33. In the eighteenth century, Hesse-Cassel "clearly was the most heavily militarized state in Europe." Charles W. Ingrao, The Hessian Mercenary State: Ideas, Institutions, and Reform Under Frederick II, 1760-1785, at 132 (1987).

\textsuperscript{73} See Ingrao, \textit{supra} note 72, at 136. The ruler of Hesse-Cassel, Frederick II, attempted to recruit his countrymen by assuring them that there would be "ample pillage in America." \textit{Id.} at 141-42.

\textsuperscript{74} See Singer, \textit{supra} note 14, at 27, 37-38.

\textsuperscript{75} See Blackburn, \textit{supra} note 48, at 145.

\textsuperscript{76} South Korea had less than 200 troops in Vietnam before 1964; by 1968 more than 50,000 South Korean troops were deployed in Vietnam. \textit{Id.} at 158; see also Thomas H. Lee, Why Does an Empire Need Help? Explaining the Supply and Demand for the Multilateral Exercise of Military Power in Decentralized Empires 31 (Jan. 21, 1998) (unpublished manuscript, on file with author).

\textsuperscript{77} See Thomson, \textit{supra} note 48, at 94. Thomson observes that the Thai press called the arrangement "mercenary." \textit{Id.} Lee estimates that South Korea received over $1.35 billion in "Vietnam-related remittances." Lee, \textit{supra} note 76, at 34.

\textsuperscript{78} For a further discussion of foreigners in Middle Eastern armies, see Thomson, \textit{supra} note 48, at 90.

\textsuperscript{79} See Zarate, \textit{supra} note 32, at 90.

\textsuperscript{80} The British term this practice "seconding." Thomson, \textit{supra} note 48, at 27. For a thorough discussion of state-to-state loan of soldiers throughout history, see \textit{id.} at 26-32.

\textsuperscript{81} UK Green Paper, \textit{supra} note 13, ¶ 58.
Political science professor Janice E. Thomson deems these twentieth-century activities "disguised mercenarism." To disguise these activities states do not just compensate foreign forces with money. For example, Pakistan sends its troops to Saudi Arabia in exchange for aid packages. Similarly, the United States did not technically lease troops from Thailand, the Philippines, or South Korea, but did cover all costs of their deployment and replacement. While arguably "disguised mercenarism," all loaned forces of the twentieth century have maintained that they are fighting for their home state.

2. State-Recruited Foreigners

Since ancient times, states have recruited foreigners to fight in their armies. The antecedent of this practice in the modern era is the condotta (contract) system, which arose in Italy in the thirteenth century. Italian city-states hired noncitizens to serve as a city-states' soldiers through private contracts. This practice gave rise to the Free Companies, which formed during the Hundred Years' War (1337-1453), and were composed of contractual soldiers, or condottieri. Members of Free Companies were ultimately loyal to the company, not to their employing state.

Free Companies mostly disappeared in the fifteenth century when Charles VII of France hired several of the companies and ordered them to defeat the others. The condotta system survived in Italy, however, through the fifteenth century. Some condottieri came to

82. Thomson, supra note 48, at 96. The Thai press perceived the Thai troops in Vietnam as mercenaries. Id. at 94. David Isenberg alleges that the forces were mercenaries but were called allies "to avoid public controversy." David Isenberg, Ctr. For Def. Info., Soldier of Fortune Ltd.: A Profile of Today's Private Sector Corporate Mercenary Firms 4, available at http://www.cdi.org/issues/mercenaries/merc1.html (Nov. 1997).
83. See Thomson, supra note 48, at 90.
84. Id. at 94.
85. Id. at 97 ("In the twentieth century, foreign aid, mutual defense pacts, and per diems have replaced eighteenth-century subsidies, leases, and direct recruiting.").
86. See Singer, supra note 14, at 20-21.
87. Id. at 22.
88. Id. at 23.
89. See Zarate, supra note 32, at 84. For a full discussion of the Free Companies, see Singer, supra note 14, at 23-26.
90. See Singer, supra note 14, at 24. Among the most successful companies were the Great Company (composed of nearly 10,000 soldiers), the English White Company, and the Grand Catalan Company (which ruled Athens for sixty years). Id. at 25.
91. Id. at 26. The French army became the first standing army in Europe since the fall of Rome. Id.; see also Milliard, supra note 13, at 9.
92. Milliard, supra note 13, at 10 & n.52.
seize political power for themselves, and the *condottieri* era “marked the zenith of mercenary influence over states’ affairs.”

States still recruit foreigners to serve as units in their national armies. In 1831, King Louis Phillipe created the French Foreign Legion in the “traditions of foreign troops who have served France since the Middle Ages.” Soldiers of more than a hundred nationalities have served in the French Foreign Legion, and Legionnaires may obtain French citizenship after five years of service. The French government provides Legionnaires with clothing, food, accommodation, medical care, and pays them at least 975 euros per month.

The British established the equally famous Brigade of Gurkhas after defeating these Nepalese fighters in 1816. Following defeat and peace, many Gurkhas enlisted in the East India Company army. The British national army later subsumed this force. As of 2001, there were 3400 soldiers in the Gurkha Brigade. In 2003, Gurkhas were held to be part of the British army but not entitled to the same
benefits as other British soldiers. Though citizens of other nations, the loyalty of the Gurkhas to Britain and the Legionnaires to France is unquestioned.

The 30,000 noncitizens serving in the American armed forces are eligible to apply for naturalization after serving for one year.

As a general matter, state-recruited foreigners are not only strictly controlled by the recruiting state, but become a part of the recruiting state's national army and possibly citizens of that state. While fighting for pay, these soldiers are not fighting for self-interested monetary gain, but are part of their adopted state's foreign policy machine. This Note next turns to corporate actors of varying levels of internal organization or coherence whose loyalty is not tied to any particular state.

3. Corporate Actors

The Free Companies of medieval Europe were not only state-contracted units of foreign soldiers, but companies formed to make a profit. During the subsequent era of mercantile imperialism, corporations raised private armies in the form of joint stock companies. Corporations such as the English and Dutch East India companies received charters from their home governments to monopolize trade in a particular region, and fielded armies and fleets to protect their trading interests. By 1782, the English East India Company employed over 100,000 soldiers, a force larger than the contemporary British national army. This force included Eurasians, Indians, Swiss, and Germans. In Brazil, the Dutch West Indies Company became involved in its own land war with Portugal.

104. Gurkhas and their British officers are bound together by "comradeship and mutual respect," and Gurkhas have earned thirteen Victoria Crosses. See Brigade of Gurkhas, supra note 100. The Victoria Cross is the United Kingdom's highest award for bravery. See Ministry of Def., Military Honours & Awards, at http://www.mod.uk/honours/ (last visited Feb. 28, 2005).
107. Though the Gurkhas do not become citizens of the United Kingdom through their service in the Gurkha brigade, they are a part of the British Army and part of that state's military and foreign policy. See Ministry of Def., 1 W.L.R. at 289.
108. See Singer, supra note 14, at 24. The Free Companies were "permanent military and economic organizations" that marketed themselves to prospective employers. Id.; see also Milliard, supra note 13, at 8.
109. See Singer, supra note 14, at 34. For a full discussion of the mercantile companies, see id. at 34-37. See also Thomson, supra note 48, at 32-41.
110. See Singer, supra note 14, at 34.
111. Id. at 35.
112. See Thomson, supra note 48, at 38.
113. See Singer, supra note 14, at 36. The Dutch West Indies Company looked out for its own economic interests while sacrificing peace: "[W]hen Portugal sued for
Ultimately, the home states of the mercantile companies assumed sovereignty of their holdings and powers. But during the many years of their operations, these companies signaled a break down of "all analytical distinctions—between the economic and political, nonstate and state, property rights and sovereignty, the public and private."115

The modern PMFs are very much like the mercantile companies: They are "structured as firms and operate as businesses first and foremost."116 Some are part of larger corporations and traded on national securities markets.117 PMFs sell small teams of commandos, military advisers, and unarmed guards.118 These firms operate or have operated in over fifty states, including Afghanistan, Angola, Croatia, Ethiopia, Eritrea, Iraq, and Sierra Leone.119 The United Nations, nongovernmental organizations, and multinational corporations have all used private security forces.120 From 1994 to 2001, the U.S. Defense Department spent as much as $300 billion on contracts with private military contractors.121

peace, the company lobbied hard against the treaty. Its directors argued that the company had profited handsomely by the war, and thus [the war] should be continued." Id.

114. Id. The Dutch East India Company operated for 194 years and the English East India Company operated for 258 years. Id. at 37.

115. Thomson, supra note 48, at 32.


117. Military Professional Resources, Inc. ("MPRI") is a subsidiary of L3 Communications, which is publicly traded on the New York Stock Exchange under ticker symbol LLL. See L-3 Communications, Divisions, at http://www.l-3com.com/divisions (last visited Feb. 28, 2005); L-3 Communications, Investor Information, at http://www.l-3com.com/investor_relations/investor_info (last visited Feb. 28, 2005). PMFs "organize themselves as multinational commercial entities that pursue particular economic goals," and "are outside the State and may function as a ‘war machine,' autonomous and unrelated to the State." Sapone, supra note 34, at 13.

118. See UK Green Paper, supra note 13, ¶¶ 9-10; Singer, supra note 1, at 521. It is widely believed that it is rare for PMFs to directly engage in combat. UK Green Paper, supra note 13, ¶¶ 9-10.


120. UK Green Paper, supra note 13, ¶ 12. PMFs are an attractive solution for "certain non-governmental organizations, such as humanitarian relief agencies who, caught in the full heat of warfare, view the prospect of hired help as an essential shield for their supply convoys and field operations." Kritsiotis, supra note 45, at 13.

121. See Laura Peterson, Privatizing Combat, the New World Order, in Making a Killing: The Business of War (Ctr. For Pub. Integrity, ed.), at http://www.publicintegrity.org/bow/report.aspx?aid=148 (last visited Feb. 23, 2005) (noting that "[b]ecause of the limited information the Pentagon provides and the breadth of services offered by some of the larger companies, it was impossible to
The two particular PMFs repeatedly analyzed in scholarship are the now-defunct Executive Outcomes ("EO"), of South Africa, and Military Professional Resources, Inc. ("MPRI"), of the United States. EO formed in South Africa during the transition from apartheid to democracy. The company primarily worked for African states and received as payment mining and oil concessions in these nations. Founded in 1989, EO was linked to the South African Defense Force and to mining and oil extraction companies. Originally employed to train South African military forces and to conduct "marketing warfare" for clients such as De Beers, EO soon found itself working outside South Africa in mining security and drug raids and finally for sovereign states.

Contrary to general practice, EO employees participated in combat directly. In Angola, EO operatives flew helicopters in combat, and in Sierra Leone helped state forces retake four townships from the rebel Revolutionary United Front ("RUF"). The former U.N. Special Rapporteur on the use of mercenaries as means of impeding the right of people to self-determination ("U.N. Special Rapporteur"), Enrique Bernales Ballesteros, alleged that EO "rival[ed] a function determine what percentage of these contracts was for training, security or logistical services"); see also Singer, supra note 1, at 522.

122. Executive Outcomes ("EO") is likely the best known PMF. See Singer, supra note 14, at 101. For a full discussion of EO, see id. at 101-18.
124. See Isenberg, supra note 82, at 6.
125. See Zarate, supra note 32, at 147.
126. See Singer, supra note 14, at 101-02.
traditionally assigned to the State, namely, security . . . includ[ing] the organization of the armed forces.\textsuperscript{131} Although EO officially dissolved in 1999, political scientist Peter Singer notes that many spin-offs of EO are still active, including Alpha 5, Cape International, Lifeguard, Sandline, and Saracen.\textsuperscript{132}

MPRI has been called “the primary player in private military service contracting.”\textsuperscript{133} The company’s databases include over 12,500 former defense and law enforcement professionals.\textsuperscript{134} Founded in 1987 by eight former senior military officers, many of MPRI’s employees are former U.S. military officers and soldiers.\textsuperscript{135}

United States government officials recommended MPRI for some of the corporation’s first contracts, including those in Bosnia, Colombia, Croatia, and Nigeria.\textsuperscript{136} Indeed, the links between the U.S. government and MPRI in the NATO Bosnia campaign caused some European allies “to question how one would know if a MPRI employee was really a retired officer, or still active with the [Defense Intelligence Agency], and whether it made a difference in the end.”\textsuperscript{137}

In 1994, the Pentagon licensed MPRI to assist the Croatian Ministry of Defense and provide Croatian officers with “classroom instruction in democratic principles and civil-military relations to [those] previously accustomed to the Soviet model of organization.”\textsuperscript{138} Four months after this democracy training began, Croat forces launched “Operation Storm,” a massive, sophisticated offensive against the Serbian army, an assault that “carried a Western-style imprint that

\begin{itemize}
\item \textsuperscript{133} Gaul, supra note 116, at 1493. MPRI is “perhaps the most dynamic U.S.” PMF, advertising abilities in “airborne operations, civil affairs, close air support, counterinsurgency, force integration, foreign affairs, joint operations, intelligence (both strategic and tactical).” Milliard, supra note 13, at 11-13.
\item \textsuperscript{134} L-3 Communications, MPRI Our Mission, at http://www.mpri.com/site/mission.html (last visited Feb. 28, 2005); L-3 Communications, MPRI Our Team, at http://www.mpri.com/site/our_team.html (last visited Feb. 28, 2005).
\item \textsuperscript{135} See Singer, supra note 14, at 119. “Although there is a general uneasiness at the concept of retired American military personnel trading commercially on skills and contacts developed while in public service, those within MPRI say that the firm is distinguished by its professionalism and loyalty to U.S. foreign policy goals.” Id.
\item MPRI has acknowledged that it has accessed United States intelligence at high levels. Id. at 120-21.
\item \textsuperscript{136} See id. at 121.
\item \textsuperscript{137} Id. (footnote omitted).
\item \textsuperscript{138} Id. at 126 (footnote omitted).
\end{itemize}
appears to bear evidence of MPRI’s assistance” in combat training or strategy.139

For all intents and purposes, PMFs are heirs of the Free Companies and joint stock companies of previous eras. They operate as private companies that offer military services to foreign countries for pay. This Note next examines soldiers of fortune, the archetypal mercenaries.

4. Soldiers of Fortune

Known as soldiers of fortune, “Wild Geese,” dogs of war, and les affreux (“the dreaded ones”),140 these fighters are “the ideal type of a mercenary.”141 Until the rise of PMFs, these soldiers of fortune, many with military experience, were the main actors in the private military market.142 They operated in weak states for any government, corporate entity, or individual willing to pay them.143 The golden age of these fighters was the 1950s and 1960s in sub-Saharan Africa, where notorious men like “Mad” Mike Hoare and Bob Denard sold their military services to the highest bidder.144 More recently, mercenaries operated in the former Yugoslavia, and for “the last days of the Mobutu regime in Zaire” (now Democratic Republic of Congo).145 In 1976, thirteen men were tried as mercenaries in Luanda, Angola, and four were executed.146 In spite of their reputation, the number of soldiers of fortune acting in any conflict generally has been small, and soldiers of fortune mostly have been ineffective.147

Having examined the four different types of forces that may be considered mercenaries, this Note turns to the international and domestic conventions, laws, resolutions, and declarations that regard and regulate mercenaries.

139. Id. at 127 (noting the “commonly accepted belief” that MPRI provided training in “basic infantry tactics (such as covering fields of fire and flanking maneuvers), and medium-unit strategy and coordination as well”); see also Milliard, supra note 13, at 14 (finding MPRI’s help to the Croatian army, if true, “remarkable”). MPRI denied that they assisted with Operation Storm, claiming that the Croatian forces “could have got [sic] a battle plan just as well from Georgetown University.” Singer, supra note 14, at 126.

140. See Zarate, supra note 32, at 87; see also Herbert M. Howe, Global Order and the Privatization of Security, Fletcher F. World Aff., Fall 1998, at 3 (“The Congolese during the 1960s labeled mercenaries as les affreux for often despicable behavior.”).


142. Singer, supra note 14, at 37.

143. See id.

144. See id. Denard attempted coups in the Comoros Islands and the Seychelles.

Id.

145. Id. at 43-44. Additionally, Ukrainian mercenaries are alleged to have operated in Algeria, Angola, Bosnia, Chechnya, Croatia, Democratic Republic of Congo (formerly Zaire), Guinea, Kosovo, Liberia, Sierra Leone, and Tajikistan. Id. at 44.

146. See Thomson, supra note 48, at 94.

147. See id. at 95.
B. Mercenary Regulation

International acceptance of private militaries waned with the rise of the nation-state in the sixteenth century, when citizens became more closely associated with their national governments. As nations formed, new states attempted to monopolize violence and began to reign in private violence.

Attempts at controlling mercenarism first came in the form of the neutrality laws, passed in the nineteenth century and early twentieth century. After World War II, with the formation of the United Nations and the decolonization of Africa, the international community began to focus on the problem of mercenaries again.

Part I.B.1 examines the international conventions, resolutions, and declarations on mercenaries. Part I.B.2 explores state regulation of mercenaries through domestic laws.

1. International Law

International law can be found in three different sources: treaties, customary international law, and general principles of law (jus cogens). Treaties are binding only on their signatories. Customary international law arises when a predominant number of states follow a certain practice out of a sense of opinio juris (a sense of legal obligation evidenced by state practice). The Restatement (Third) of the Foreign Relations Law of the United States ("Restatement") similarly recognizes a rule of international law as one that has been "accepted as such by the international community of states" as "customary law," "by international agreement" or "derivation from general principles common to the major legal systems of the world." The Restatement defines customary law as "result[ing] from a general and consistent practice of states followed by them from a sense of legal obligation." International agreements can give rise to

148. Singer, supra note 14, at 31. Indeed, state-monopolized violence is perhaps the key characteristic of a state. Thomson writes that "[a]ccording to Weber, one of the essential characteristics of the state is that it 'successfully upholds a claim to the monopoly of the legitimate use of physical force in the enforcement of its order.'" Thomson, supra note 48, at 7 (quoting Max Weber, The Theory of Social and Economic Organization 154 (A.M. Henderson & Talcott Parsons trans., 1964)).

149. See Singer, supra note 14, at 31-32; Thomson, supra note 48, at 69-142.

150. See Thomson, supra note 48, at 78-84.


153. Id. §§ 102 cmt. c., 103; see Ian Brownlie, Principles of Public International Law 8-9 (3d ed. 1979).

154. Restatement, supra note 152, § 102(1).

155. Id. § 102(2). One scholar has further split customary international law into "traditional custom" and "modern custom." Anthea Elizabeth Roberts, Traditional and Modern Approaches to Customary International Law: A Reconciliation, 95 Am.
international law "when such agreements are intended for adherence by states" and are accepted.\textsuperscript{156}

Article 38 of the Statute of the International Court of Justice ("ICJ") provides that the ICJ shall apply both "international conventions" and "international custom, as evidence of a general practice accepted as law," and "the general principles of law recognized by civilized nations."\textsuperscript{157} United Nations General Assembly Resolutions can be evidence of customary international law,\textsuperscript{158} and Protocol I may also be considered customary international law.\textsuperscript{159} The convergence of domestic regulations may be evidence of international law.\textsuperscript{160} Part I.B.1.a examines treaties and customary law regarding mercenary use.

a. Treaties of Broad Ratification

The first international statement on mercenaries is found in Hague Convention No. V Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land of 1907 ("Hague V"), the first formal pronouncement of the modern international laws of war.\textsuperscript{161} Hague V addresses the duty of states with respect to mercenaries and other states; it does not cover treatment of mercenaries themselves.\textsuperscript{162} Under Article 4 of Hague V, neutral powers are prohibited from forming mercenary armies or allowing recruitment of mercenaries on

\textsuperscript{156} J. Int'l L. 757, 757 (2001). Law professor Arthur A. Weisburd argues that treaty law only goes beyond declaration and becomes customary international law when "states acknowledge, at least in principle, a duty to make reparation for its breach." Arthur M. Weisburd, \textit{Customary International Law: The Problem of Treaties}, 21 Vand. J. Transnat'l L. 1, 9 (1988). Weisburd argues that it makes [no] sense to label as international law rules that many states will not obey and that very few states are willing to enforce against violators. If one were to accept this view, the world would soon witness repeated violations of rules that scholars insisted were legally binding. Thus, the discipline of international law would in effect be describing itself as ineffectual.\ldots

\textsuperscript{157} Even beyond this prudential point there are questions of intellectual honesty at issue here.

\textit{Id.} at 45.

\textsuperscript{158} Restatement, supra note 152, § 102(3).


\textsuperscript{160} See supra note 62 and accompanying text (discussing Protocol I); infra Part I.B.1.a.ii (same).

\textsuperscript{161} Restatement, supra note 152, § 102(4) ("General principles common to the major legal systems\ldots may be invoked as supplementary rules of international law where appropriate.").

their territory.\textsuperscript{163} No duty exists, however, to prevent mercenaries from passing through a neutral state's territory.\textsuperscript{164}

The 1949 Geneva Convention Relative to the Treatment of Prisoners of War ("POW Convention") does not mention mercenaries at all.\textsuperscript{165} The POW Convention affords POW status to soldiers "who have fallen into the power of the enemy."\textsuperscript{166} Though silent on the specific status of mercenaries, some scholars believe that the POW Convention drafters intended to confer POW status on mercenaries.\textsuperscript{167} In any event, the POW Convention does not criminalize mercenary activity.\textsuperscript{168} Common Article 3, found in all four of the Geneva Conventions of 1949, does provide minimum protections to be applied in international and non-international conflict.\textsuperscript{169} It mandates that all "[p]ersons taking no active part in hostilities," including combatants who have stopped fighting, must be treated "humanely."\textsuperscript{170} Those falling under common Article 3 protection cannot be tortured or subjected to "outrages upon personal dignity."\textsuperscript{171}

Article 2(4) of the U.N. Charter requires that all states "refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state."\textsuperscript{172} States may only use force in self-defense or by authorization of the U.N. Security Council.\textsuperscript{173} In essence, the U.N. Charter reinforces the sovereignty of all its members.\textsuperscript{174} Regarding mercenaries, this general doctrine was expanded upon by a series of U.N. General Assembly Resolutions, and finally by a multilateral convention.

\section*{b. Customary International Law with Specific Relevance to Mercenaries}

Beginning in the 1960s, in an effort to stave off progress toward African self-determination, colonial powers enlisted the use of

\begin{footnotesize}
\begin{enumerate}
  \item Id. art. 4, 36 Stat. at 2323.
  \item Id.
  \item See POW Convention, supra note 165, art. 4, 6 U.S.T. at 3320-22, 75 U.N.T.S. at 138-40.
  \item Milliard, supra note 13, at 22.
  \item See POW Convention, supra note 165, 6 U.S.T. at 3316, 75 U.N.T.S. at 135.
  \item See, e.g., id. art. 3, 6 U.S.T. at 3318-20, 75 U.N.T.S. at 136-38.
  \item Id.
  \item Id.
  \item U.N. Charter art. 2, para. 4.
  \item Id. art. 51.
  \item See id. art. 2, para. 4.
\end{enumerate}
\end{footnotesize}
In response, international and regional organizations, and one nation, attempted to define, regulate, and even outlaw mercenaries. These agreements, along with the more recent Rome Statute establishing the International Criminal Court ("ICC"), are examined below.

i. U.N. Resolutions

Beginning in 1965, the U.N. General Assembly passed a series of five resolutions on sovereignty and the use of mercenaries. Adopted unanimously, Resolution 2131 declares that "[n]o State has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State." General Assembly Resolution 2465 was the first resolution that specifically addressed mercenaries. Resolution 2465 stated that "using mercenaries against movements for national liberation and independence is punishable as a criminal act and that the mercenaries themselves are outlaws." It also urged all governments to enact domestic legislation making the "recruitment, financing and training of mercenaries in their territory" a punishable offense.

The next General Assembly resolution, Resolution 2625, passed by consensus vote, proclaimed that states have only a "duty to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State." Thus, Resolution 2625 represented a retreat from Resolution 2465, in allowing states to tolerate mercenary activity so long as they do not organize or encourage mercenaries.

In 1973, the General Assembly passed Resolution 3103, the declaration on Basic Principles of the Legal Status of the Combatants

175. See Green, supra note 151, at 114 ("In view . . . of the number of mercenaries who enrolled in colonial armies or were prepared to serve for pay in campaigns directed against national liberation groups, widespread agitation among third world states resulted in the condemnation [of mercenaries].").

176. See infra Part I.B.1.b.v (discussing use of the Rome Statute to prosecute use of mercenaries and crimes relating to mercenarism).


179. Id.


181. See id.; Milliard, supra note 13, at 27. Indeed, "states are not prohibited from knowingly tolerating mercenary activities that lead to incursions in other states." Id. This is very much the idea of Hague V. See Hague V, supra note 161, arts. 4-7, 36 Stat. at 2323. Milliard argues that Resolution 2625 was incorporated into customary international law by the ICJ. Milliard, supra note 13, at 27; see Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 187-92 (June 27) (separate opinion of Judge Ago).
PRIVATE MILITARY FIRMS

Struggling Against Colonial and Alien Domination and Racist Régimes, with eighty-three votes, thirteen votes against, and nineteen abstentions. This resolution declared the use of mercenaries by colonial and “racist régimes” a criminal act and mercenaries punishable as criminals. Resolution 3103 was thus a return to the themes of Resolution 2465, being specifically concerned with self-liberation movements struggling against “alien domination” and colonial and “racist régimes.”

The next year, in 1974, the General Assembly attempted to define aggression with Resolution 3314 and the Definition of Aggression. The Definition of Aggression explicitly mentions mercenaries, and equates aggression with, among other things, “[t]he sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries.” Adopted by consensus, Resolution 3314 defines a state’s responsibility to respect other states’ sovereignty.

The U.N. Security Council also issued several explicit, narrow, incident-specific, and admonitory resolutions relating to mercenaries during the 1960s. For example, the Security Council demanded “immediate withdrawal of all external armed forces and mercenaries, together with the military equipment used in the armed attack against the territory of the Republic of Guinea.” More than once the U.N. Security Council condemned Portugal for allowing mercenaries to operate from within its colonial holdings.

183. Id. at 142-43.
186. Id. at 143.
187. Id. The Definition of Aggression attempts to bolster the U.N. Charter by refining the definition of aggression, a key term found in the U.N.'s purpose and in its Chapter VII powers (under which the U.N. “determine[s] the existence of any . . . act of aggression” and can then act “to maintain or restore international peace and security”). Id.
188. Green, supra note 151, at 114-15. These resolutions were not Chapter VII resolutions, and therefore not obligatory. Id. at 114.
ii. Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflicts

In 1977, Protocol I\textsuperscript{91} deprived mercenaries of POW status for the first time.\textsuperscript{192} Article 47 provides that:

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 the hostilities;

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

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

(e) Is not a member of the armed forces of a Party to the conflict; and

(f) Has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.\textsuperscript{193}

Article 47 clearly denies POW status to those falling under the definition.\textsuperscript{194} If a person is found to be a mercenary under Protocol I, he is then either a noncombatant and afforded civilian status, or an unlawful combatant and afforded protection under Article 75 of Protocol I.\textsuperscript{195} Article 75 prescribes that unlawful combatants “shall be treated humanely in all circumstances,” and may not be subjected to torture, corporal punishment, mutilation, “outrages upon personal

\textsuperscript{91} See Protocol I, supra note 62, art. 47, 1125 U.N.T.S. at 25. The United States is a signatory to Protocol I, but did not ratify it. Documents on the Law of War, supra note 62, at 404.

\textsuperscript{192} For commentary on the humanitarian rights of captured mercenaries contemporary to the drafting of Protocol I, see Documents on the Laws of War, supra note 62, at 419-22. See also Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (Yves Sandoz et al. eds., 1987); Captain John Robert Cotton, Comment, The Rights of Mercenaries as Prisoners of War, 77 Mil. L. Rev. 143 (1977). Cotton argues that if guerillas are afforded POW status, as they ultimately were, mercenaries should also be afforded POW status. Id. at 164.

\textsuperscript{193} Protocol I, supra note 62, art. 47, 1125 U.N.T.S. at 25.

\textsuperscript{194} See id.

\textsuperscript{195} Green, supra note 151, at 115.
dignity, in particular humiliating and degrading treatments,” collective punishment, or be threatened with any of the foregoing.196

iii. Regional Initiatives in Africa

The International Commission of Inquiry on Mercenaries (“Luanda Commission”),197 created by the Angolan government in 1976, issued its own Draft Convention on the Suppression of Mercenarism (“Luanda Convention”).198 At the time of the Luanda Commission’s genesis, thirteen foreigners were on trial in Luanda, Angola, for mercenary activity.199 Four of the men were subsequently sentenced to death and executed.200 The Luanda Convention declared mercenarism an international crime “committed by the individual, group or association, representatives of the State and the State itself.”201

The Luanda Convention declared the crime of mercenarism an obstacle to the self-determination of states.202 Accordingly, states must prevent mercenarism and any related activities from occurring within their respective jurisdiction.203 If a state does not prevent these activities the state itself is guilty of mercenarism.204 The Luanda trial, Commission, and Convention have been criticized as overbroad in their actions and prohibitions.205

African states formed the Organization of African Unity (“OAU”) in 1963.206 The OAU Charter, like the U.N. Charter, sought to
preserve the sovereignty of its members and was, at the time of its formation, the largest regional organization in the world.207

In 1977, one year after the Luanda Convention and trial, the OAU issued its own Convention for the Elimination of Mercenarism in Africa ("OAU Mercenary Convention").208 The OAU Mercenary Convention uses a definition of "mercenary" nearly identical to that found in Article 47 of Protocol I.209 Although Article 47 requires that the expected monetary gain be more than that of regular combatants, the OAU Mercenary Convention merely requires that mercenaries anticipate and desire monetary gain of any amount.210 The OAU Mercenary Convention, however, only applies to those fighting against "a process of self-determination, stability, or the territorial integrity of another [OAU] State."211 An OAU state could use mercenaries in any other capacity.212 The OAU Mercenary Convention contains no enforcement mechanism and relies on member states' compliance and their enactment of domestic laws.213 The OAU Mercenary Convention has been largely ignored.214

iv. 1989 U.N. Mercenary Convention

In 1989, the U.N. General Assembly adopted the International Convention Against the Recruitment, Use, Financing and Training of Mercenaries ("U.N. Mercenary Convention").215 The U.N. Mercenary Convention incorporates the definition of mercenary found in Article 47 of Protocol I, and applies it to all conflicts, international and internal. It also adds a further specification of mercenary activity.216 Under the U.N. Mercenary Convention, a mercenary:

(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

207. Milliard, supra note 13, at 43-44.
208. OAU Mercenary Convention, supra note 63, 1490 U.N.T.S. at 96.
210. See OAU Mercenary Convention, supra note 63, art. 1, 1490 U.N.T.S. at 96.
211. Id. at 97.
212. See Milliard, supra note 13, at 55-56 (supplying hypothetical situations where mercenaries could be used or would go unpunished under the OAU Mercenary Convention's definition of mercenary).
213. See OAU Mercenary Convention, supra note 63, art. 6, 1490 U.N.T.S. at 97-98; Singer, supra note 1, at 529.
214. See Singer, supra note 1, at 529.
Undermining the territorial integrity of a State;

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

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

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

(e) Is not a member of the armed forces of the State on whose territory the act is undertaken.\(^\text{217}\)

Article 5(1) of the U.N. Mercenary Convention prohibits states from “recruit[ing], us[ing], financ[ing] or train[ing] mercenaries,” so defined, for any end.\(^\text{218}\) Thus, no state may use mercenaries under any circumstances.\(^\text{219}\) The U.N. Mercenary Convention also provides procedures for extradition of captured mercenaries.\(^\text{220}\)

Drafted in 1989, the U.N. Mercenary Convention required ratification by twenty-two states.\(^\text{221}\) In 2001, Costa Rica became the twenty-second state party.\(^\text{222}\) Subsequently Belgium, Guinea, Mali, and New Zealand ratified the U.N. Mercenary Convention, bringing the total number of state parties to twenty-five.\(^\text{223}\)

v. Rome Statute of the International Criminal Court

The ICC, established in 2002 by the Rome Statute, is a permanent, treaty-based court committed to the principle that crimes of serious concern to the international community must be punished.\(^\text{224}\) The Rome Statute reaffirms a principle of the U.N. Charter, that no state may use force against another.\(^\text{225}\) The ICC has jurisdiction over four crimes—genocide, crimes against humanity, war crimes, and crimes of
The 1974 Definition of Aggression included mercenarism as an act of aggression, and may be a future source or inspiration for an ICC definition of the crime of aggression. If the crime of aggression is defined to include either state use of mercenaries or some crime of mercenarism itself, the ICC could become a forum for mercenary prosecution.

The United States is not a party to the ICC, but has many laws that may be used to regulate mercenaries and PMFs. Discussion of these laws and other states’ domestic laws follows.

2. Domestic Law

The first domestic laws that may be applied to mercenaries did not address mercenaries per se, but required state neutrality. Since a state was considered responsible for the belligerent acts of its citizens or subjects, the acts of a citizen as mercenary could be attributed to his state. From the late eighteenth century, neutrality laws that addressed this problem evolved into specific domestic legal regimes governing mercenary conduct.

a. Antecedents in Neutrality Laws

Neutrality laws give sovereign states the exclusive power to make war, a power that may be considered the highest expression of sovereignty. The United States passed the world’s first neutrality

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aggression—the last left undefined at the time of the Rome Statute. The 1974 Definition of Aggression included mercenarism as an act of aggression, and may be a future source or inspiration for an ICC definition of the crime of aggression. If the crime of aggression is defined to include either state use of mercenaries or some crime of mercenarism itself, the ICC could become a forum for mercenary prosecution.

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226. Rome Statute, supra note 224, art. 5, 2187 U.N.T.S at 92. The Rome Statute may be amended beginning seven years after its enactment, not before. Id. art. 121, 2187 U.N.T.S at 156.


228. See Milliard, supra note 13, at 67-68.

229. Although the United States initially signed the Rome Statute, on May 6, 2002, the Secretary-General received notice that “the United States does not intend to become a party to” the Rome Statute and “[a]ccordingly, the United States has no legal obligations arising from its signature.” 2 Multilateral Treaties, supra note 222, at 146 n.6.


231. See infra Part I.B.2.a (discussing early neutrality laws).


233. See Thomson, supra note 48, at 7. Thomson notes that sovereignty is an “interesting practice because it is not an objective fact but a claim whose viability depends fundamentally on an intersubjective understanding.” Id. at 84. For a discussion of the theory of national sovereignty, see id. at 11-18.
law in 1794,\textsuperscript{234} likely prompted by fear of being drawn into the Napoleonic Wars.\textsuperscript{235} With the Neutrality Act, Congress\textsuperscript{236} declared that any citizen within the United States that "accept[s] and exercise[s] a commission to serve a foreign prince or state in war by land or sea . . . shall be deemed guilty of a high misdemeanor."\textsuperscript{237} The Neutrality Act was the first domestic law to address the legality of hostile expeditions against foreign states launched from U.S. soil.\textsuperscript{238} This law served as a model for the rest of the world: Between 1794 and 1938, forty-nine states passed some manner of neutrality law.\textsuperscript{239} The Neutrality Act's jurisdiction did not extend to activity conducted exclusively outside the United States and its territory, such that American citizens could only be punished for crimes committed on U.S. soil.\textsuperscript{240}

Britain's Foreign Enlistment Act of 1870 prohibits enlistment of British citizens in the armed forces of a foreign state at war with another foreign state, if the latter state is at peace with Britain.\textsuperscript{241} Recruitment for such purpose is also prohibited.\textsuperscript{242} More recently, a handful of states have passed domestic laws aimed at more discreet aspects of mercenary activity.

b. Twentieth Century U.S. Laws Regulating Private Transfers of Military Technology and Services

In the twentieth century the United States passed laws aimed at both preserving neutrality and regulating the flow of military hardware and knowledge. The U.S. Foreign Relations Act prohibits

\begin{footnotesize}
\textsuperscript{234} See Neutrality Act, 1 Stat. at 381-84.
\textsuperscript{235} Thomson, supra note 48, at 77. For a discussion of circumstances surrounding passage of the 1794 Neutrality Act, see id. at 77-78. Scholars disagree about Congress's motivation for passing the Neutrality Act. Some scholars contend that Congress passed the Neutrality Act in response to Britain's use of Hessian mercenaries in the Revolutionary War. See, e.g., Allaoua Layeb, Mercenary Activity: United States Neutrality Laws and Enforcement, 10 N.Y.L. Sch. J. Int'l & Comp. L. 269, 272 (1989) (citing a "general antipathy . . . toward the use of mercenaries, due to the unpleasant experiences the United States had with the Hessian . . . soldiers (mercenaries) who fought for the British").
\textsuperscript{236} The Constitution also gives Congress the power to "grant Letters of Marque and Reprisal." U.S. Const. art. I, § 8, cl. 11. For discussion of the Marque and Reprisal Clause as a mechanism to regulate mercenary activity, see infra note 426.
\textsuperscript{237} Neutrality Act, ch. 50, 1 Stat. at 381-82; see Sapone, supra note 34, at 29 (discussing passage of the Neutrality Act of 1794). For a thorough history of United States neutrality laws, see generally Layeb, supra note 235.
\textsuperscript{238} Thomson, supra note 48, at 79.
\textsuperscript{239} Id. at 80-81 tbl. 4.2.
\textsuperscript{240} Neutrality Act, ch. 50, 1 Stat. at 381-84; see Sapone, supra note 34, at 31-32 (citing United States v. Dane, 570 F.2d 840 (9th Cir. 1977)). Nevertheless, the Neutrality Act was the most Congress could do to distance the U.S. government from privateering and individual citizens' foreign involvement in military activities.
\textsuperscript{241} Foreign Enlistment Act, 1870, 33 & 34 Vict., c. 90, § 4 (Eng.).
\textsuperscript{242} Id. § 3.
\end{footnotesize}
recruitment of American citizens on U.S. soil for service in a foreign army, if that army is fighting a state with which the United States is at peace.\(^\text{243}\) It does not prohibit an individual from leaving the United States to enlist in a foreign army, whatever the status of that state in relation to the United States.\(^\text{244}\) The Foreign Relations Act has never been used to prosecute mercenaries.\(^\text{245}\)

The Arms Export Control Act ("AECA") of 1968 regulates arms dealing and sale of military services.\(^\text{246}\) Under the International Traffic in Arms Regulations ("ITAR"), which implement the AECA,\(^\text{247}\) any company offering military advice, services, or sales to foreign nationals must first obtain a license from the U.S. State Department, whether this transfer occurs in the United States or abroad.\(^\text{248}\) Under ITAR, Congress must be notified before the export of military services in excess of $50 million.\(^\text{249}\)

The Uniform Code of Military Justice ("UCMJ"), which governs behavior of U.S. military forces, as originally written did not cover civilians abroad, including those working side by side with American soldiers.\(^\text{250}\) The 2004 Military Extraterritorial Jurisdiction Act extended the UCMJ to civilians "employed by or accompanying the Armed Forces outside the United States,"\(^\text{251}\) but does not apply to American civilians employed by a foreign government or U.S. agencies outside the Armed Forces.\(^\text{252}\)

\(\text{244. Id. §§ 956-960.}\)
\(\text{245. Sapone, supra note 34, at 33-34. Sapone notes that "[w]hen there is war between the United States and a foreign State, mercenaries are immune from prosecution." Id. at 33. Sapone cites United States v. Elliot, "which concerned a conspiracy to destroy a railroad bridge in the Republic of Zambia," and where "the U.S. district court held that the statute applied because the United States was 'at peace' with Zambia." Id. at 33-34; see United States v. Elliott, 266 F. Supp. 318 (S.D.N.Y. 1967). In Elliot, the defendant also challenged the Foreign Relations Act as unconstitutional because it had never been used prior to the instant case. The court rejected this claim. Id. at 325-26.}\)
\(\text{246. 22 U.S.C. § 2751 (2000). The AECA is also known as the Foreign Military Sales Act. The AECA provides that sales of arms to other states "be approved only when they are consistent with the foreign policy interests of the United States." Id.}\)
\(\text{247. International Traffic in Arms Regulation, 22 C.F.R. § 120.8 (2004).}\)
\(\text{248. Id. § 120.1.}\)
\(\text{249. Reporting of Offsets Agreements in Sales of Weapon Systems or Defense-related Items to Foreign Countries or Foreign Firms, 15 C.F.R. § 701.1, 701.3(a) (2004).}\)
\(\text{250. Uniform Code of Military Justice, 10 U.S.C. § 802 (2000) [hereinafter UCMJ]; see Singer, supra note 1, at 537.}\)
\(\text{251. 18 U.S.C.A. § 3267 (2004).}\)
\(\text{252. See Singer, supra note 1, at 537.}\)
c. South Africa's RFMAA

In 1998, largely in response to the activities of EO in Angola and Sierra Leone, South Africa passed the RFMAA.253 The South African constitution provides that the country must “live in peace and harmony” and thus South African citizens may not “partic[ip][ate] in armed conflict, nationally or internationally, except as provided for in the Constitution or national legislation.”254

The RFMAA prohibits mercenary activity within South Africa, including recruitment, training, or financing of such activity.255 A citizen or permanent resident of South Africa may not “offer to render any foreign military assistance” to another state, group, entity, or person without permission from the government.256 Foreign military assistance includes “military services or military-related services, or any attempt, encouragement, incitement or solicitation to render such services,” where services are defined as advice; training; personnel, financial, logistical, intelligence, or operational support; personnel recruitment; medical or paramedical services; and procurement of equipment.257 Security services for individuals or property involved in armed conflict are also subject to regulation, as are coup attempts and any furtherance of the military interests of a party to an armed conflict.258 To obtain permission to offer military assistance a firm must submit an application to the National Conventional Arms Control Committee; the Committee approves or disapproves it and sends it on to the South African Minister of Defence for final approval.259


256. Id. ¶ 3.

257. See id. ¶ 1.

258. See id. An armed conflict includes “any armed conflict between” armed forces of states, armed forces of a state and an internal armed group, or any armed groups no matter their nature. Id. ¶ 1.

259. See id. ¶¶ 1, 4-5, 1 JSRSA at 2-263 to 2-264. The Committee submits quarterly reports of all registered foreign military assistance authorizations to the President, Parliament, and the Parliamentary Committees on Defence. See id. ¶ 6, 1 JSRSA at 2-264. 
The RFMAA explicitly states that authorization of foreign military assistance may not be granted if the proposed action conflicts with international law, would result in human rights violations, would destabilize or “negatively influence the balance of power” in the region, would “support or encourage terrorism,” would affect South Africa’s interests, or is “unacceptable for any other reason.”

A conviction for violation of the RFMAA may result in punishment of a fine or imprisonment, and forfeiture of any equipment involved in the activity. The RFMAA may be applied extraterritorially, such that “[a]ny court of law . . . may try a person for an offence . . . notwithstanding the fact that the act or omission . . . was committed outside” South Africa, except in the case of a foreign citizen committing all acts outside South Africa.

Australia, Canada, Denmark, Finland, Greece, Italy, the Netherlands, Norway, Portugal, Russia, Switzerland and the

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260. Id. ¶ 7, 1 JSRSA at 2-264.
261. See id. ¶ 8.
262. Id. ¶ 9.
263. Crimes (Foreign Incursions and Recruitment) Act, 1978, c. 13 (Austl.). The Act does not apply to actions done in “relation to the defence of Australia.” Id. ¶ 5. There have been few successful prosecutions, “but the Act is thought to have value as a deterrent.” UK Green Paper, supra note 13, ¶ 69 annex B, at 40.
264. Foreign Enlistment Act, R.S.C., ch. F-28 (1985) (Can.). It is a violation of the Act to “leave[ ] or go[ ] on board any conveyance with a view to leaving Canada with intent to accept any commission or engagement in the armed forces of any foreign state at war with any friendly foreign state.” Id. ¶ 4. It is also an offence within Canada to “induce[ ] any other person to leave or go on board any conveyance with a view to leaving Canada, with a like intent,” whether the inducer is Canadian or not. Id. There have been few successful prosecutions under this legislation. UK Green Paper, supra note 13, ¶ 69 annex B, at 40.
265. Danish law prohibits recruitment in Denmark “for foreign war service,” but no recent prosecutions have occurred. UK Green Paper, supra note 13, ¶ 69 annex B, at 41.
266. Finnish law prohibits recruitment of Finnish citizens for armed service in another state. “Crimes committed by Finnish citizens or residents abroad can be punished . . . provided that they are punishable also in the country where they were committed . . . [Finland also] provides for universal jurisdiction concerning crimes against international law, including genocide, war crimes and crimes against humanity.” Id.
267. Recruitment of mercenaries in Greece is illegal. Id.
268. Italy prohibits “hiring, using, financing or training of mercenaries.” Id.
269. “Since 1984 it has been illegal . . . for Dutch nationals to enter military service for a nation with which the Netherlands is at war or is about to be at war.” Id. at 42.
270. Norway criminalizes “recruitment, without the King’s permission, of troops in the realm for foreign military service” and “also criminalises the formation, participation in or support of a private organisation of a military character.” The Norwegian Act was passed “to prevent Norwegians from participating in the Spanish civil war.” Id.
271. “The activity of Portuguese nationals engaged in mercenary activity abroad is banned under provisions of the Portuguese Criminal Code.” Mercenary activity includes “combat activities but not advice or technical assistance to foreign military forces.” No citizen has been prosecuted for these offenses. Id.
Ukraine have passed anti-mercenary laws. Of African states, only South Africa, with the RFMAA, has passed an anti-mercenary domestic law.

Having surveyed types of extra-state forces and privatized soldiers, and the existing international and domestic laws aimed at regulating them, this Note turns to critiques of the current legal regime. Additionally, Part II examines suggestions for reform of the current regimes, and new methods and mechanisms of mercenary and private force regulation.

II. CURRENT AND PROPOSED OPTIONS FOR MERCENARY REGULATION

Current laws have very little actual effect on mercenary activity, although there are a number of multilateral conventions and potentially controlling domestic laws in key source jurisdictions. Additionally, current international law simply does not contemplate PMFs, nor is it equipped to handle foreign fighters of mixed religious or ideological and economic motivations, also known as "confessional mercenaries." Much of this difficulty stems from definition. Enrique Bernales Ballesteros, the former U.N. Special Rapporteur, acknowledges that defining "mercenary" is complex, if not impossible. Perhaps the drafters of twentieth-century international mercenary law "confused the principles of jus ad bellum and jus in bello, thereby producing
questionable and ultimately tenuous attempts at international regulation.” Moreover, while international pronouncements on mercenaries urge states to pass domestic law and categorically condemn mercenary activity, no monitoring or enforcement mechanisms have been established at the international level and any domestic legal regime faces enforcement issues both within a state’s boundaries and abroad.

Part II.A explores the problems with the definition of a “mercenary” found in existing legal regimes. Part II.B outlines commentators’ critiques of current international, regional, and domestic law, and these regimes’ potential applicability to PMFs. In addition, it raises issues of national sovereignty and the security problems presented by failed states, both of which are implicated in all current and prospective legal regimes. Part II.C examines scholars’ suggestions of how soldiers of fortune and PMFs might be effectively regulated, deterred, or banned.

A. Who Is a “Dog of War”? Defining “Mercenary”

While definitions of mercenaries do exist in international law, these definitions (indeed, they are nearly the same definition) have been criticized. The current international definition is extremely narrow. Article 47 of Protocol I defines a “mercenary” as a foreign combatant recruited to fight in one specific conflict and motivated by the desire for private gain in an amount in excess of the payment to the armed forces of the recruiting state. The U.N. Mercenary Convention drops Article 47’s final requirement, and a mercenary thus need only be motivated by private gain of any amount. To be a mercenary, a combatant must not have, in any way, the permission or sanction of his home state under the U.N. Mercenary Convention, the OAU Mercenary Convention, or Article 47 of Protocol I.

Moreover, under the current regime a combatant may be considered a mercenary only if he is hired for one specific and finite engagement. Both the South African firm EO and the U.S. firm

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282. The *jus in bello* are the “rules governing the conduct of war.” *Id.*
283. Milliard, supra note 13, at 3-4.
284. See Singer, supra note 1, at 545 (citing a “void in monitoring mechanisms”).
285. See infra Parts II.B-C (discussing the current regulatory regime and outlining scholars’ proposals for reform).
286. See Milliard, supra note 13, at 71-72 (enumerating the available exclusions from mercenary status found in the current definition of “mercenary”).
287. For a definition of “mercenary” see Article 47’s definition, supra note 193 and accompanying text.
290. Singer, supra note 1, at 532.
MPRI, however, while not maintaining a standing army, maintain databases of employees.\textsuperscript{291} EO often contracted an employee for a period of time not tied to a specific conflict.\textsuperscript{292}

These hyper-specific definitions are likely a product of the post-colonial period in which these international laws came into being, and of some states’ reluctance to prohibit the use of combatants who are noncitizens. The international community passed most of the regulations, resolutions, and conventions in response to the mercenary activities in Africa immediately following decolonization, an environment that no longer exists and only existed for a short time.\textsuperscript{293}

Domestic laws suffer from many of the same problems as international laws, in that they often look to international laws for a definition of mercenary, or simply mirror the definitions found there.\textsuperscript{294} Singer criticizes the RFMAA’s definition of a mercenary, noting that the definition is very broad, “making it almost irrelevant.”\textsuperscript{295}

B. Other Problems with Existing Legal Regimes

Definitional ambiguity creates problems for the existing international and domestic regimes. Even if the definitions of mercenary were clear, the current regimes would still suffer from the problems of providing unclear legal status in the \textit{jus in bello}, lack of monitoring and enforcement, no extraterritorial force, and no transnational coordination. Mercenary use and its prohibition also raise complex issues for both source states and weak or failed states.

1. International Regimes

Current international regimes do not make clear what status PMF employees and mercenaries would be afforded if captured in combat. Additionally, the existing international laws make no mention of PMFs and provide no enforcement or monitoring mechanisms. An example of the failure of international law is the OAU’s regional regime, which prohibits the use of mercenaries against, but not by, OAU member states.\textsuperscript{296}

\begin{itemize}
  \item \textsuperscript{291} \textit{Id.; }L-3 MPRI, MPRI Our Team, \textit{at} http://www.mpri.com/site/our_team.html (last visited Feb. 26, 2005).
  \item \textsuperscript{292} Singer, \textit{supra} note 1, at 532. Singer notes that “[d]espite fighting for pay in other nations’ wars, personnel of Executive Outcomes would not meet the [mercenary] standard.” \textit{Id.}
  \item \textsuperscript{294} See Singer, \textit{supra} note 1, at 536-37.
  \item \textsuperscript{295} \textit{Id.} at 540; see Africa’s Dogs of War, \textit{supra} note 253.
  \item \textsuperscript{296} OAU Mercenary Convention, \textit{supra} note 63, arts. 1, 6, 1490 U.N.T.S. at 96-98.
\end{itemize}
a. The Status of Mercenaries in Combat

Assuming one could determine who a mercenary is, it is still not clear how he ought to be treated if captured in combat. Hague V set out responsibilities of states and rules for belligerents regarding mercenaries, but did not prohibit or seek to deter mercenaries, nor did it define their status.\textsuperscript{297}

The 1949 POW Convention protects the rights of lawful combatants in international wars.\textsuperscript{298} The POW Convention, by its silence on the status of mercenaries, appears to include mercenaries in those afforded POW protection.\textsuperscript{299} The United States ratified the POW Convention, and thus presumably would confer POW status on a mercenary captured in combat.

Article 47 of Protocol I explicitly revoked a mercenary's POW status.\textsuperscript{300} In place of POW status, mercenaries ostensibly would receive the protections of Protocol I's Article 75,\textsuperscript{301} which are similar to common Article 3 protections. The United States has not ratified Protocol I, and in fact the U.S. Ambassador explicitly rejected Article 47 as not being part of customary international law.\textsuperscript{302}

The U.N. General Assembly Resolutions purported to criminalize mercenarism while not explicitly denying POW status.\textsuperscript{303}

In any event, Singer argues that "the exact legal threshold of what constitutes participation in [a] conflict is certainly open to question."\textsuperscript{304} A U.S. Air Force Judge Advocate General has stated that civilian contractors who operate weapons "that are a critical node in overall

\begin{footnotes}
298. Singer, supra note 1, at 526.
299. Id. at 526-27.
300. Protocol I, supra note 62, art. 47, 1125 U.N.T.S. at 25. For commentary contemporary to this revocation, see generally Cotton, supra note 192.
301. See supra note 196 and accompanying text.
303. United Nations General Assembly resolutions are non-binding. Green, supra note 151, at 114. The U.N. Charter authorizes the General Assembly to "discuss any questions or any matters" and to "make recommendations to the Members of the United Nations or to the Security Council." U.N. Charter art. 10. In contrast, the Security Council is charged with the "maintenance of international peace and security," and United Nations member states "agree to accept and carry out the decisions of the Security Council." Id. arts. 24-25. "International organizations generally have no authority to make law, and their determinations of law ordinarily have no special weight," though they may indicate what voting states believe the law to be. Restatement, supra note 152, § 103 cmt. c. While "[i]nternational agreements create law for the states parties thereto," customary international law only arises where the agreements "are intended for adherence by states generally and are in fact widely accepted." Id. § 102(3) (emphasis added). Resolutions, particularly those of the General Assembly, if adopted by consensus or near unanimity, are given substantial weight, and may reflect customary international law, but still may not be afforded the full effect of law. Brownlie, supra note 153, at 14.
304. Singer, supra note 1, at 532.
\end{footnotes}
combat operations" could be considered unlawful combatants. Singer is unclear about whether PMF employees could be considered mercenaries, and thus what status they would be afforded in the *jus in bello*.

Even if judged unlawful combatants, PMF employees have many avenues to escape the mercenary label. While not the armed forces of a national government, PMF employees work not as individuals but as personnel of a firm for (most likely) a sovereign power (or a corporation). PMFs could incorporate their employees into a nation's armed forces (as the Sandline company did in Papua New Guinea in 1997) and thus escape mercenary status. Finally, if a PMF obtains a license from a government (any government) it might be considered "sent by a State which is not a Party to the conflict on official duty," and thus evade mercenary status. Indeed, Singer finds that the only real legal sanction available against PMFs under the current international legal regime is that their employees might lose their rights in war if captured.

Discussing the legal status of armed contractors in Iraq, Phillip Carter, a former U.S. Army officer, claims that these contractors fall into a "legal gray zone" being neither noncombatants (because they are armed) under the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War, nor lawful combatants (because they do not wear uniforms or fall into the military hierarchy) under the POW Convention.

More recently, mercenarism was excluded from the Rome Statue of the ICC. The 1974 Definition of Aggression, U.N. General
Assembly Resolution 3314 included mercenarism as a crime of aggression, but crimes of aggression were left undefined in the Rome Statute of the ICC. Mercenarism might fall into a definition of crimes of aggression, but this remains to be seen.

b. No Contemplation of PMFs

None of the existing international legal regimes even contemplate the existence of PMFs. The most recent mercenary regulation, the U.N. Mercenary Convention, “had extremely poor timing,” in that it was issued just as the private military trade began to shift to the PMF model away from soldiers of fortune. With respect to PMFs, Singer finds that international law is altogether “too primitive . . . to handle such a complex issue that has emerged just in the last decade.” As demonstrated above, it is unclear whether PMFs even fall into the current definition of a mercenary. Furthermore, the answer to that question in current international law depends on the particular regime being analyzed.

c. No Monitoring or Enforcement Mechanisms

The U.N. Mercenary Convention, the most recent regime, lacks both enforcement and monitoring mechanisms. Not one permanent member of the U.N. Security Council ratified the U.N. Mercenary Convention, and no mercenary has been prosecuted under it. State parties include Angola, Congo-Brazzaville, Democratic Republic of Congo, Nigeria, and Ukraine, all of which permitted or benefited from mercenary trade since signing or ratifying the U.N. Mercenary Convention. Singer finds that, because these states permitted or benefited from mercenary activity, the U.N. Mercenary Convention is actually “anti-customary law.”

d. Regional Regimes: The Organization of African Unity

The OAU Mercenary Convention forbids the use of mercenaries to violate the sovereignty of another OAU member state but permits use of mercenaries in OAU internal conflicts, or to violate the sovereignty

315. See Definition of Aggression, supra note 185, at 143 & annex.
317. Singer, supra note 1, at 531.
318. Id. at 526.
319. Id. at 531.
320. The five permanent members of the U.N. Security Council are China, France, Russia, the United Kingdom, and the United States. U.N. Charter art. 23.
321. 2 Multilateral Treaties, supra note 222, at 115.
322. See Singer, supra note 1, at 531.
323. Id.
324. Id.
of nonmember states. Furthermore, the OAU Mercenary Convention calls for passage of domestic laws and relies on individual compliance of the member states. Only South Africa has an anti-mercenary domestic law, and OAU states generally have not complied with the convention. Like international regimes, domestic regimes suffer from problems beyond those of definition. Apart from South Africa, no state has one coherent law regulating PMFs or mercenaries. Rather, some states—for example, the United States—have a patchwork of laws and rules. These conglomerates lack transnational harmonization and extraterritorial force (both jurisdictionally and in terms of monitoring capability). Furthermore, like international regulatory schemes, domestic laws can create sovereignty implications for both source states and receiving states.

2. Domestic Regimes

Few states have laws regulating mercenaries, and only South Africa has passed a law regulating PMFs specifically. Still, the United States has a pastiche of laws and regulations pertaining to transfer of arms and military services. These laws are examined below.

a. An Overlapping Patchwork of Rules

The United States, though it does have a significant body of law regulating both enlistment in foreign armies and sale of military goods and services, provides an example of the inadequacy of domestic laws. The UCMJ extends to civilians “employed by or accompanying the Armed Forces outside the United States,” but does not apply to American civilians employed by entities other than the Pentagon. Nor are the foreign states where American civilians operate likely to prosecute PMF employees, either because the PMF is doing “the state’s dirty work,” the state lacks enforcement capability, or the PMF is actually fighting the regime in power. PMF employees are thus effectively unaccountable.

As proof of this unaccountability, Singer offers the example of the DynCorp employees who engaged in statutory rape, promoted prostitution, and took bribes, all while working for the U.S. government as part of the U.N. peacekeeping operation in Bosnia and

325. See OAU Mercenary Convention, supra note 63, art. 1, 1490 U.N.T.S. at 96-97; see also Singer, supra note 1, at 529.
326. Singer, supra note 1, at 529.
327. See id. at 539.
328. See infra Part II.B.2.a.
329. Singer, supra note 1, at 537.
331. See Singer, supra note 1, at 537.
332. Id.
333. See id. at 537-38.
Kosovo. DynCorp removed their offending employees from the former Yugoslavia before the employees could be arrested, and these employees were never held accountable for their actions. Notwithstanding this employment history, the United States subsequently contracted with DynCorp to assist with the training of the Iraqi police force following the 2003 invasion of Iraq.

If PMF contracts involve arms transfers, the contracts fall under the arms control regulations of ITAR. Although official government approval is required, confusion surrounds this process. As long as the contract is for less than $50 million, a PMF does not need to notify Congress of its proposed actions. Licensing itself is a somewhat hollow measure. Although the U.S. embassy in the receiving country is officially charged with oversight of the contract, no specific monitoring or follow-up is required after the initial license is granted.

The Alien Tort Statute ("ATS") may be a source of deterrence in U.S. law, as foreign victims of human rights abuses at the hands of American PMF employees might be able to sue these employees and their employer in U.S. courts.

b. Extraterritoriality, Under-Enforcement, Lack of Transnational Coordination, and the "Reincorporation Problem"

A particular domestic regulation regime is generally only effective within that sovereign state. South Africa's RFMAA is a model domestic law, but one with limited force extraterritorially, in part because of its lack of monitoring mechanisms. Monitoring

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334. Id. at 538.
335. See id. Singer alleges that the two "whistleblower" DynCorp employees were in fact fired for bringing the conduct to light. Id.
336. See id. DynCorp, however, has taken steps to redress the problem: All its "employees [must] sign a written statement that they understand that human trafficking and prostitution are 'immoral, unethical, and strictly prohibited.'" See id. That DynCorp was subsequently hired to perform more work for the United States undermines the argument of some that the market will adequately control PMFs. See infra Part II.C.1 (discussing the possibility of market regulation).
337. International Traffic in Arms Regulations, 22 C.F.R. § 120 (2004); see Singer, supra note 1, at 538.
338. See Singer, supra note 1, at 538-39.
339. 22 C.F.R. § 120.8.
340. See Singer, supra note 1, at 539.
341. See id. Singer points to a 1998 incident in Colombia in which a PMF mistakenly bombed a village instead of a rebel holding. The United States declined to work with the Colombian government to hold the PMF employees accountable. Id.
343. See Garmon, supra note 123, at 339 (discussing the ATS as a possible method of both punishing and deterring human rights abuses by PMF employees).
344. Singer, supra note 1, at 536. "[F]ew issues are more troublesome than an attempt by one state to exercise legal powers within another state's sovereign territory." Id.
mechanisms are so lacking, in fact, that the South African minister who sponsored the Act "admitted that his nation would be dependent on journalists to help it enforce its law."

Because domestic laws are neither universal nor uniform, mercenary firms may "escape" an inhospitable state by reincorporating elsewhere. As businesses with no absolute national ties, PMFs can simply trade a hostile national legal regime for a friendly one. They may also simply change names, as when Capricorn Air re-registered itself as Ibis Air. Additionally, because of the possibility of escape, domestic legislation is not a long-term solution, and may only create a race to the bottom, in which firms move to weak states, with minimal or nonexistent monitoring and enforcement capabilities. While several U.N. General Assembly Resolutions called mercenaries "outlaws," they simultaneously "placed the burden of enforcement exclusively on state regimes," who have rarely been willing or able to comply.

Domestic laws mostly ignore the specific problem of PMFs. Domestic laws often either defer to international law or, like international law, are unable to define PMFs.

The United States and South Africa are the only countries that have enacted laws directly aimed at regulating PMFs. The United Kingdom produced a "Green Paper" regarding PMFs, but that government has yet to legislate on the subject.

345. Id.
346. Id. at 535. The UK Green Paper shares Singer's concern, noting that firms may "mutate." UK Green Paper, supra note 13, ¶ 35.
347. Singer, supra note 1, at 535. In fact, this may have occurred with EO after South Africa passed the RFMAA. Spin-offs of EO are still operating and before EO disbanded, founder Eben Barlow remarked that other African nations expressed interest in becoming the firm's host state. Id.
348. Id.
349. Id. Such a scenario is analogous to some theories of why so many American corporations incorporate in Delaware, a state of relatively lax corporate law. Milliard, supra note 13, at 84; see William L. Cary, Federalism and Corporate Law: Reflections Upon Delaware, 83 Yale L.J. 663, 666 (1974).
351. Singer, supra note 1, at 527.
352. Id. at 524 ("[A]ll but a few states' domestic statutes currently ignore PMFs' very existence.").
353. Id. at 536-37.
354. Id. at 540. Milliard praises these laws as "the best domestic [PMF] regulations to date." Milliard, supra note 13, at 80.
355. UK Green Paper, supra note 13. A "Green Paper" is a policy paper and makes no formal recommendations. See Singer, supra note 1, at 540 n.79.
356. Singer, supra note 1, at 541. Singer notes that London is "a hub for many PMFs." Id.
c. Interference with Source-State Sovereignty

If a PMF works for a state, it could be considered "sent by a State on official duty," thus falling out of the current mercenary definition.\(^{357}\) Determining whether a PMF is working at the behest of, or at least with the sanction of, its home state is not simple. When Sandline International, a British PMF, violated U.N. sanctions by providing military assistance to the deposed government of Sierra Leone, the firm claimed it had governmental approval.\(^{358}\) The British government denied this charge.\(^{359}\)

Furthermore, source states could be dragged into a war they have no interest in fighting.\(^{360}\) If American civilians are attacked, killed, or kidnapped while working in a state with which the United States is not at war,\(^{361}\) it is unclear what duties the United States owes to those civilians in theory and in practice.\(^{362}\)

d. The Particular Problem of Failed States

PMFs are unlikely to commit abuses in strong states with robust public armed forces, such as the United States (they are also unlikely to carry out military operations in strong states).\(^{363}\) More likely, PMFs will operate (indeed have operated) and commit abuses in weak states such as Sierra Leone and Angola.\(^{364}\) But the states most needful of and best situated to implement PMF regulation, these receiving states, are often the most incapable of achieving regulation in practice.\(^{365}\)

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357. U.N. Mercenary Convention, supra note 63, art. 1, 2163 U.N.T.S. at 97.
359. Id. For further discussion of this incident, see Wrigley, supra note 132.
360. UK Green Paper, supra note 13, ¶ 63; Gaul, supra note 116, at 1491.
361. If the civilian is working in a state at war with the United States, there is already evidence of what will occur. A former United States Air Force Captain, Kirk von Ackermann, vanished while working for a Turkish contractor near Tikrit, Iraq, in November 2003. The United States military turned the search over to local Iraqi police and gave them von Ackermann's photograph to assist in their search. See Singer, supra note 26.
362. See also Gaul, supra note 116, at 1491. It is not difficult to imagine a scenario of the United States armed forces entering a country to rescue civilian contractors and subsequently being drawn into armed conflict with that state. The British government contemplates just such a scenario in its Green Paper. UK Green Paper, supra note 13, ¶ 63. South Africa averted a similar situation in the 2003 incident in Equatorial Guinea. There, South Africa had promised to intervene if any of its citizens involved in the coup plot received the death penalty. All were spared, and South Africa did not intervene. *Coup Plotters Jailed in E Guinea*, BBC News, Nov. 26, 2004, at http://news.bbc.co.uk/1/hi/world/africa/4044305.stm.
363. See Singer, supra note 1, at 536.
364. Id. at 535. Indeed the states most likely to hire PMFs for combat or near-combat operations are weak states. Singer cites the example of Sierra Leone, which "could not control its own capital, let alone monitor and punish the actions of an outside military firm." Id.
365. Cf. Rotberg, supra note 53, at 86-87 (detailing the symptoms of a failed state, including its inability to provide security and government).
Effective regulation thus would have to come from an outside strong state, but this may implicate problems of sovereignty.\footnote{366. Indeed, some say it would be a violation of a state’s sovereign rights to forbid use of foreign mercenary forces. See, e.g., Zarate, supra note 32, at 80; David Kassebaum, Note, A Question of Facts—The Legal Use of Private Security Firms in Bosnia, 38 Colum. J. Transnat’l L. 581, 593 (2000). Whatever might be said about the use of indigenous private military forces, it is difficult, as a matter of elementary political theory, to see how a sovereign right to use foreigners against some of its citizens within its borders. Cf. The Declaration of Independence, para. 26 (U.S. 1776) (stating that at the time of the Declaration of Independence, the King of Britain, George III, was “transporting large Armies of foreign mercenaries to compleat the works of death, desolation and tyranny, already begun with circumstances of Cruelty & perfidy scarcely paralleled in the most barbarous ages, and totally unworthy the Head of a civilized nation”).}{\textsuperscript{366}}

Even if a PMF’s home state does attempt to regulate extraterritorial activity, as South Africa does, it may be difficult to know what goes on in the receiving state. Again, this raises the issue that weak states are often PMF clients.\footnote{367. See Singer, supra note 1, at 536.}{\textsuperscript{367}} Because it is lacking in organization and central government—the very reasons that a state resorted to hiring the PMF—it may be especially difficult for the employing state to control the PMF and for people not on the ground to know what is happening.\footnote{368. Id. South Africa’s RFMAA is not immune from this problem. The minister supervising passage of the legislation noted that South Africa would likely have to depend on reports from journalists to enforce the law. Id.}{\textsuperscript{368}}

In addition to the regimes imposed or proposed by states, scholars have formulated means and regimes to deter and regulate mercenaries. Some scholars hope for self-regulation and market control. Still others believe that a combination of international oversight and harmonization of domestic law will achieve adequate control. Finally, a few seek to ban and end all privatized violence out of a concern for the moral implications of such violence and the impact it may have on self-liberation movements. Each of these categories of solution are examined in Part II.C.

C. Future Options for Regulation

In 1992, attorney Marie-France Major posited that an integral step in ending the use of mercenaries in armed conflict was ratification of the U.N. Mercenary Convention, along with passage of new domestic laws defining mercenary recruitment as an offense.\footnote{369. Major, supra note 34, at 149-50.}{\textsuperscript{369}} She also called for the U.N. Commission on Human Rights to “formulate a juridical solution to the problem.”\footnote{370. Id. at 150.}{\textsuperscript{370}} Major argued that mercenarism must be defined as a crime against humanity.\footnote{371. Id.}{\textsuperscript{371}} Twelve years after Major’s writing, the U.N. Mercenary Convention has only just come into
force, ratified by many countries that subsequently used mercenaries. No "juridical" solution exists.

Most PMFs would prefer to be self-regulated, relying mainly on the market to delineate "good" and "bad" firms on the basis of efficient performance. An industry lobby group, the International Peace Operations Association ("IPOA"), created a code of conduct for the industry. The government of the United Kingdom believes, however, that a self-policing code of conduct would not be enough if it is lacking in external enforcement mechanisms. Part II.C explores proffered regulatory schemes, beginning with nonregulation through default to market mechanisms.

1. The Market

While PMFs would clearly prefer industry-driven market regulation over any international or state regime, favoring reliance on market mechanisms is the minority opinion in scholarship. Singer notes that "the market is not a regulatory institution, but simply a theoretic space in which trade takes place." Advocates of market control include PMFs themselves, law professor Dino Kritsiotis, and attorney Juan Carlos Zarate.

Zarate finds PMFs to be a welcome and useful product in the evolution of modern warfare, and claims that, up to the time of his writing in 1998, PMFs had "restricted their contracts solely to work for legitimate regimes or organizations." Zarate does believe that some regulation is necessary on the contingency that "the geopolitical market may change so that the only available contracts for [PMFs] are with disreputable governments." With some help from domestic regulations, Zarate believes that the market will provide all the constraint necessary on the power of PMFs. Zarate notes that PMFs

372. See 2 Multilateral Treaties, supra note 222, at 114.
373. While Milliardi believes that the International Criminal Court ("ICC") may one day have jurisdiction through the definition of "crime[s] of aggression," crimes of aggression is not now defined. See Milliard, supra note 13, at 67-68; supra note 228 and accompanying text.
374. See Singer, supra note 1, at 543.
375. See id. The International Peace Operations Association ("IPOA") lobbies on behalf of the PMF industry. See Singer, supra note 14, at viii.
376. UK Green Paper, supra note 13, ¶ 76. Without domestic enforcement mechanisms a state could "be compelled to watch while a company pursued a course that was plainly contrary to the public interest." Id.
377. Singer, supra note 1, at 543.
378. This is a minority position. See, e.g., Milliard, supra note 13; Singer, supra note 1, at 543.
379. Zarate, supra note 32, at 80.
380. Id.
381. See id. at 148-50. Zarate judges that it is in PMF firms' best interests to act scrupulously, noting that "[i]nvolvement in controversial wars and loss of personnel have economic consequences... morale implications... and an impact on reputation." Id. at 149.
could gain, and indeed EO did gain, property rights concessions (of mining and oil) from the countries with which they contract.\textsuperscript{382} To guard against failure of market regulation, Zarate proposes an additional regime of state-based licensing.\textsuperscript{383}

Kritsiotis likewise views PMFs as a “new breed of mercenary,” but also one that will “champion legitimate causes.”\textsuperscript{384} He opines that the international community erred in denying POW status to mercenaries in Article 47 of Protocol I.\textsuperscript{385} This denial may function as a deterrent to soldiers of fortune but is a hindrance to PMFs.\textsuperscript{386} Proponents of market regulation believe PMFs are inevitable, focusing on the premise that “as long as there is war, there will be a need for military expertise.”\textsuperscript{387}

2. Registration and Oversight

Even some market regulation enthusiasts, such as Zarate, recognize the necessity of PMF regulation. Many PMF commentators agree, and offer various solutions consisting of regulation and oversight using both existing and new definitions of mercenary, and existing and new international organizations and legal regimes. Two recent advocates of registration and oversight for PMFs are Singer and U.S. Army Judge Advocate General Todd S. Milliard.

\textsuperscript{382} Id. at 147. Zarate goes so far as to state that EO and similar firms “could... gain hegemonic power,” thus “leading a vanguard” of neo-colonialism. Id.; see also UK Green Paper, supra note 13, ¶ 40 (calling the act of assigning mineral rights to a PMF a “mortgaging [of] future returns”). When a state is temporarily ruled by an occupying power after war, the occupying state has no right to exploit the occupied state’s mineral and oil resources. Hague Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, art. 55, 36 Stat. 2277, 2309. Under the law of occupation the exploitation of mineral and oil resources of a sovereign state by an occupying state is limited to “the military needs of the army of occupation.” Michael Ottolenghi, Note, The Stars and Stripes in Al-Fardos Square: The Implications for the International Law of Belligerent Occupation, 72 Fordham L. Rev. 2177, 2186 (2004).

\textsuperscript{383} Id. at 153. Zarate looks to the United States as an example of such a regime. Id. Additionally, Zarate champions a new international convention from the United Nations, bilateral agreements between supply states and employer states, and other domestic legislation. Id. at 153-54.

\textsuperscript{384} Kritsiotis, supra note 45, at 12.

\textsuperscript{385} Id. at 14-16; see Protocol I, supra note 62, art. 47, 1125 U.N.T.S. at 25.

\textsuperscript{386} Kritsiotis, supra note 45, at 15-17. Kritsiotis argues that mercenaries ought to be afforded POW status. Id. at 17; see also Kwakwa, supra note 216, at 69 (arguing that the purpose of the humanitarian laws of war is to protect not only the “victims” of war, but all persons involved, and that “as many combatants and conflicts as possible” should fall under the protections of the laws of war); cf. Cotton, supra note 192, at 166 (seeing the question of whether mercenaries should be afforded POW status as a “potential crisis in the international community”). Because the definition of a mercenary in Article 47 is narrow, however, it is quite possible that a soldier of fortune or PMF could evade classification as such. Kritsiotis, supra note 45, at 18.

\textsuperscript{387} Id. at 191.
PMFs are businesses first and foremost, existing to earn profit and thus may not be at all effective at self-regulation.388 If there is no enforcement mechanism any voluntary code of conduct likely will fail.389 "[C]ustomer satisfaction can and does conflict with the need to avoid grave human rights violations."390 Members of national armies commit human rights violations and employees of PMFs most likely will as well.391 When the goal is profit, as it must be for any business, it is possible that profit may be privileged over people.392

This leaves a substantial vacuum of law.393 Milliard identifies the most immediate problem arising out of this vacuum: The potential for "unregulated transfer of military services to [private] armed forces."394 Milliard argues that such transfers must occur only between states, or possibly between a state and an armed force recognized by the international community as legitimate.395 Singer and Milliard both accept use of PMFs, coupled with registration and oversight. They reach the same end, but get there through different philosophical means and with differing priorities. Singer is a political scientist, and sees the puzzle as one of controlling an inherently dangerous but inevitable phenomenon. Milliard, a Judge Advocate General with the U.S. Army,396 sees promise in PMFs as a means for effective humanitarian intervention, given United Nations and individual state inaction.

Singer believes that, because of the ability of PMFs to escape from any one state, any effective regulation must be international.397 A
wholesale ban on mercenaries, Singer concludes, might be a threat to sovereign states' right to self-defense under Article 51 of the U.N. Charter. Singer is troubled by both the enforcement and supply-and-demand issues that a ban on PMFs would raise. Singer notes that powerful states like the United States and the United Kingdom favor use of PMFs, making the likelihood of banning the industry altogether politically unlikely. Singer concludes that an attempt to ban PMFs "would likely only repeat the past failures of anti-mercenary laws." Thus, Singer proposes a hybrid international plan. He advances a process of registration, entailing evaluation of firms' compliance with both business and international military standards, couched in the office of the U.N. Special Rapporteur. A task force of international experts and stakeholders would establish rules and monitoring mechanisms for the PMF industry, eventually forming an international office to register, monitor, and evaluate PMFs. The United Nations could then employ the approved firms. Approved firms would carry, to other employers, a kind of seal of approval from the United Nations making these firms more desirable military force providers than unsanctioned firms. Singer envisions this office as providing oversight of PMFs, possibly even on the ground. Any firm violating its contract or the laws of war would be punished, though Singer does not specify what this punishment would be. Singer supports stricter measures in the case of proven human rights violations by PMFs, including legal sanctions in the employing state, waiver of objection to extradition to a state with universal jurisdiction, or some legal recourse to the ICC or an ad hoc tribunal. Yet Singer despairs that the world currently lacks the political will necessary to regulate PMFs, and that such political will may only manifest following a "massive violation."

398. U.N. Charter art. 51; see Singer, supra note 1, at 544.
399. Singer, supra note 1, at 544.
400. Id.
401. Id.
402. Id. at 545-46.
403. Id. at 545. Similarly, Isenberg proposes a registration modeled on the U.N. Register of Conventional Arms, thus cataloguing both client states and firms. See Isenberg, supra note 82, at 24.
404. Singer, supra note 1, at 545.
405. Id. at 545-46.
406. Id.
407. Id. at 546.
408. Id.
409. Id.
410. Id. at 547. Zarate notes that provider states “have a vested interest in retaining the option to influence foreign conflicts by allowing mercenaries to sell their services with the possibility of denying responsibility for their actions.” Zarate, supra note 32, at 91.
In the interim, Singer suggests several "short-term" measures to remedy the vacuum of law surrounding PMFs. Singer advocates expanding the mandate of the U.N. Special Rapporteur to undertake a study of PMFs currently operating; further ratification of the U.N. Mercenary Convention; more and improved domestic laws, for example, changing the focus of South Africa's RFMAA to the type of services provided instead of the destination of services; making the U.S. licensing process more transparent to enable oversight of licensed contracts; and expanding the Military Extraterritorial Judicial Act to cover all PMFs working abroad. Finally, he proposes a unification of domestic laws based on current, positive models of state regulation.

Milliard, concerned with humanitarian crises, argues that PMFs are an ideal solution to the general reluctance of states to intervene in small internal conflicts. Milliard calls the 1994 atrocities in Rwanda "the most poignant example" of an opportunity for effective PMF humanitarian intervention, although he acknowledges the unlikelihood that PMF intervention could have stopped the genocide. Still, a PMF "could have seized, disabled, or simply jammed the Hutu-controlled Radio Mille Collines," a main source of the incitement to violence.

Milliard uses hypothetical outcomes of the 1994 Rwandan genocide to justify use of PMFs, arguing that "if there is any reasonable possibility of averting humanitarian catastrophes" through use of PMFs, such use should be sanctioned. In furtherance of this, Milliard proposes his own Draft International Convention to Prevent the Unlawful Transfer of Military Services to Foreign Armed Forces ("Milliard's Convention"). Milliard's Convention proposes to "codify states' international law responsibilities, to address concerns about [PMF] accountability and transparency, to marginalize the unaffiliated individual who attempts to transfer military services without state sanction, and to buttress legitimate states' sovereign

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411. Singer, supra note 1, at 547.
412. Singer hopes that, with increased ratification, the U.N. Mercenary Convention might cease to be perceived of as "a false document propped up by a mostly hypocritical signatory body." Id. at 548.
413. Singer notes that "such expansion of U.S. criminal law may be potentially unenforceable." Id. at 548.
414. See id. (discussing Singer's proposals in this area).
415. Milliard, supra note 13, at 16.
416. Id. at 18. Other pro-PMF commentators have claimed that the entire Rwandan genocide could have been prevented for $150 million. See Stephen Mbogo, IPOA, Mercenaries? No, PMCs, at http://www.ipoaonline.org/news/091800-2.htm (Sept. 18, 2000).
417. Milliard, supra note 13, at 18.
418. Id. at 19 (emphasis added).
419. Id. at 79-80. For the full text of Milliard's Convention, see id. at 79 & n.454, app. A.
authority to engage in transfers of military services.” Additionally, Milliard calls for complementary domestic regulation.

3. Moral Condemnation and Legal Fatalism

Some commentators find PMFs and mercenaries unacceptable and seek to eradicate them. These scholars eschew entirely the problematic practicalities of banning private violence, focusing instead on the theoretical reasons for suppression of private violence.

Former Human Rights Watch fellow Montgomery Sapone seems to condemn PMFs, and all privatized violence, as morally wrong. He writes that mercenaries have been used by a significant number of political opposition groups, arms dealers, and drug-traffickers, and “are known to have been involved in massacres, executions, looting, and rape.” As other scholars have noted, mercenaries are dangerous because they are motivated by profit alone and are likely to prolong, rather than work to end, any conflict in which they participate.

After surveying the circumstances behind both the condemnation in international law, and the popularity of the mercenaries in the public imagination, Sapone concludes that the current regime, whatever its faults, “prevents the complete commodification of military skill by structuring various guidelines about when and how military skill and labor can circulate.” Equating commodification of sex and prostitution to commodification of violence and mercenarism, Sapone laments that “[a] world in which violence and death are bought and sold is an empty and cold place.” Sapone does not, however, offer any real solution to this commodification of violence, nor does he directly call for an outright ban on mercenaries, PMFs, or private violence.

4. Innovative Use of Existing Domestic Laws

Some student commentators have analyzed various existing U.S. laws that may be used to regulate mercenaries. One such

420. Id. at 79.
421. Id. at 79-80. Milliard envisions that PMFs’ home states will be the sources of regulation. Id. at 80.
422. Sapone, supra note 34, at 3.
423. Id. at 4. Sapone explores why mercenaries, who have received so much negative legal and political attention in recent years, still capture the imagination of “adolescent boys, readers of Soldier of Fortune [magazine], and many U.S. Army soldiers.” Id. at 4-5. Presumably, Sapone seeks to answer Major’s question of “[w]hy anyone today would want to be employed as a mercenary.” Major, supra note 34, at 147.
424. Sapone, supra note 34, at 42.
425. Id. at 43.
426. In addition to the proposals outlined in this Note, one student commentator advocates revising the Neutrality Act and Passport Act and using them to revoke the
commentator offers the ATS\textsuperscript{427} as an "instrument for applying international norms to PMFs."\textsuperscript{428} The ATS provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."\textsuperscript{429} Because U.S. courts have held customary international law to be a valid source of law in ATS suits, both individual employees of PMFs who commit human rights abuses and the PMF employer may be sued in the United States.\textsuperscript{430} It is not clear, however, that the United States has accepted mercenarism as a crime.\textsuperscript{431}

5. PMFs and Africa

PMFs have a unique relationship to Africa.\textsuperscript{432} While African nations are nation-states, many have "not resolved issues of nation building and state formation," resulting in some weak states.\textsuperscript{433} Therefore, responsible PMFs could be a boon for Africa.\textsuperscript{434} Dr. Abdel-Fatau Musah and Doug Brooks, president of the industry
organization IPOA, observe that developed nations and particularly the United States are reluctant to intervene in African conflicts.435

Though in favor of PMFs, these commentators are still wary of them and recommend that mercenaries only be deployed by the United Nations, the OAU, or their home state. These commentators also believe that funding for PMF deployment should come from a source other than the employing state.436 Musah and Brooks would require U.N. monitoring of any PMF operation.437 Still, Brooks states that private forces do not have an incentive to prolong a conflict but rather to end it, as the market will expose any inefficiency or wrongdoing and punish the offending firms accordingly.438

To praise the potential for use of PMFs in Africa, including in peacekeeping operations, Brooks notes that the entire 1996 EO contract with Sierra Leone cost $36 million, while the United Nations spent $3 million per day for peacekeeping in Sierra Leone.439 The economic efficiency of PMFs is broadly claimed in their defense.440 Thus, the argument has returned to market efficiencies.441

The scholars discussed in Part II.C accept the existence of PMFs and seek to find a way to regulate or control them, or despair their existence but make no recommendations for prospective regulatory regimes. Part III argues that ideally PMFs would not exist, as they subvert hard-won principles of sovereignty that have been in place for the last several centuries and, at best, can only be tenuously controlled. Starting from Article 47 of Protocol I, Part III.A redefines “mercenary.” Though ideally supporting a total ban, Part III.B.1 recognizes that a total ban is not feasible. Therefore, the rest of Part III.B identifies the goals of any effective regulatory regime and recommends measures for deterrence, control, and regulation.


436. Musah & Brooks, supra note 435, at 2. “It is essential that the future of Africa is not mortgaged out of desperation to end the wars.” Id. at 1. A staunchly anti-PMF organization agrees: “[H]iring samurai is no answer to the problems of African states,” because “samurai are not content with three bowls of rice a day.” Wrigley, supra note 132.

437. See Musah and Brooks, supra note 435, at 2. This level of monitoring may not be realistic, as it would add significantly to the cost of PMF deployment. See infra note 469 and accompanying text.

438. Brooks, supra note 13, at 1, 3.

439. Mbogo, supra note 416.

440. UK Green Paper, supra note 13, ¶ 59 ("It is at least possible that if the tasks [of peacekeeping] were put out to tender, private companies would be able to do the job more cheaply and more effectively.").

441. See supra Part II.C.1 (exploring the possibilities of private sector or market control for PMFs).
III. THE FUTURE OF PMFS

"Just because we can turn something over to the private market does not always mean we should."442 States worked to monopolize violence in history,443 and should not casually discard this achievement. In the "[s]tate-oriented hegemonic view," privatized violence carried out by forces with "little loyalty to any State . . . def[ies] military norms and thus lack[s] moral legitimacy."444

Though states have never monopolized violence entirely,445 the hegemonic structure of the international community operates on the premise that violence is not a commodity.446 Additionally, PMFs and mercenaries prove ever difficult to define.447 The current international agreements and conventions on mercenaries use an extremely narrow definition of mercenaries.448 Before considering endorsing PMFs, the international community must agree on who is and who is not a mercenary. Only then can the international community and individual states decide if and how to regulate mercenaries and PMFs.

A. Redefining "Mercenary"

A mercenary is "a professional soldier serving a foreign power" who "receives payment for his services."449 When home states loan their citizen soldiers to another state, those soldiers do not fall into the literal terms defining a mercenary because they are actually fighting at the behest of their own state.450 Those who volunteer and become part of a foreign army do not fall into the spirit of the mercenary definition, because, though not fighting for their home state, they are under the control of a state, and indeed often become citizens of the national army for which they fight.451 These forces transfer allegiance from one state to another state, rather than discarding state loyalty entirely.

443. Thomson, supra note 48, at 107 ("Stamping out unauthorized nonstate violence was not a mere mopping-up operation.").
444. Sapone, supra note 34, at 6.
445. See Krasner, supra note 42, at 651-52 (stating that "[s]overeignty has always been problematic" and that "[o]nly a very few states have actually possessed all of the major attributes that are associated with sovereignty").
446. Sapone, supra note 34, at 43 ("By preserving a discourse of nonalienability of military skill, we preserve the illusion that the State controls war, and that a soldier's death cannot be bought.").
447. See Milliard, supra note 13, at 3-4; cf. Best, supra note 33, at 328 n.83.
449. 9 The Oxford English Dictionary. supra note 65, at 618.
450. The South Korean, Thai, and Filipino soldiers that fought in South Vietnam are not mercenaries, but forces "loaned" to another state; at most this is "disguised" mercenarism. See supra note 82 and accompanying text.
451. Recruits to the French Foreign Legion and the United States armed forces can become citizens after a proscribed period of service. See supra notes 97, 106 and accompanying text.
Solders of fortune, who fight for the highest bidder, are clearly mercenaries. PMFs are also mercenaries because they are foreign soldiers paid to fight and have no loyalty to their employing state. The definition found in existing international agreements addressing mercenaries is, however, much narrower and would exclude PMFs and even many soldiers of fortune, allowing both groups to maneuver out of the mercenary definition. The definition of mercenary found in international agreements and accepted as customary international law must be revised to reflect the contemporary reality of privatized violence.

The definition of a mercenary found in Article 47 of Protocol I, which denies mercenaries the right to POW status, may be adapted to include PMFs as mercenaries. Article 47(2)(a) provides that a mercenary must be “specially recruited locally or abroad in order to fight in an armed conflict," which limits recruitment and participation to a finite engagement. This provision must be jettisoned, as PMFs may contract employees for a period of time rather than for a specific conflict. Subsection (b) requires that a mercenary take “a direct part in hostilities." These two requirements can be both collapsed and expanded to cover PMF employees, while allowing for use of personal bodyguards, in the following manner:

A mercenary is any person who takes a direct part in military activities:

(a) in a country or territory of which he is not a citizen or subject; other than engaging in armed self-defense of state officials or private persons under rules of engagement permitting proportionate return of fire if fired upon or upon reasonable belief of imminent threat to the life or safety of the protected person or persons, such use of force in self-defense to be limited to the use of side arms or firearms limited against enemies in visual range.

Subsection (c) of Article 47 states that a mercenary must be motivated by “the desire for private gain... in excess of that promised or paid to combatants of similar ranks and functions in the armed forces” of the contracting party. This definition need not be

452. This ability to transfer loyalty is typified by Bob Denard, who fought on both sides of a conflict in the Comoros Islands. See Thomson, supra note 48, at 93-94.
454. Id.
455. Id. In contrast, the OAU Mercenary Convention provides that a mercenary need only be motivated by material compensation not necessarily in excess of that paid to the contracting states' armed forces. See OAU Mercenary Convention, supra note 63, art. 1, 1490 U.N.T.S. at 96 (a mercenary “[i]s motivated to take part in the hostilities essentially by the desire for private gain and in fact is promised by or on behalf of a party to the conflict material compensation”). It is worth noting that no iteration of this provision requires that a hired soldier be paid at the rate of his home army. South Korean troops fighting in Vietnam received “more than twenty times
so convoluted—in this Note's proposed redefinition, it is enough that a mercenary "takes a direct part in military activities" and "is motivated to take part by the desire for private monetary or material gain."

Finally, regarding nationality, Article 47 excludes any citizens or residents of the territory of a party to the conflict, any member of the armed forces of a party to the conflict, and those that were "sent by a State which is not a Party to the conflict on official duty as a member of its armed forces." In the proposed redefinition, a mercenary is one who "takes a direct part in military activities" if this participation is independent of any legal obligation, regulation, or order by the state of which he is a citizen or subject to participate in such activity. (Active duty members of a state's armed forces, participating with consent of their government on official duty are in any event not mercenaries, regardless of whether they are a citizen or subject.)

In essence, mercenaries are those combatants who take a direct part in hostilities and who are noncitizens of the conflicting state or states, are not sent on official state business, and are motivated by material gain.

The proposed redefinition of "mercenary" would read as follows:

A mercenary is a person who takes a direct part in military activities:

(a) in a country or territory of which he is not a citizen or subject; other than engaging in armed self-defense of state officials or private persons under rules of engagement permitting proportionate return of fire if fired upon or upon reasonable belief of imminent threat to the life or safety of the protected person or persons, such use of force in self-defense to be limited to the use of side arms or firearms limited against enemies in visual range; and

(b) is motivated to take part by the desire for private monetary or material gain; and

(c) acts independent of any legal obligation, regulation, or order by the state of which he is a citizen or subject to participate in such activity. (Active duty members of a state's armed forces, participating with consent of their government on official duty are in any event not mercenaries, regardless of whether they are citizens or subjects.)

So redefined, PMF operatives fall into the definition of a mercenary and, under Article 47, are not afforded POW status, and are criminalized under the U.N. Mercenary Convention. Having

their military salaries" from the U.S. government in return for military services. Lee, supra note 76, at 35.

redefined mercenaries in this way, this Note now turns to the implications of this definition and other proposed supplementary provisions.

B. Future Regulation

Regulation of mercenaries has thus far proved somewhat ineffective, even for soldiers of fortune. Existing mercenary regulations did not deter former EO employees from attempting a coup in Equatorial Guinea in 2003. The current definitions and agreements must be abandoned, and a new scheme for regulation must be put in its place.

Singer elucidates the factors to be considered in any regulatory or prohibition scheme. First, the goal of any regulatory scheme must be clear and appropriate. Second, the definition of which fighters and forces fall in or fall out of any scheme must be clear and unconfused. Third, the specific activities to be regulated must be obviously identified. Fourth, an oversight, regulatory, and enforcement body must be denominated. Finally, Singer demands that any regulatory scheme contemplate its own cost. Using these criteria, this Note examines the plausibility of a total ban on soldiers of fortune and PMFs. Rejecting a ban as unachievable and unrealistic, this Note next considers other specific measures to further PMF and soldier of fortune regulation and deterrence.

1. A Total Ban Is Not Feasible

A total ban on soldiers of fortune and PMFs is philosophically attractive, as it keeps violence from being commodified, thus preventing death from being priced. Such a ban also preserves the hegemonic order of state-monopolized violence, “provid[ing] assurance that there is not a war machine” and keeping alive the “ideal of nonmonetized death.”

Still, violence has never been fully monopolized by the state, and private forces have functioned throughout history. A total ban on mercenary forces, using the term “mercenary” as redefined in Part III.A, would satisfy Singer’s first three requirements of a regulatory

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459. See Singer, supra note 1, at 542.
460. See id.
461. Id.
462. Id. at 543.
463. Id.
464. See id.
465. See Sapone, supra note 34, at 43.
466. Id.
467. See Thomson, supra note 48, at 3.
scheme in that it is clear what actors, activities, and forces would fall into the prohibited activities.\textsuperscript{468} Such a ban, however, does not adequately answer Singer’s fourth and fifth requirements, that any regulatory scheme have a clear oversight body and an identifiable cost. How such a ban would be enforced is unclear, and the cost of enforcement would be enormous because of the necessary monitoring and investigation involved.\textsuperscript{469}

The United States did not ratify the U.N. Mercenary Convention\textsuperscript{470} and objected to Protocol I. It is very unlikely to support a total ban on soldiers of fortune and PMFs. The United Kingdom, as evidenced in its Green Paper, also may demur from such a ban.\textsuperscript{471}

Existing international agreements have a poor enforcement and ratification record. The U.N. Mercenary Convention came into force over a decade after its drafting and has not been used to prosecute any mercenaries. Milliard’s Draft Convention could replace or supplement the existing international regime.\textsuperscript{472} Instead of wholly condemning the use of PMFs, Milliard prescribes oversight and licensing,\textsuperscript{473} a scheme that, in the immediate and foreseeable political climate, may prove more palatable to the international community and to the United States and United Kingdom,\textsuperscript{474} two of the primary source states. Milliard’s Convention also tracks South Africa’s approach to regulation,\textsuperscript{475} tending to oversight and licensing rather than a total ban.

A total ban, in fact, might have unintended negative consequences. Even if PMFs are banned entirely, nation-states, particularly weak states such as Angola and Sierra Leone, will still need to find security somewhere. They may turn to a black market of PMFs, soldiers of fortune, or even child soldiers.\textsuperscript{476} These forces are even less controllable than corporate PMFs, which may be recognized and regulated by their source state, as PMFs would be under Milliard’s Convention. Milliard’s Convention, however, is not comprehensive, focusing on source states.\textsuperscript{477} Specific supplemental actions should be taken to further deter soldiers of fortune and PMFs. These are set out below.

\textsuperscript{468} See Singer, supra note 1, at 542-43; supra notes 466-71.

\textsuperscript{469} See Singer, supra note 1, at 542-43.

\textsuperscript{470} See 2 Multilateral Treaties, supra note 222, at 112.

\textsuperscript{471} See UK Green Paper, supra note 13.

\textsuperscript{472} See Milliard, supra note 13, at 79 & n.454, app. A.

\textsuperscript{473} Id.

\textsuperscript{474} See Singer, supra note 1, at 544 (noting that the United States and the United Kingdom “clearly support the [PMF] industry”).


\textsuperscript{476} See supra note 129 and accompanying text.

\textsuperscript{477} See Milliard, supra note 13, at 79 & n.454, app. A.
2. Suggested Supplemental Provisions for Mercenary Regulation

This Note highlights two troubling areas affected by PMF activity but as yet lacking in regulation or clarity: The co-opting of natural resources and the status of PMF employees in armed combat. It also addresses the current status of U.S. law, where laws capable of regulating PMFs exist, but are rarely enforced.

a. Co-opting of Natural Resources

Regardless of whether private mercenaries or members of a foreign state army on active duty render military services, states must be prohibited from promising material compensation for military services in the form of rights to oil or other natural resources. This prohibition on "mortgaging future returns" attempts to protect African states from outside exploitation of natural resources. Any contract or agreement providing for such an arrangement must be void. While arguably paternalistic, such a provision helps decommodify military activity and removes a significant threat and potential detriment to African states. Africa must solve its security problems in another way.

b. Unlawful Combatants, Common Article 3, and Super-Deterrence

It should be clear that mercenaries are denied POW status under the redefinition of mercenary, found in Part III.A, and that mercenaries are unlawful combatants. Falling out of lawful combatant status, mercenaries may receive the protections of common Article 3 and Article 75 of Protocol I. They must be treated "humanely," but are not entitled to more.

This Note presumes that unlawful combatants are entitled to common Article 3 protections. The United States, however, has determined that unlawful combatants, specifically members of al-Qaeda, are not entitled to POW status, and also are not entitled to any Geneva protections at all, assumedly including common Article 3 protections. If the United States knew that its citizens, when acting as mercenaries, would not be entitled to common Article 3 protections, perhaps it would reconsider its policy on unlawful combatants.

478. See UK Green Paper, supra note 13, ¶ 40.
If mercenaries are not afforded common Article 3 protections, this could act as super-deterrence to those contemplating mercenary service. While denying common Article 3 protections on the super-deterrence rationale (which is a pragmatic rationale) is of dubious efficacy with respect to al-Qaeda, where operatives are motivated by religion and culture, it would surely be more effective as to unlawful combatants who choose to fight for material gain or adventure, and who might for that reason factor the consequences of treatment upon capture into any cost-benefit analysis.

c. Domestic Law

The need for domestic regulation of mercenaries is just as great as the need for international regulation. South Africa's RFMAA provides an excellent model for domestic regulations, in that it makes quite clear what activities are proscribed and establishes a procedure by which PMFs can gain governmental approval.

United States laws and regulations on mercenaries are not as simple or as clear as the RFMAA, but U.S. law that might apply to mercenaries does exist. The real problem is that, in the United States, political will for enforcement of these laws against mercenaries is lacking. By addressing the problem at the international level and publicizing the problem, the public may force a change in political will leading to greater enforcement of these germane domestic laws.

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482. Al-Qaeda operatives are “confessional mercenaries.” See supra note 279 and accompanying text.

483. Indeed, international agreements have explicitly called for complementary domestic regulation. U.N. Mercenary Convention, supra note 63, arts. 5-6, 2163 U.N.T.S. at 97-98 (calling on state parties to “make the offenses set forth in the [U.N. Mercenary Convention] punishable by appropriate penalties”); OAU Mercenary Convention, supra note 63, art. 6, 1490 U.N.T.S. at 97-98 (calling on member states to take steps to end mercenary activity within their borders).


486. Singer, supra note 1, at 547.

487. It seems that awareness of PMF use by the United States government is growing. E.g., Estes Thompson, Families Sue over Workers' Slaying in Iraq: N.C. Security Firm Named in Lawsuit, Wash. Post, Jan. 6, 2005, at A7 (regarding the four Blackwater Security contractors killed in Fallujah, "[t]he families contend that the company, Blackwater Security Consulting, cut corners that led to the men's deaths"); Howard Witt, Graner Led Abuse at Abu Ghraib, Witnesses Testify, Chi. Trib., Jan. 11, 2005, at A7 (noting that at Abu Ghraib, "civilian contractors appeared to be in charge of the high-security wing and issued orders to deprive detainees of sleep, handcuff them to walls and otherwise make them uncomfortable"); David Zucchino, Death Without Honors, L.A. Times, Jan. 15, 2005, at A1 (reporting that "contractors killed in Iraq tend to die anonymously, mentioned only in passing").
Domestic laws, because they inevitably suffer from a lack of extraterritoriality and monitoring capability, particularly in weak states, must be standardized (as much as is possible). Convergence of domestic law also will provide evidence of customary international law.  

CONCLUSION

Though violence has never been perfectly monopolized by the state, suppression of privatized violence was an important step in the evolution of the modern nation-state. The international community continues to be organized into nation-states, and states or regions that deviate from this scheme are seen as outliers (and even broken), not as innovators. While it is conceivable that the nation-state regime is neither inevitable nor ideal, it is the current dominant system of international organization.

Privatized violence poses a threat to the nation-state regime, both actually and through appearance. Since the initial state-sponsored suppression of private violence at the rise of the nation-state, there were occasional outbreaks of non-state violence, but these incidents remained at the margins of the international, state-driven hegemony. But, when the Cold War ended and developed nations—particularly the United States—downsized their militaries and the colonial powers withdrew from Africa, the PMF was invented (or reinvented). Private violence is creeping in from the margins to the mainstream and "corporate warriors" now fight battles across the globe.

The term "mercenary" merits a new definition, one that encompasses PMFs. Thus the international community must reconsider mercenaries to include any person who takes a direct part in military activities in a country of which he is not a citizen (other than engaging in self-defense of state officials or other persons under appropriate and restricted rules of engagement); is motivated by desire for private gain; and acts independent of any state order or legal obligation.

488. See Restatement, supra note 152, § 103 cmt. c.
489. See Thomson, supra note 48, at 77-84 (stating that the suppression of mercenaries began in the period of the Napoleonic Wars and the United States Neutrality Act of 1794, and continued into the nineteenth century).
490. See, e.g., U.N. Charter arts. 2-4.
491. See supra notes 53, 55-57 and accompanying text (discussing failed states).
492. See supra Part I.B.2 (discussing the first neutrality laws).
493. The activities of soldiers of fortune in Africa in the 1960s were such incidents, being both geographically and temporally finite. See supra Part I.A.4 (discussing activities of soldiers of fortune).
494. See supra Part I.A.3 (discussing "corporate" forms of private violence).
495. See supra note 119 and accompanying text for a list of some states in which PMFs have operated. Indeed, funds from the International Monetary Fund were used to pay EO for work in Sierra Leone. Isenberg, supra note 82, at 10.
496. See supra Part III.A (discussing this Note's redefinition of a mercenary).
Whether, or how much, private violence is acceptable is ultimately for the politicians to determine. The growing phenomenon of “corporate warriors,” however, must no longer be ignored. The international community and individual states must begin a debate about these “new” mercenaries, lest nations one day find that corporations are committing torture in Tajikistan, that private citizens own the rights to all of Sudan’s oil, or that MPRI is fighting its own land war in Somalia.

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497. See supra Parts III.B.2.b-c (discussing the possibility of a sea change in domestic political will).
498. Mercenaries must be defined to include PMFs. See supra Part III.A (offering a redefinition of mercenary to include PMFs).
499. See supra note 113 and accompanying text.