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## Taking Shots at Private Military Firms: International Law Misses its Mark (Again)

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Kevin H. Govern and Eric C. Bales

## **Abstract**

Part I of this Article takes a brief tour through military history on the consistent use of mercenaries through the ages, which Peter Singer illuminates masterfully in *Corporate Warriors*. Next, a brief overview on the binding nature (or not) of international custom and treaty is explored in Part II and then the codifications of international law are taken up in Part III, beginning with the Hague and Geneva Conventions. Several United Nations (“U.N.”) instruments are analyzed for their efficacy in changing the long-standing customary international law on the use of mercenaries and whether or not each is applicable to PMF contractors. Part IV closes out the Article by discussing alternative bodies of domestic law that provide criminal accountability, including the recent case of Alaa Mohammad Ali, a civilian contractor working in Iraq who was convicted on June 23, 2008 by court martial under the recent changes to the Uniform Code of Military Justice (“UCMJ”).

## ARTICLES

# TAKING SHOTS AT PRIVATE MILITARY FIRMS: INTERNATIONAL LAW MISSES ITS MARK (AGAIN)

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### INTRODUCTION

On September 16, 2007 a car bomb exploded 200 yards from a meeting in Baghdad that included Kerry Pelzman, a specialist with the United States Agency for International Development.<sup>1</sup> Her Blackwater security detail rushed her to a waiting convoy and radioed to the Green Zone for backup, fearing the explosion might be the prelude to an abduction attempt.<sup>2</sup>

The arriving support convoy's route around the Nusoor Square traffic circle was blocked by a construction barrier protecting a maintenance crew.<sup>3</sup> Nearby cars were repeatedly

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1. *Iraqi Report: Witnesses Recount Terror in Blackwater Shooting*, CNN, Oct. 8, 2007, <http://edition.cnn.com/2007/WORLD/meast/10/08/blackwater.thatday.ap/index.html> (last visited Nov. 3, 2008) [hereinafter *CNN Report*].

2. *Id.*

3. *Iraq Demands \$136M Blackwater Payout*, CBSNEWS.COM, Oct 8, 2007, <http://www.cbsnews.com/stories/2007/10/08/iraq/printable3343975.shtml> (last visited Dec. 17, 2008).

warned to stop but one driven by a twenty year-old, third-year medical student, continued to approach despite the warnings—he was fired upon and killed instantly.<sup>4</sup> The backup convoy pushed the barriers aside, firing on other cars and a city bus that continued to advance. Finally clear of the impediment, the backup team moved through the traffic circle against the flow of traffic toward Pelzman’s convoy as it rushed back to the Green Zone.<sup>5</sup> Witnesses swear that Blackwater was not under attack at the time of the shootings.<sup>6</sup> The Blackwater operators say otherwise.<sup>7</sup>

The incident at Nusoor Square focused the public’s attention on the use of private security contractors in Iraq, if the horrific image of the burnt corpses of Blackwater operators hanging from a Fallujah bridge had not already.<sup>8</sup> Who are these operators and what role do they serve? Are they mercenaries? What is their status under international law? What restraint or accountability exists? These questions form the basis of this Article.

Private Military Firms (“PMFs”)<sup>9</sup> like Blackwater are corporate bodies that specialize in the provision of military skills, including combat operations.<sup>10</sup> PMFs operate globally, often with strategic impact on both the process and outcome of conflicts.<sup>11</sup> They have become integral to the peacetime security systems of rich and poor states alike.<sup>12</sup> According to Senator Lindsey Graham of South Carolina, the use of private contractors “is the way we are going to war in the future.”<sup>13</sup>

Numerous legal commentators suggest, and news reporters

4. See *CNN Report*, *supra* note 1.

5. *Id.*

6. Bushra Juhi, *Survivor Recalls Blackwater Shooting*, WASHINGTON POST, Sept. 21, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/09/20/AR2007092001404.html>.

7. See generally *CNN Report*, *supra* note 1.

8. See, e.g., *The High-Risk Contracting Business*, FRONTLINE, June 21, 2005, <http://www.pbs.org/wgbh/pages/frontline/shows/warriors/contractors/highrisk.html>.

9. Like Richard Morgan, we make narrow use of Peter Singer’s term Private Military Firm (“PMF”) to include only security contractors. See Richard Morgan, *Professional Military Firms Under International Law*, 9 CHI. J. INT’L L. 213, 216 (2008).

10. See P. W. SINGER, *CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY* 8 (2003).

11. *Id.* at 9.

12. *Id.*

13. Lydia Gensheimer, *War Zone Crimes: Accountability MIA*, CQ WKLY., May 11, 2008, available at 2008 WLNR 9399034.

often parrot, two erroneous blanket assertions: that PMF contractors are mercenaries<sup>14</sup> and only standing national armies can legitimately engage in warfare.<sup>15</sup> PMF contractors are not, in fact, mercenaries.<sup>16</sup> Frankly, it is unlikely that anyone could ever be shown to be a mercenary under current international law.<sup>17</sup> International instruments on point enjoy little support, and contrary practice by the international community casts a dubious shadow over whether those instruments are true codifications of customary international law.<sup>18</sup> As to national armies as the only legitimate combatants, their existence is a recent innovation. Mercenaries, however, have existed as long as recorded history.

These dynamics present the fascinating but difficult issue of where PMF contractors fit into the legal order in an armed conflict. Part I of this Article takes a brief tour through military history on the consistent use of mercenaries through the ages, which Peter Singer illuminates masterfully in *Corporate Warriors*.<sup>19</sup>

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14. See United Nations (U.N.) Hum. Rts. Council, Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of People to Self-Determination, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, ¶ 56, U.N. Doc. A/HRC/7/7 (Jan. 9, 2008) (prepared by José Luis Gomez del Prado), available at <http://www2.ohchr.org/english/issues/mercenaries/docs/A.HRC.7.7.pdf> (“[The Working Group] is of the opinion that many such manifestations are new modalities of mercenary-related activities.”); Alexander Higgins, *US Rejects UN Mercenary Report*, USA TODAY, Oct. 17, 2007, [http://www.usatoday.com/news/world/2007-10-17-3392316246\\_x.htm](http://www.usatoday.com/news/world/2007-10-17-3392316246_x.htm) (“[The] U.N. report . . . said the use of private security guards like those involved in the [Nusoor Square] shooting . . . amounted to a new form of mercenary activity.”).

15. See Zoe Salzman, *Private Military Contractors and the Taint of a Mercenary Reputation*, 40 N.Y.U. J. INT’L L. & POL. 853, 878 (2008).

16. See Antenor Hallo de Wolf, *Modern Condottieri in Iraq: Privatizing War from the Perspective of International and Human Rights Law*, 13 IND. J. GLOBAL LEGAL STUD. 315, 324 (2006) (“[O]ne of the most fervent and skeptical critics of [PMFs], the former U.N. Special Rapporteur on Mercenaries, Enrique Ballesteros, has implicitly acknowledged that it is necessary to distinguish [PMFs] and their personnel from actual mercenaries.”).

17. Professor Geoffrey Best argues that any individual who could not exclude himself from the poorly drafted definition(s) of mercenary “deserves to be shot—and his attorney with him!” GEOFFREY BEST, *HUMANITY IN WARFARE: THE MODERN HISTORY OF THE INTERNATIONAL LAW OF ARMED CONFLICT* 375 n.83 (1980).

18. Salzman, *supra* note 15, at 878 (though highly critical of PMFs and advocating application of the international conventions against mercenarism against PMFs, Salzman buries an admission in the closing paragraphs of Part IV of her article that the conventions are without real effect because of low ratification and widespread contrary state practice).

19. See generally SINGER, *supra* note 10. Peter Singer is a National Security Fellow at the Brookings Institute and is widely published in his critiques against the privatization of warfare.

Next, a brief overview on the binding nature (or not) of international custom and treaty is explored in Part II and then the codifications of international law are taken up in Part III, beginning with the Hague and Geneva Conventions. Several United Nations (“U.N.”) instruments are analyzed for their efficacy in changing the long-standing customary international law on the use of mercenaries and whether or not each is applicable to PMF contractors.<sup>20</sup> Part IV closes out the Article by discussing alternative bodies of domestic law that provide criminal accountability, including the recent case of Alaa Mohammad Ali, a civilian contractor working in Iraq who was convicted on June 23, 2008 by court martial under the recent changes to the Uniform Code of Military Justice (“UCMJ”).

### I. *HISTORY OF MERCENARIES*

Peter W. Singer, Senior Fellow at the Brookings Institute and ardent critic of PMFs, readily admits the hiring of private individuals to fight battles “is as old as war itself.”<sup>21</sup> The contemporary notion that war was fought exclusively by standing armies of sovereign nation-states is erroneous.<sup>22</sup> The “monopoly of the state over violence is the exception in world history, rather than the rule.”<sup>23</sup> The sovereign nation-state is a “new” model that throughout its 400-year existence has availed itself of private warriors to build and maintain public power.<sup>24</sup>

#### A. *Mercenarism in Ancient History*

The earliest recorded use of mercenaries rests with King Shulgi of Ur (2094–2047 B.C.).<sup>25</sup> King Ramses II is chronicled

20. Todd Milliard’s exhaustive research on the experiences of post-colonial Africa in shaping international law on mercenarism provides an oft-cited template that greatly informs the analysis in Part III. Milliard focuses on the post-colonial African context and recommends a new regulatory scheme for PMFs. *See generally* Todd S. Milliard, *Overcoming Post-Colonial Myopia: A Call to Recognize and Regulate Private Military Companies*, 176 *MIL. L. REV.* 1 (2003). This Article departs from this emphasis and instead surveys the international law on point and its deficiencies before moving on to existing domestic U.S. law that may provide some degree of accountability.

21. SINGER, *supra* note 10, at 19.

22. *See id.*

23. JANICE THOMSON, *MERCENARIES, PIRATES AND SOVEREIGNS: STATE BUILDING AND EXTRATERRITORIAL VIOLENCE IN EARLY MODERN EUROPE* 15 (1996).

24. SINGER, *supra* note 10, at 20.

25. *Id.*

as leading an army whose ranks swelled with Numidian mercenaries in the Battle for Kadesh in 1294 B.C.<sup>26</sup> King David used mercenaries to drive out the Philistines in 1000 B.C.<sup>27</sup> Most ancient Greek city-states relied on mercenaries as force multipliers—save Sparta and a few others.<sup>28</sup> Alexander the Great invaded Persia with one-third of his army constituting mercenaries.<sup>29</sup> By the end of his conquest of Persia, almost the entire army was comprised of mercenaries.<sup>30</sup> The vast majority of Caesar's cavalry were mercenaries,<sup>31</sup> as were the *foederati* of Justinian's East Roman Army.<sup>32</sup> Even at its height, the Roman Empire continued to use hired foreign troops, eventually resulting in its legions being more Germanic than Roman.<sup>33</sup> Mercenaries were also heavily relied upon during the Norman Conquest,<sup>34</sup> by Italian city-states during the Renaissance,<sup>35</sup> and by Britain in her attempt to put down the rebellion that became the American Revolutionary War.<sup>36</sup>

### B. *Europe and the Free Companies*

The PMF model is not a new concept. Their corporate form can be traced back as early as the Byzantine Empire, which made use of Norse mercenaries that later formed the Varangian Guard.<sup>37</sup> The Byzantine Empire also employed the services of the Grand Catalan Company, the longest-lasting “free company.”<sup>38</sup> Free companies flourished in Europe for over 150 years until their wealth and power was too much for European nobility.

The first blow leading to the demise of the free companies

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

27. Milliard, *supra* note 20, at 2.

28. G.T. GRIFFITH, *THE MERCENARIES OF THE HELLENISTIC WORLD* 4 (1935).

29. *Id.* at 12–13.

30. SINGER, *supra* note 10, at 21.

31. DUPUY, *supra* note 26, at 98.

32. Milliard, *supra* note 20, at 2.

33. SINGER, *supra* note 10, at 21.

34. Milliard, *supra* note 20, at 2.

35. *Id.* at 2.

36. See ANTHONY MOCKLER, *THE NEW MERCENARIES* 6 (1985); cf. ROBERT YOUNG PELTON, *LICENSED TO KILL: HIRED GUNS IN THE WAR ON TERROR* 3 (2006) (Colonial American forces also resorted to mercenaries).

37. DUPUY, *supra* note 26, at 303–06, 382.

38. *Id.* at 387–88; see also MOCKLER, *supra* note 36, at 9–10.

came in the fifteenth century at the hands of King Charles VII of France.<sup>39</sup> The French solution was to establish a standing army that absorbed many of the free companies and vanquished the others.<sup>40</sup> This provoked the neighboring Duke of Burgundy to follow suit, and so began a trend across Europe.<sup>41</sup> Those mercenaries surviving the turn-out in France moved into Italy and its *condottiere* companies.<sup>42</sup>

The Italian city-states continued the use of mercenaries because their use was a more efficient and expedient manner of warfare. This enabled the nobles to avoid the disruption of mobilizing the entire population of a city-state militia and allowed the productivity of its merchant class to continue relatively unabated.<sup>43</sup> The Italian city-states mitigated free-company power through craftily dividing contracts among “mutually jealous” captains and by bestowing honors on the loyal and successful ones, integrating them into Italian society and minimizing the risk of coups.<sup>44</sup> After a time, however, entrepreneurs within individual city-states replicated the free company model and obviated the need for foreign mercenaries.<sup>45</sup> Consequently, some “local companies” became so powerful they seized control of their employing city-states.<sup>46</sup>

As standing armies became the norm in Europe, mercenary use declined but did not altogether disappear.<sup>47</sup> The Swiss, for example, specializing in fielding entire units rather than individual warriors, supplied sovereigns throughout Western Europe with experienced pike men and other unique units.<sup>48</sup> The Swiss were so renowned for their skill in battle that Pope Julius II formed the Papal Guard from available Swiss units in the sixteenth century.<sup>49</sup>

39. SINGER, *supra* note 10, at 26.

40. *Id.*

41. *Id.*

42. DUPUY, *supra* note 26, at 409.

43. SINGER, *supra* note 10, at 22.

44. *Id.* at 23.

45. *See id.* at 26.

46. *See* SINGER, *supra* note 10, at 26.

47. *See* Jonathan D. Heskett, *The Potential Scope for Use of Private Military Companies in Military Operations: An Historical and Economic Analysis* (Dec. 2005) (unpublished Master's thesis, Naval Postgraduate School), <http://handle.dtic.mil/100.2/ADA443220>.

48. MOCKLER, *supra* note 36, at 8–9.

49. Milliard, *supra* note 20, at 10.



By the 1600s war had become Europe's largest industry.<sup>50</sup> As a result a new generation of entrepreneurs sprang up to recruit, equip, train, and lease entire units of mercenaries to the highest bidder.<sup>51</sup> Among the most successful were Louis de Greer (providing Sweden with an entire navy, including its sailors), Count Ernst von Mansfeld (raising an entire army for Frederick V, Elector Palatine) and Bernard von Weimar (fielding armies for Sweden and France).<sup>52</sup> Count Wilhelm von Schaumburg even established an international military academy for officers of all nations in order to train and pass on the laws of war.<sup>53</sup>

The use of mercenary forces continued through the Thirty Years' War (1618–48),<sup>54</sup> but it became painfully clear to the employing sovereigns that mercenary units devastated the countryside by living off the land at the expense of the populace, making fiscal cost-benefit not worth the high social costs.<sup>55</sup> In the end, the Peace of Westphalia brought the greatest suppressing blow to the free companies by formally ushering in the era of sovereign states and heralding the preference of standing national armies.<sup>56</sup>

### C. *The Joint-Stock Companies*

The practice of mercenarism continued after Westphalia, perhaps most notably by the Trade Companies of the eighteenth century.<sup>57</sup> Interestingly, the corporate warriors in their employ did not serve the interests of the state but instead those of the shareholders. Joint-stock companies like the Dutch East India Company were given exclusive trade rights within geographic regions and invested with a kind of sovereignty and dominion that gave them absolute power to “make[ ] peace and war at pleasure, and by [their] own authority; administer[ ] justice to all; . . . settle colonies, build[ ] fortifications, lev[y] troops, maintain[ ] numerous armies and garrisons, fit[ ] out fleets, and

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50. SINGER, *supra* note 10, at 28.

51. *Id.*

52. *Id.*

53. *Id.* at 33.

54. *Id.* at 28.

55. *Id.* at 29.

56. *Id.*

57. *Id.* at 34.

coin[ ] money.”<sup>58</sup> In this vein, the British East India Company fielded an army of 100,000 foreign troops that surpassed King George II’s standing army.<sup>59</sup>

Frequently, the Trade Companies disregarded instructions from their sovereigns and waged politically expensive, but economically profitable, wars upon other Trade Companies.<sup>60</sup> Eventually, however, the Trading Companies became victims of their own success, suffocating beneath the financial weight of an enormous military apparatus that had become largely unnecessary with the elimination of competitors and local dissent.<sup>61</sup> The English Crown only continued to subsidize the British East India Company because it was uncertain how else to maintain effective rule in India.<sup>62</sup> The Supoy Mutiny in 1857, which cost 11,000 European lives and required regular British troops to suppress it, brought the dissolution of the British East India Company a year later.<sup>63</sup> The last two private companies governing colonial territories (Rhodesia and Mozambique) did not come to an end until the early twentieth century.<sup>64</sup>

#### D. *Mercenarism in Decolonized Africa*

The end of the Cold War was the catalyst for the growth of modern mercenarism.<sup>65</sup> As the United States and the Soviet Union began downsizing, the “market” was flooded with soldiers highly skilled in combat arms.<sup>66</sup> With the thaw in relations with the Soviet Union, the superpowers were less concerned about maintaining dominating influence around the globe. The combination of shrinking militaries and their diminishing commitment to regional security sustained the mercenary trade by leaving unfilled security needs, particularly in Africa.<sup>67</sup>

Colonial powers looking to maintain their influence during

58. *Id.*

59. *Id.* at 35.

60. *Id.* at 35–36.

61. *See id.* at 36.

62. *See id.*

63. *Id.*

64. *Id.* at 37.

65. *See* Ryan Scoville, *Toward an Accountability-Based Definition of “Mercenary,”* 37 *GEO. J. INT’L L.* 541, 542 (2006).

66. *Id.*

67. *See* Donald G. McNeil Jr., *Pocketing the Wages of War*, *N.Y. TIMES*, Feb. 16, 1997, § 4, at 45.

the decolonization of the 1950s and 1960s were the backers of mercenaries operating in Africa.<sup>68</sup> The most damning link for mercenarism was the link with Apartheid. From this and similar uses, mercenaries became synonymous with the suppression of self-determination movements and international opinion quickly turned against what had been the long-accepted practice of private actors in warfare.<sup>69</sup>

This is not to say mercenaries were without their meritorious service in Africa. In 1994, Executive Outcomes was hired by the Angolan government to prevent its overthrow by the rebel National Union for the Total Independence of Angola (“UNITA”).<sup>70</sup> Executive Outcomes decimated UNITA, allowing Angola’s government to remain in control and consolidate its power. In 1995, Executive Outcomes did much the same for Sierra Leone when it dislodged the Revolutionary United Front from the diamond fields and forced them to negotiate a peace settlement with the government.<sup>71</sup> Nevertheless, due in large part to the cruel behavior of mercenaries in the decolonization conflicts, many countries moved to restrict and/or prohibit mercenarism.<sup>72</sup> Chief among these efforts are the Protocol Additional to the Geneva Convention Relating to the Protection of Victims of International Armed Conflicts (“Protocol I”) and the International Convention Against the Recruitment, Use, Financing and Training of Mercenaries (“Convention Against Mercenaries”).<sup>73</sup> Each of these is discussed in Part III of this Article.

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68. See SINGER, *supra* note 10, at 37.

69. See, e.g., The Secretary General, *Report on the Question of the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of People to Self-Determination, delivered to the Commission on Human Rights and the General Assembly*, U.N. Doc. A/49/362 (Sept. 6, 1994).

70. See Thomas K. Adams, *The New Mercenaries and the Privatization of Conflict*, 24 PARAMETERS 109 (1999).

71. See *id.*

72. See William C. Peters, *On Law, Wars and Mercenaries: The Case for Courts-Martial Jurisdiction over Civilian Contractor Misconduct in Iraq*, 2006 B.Y.U. L. REV. 367, 412–13 (2006).

73. See, e.g., The District General, *United Nations International Convention Against the Recruitment, Use, Financing and Training of Mercenaries*, U.N. Doc. A/RES/44/34 (Dec. 4, 1989) [hereinafter *Convention Against Mercenaries*]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3. [hereinafter *Protocol I*].

E. *Rise of Contemporary Mercenaries and Private Military Firms*

By the nineteenth century, strong national armies had diminished the need and the opportunity for mercenaries,<sup>74</sup> but the diminishing interest of the superpowers in the security of weaker states created an opportunity for unemployed soldiers to once again band together and fill the unmet need of countries unable to provide effectively for their own security.<sup>75</sup> It was not until the events of September 11, 2001, however, that mercenarism experienced its Renaissance.<sup>76</sup> Shortly after September 11, President George W. Bush signed a presidential finding that authorized the Central Intelligence Agency (“CIA”) to kill Osama bin Laden and his cohorts.<sup>77</sup>

Finding itself short on paramilitary operators, the CIA hired private contractors for initial combat operations in Afghanistan.<sup>78</sup> During the initial stages of the campaign, over half of the 100 CIA paramilitary operators in Afghanistan were contractors.<sup>79</sup> The CIA also contracted security services from PMFs like Blackwater.<sup>80</sup> The majority of Blackwater’s security operations occurred at the Kabul Airport and the Ariana Hotel, but a small detachment was stationed at “Fort Apache,” the firebase from which “Task Force 11” operated.<sup>81</sup>

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

74. Milliard, *supra* note 20, at 10.

75. See Tina Garmon, *Domesticating International Corporate Responsibility: Holding Private Military Firms Accountable Under the Alien Tort Claims Act*, 11 TUL. J. INT’L & COMP. L. 325, 326–27 (2003).

76. See Eugene B. Smith, *The New Condottieri and U.S. Policy: The Privatization of Conflict and Its Implications*, 32 PARAMETERS 104, 107–08 (2002).

77. PELTON, *supra* note 36, at 30.

78. *Id.* at 30–31.

79. *Id.* at 32 (the other half were CIA employees or Special Forces operators on loan to the CIA).

80. *Id.* at 31, 37.

81. *Id.* at 38–39 (“Task Force 11” is the special forces unit tasked to operate in the Afghanistan-Pakistan border region and neutralize Osama bin Laden).

Burma, Philippines, Indonesia); and, the Americas (Columbia, Haiti, Mexico, United States).<sup>82</sup> In Iraq there are over 155,000 civilian contractors;<sup>83</sup> up to 30,000 of them provide protective security functions,<sup>84</sup> making private contractors collectively the second-largest armed component in Iraq.<sup>85</sup> The most recent accounts suggest that the number of civilian contractors in Iraq actually outnumbers the U.S. troop presence.<sup>86</sup>

Absorbing the surplus of highly trained, professional soldiers, PMFs are largely staffed by veterans of First World armies.<sup>87</sup> Collectively, the PMFs offer a full range of military services.<sup>88</sup> In fact, Blackwater has the capability of fielding a 1700-man brigade of private soldiers with its own cadre of helicopters and cargo planes.<sup>89</sup> Clients can also hire private gunships, intelligence gathering, aerial surveillance, armored cars, remote-controlled blimps and fast-attack aircraft.<sup>90</sup>

That said, the United Kingdom's Foreign and Commonwealth Office reported in *Private Military Companies: Options for Regulation* that few PMFs are actually capable or willing to provide private military forces for actual combat operations.<sup>91</sup> Still, many legal commentators insist on branding PMF contractors as mercenaries.<sup>92</sup> As we will see, "mercenary" is a term of art that can seldom be applied to most actual mercenaries and even fewer PMF contractors.

82. SINGER, *supra* note 10, at 8–17; see also Jon D. Michaels, *Beyond Accountability: The Constitutional, Democratic, and Strategic Problems with Privatizing War*, 82 WASH. U. L.Q. 1001, 1024–37 (2004).

83. David Ivanovich, *Contractor Deaths Up 17 Percent Across Iraq in 2007*, HOUS. CHRON., Feb. 10, 2008, at A1.

84. Mathew Quirk, *Private Military Contractors*, ATL. MONTHLY, Sep. 2004, at 39, available at <http://www.theatlantic.com/doc/200409/quirk>.

85. J.T. Mlinarcik, *Private Military Contractors & Justice: A Look at the Industry, Blackwater & the Fallujah Incident*, 4 REGENT J. INT'L L. 129, 133 (2006).

86. See generally Gensheimer, *supra* note 13.

87. See UNITED KINGDOM FOREIGN & COMMONWEALTH OFFICE, *PRIVATE MILITARY COMPANIES: OPTIONS FOR REGULATION, 2001-2002*, H.C. 577, at ¶ 25, available at <http://www.fco.gov.uk/resources/en/pdf/consultations-mercenaries> [hereinafter U.K. GREEN PAPER].

88. Milliard, *supra* note 20, at 11.

89. PELTON, *supra* note 36, at 4.

90. *Id.*

91. U.K. GREEN PAPER, *supra* note 87, ¶ 24.

92. Salzman, *supra* note 15, at 876–79.

II. *INTERNATIONAL LAW: BINDING OR NOT?  
THAT IS THE QUESTION!*

The negative historical connotations of mercenary use in post-colonial Africa resulted in a push for criminalizing mercenarism.<sup>93</sup> Resulting international provisions, however, fail to adequately define mercenaries and remain ineffective in establishing a regulatory scheme that could be applied plausibly to mercenaries, let alone modern PMFs.<sup>94</sup> Before we can reach that discussion, however, it behooves us to *briefly* explore how and whether international law becomes binding. The sources of international law are: (1) treaties, (2) customary international law, (3) *jus cogens* principles (“peremptory norms”) recognized by civilized nations, and (4) judicial decisions of the International Court of Justice.<sup>95</sup> For purposes of this Article, only treaties and customary international law are discussed in detail.

A. *Treaties*

Treaties are definitive sources of international law.<sup>96</sup> Binding treaties are those between states that are memorialized in writing, intend to convey legal obligations or create reliance, and are subject to governance under international law.<sup>97</sup> There is no legal distinction between the various written instruments—treaties, conventions, and protocols all carry the same weight.<sup>98</sup> While treaties are generally regarded as binding upon only those states party to them, a treaty can nevertheless bind non-party states insofar as it is declaratory of customary international law.<sup>99</sup>

Some commentators differentiate treaties codifying customary international law from those promulgating innovations.<sup>100</sup> There is an attempt to explain whether new treaties are likely to

93. See E.L. Gaston, *Mercenarism 2.0? The Rise of the Modern Private Security Industry and Its Implications for International Humanitarian Law Enforcement*, 49 HARV. INT’L. L.J. 221, 230–31 (2008).

94. DUPUY, *supra* note 26, at 335.

95. Statute of the International Court of Justice, art. 38, ch. 2, June 26, 1945, 59 Stat. 1031, 33 U.N.T.S. 993.

96. DAVID J. BEDERMAN, *INTERNATIONAL LAW FRAMEWORKS* 26 (2d ed. 2006).

97. See *generally* Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

98. See BEDERMAN, *supra* note 96, at 26.

99. See DAVID J. BEDERMAN, *THE SPIRIT OF INTERNATIONAL LAW* 42-45 (2002).

100. BEDERMAN, *supra* note 96, at 27.

garner sufficient international support.<sup>101</sup> Near unanimity can be indicative of customary international law, a high number of accessions alone is not dispositive when state practice is contrary to a treaty.<sup>102</sup> Even treaties with few accessions and non-binding resolutions serve more than a rhetorical purpose—they often signal the opening stages of a drive toward *creating* customary international law.<sup>103</sup>

### B. Customary International Law

Custom is evidence of a general practice among states that is accepted as law. The formation of customary international law rests on two key elements: states following the norm in general practice (*usus*) and doing so under a sense of obligation of law (*opinio juris sive necessitatis*).<sup>104</sup> General practice is considered to be a “source of signal strength” for custom.<sup>105</sup>

The “general practice” element involves an objective inquiry: do international actors follow the rule consistently?<sup>106</sup> In showing general practice, what states *do* is far more important than what states *say*. Still, practitioners rely on correspondence, publications and media accounts to demonstrate past practice.<sup>107</sup> The “sense of obligation” element is a subjective inquiry of whether past observation comes from a sense of legal duty or merely because they were politically expedient.<sup>108</sup> Those actions undertaken for expedience are not considered performed under a sense of obligation.

There is no temporal requirement for lengthy observation before a rule can become binding custom.<sup>109</sup> Popular practices can enjoy immediate recognition.<sup>110</sup> It is the consistent and uni-

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101. *Id.*

102. Jean-Marie Henckaerts, *Study on Customary International Humanitarian Law*, 857 INT'L REV. RED CROSS 175, 183 (2005).

103. BEDERMAN, *supra* note 96, at 28; *see also* Beatrice Jarka, 30 Years from the Adoption of Additional Protocols I and II to the Geneva Convention, at 1–2, 4–5 (unpublished dissertation, Universitatea Nicolae Titulescu), <http://lexetscientia.univnt.ro/ufiles/3.%20Romania.pdf> (admitting that Protocol I inserted innovations in an attempt to change then-existing laws of war on mercenarism).

104. BEDERMAN, *supra* note 96, at 16; Henckaerts, *supra*, note 102 at 178.

105. BEDERMAN, *supra* note 96, at 16.

106. *Id.* at 16–17.

107. *Id.* at 17.

108. *See id.*

109. *Id.* at 19.

110. *Id.*

form observance by most (if not all) of the international community that confirms a rule as a "general practice."<sup>111</sup> An important note is the presumption in customary international law that *silence* equates to acceptance.<sup>112</sup> If a state truly disagrees with a practice, it is incumbent upon it to protest loudly and often.<sup>113</sup> Otherwise, *new* practices become the rule, rather than the exception.

### III. EVOLVING INTERNATIONAL LAW ON MERCENARIES

In addition to discussing the two most popularly cited instruments—Protocol I and the Convention Against Mercenaries—this Part begins with a discussion of the Hague Conventions and the Geneva Conventions, then moves through numerous U.N. Resolutions.<sup>114</sup>

#### A. The Hague Conventions

The Hague Conventions represent the first attempt to codify customary international law on the use of mercenaries.<sup>115</sup> The Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land ("Hague V") sought to clarify the rights and duties of neutral states toward belligerent states during war by regulating mercenary recruitment.<sup>116</sup> Its drafters distinguished between active recruitment of mercenaries *by a state* within its own territory and "the acts of individual citizens leaving to join a [mercenary] force of their own accord."<sup>117</sup> Specifically, Article 4 precludes a neutral state from opening recruitment centers within its borders and raising armies for the benefit of a party to an armed conflict.<sup>118</sup> On the other hand, Article 6 expressly communicates that a state is *not required* to prevent its citizens nor foreign nationals from cross-

111. *Id.*

112. *Id.* at 22.

113. *See id.* at 23–24.

114. *See generally* Protocol I, *supra* note 73; Convention Against Mercenaries, *supra* note 73.

115. *See* H.C. Burmester, *The Recruitment and Use of Mercenaries in Armed Conflicts*, 72 AM. J. INT'L L. 37, 42 (1978).

116. *See id.*; *see also* Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, Oct. 18, 1907, 36 Stat. 2310, T.S. No. 540 [hereinafter Hague V].

117. Burmester, *supra* note 115, at 41.

118. *See* Hague V, *supra* note 116, art. 4.



ing its frontier to join the ranks of a belligerent's army.<sup>119</sup>

While a neutral state is required to refrain from domestic recruitment or staging of mercenaries, Hague V does not outlaw mercenarism.<sup>120</sup> Thus, a nation's own citizens can freely choose to become mercenaries. Furthermore, foreign nationals are free to transit through a neutral country en route to serve as a mercenary for a belligerent.

The Hague Convention does not apply to PMFs because they are private corporations, not the state actors at whom Hague V is aimed.<sup>121</sup> If one were to postulate that PMF contractors are the functional equivalent of mercenaries, the Hague Convention places no burden on the individual and, frankly, no burden on neutral states to prevent their citizens or those of foreign countries from entering the fray. The only thing Hague V would preclude is the establishment of a wholly-owned PMF corporation by a nation's government.

### B. *The Geneva Conventions*

The Geneva Convention Relative to the Treatment of Prisoners of War ("Geneva III") is applicable whenever parties conduct themselves as belligerents—a declaration of war is not necessary.<sup>122</sup> Geneva III establishes, *inter alia*, the protections due to prisoners of war ("POWs"), setting out six qualifying classes in Article 4A: (1) members of an armed force; (2) members of a militia or similar volunteers, provided they operate under a designated leader, wear a fixed, distinct emblem recognizable from a distance, openly carry arms and conduct military operations within the laws of war; (3) members of an armed force of a government not recognized by one of the parties; (4) civilian staff providing logistical support to an armed force; (5) civil air crews of a state who is party to the conflict; and (6) civilians who partake in a spontaneous uprising to repel an invading force.<sup>123</sup>

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119. *See id.* art. 6.

120. Jackson Maogoto and Benedict Sheehy, *Contemporary Private Military Firms Under International Law: An Unregulated 'Gold Rush'*, 26 ADEL. L. REV. 245, 263–64 (2005).

121. *See id.* at 254; *see also* P.W. Singer, *War Profits and the Vacuum of Law: Privatized Military Firms and International Law*, 42 COLUM. J. TRANSNAT'L L. 521, 531 (2004).

122. Geneva Convention (III) Relative to the Treatment of Prisoners of War, art. 2, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva III].

123. *Id.* art. 4A.

Combatant immunity from reprisal<sup>124</sup> and prosecution for acts not violative of international law (read: engaging in hostilities)<sup>125</sup> hinge upon membership in one of these classes. A full survey of specific POW protections is beyond the scope of this Article, but they can be found in Articles 12 to 121 of Geneva III.

### 1. Acknowledging the Link Between Geneva III and Protocol I

Informed readers know that Protocol I (1977) compliments Geneva III (1949) and that the Convention cannot be read without the Protocol.<sup>126</sup> Though the United States has never become a participating state in Protocol I, it bears significantly on international law and a substantive discussion of international law on mercenarism would be incomplete without its inclusion. The approach of this article is to move through the numerous international instruments in chronological order, which necessarily postpones a substantive discussion of Protocol I.

### 2. Application of Geneva III

Nowhere in Geneva III are mercenaries mentioned. While there has been much scholarly debate as to whether or not the drafters intended to consider mercenary status, most agree that Geneva III's drafters made no adjustments for mercenaries.<sup>127</sup> Mercenaries were regularly incorporated into the military during the period immediately preceding the enactment of the Geneva Conventions.<sup>128</sup> The debate on protected status aside, the collective Geneva Conventions in no way criminalize or marginalize mercenarism.<sup>129</sup>

124. *Id.* art. 13.

125. *Id.* art. 19.

126. Protocol I is an amendment to the Geneva Conventions.

127. See Milliard, *supra* note 20, at 21–22 nn.116–22 (tracing the scholastic debate and general consensus that no perceptible change was made).

128. Before the United States formally entered World War II, U.S. citizen-mercenaries were incorporated into the war effort. The "Flying Tigers" was a group of American fighter pilots operating under the CAMCO Corporation who "shot down Japanese planes and targeted infrastructure for three times what regular aviators made, plus a bonus for every downed plane." PELTON, *supra* note 36, at 3.

129. See Geneva Convention (I) on Armed Forces in the Field, arts. 49–50, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, arts. 50–51, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva III, arts. 129–30; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, arts. 146–47, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva IV].

The question that immediately comes to mind is whether or not PMF contractors are affiliated with the military sufficiently to qualify for POW protections and combatant immunities. An argument that can be made for extending these protections is that individual contractors of a PMF are a sort of militia or partisan, as described in Article 4A of Geneva III.<sup>130</sup>

Lindsey Cameron of the University of Geneva's Faculty of Law argues application of protection to PMF contractors vis-à-vis Article 4A(2) runs contrary to the intended purpose of the provisions.<sup>131</sup> "The historical purpose," Cameron writes, was to allow continued partisan fighting by "remnants of a defeated force or groups seeking to liberate an occupied territory."<sup>132</sup> This is likely correct. The Commentary to Geneva III makes a single but striking reference supporting Cameron's assertion: the term "partisan," "preclude[s] any abusive interpretation which might have led to the formation of armed bands such as the 'Great Companies' of baneful memory."<sup>133</sup> That is, the "[m]ercenaries who devastated France in the 14th century, during the peaceful periods of the Hundred Years War."<sup>134</sup>

Begrudgingly, Professor Cameron concedes there is "a very limited basis" for some PMF contractors in Iraq to classify as lawful combatants under international humanitarian law.<sup>135</sup> Not going out of the way to specify what that basis might be, Cameron cautions that denying protections to contractors could create a disincentive to continued observance of humanitarian law by PMFs, and, as a matter of public policy, it might be best to extend the protection(s) to contractors.<sup>136</sup> If PMF contractors cannot be established as combatants under the Geneva context, they likely stand exposed as civilians engaged in hostilities. The Geneva Conventions are clear that a civilian loses his or her protected status when they commit, *inter alia*, espionage, sabotage, or homicide against the personnel or equipment of the en-

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130. Geneva III, art. 4A.

131. See Lindsey Cameron, *Private Military Companies and Their Status Under International Humanitarian Law*, 863 INT'L REV. RED CROSS 573, 586 (2006).

132. *Id.*

133. Int'l Comm. of the Red Cross, *Commentary on Geneva Convention (III) Relative to the Treatment of Prisoners of War*, 63 (1960), available at <http://www.icrc.org/IHL.nsf/WebList?ReadForm&id=375&t=com>.

134. *Id.* at 63 n.42.

135. Cameron, *supra* note 131, at 586.

136. *Id.* at 586.

emy.<sup>137</sup>

The legal fate of individual contractors turns entirely on what is meant by “direct participation” in hostilities.<sup>138</sup> Because of inconsistent practice among states, the question must be taken up case-by-case.<sup>139</sup> This has prompted the International Committee of the Red Cross to clarify the notion of “direct participation” by commissioning expert meetings which began in 2003.<sup>140</sup> Five years later, the world is still waiting for answers.<sup>141</sup> In the meantime one might look to Article 51 of the Charter of the United Nations (“U.N. Charter”) for guidance, which permits individual and collective self-defense in response to an armed attack.<sup>142</sup> Analogizing PMFs as agents of the government on official duty—as was the Blackwater group with the U.S. Agency for International Development protectee at Nusoor Square—it is plausible that the principle of self defense and defense of third parties would come into play should a prosecution be attempted in light of the Geneva Conventions.<sup>143</sup>

### C. *Non-Binding Resolutions of the United Nations*

As the Geneva Conventions were being drafted, the U.N. Charter was enacted, recognizing the sovereignty of Member States<sup>144</sup> and establishing a collective method of addressing threats to international peace and security.<sup>145</sup> This included the requirement that Member States “refrain from the threat or use

137. See Geneva IV, *supra* note 129, art. 68.

138. Henckaerts, *supra* note 102, at 190.

139. *Id.*

140. See, e.g., Int’l Comm. of the Red Cross, *Report on the Direct Participation in Hostilities under International Humanitarian Law* (Sept. 20, 2003), [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205/\\$File/Direct%20participation%20in%20hostilities-Sept%202003.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205/$File/Direct%20participation%20in%20hostilities-Sept%202003.pdf).

141. Convened in 2003 by the International Committee of the Red Cross, the Working Group on the Direct Participation of Civilians in Hostilities will produce, “after a final meeting in Geneva,” a publication of interpretative guidelines. Chatham House, *Civilians at War: Deconstructing the 21st Century Battlefield 1* (2007), [http://www.chathamhouse.org.uk/files/10161\\_il011107.pdf](http://www.chathamhouse.org.uk/files/10161_il011107.pdf).

142. U.N. Charter, art. 51.

143. A prosecution is arguably permissible, by analogy, against a “civilian” with the occupying force who takes up hostilities as an unlawful combatant. See Geneva IV, art. 68 (allowing prosecution of protected persons who take up hostilities against an occupying force); see also Protocol I, *supra* note 73, art. 51 (explaining that civilians lose their protections when they take up hostilities).

144. U.N. Charter art. 1, ¶ 1.

145. *Id.* art. 2, ¶ 1.

of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the [p]urposes of the United Nations.”<sup>146</sup>

Commentators refer to either “aggression” or “intervention” when referring to states’ “threat or use of force.” “Aggression” is common parlance while “intervention” is reserved for discussions on the use of force in relation to the principles of neutrality law under the Hague Conventions.<sup>147</sup> Whatever the lexicon, the U.N. Charter significantly limits resort to force<sup>148</sup> making limited exceptions for self-defense in the face of an armed attack<sup>149</sup> and collective use of military force authorized by the U.N. Security Council.<sup>150</sup> Several “non-binding” U.N. resolutions issued between the Charter’s entry into force and the adoption of the Convention Against Mercenaries purportedly place additional restrictions on state authority to use force, including the use of mercenaries.<sup>151</sup>

### 1. Resolution 2131

In 1965 the U.N. General Assembly unanimously adopted the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty (“Resolution 2131”).<sup>152</sup> Resolution 2131 bars, for any reason, direct or indirect intervention by one state into the internal or external affairs of another state.<sup>153</sup> In language particularly germane to this Article, states were also admonished not to “organize, assist, foment, finance, incite or tol-

146. *Id.* art. 2, ¶ 4.

147. Milliard, *supra* note 20, at 23.

148. *See* U.N. Charter art. 2, ¶ 4.

149. *Id.* art. 51.

150. *Id.* arts. 39, 42.

151. Millard, *supra* note 20, at 23 (“Several non-binding UN resolutions issued since 1965, however, may place additional restrictions on states’ authority to use force, to include states’ use of mercenaries.”); Françoise Hampson, *Mercenaries: Diagnosis Before Prescription*, 3 NETH. Y.B. INT’L L. 1, 20 (1991) (“General Assembly resolutions, [while] not binding as such in [the area of resort to armed force], may nevertheless represent an encapsulation of customary international law. This is particularly likely to be the case where they are adopted by large majorities, especially if the majority includes the Security Council veto powers.”).

152. *See generally* Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, G.A. Res. 2131, U.N. GAOR, 20th Sess., Supp. No. 14, at 11, U.N. Doc. A/6014 (Dec. 21, 1965) [hereinafter Resolution 2131].

153. *Id.* ¶ 1.

erate subversive, terrorist or armed activities *directed towards the violent overthrow of . . . another State* or interfere in civil strife in another State.”<sup>154</sup>

While Resolution 2131 does not expressly reference mercenaries, an argument can be made that its exhortation to not “tolerate” any “armed activity” prohibits state recruiting, organizing, financing or sending mercenaries to intervene in another state’s affairs.<sup>155</sup> This conceivably includes prevention of a nation’s own citizens from privately undertaking mercenary preparations. Though enjoying broad support, Resolution 2131 is unlikely to stand for the proposition that mercenarism is a prohibited activity. Beyond its failure to specifically mention mercenaries, “no subsequent UN declaration and few scholars have cited the resolution as authority for this proposition.”<sup>156</sup> Rather, Resolution 2131 restricts state behavior toward other states without regard to *whom* the state intended to use for the interference.<sup>157</sup> Resolution 2131 appears entirely inapplicable to PMFs because they are not state actors. It is only state recruitment for the purposes of unjustly intervening in another state’s affairs that is proscribed. As private corporations, Resolution 2131 simply does not reach PMFs.

## 2. Resolution 2465

Three years after Resolution 2131 was adopted, the Declaration on the Granting of Independence to Colonial Countries and Peoples (“Resolution 2465”),<sup>158</sup> was adopted by the General Assembly with a bare majority—fifty-three yeas, eight nays and forty-three abstentions.<sup>159</sup> Regarding mercenarism, the resolution attempted to make the use of mercenaries “against movements for national liberation and independence” a criminal act, brand mercenaries themselves as “outlaws” and compel Member States to enact domestic legislation to prevent their citizens from serving as mercenaries and punish “the recruitment, financing

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154. *Id.* ¶ 2 (emphasis added).

155. Milliard, *supra* note 20, at 24.

156. *Id.*

157. See Resolution 2131, *supra* note 153, ¶¶ 1, 2.

158. Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 2465, U.N. GAOR, 23d Sess., Supp. No. 18, at 4, U.N. Doc. A/7218 (Dec. 20, 1968) [hereinafter Resolution 2465].

159. Milliard, *supra* note 20, at 24.

and training of mercenaries in their territory.”<sup>160</sup> Having garnered a majority by only two votes, Resolution 2465 cannot be said to represent a widely accepted international principle.<sup>161</sup> This may explain why the same provision called on Member States to enact domestic legislation to make the edict enforceable.<sup>162</sup>

By this language mercenarism was pronounced, under limited circumstances, to be a crime. This did not reflect then-existing international law on mercenarism.<sup>163</sup> Rather, it was an attempt by some Member States to put their aspiration against mercenarism into motion.<sup>164</sup> Even in the most generous reading, Resolution 2465 limits itself by applying only to mercenary activity aimed at suppressing “national liberation and independence” movements.<sup>165</sup> Such language makes Resolution 2465 largely irrelevant outside of the post-colonial context.<sup>166</sup> If contemporary PMFs could be pigeon-holed into the mercenary label, Resolution 2465 would conceivably apply only in anti-liberation contexts. Thus the PMF use by the post-colonial governments of Angola and Sierra Leone in the 1990s was entirely outside of the scope of Resolution 2465, whether the participants were mercenaries or mere contractors.

### 3. Resolution 2625

The General Assembly issued the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations (“Resolution 2625”), in 1970.<sup>167</sup> This measure differs from the previous resolutions in two material respects.

160. Resolution 2465, *supra* note 159, ¶ 8.

161. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 103 (1987) (noting resolutions evidence customary international law only when adopted by large majorities).

162. See Resolution 2465, *supra* note 158, ¶ 8.

163. See Milliard, *supra* note 20, at 26.

164. *Id.* (citing Hersch Lauterpacht, *Codification and Development of International Law*, 49 AM. J. INT’L L. 16, 35 (1955) (distinguishing an aspirational principle from an emerging rule of customary international law)).

165. Resolution 2465, *supra* note 158, ¶ 8.

166. Milliard, *supra* note 20, at 27.

167. Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028 (Oct. 24, 1970) [hereinafter Resolution 2625].

First, it does not limit itself to national independence movements. Second, it softens the language from earlier resolutions by not condemning state toleration of mercenarism when it speaks only of a *state's* "duty to refrain from organizing or encouraging . . . mercenaries, for incursion into the territory of another State."<sup>168</sup>

With Resolution 2625, the pendulum swung against *state-sponsored* organization or encouragement of mercenarism, regardless of the context. Toleration by the state, however, is not proscribed by the terms of Resolution 2625. Like those before it, Resolution 2625 is aimed squarely at the state as a consumer of mercenary services. The restriction is inconsequential—it prohibits only state organization and incitement of mercenarism. In this regard it is like Hague V which proscribed only official sponsorship and recruitment. Consistent with the principles of neutrality embodied in Hague V, Resolution 2625 "stands out because of its consistency with international law and its lack of political overtones, two characteristics that may explain the resolution's unanimous approval and its explicit incorporation into customary international law by a subsequent decision of the International Court of Justice."<sup>169</sup> Resolution 2625 does not purport to prevent private corporations from recruiting, training and conveying individuals for intervention in the territories of a sovereign state. This is all the more true when PMFs provide security services for non-state clients.

#### 4. Resolution 3103

With the Declaration on Basic Principles of the Legal Status of the Combatants Struggling Against Colonial and Alien Domination and Racist Regimes ("Resolution 3103"),<sup>170</sup> the General Assembly again took up mercenarism in the context of post-colonialism. Returning to the political rhetoric of earlier resolutions, it reads: "The use of mercenaries by colonial and racist régimes against the national liberation movements struggling for

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168. *Id.* at 123.

169. Milliard, *supra* note 20, at 27 (referring to the case *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27)).

170. Declaration on Basic Principles of the Legal Status of the Combatants Struggling Against Colonial and Alien Domination and Racist Regimes, G.A. Res. 3103, U.N. GAOR, 28th Sess., Supp. No. 30, at 142, U.N. Doc. A/9030 (Dec. 12, 1973) [hereinafter Resolution 3103].



their freedom and independence from the yoke of colonialism and alien domination is considered to be a criminal act and the mercenaries should accordingly be punished as criminals.”<sup>171</sup>

Like its predecessors, Resolution 3103 speaks to the criminality of *being* a mercenary, except it uses “should be punished as criminals,” as compared to describing mercenaries as “out-laws.”<sup>172</sup> Resolution 3103 has been described as a “novel and unsupported declaration” that in no way criminalizes state use of mercenaries.<sup>173</sup> This is true because a non-binding resolution cannot “amount to customary international law unless approved by wide majorities and *affirmed by subsequent state practice*.”<sup>174</sup> The trend toward regulation is manifest in the broader affirmation of Resolution 3103 (eighty-three yeas, thirteen nays and forty-three abstentions) as compared to Resolution 2465 (fifty-three yeas, eight nays and forty-three abstentions).<sup>175</sup> State practice, however, continued to go against the grain of Resolution 3103.<sup>176</sup>

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

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171. *Id.* art. 5.

172. Compare Resolution 3103, *supra* note 171, ¶ 5, with Resolution 2465, *supra* note 159, ¶ 8.

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

174. Milliard, *supra* note 20, at 30 (citing Wil D. Verwey, *The International Hostages Convention and National Liberation Movements*, 75 AM. J. INT’L L. 69, 81 (1981) (“[D]oubt seems to prevail as to whether the claim formulated in [Resolution 3103] has in the meantime developed into a rule of customary law.”) (emphasis added)).

175. *Id.* at 28.

176. Joseph Wheatley, *The Wages of War: Toward a Legal and Legitimate Role for Private Military Companies in Africa*, 1 J. INT’L L. & POL’Y (2004), available at [http://www.law.upenn.edu/groups/jilp/1-1\\_Wheatley\\_Joseph.pdf](http://www.law.upenn.edu/groups/jilp/1-1_Wheatley_Joseph.pdf) (citing Kevin A. O’Brien, *Private Military Companies and African Security: 1990–98*, in MERCENARIES: AN AFRICAN SECURITY DILEMMA 46–48, 62–63 (Abdel-Fatau Musah & J. Kayode Fayemi eds., 2000)). Since the 1960s, numerous African nations hired mercenaries with some regularity in spite of their professed disdain. See *id.*

## 5. Resolution 3314

An important resolution that enjoyed wide support was the Definition of Aggression (“Resolution 3314”).<sup>177</sup> Resolution 3314 describes “aggression” as the “use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.”<sup>178</sup> The unjust use of force can occur via a state’s armed forces or by utilizing “mercenaries, which carry out acts of armed force against another State” or substantially aid a state in the aggression.<sup>179</sup>

With Resolution 3314’s adoption by consensus in 1974, it is apparent that Member States accepted it as customary international law.<sup>180</sup> By its terms, then, Resolution 3314 identifies *all* state use of mercenaries to affect unjust “force . . . against the territorial integrity or political independence of another State” as an act of aggression, in violation of Article 2(4) of the U.N. Charter.<sup>181</sup> The context of the state’s action is not a relevant criterion (read: not limited to post-colonial struggles). The affected parties of this resolution are not mercenaries or PMFs. Rather it is the state that commits an unjust aggression by any of the condemned means. The fate of the individual warriors was not addressed by the Resolution.

## 6. An Emerging Trend

When one surveys the aforementioned resolutions, a trend toward restricting mercenarism is apparent and evidences an emerging concept of customary international law.<sup>182</sup> These restrictions, however, apply to the organization, encouragement, or conveyance of mercenaries *by* states.<sup>183</sup> Despite this restriction, states are not precluded from *tolerating* mercenary activities that lead to a use of armed force in other states.<sup>184</sup>

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177. Definition of Aggression, G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 31, U.N. Doc. A/9631 (Dec. 14, 1974) [hereinafter Resolution 3314].

178. *Id.* ¶ 1.

179. *Id.* ¶¶ 3(f), (g).

180. Milliard, *supra* note 20, at 30.

181. Resolution 3314, *supra* note 177, art. 1.

182. Milliard, *supra* note 20, at 30.

183. *See id.* at 31.

184. *See id.*

### D. Protocol I to the Geneva Conventions

Protocol I builds on Geneva III by proffering a definitive statement on mercenaries.<sup>185</sup> Accompanying the definition is a provision discouraging mercenary activity but not one prohibiting it—the result of political compromise.<sup>186</sup> The Working Group that drafted Article 47 carried the sentiment that mercenaries should not enjoy the “fundamental guarantees” of Article 75 of the Protocol.<sup>187</sup> Ironically, one of the only representatives putting forth a defense of the historic and contemporary use of mercenaries and demanding the allowance of the fundamental guarantees was the Vatican.<sup>188</sup>

Though ratified by approximately eighty-five percent of the Member States of the U.N., Protocol I’s efficacy is limited because the states most active in international armed conflicts, particularly the United States, are not party to it.<sup>189</sup> Of course, provisions of a convention can nevertheless be applicable against a non-party state when those rules represent customary international law,<sup>190</sup> but this necessitates consistent state practice—something the champions of Article 47 fail to observe.<sup>191</sup>

While Protocol I is widely accepted as a codification of customary international law, the categorization of mercenaries as unlawful combatants in Article 47 is *not*.<sup>192</sup> The strictures of Article 47 are so contentious that universal acceptance is unlikely, and it risks becoming virtually irrelevant to armed conflicts in-

185. Protocol I, *supra* note 73, art. 47.

186. See Milliard, *supra* note 20, at 31 (citing 15 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS, GENEVA (1974-77) 189-202, 481 (CDDH/III/GT/82, May 13, 1976) [hereinafter OFFICIAL RECORDS]).

187. *Id.* at 32-33.

188. See *id.* at 33 (citing 6 OFFICIAL RECORDS ¶ 87 (CDDH/SR.41, May 26, 1977)) (arguing that Article 75’s Fundamental Guarantees should be extended to mercenaries, “whatever their faults and their moral desituation.”).

189. Henckaerts, *supra* note 102, at 177.

190. See *id.*; see also Shawn McCormack, *Private Security Contractors in Iraq Violate Laws of War*, 31 SUFFOLK TRANSNAT’L L. REV. 75, 93-94 (2007). The International Court of Justice takes great stock in the near-universal ratification of instruments like the United Nations Charter. See *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 99-100 (June 27). But see Henckaerts, *supra* note 102, at 183 (wide popularity is not in and of itself dispositive).

191. See *supra* note 176 and accompanying text.

192. See Henckaerts, *supra* note 102, at 187; see also Jarka, *supra* note 103, at 1-2, 4-5.

volving one or more non-contracting parties.<sup>193</sup> Continued disregard of Article 47 will lead even contracting states to disregard them.<sup>194</sup>

### 1. What Article 47 Purports to Do

The Working Group discussions leading to Article 47 focused heavily on the use of mercenaries in Africa since 1960 and their effect upon post-colonial struggles for self-determination.<sup>195</sup> Looking not much further than this brief decolonization period, the Diplomatic Conference ignored more than three millennia of mercenary use and codified the utility of mercenarism within internal conflicts and liberation movements.<sup>196</sup> Article 47 proposes to redress *two decades* of past grievances by breaking with *3000 years* of history by stripping combatant immunities and prisoner of war protections from mercenaries.<sup>197</sup> Article 47 goes on to define a mercenary as any person who:

- (a) is specially recruited locally or abroad in order to fight in an armed conflict;
- (b) does, in fact, take a direct part in hostilities;
- (c) is motivated to take part in hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
- (d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
- (e) is not a member of the armed forces of a Party to the conflict; and
- (f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.<sup>198</sup>

Article 47 undoubtedly condemns mercenary activities and seeks

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193. See Yoram Dinstein, *Comments on Protocol I*, 320 INT'L REV. RED CROSS 515 (1997).

194. *Cf. id.* (discussing disregard of Protocol I, in general).

195. Milliard, *supra* note 20, at 33.

196. See Protocol I, *supra* note 73, arts. 1(3), 1(4).

197. *Id.* art. 47(1).

198. *Id.* art. 47(2).

to remove the protections otherwise afforded to them.<sup>199</sup> This is a significant departure from customary international law which traditionally gives “mercenaries the same status as the members of the belligerent force for which they are fighting.”<sup>200</sup> Professor Cameron justifies the diminishment of rights solely on what she describes as “the shameful character of mercenary activity.”<sup>201</sup>

What Article 47 *did not* do is criminalize mercenarism. Statements made during and after the Working Group make it clear that Article 47 falls well short of that mark.<sup>202</sup> While mercenaries might now face domestic prosecution, “[t]he mere fact of being a mercenary is not . . . a criminal act [under Article 47].”<sup>203</sup> The Soviet Union’s closing statement at the Working Group reinforces this conclusion: “We hope that this article . . . will provide an incentive to Governments to adopt domestic legislation prohibiting . . . the use of mercenaries.”<sup>204</sup>

## 2. The “Legislative History” of Article 47

Proponents of Article 47 argue that “this deprivation of rights represents recent developments in customary international law.”<sup>205</sup> Regional developments—most notably within the Organization for African Unity (“African Union” or “OAU”)—are often cited as evidence.<sup>206</sup> Immediately after the adoption of

199. *See id.* art. 47(1).

200. Burmester, *supra* note 115, at 55.

201. Cameron, *supra* note 131, at 580.

202. *Cf.* Milliard, *supra* note 20, at 41 (regarding statements made after the Working Group) (quoting 6 OFFICIAL RECORDS 159, CDDH/SR.41 (1977) (“The aim of [Article 47] was to *discourage* mercenary activity and prevent irresponsible elements from getting the rights due to a combatant or prisoner of war.”) (statement by the Representative from Indonesia) (emphasis added)).

203. Burmester, *supra* note 115, at 55.

204. Milliard, *supra* note 20, at 41 (quoting 6 OFFICIAL RECORDS 204 CDDH/SR.41 (1977) (statement by the Representative from the Soviet Union)).

205. Milliard, *supra* note 20, at 36 (citing Tahar Boumedra, *International Regulation of the Use of Mercenaries in Armed Conflicts*, 20 REVUE DE DROIT PÉNAL MILITAIRE ET DE DROIT DE LA GUERRE 35, 55–67 (1981)); *see also supra* Part III.C.6 (discussing the emerging trend discernable from U.N. General Assembly Resolutions).

206. *See, e.g.*, Milliard, *supra* note 20, at 36 (referencing the flurry of Conventions and Resolutions within the African Union on the subject of mercenarism). The following were issued in short order by the Organization of African Unity [hereinafter OAU]: Resolution on Mercenaries, OAU Res. 49 (IV), Assembly of Heads of State and Government (Sept. 11-14, 1967); Int’l Comm’n of Inquiry on Mercenaries, Draft Convention on the Prevention and Suppression of Mercenarism, June 1976, *reprinted in* Paul W. Mourning, *Leashing the Dogs of War: Outlawing the Recruitment and Use of Mercenaries*, 22 VA. J. INT’L L. 589, 615 (1982) (Luanda Convention); Organization of African Unity,

Protocol I, Mr. Clark, the Nigerian representative who first proposed Article 47, is reported to have said:

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

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By adopting [Article 47], the Conference had once and for all denied to all mercenaries any such rights [as lawful combatants or prisoners of war]. The new article [thus] represent[s] an important new contribution to humanitarian law.<sup>207</sup>

But many observers dispute the notion that Article 47 is a natural evolution of customary international law,<sup>208</sup> not the least of which includes the United States.<sup>209</sup> The U.S. is not alone in its concern with Article 47; Burmester disputed Mr. Clark's analysis:

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

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Convention for the Elimination of Mercenarism in Africa, (*opened for signature*) July 3, 1977, OAU Doc. CM/817 (XXIX), Annex II (3d rev. 1977) (*entered into force* Apr. 22, 1985).

207. Milliard, *supra* note 20, at 36-37 (quoting 6 OFFICIAL RECORDS 157-58 (CDDH/S.R. 41, May 26, 1977) (statement of the Representative from Nigeria)).

208. *See, e.g.*, Hampson, *supra* note 151, at 9.

209. *See* Michael J. Natheson, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT'L L. & POL'Y 419, 426 (1987).

protections not be accorded to mercenaries, it seems only logical . . . that such protections should not be accorded to *any* private foreign participants.<sup>210</sup>

Echoing this concern, John R. Cotton observed that “if guerillas and other classes of unconventional combatants are to be included in the [Geneva] Convention’s [Article 4] protections through the Protocols, then mercenaries should also be included.”<sup>211</sup>

### 3. What It All Means: Application to Blackwater *et al.*

The definition in Article 47 of Protocol I is unworkable because if any one of its six elements is not met, the definition fails.<sup>212</sup> Perhaps the most unworkable element of the mercenary definition in Article 47 is the showing of an individual mercenary’s motivation.<sup>213</sup> By necessity a prosecutor daring to attempt to show financial gain as the chief motive must include a comparison to the motivations of individuals who join states’ armies, many of whom join “mainly for money and [are] in that sense . . . mercenary[ies] [themselves].”<sup>214</sup> It is unlikely anyone is prepared to argue members of state armies are, in reality, members of a nationalized free company motivated by health insurance benefits. If an individual could actually be shown to meet all six criteria, s/he would be barred from claiming POW protections or combatant immunities.<sup>215</sup> Even so, s/he would enjoy the *fundamental guarantees* of Article 75 of Protocol I.<sup>216</sup>

Modern PMF contractors *do not meet all six elements* of the definition of a mercenary under Protocol I and cannot, therefore, be summarily stripped by Article 47 of combatant immuni-

210. Burmester, *supra* note 115, at 55–56 (internal citations omitted).

211. Milliard, *supra* note 20, at 38 (quoting John R. Cotton, Comment, *The Rights of Mercenaries as Prisoners of War*, 77 MIL. L. REV. 143, 164 (1977)).

212. See Cameron, *supra* note 131, at 578.

213. Protocol I, *supra* note 73, art. 47(2)(c). The subjectivity of Article 47(2)(c) will be extremely difficult to prove. See Burmester, *supra* note 115, at 37–38 (quoting REPORT OF THE COMM. OF PRIVY COUNSELORS APPOINTED TO INQUIRE INTO THE RECRUITMENT OF MERCENARIES, CMND. 6569, ¶ 7 (1976)).

214. Mockler, *supra* note 36, at 16; see also Cameron, *supra* note 131, at 580 (“many soldiers enlist merely to earn a living.”).

215. See Cameron, *supra* note 131, at 579 (quoting Protocol I, *supra* note 73, art. 47(1)).

216. See *id.* (citing Protocol I, *supra* note 73, art. 45 (extending certain protections to unlawful combatants)).

ties and prisoner of war protections.<sup>217</sup> As to the application of Article 47, three specific elements are unlikely to ever be proven.

First, it is doubtful a serious claim can be put forward that modern PMF contractors are recruited to fight in an armed conflict. Rather, they predominately engage in the protection of diplomats, which by its very nature seeks to avoid hostilities and only returns fire long enough to extricate the protectee from the danger zone and then break contact.<sup>218</sup> The likes of Executive Outcomes and Sierra Leone are unlikely ever to be repeated.<sup>219</sup>

Second, the use of force by PMFs to flee from an ambush can hardly be described as direct participation in the war effort. Admittedly, Protocol I considers *any* military hostilities, whether offense or defense, to be “participating in hostilities,”<sup>220</sup> which the International Committee of the Red Cross understands to be acts “likely to cause actual harm to the personnel and equipment of the enemy armed forces.”<sup>221</sup> But direct participation does *not* include everything that is merely helpful to one side over the other.<sup>222</sup> The concept of “direct participation” is a murky one, and its scope remains an open question.<sup>223</sup> It is inconceivable, however, that a working definition would completely preclude self-defense or the defense of third persons.<sup>224</sup>

Finally, Article 47 requires the “mercenary” be a citizen of a state who is not party to the conflict.<sup>225</sup> Most PMF contractors

217. McCormack, *supra* note 190, at 94, 99. A more plausible argument against Geneva protections, discussed below, is that PMF contractors are civilians engaged in hostilities.

218. See, e.g., PHILLIP HOLDER, *THE EXECUTIVE PROTECTION PROFESSIONAL’S MANUAL* 15, 26–27, 43–48, 59–73 (1997) (emphasizing the importance of avoiding conflict, evacuating the protectee from danger, and confronting an attacker only as a last resort).

219. See GREEN PAPER, *supra* note 87, ¶ 24.

220. Protocol I, *supra* note 73, art. 49(1) (defining “attacks” as violence against an adversary, “whether in offense or in defense”).

221. Cameron, *supra* note 131, at 588 (quoting ICRC COMMENTARY ON GENEVA III, *supra* note 133, ¶ 1944).

222. *Id.*

223. See *supra* Part III.B.2.

224. See, e.g., RICHARD MORGAN, *PROFESSIONAL MILITARY FIRMS UNDER INTERNATIONAL LAW*, 9 CHI. J. INT’L L. 213, 216, 221–22 (2008) (arguing that the legal definition of when an act of self-defense is elevated to “direct participation” is unclear, interpretations advocated by groups such as the International Committee of the Red Cross consider *all* acts of self-defense as “direct participation.”).

225. Protocol I, *supra* note 73, art. 47(2)(d) (defining “mercenary” as an individual that is “neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict.”).



are citizens of states who are party to the conflict, at least in Iraq.<sup>226</sup> Some contractors working with PMFs are *not* nationals of a party to the conflict, but this quickly becomes moot when the showing fails on either of the two criteria discussed above.

#### 4. Is Article 47 Irrelevant?

The United Kingdom's Foreign and Commonwealth Office recently concluded that Article 47's mercenary definition is completely unworkable.<sup>227</sup> Undeterred, the General Assembly incorporated these shortcomings into its latest plank at mercenaries: the Convention Against Mercenaries.<sup>228</sup> As discussed below, the Convention falls flat because of the same definitional problems plaguing Article 47.

#### E. *United Nations Convention Against Mercenaries*

The U.N. took up the question of mercenarism again in 1980 in response to dissatisfaction among Member States with Protocol I's shortcomings,<sup>229</sup> and so began nine years of U.N. NewSpeak toward the creation of a comprehensive instrument for the "eradication of these nefarious activities . . . ."<sup>230</sup> The convention was adopted in 1989 and opened for signatures,<sup>231</sup> but did not become effective until 2001.<sup>232</sup>

The Convention Against Mercenaries provides a primary and secondary definition of "mercenary." The primary definition incorporates the largely unworkable elements of Protocol I, Article 47.<sup>233</sup> However, two distinctions need be addressed. The primary definition applies to *all* armed conflicts, not just *international* armed conflicts.<sup>234</sup> Also, "direct participation in hostili-

226. See McCormack, *supra* note 190, at 94.

227. U.K. GREEN PAPER, *supra* note 87, ¶ 6.

228. See generally U.N. Convention Against Mercenaries, *supra* note 73.

229. Milliard, *supra* note 20, at 57.

230. U.N. General Assembly, Sixth Committee, Report of the Ad Hoc Committee on the Drafting of an International Convention Against the Recruitment, Use, Financing and Training of Mercenaries, U.N. Doc. A/44/766 (Nov. 22, 1989) (prepared by Guillaume Pambov-Tchivounda).

231. Milliard, *supra* note 20, at 58.

232. See generally Press Release, General Assembly, Mercenaries Often a Presence in Terrorist Attacks, Special Rapporteur Tells Third Committee as It Begins Discussions on Self-Determination, U.N. Doc. GA/SHC/3650 (Oct. 31, 2001).

233. U.N. Convention Against Mercenaries, *supra* note 73, art. 1(1).

234. See *id.* art. 16(b).

ties” was removed as a definitional element and made an enumerated offense.<sup>235</sup>

Having already discussed the failings of the Article 47 definition, further discussion of the primary definition is bypassed in favor of analysis of the secondary definition. The secondary definition of the convention reads:

- A mercenary is also any person who, in any other situation:
- (a) Is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at:
    - (i) Overthrowing a Government or otherwise undermining the constitutional order of a State; or
    - (ii) Undermining the territorial integrity of a State;
  - (b) Is motivated to take part therein essentially by the desire for significant private gain and is prompted by the promise or payment of material compensation;
  - (c) Is neither a national nor a resident of the State against which such an act is directed;
  - (d) Has not been sent by a State on official duty; and
  - (e) Is not a member of the armed forces of the State on whose territory the act is undertaken.<sup>236</sup>

The convention goes on to articulate four categories of persons criminally liable: (1) anyone “who recruits, uses, finances or trains mercenaries;”<sup>237</sup> (2) a mercenary “who participates directly in hostilities or in a concerted act of violence;”<sup>238</sup> (3) anyone who attempts to commit the offenses in (1) or (2);<sup>239</sup> and (4) anyone who is an accomplice to any offense (1) through (3).<sup>240</sup>

The Convention Against Mercenaries also establishes states’ responsibilities. Article 5 provides that states “shall not recruit, use, finance or train mercenaries” for any purpose, and specifically, states shall not do so “for the purpose of opposing the legitimate exercise of the inalienable right of peoples to self-determination.”<sup>241</sup> Thus, states are purported to have an affirmative obligation to “prohibit” such activities, in general, and specifically “prevent” them if they are intended to oppose a self-deter-

235. *See id.* art. 3.

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

237. *Id.* art. 2.

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

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

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

241. *Id.* arts. 5(1), 5(2).

mination movement.<sup>242</sup> The Convention Against Mercenaries makes an unmistakable distinction for the first time in international law: all *states* shall refrain from using mercenaries.<sup>243</sup>

A strong argument exists that the Convention Against Mercenaries is irrelevant and freely ignored. Enacted in 1989, the Convention did not become “effective” until 2001,<sup>244</sup> when the requisite twenty-second state ratified the Convention.<sup>245</sup> As of November 2008, only nine additional states have acceded to its terms—three of them with reservations, bringing to thirty-one the total number of Member States that have ratified the Convention.<sup>246</sup> Ironically, only one African Union state that advocated and signed the Convention, Cameroon, ever ratified it.<sup>247</sup> At least two of the African signatories—Angola and the Democratic Republic of the Congo—subsequently hired mercenaries.<sup>248</sup> Low accession and contrary practice militate against the Convention being a true codification of customary international law, and therefore it is arguably not binding.

Conventional wisdom holds that mercenaries are not motivated by political or noble causes.<sup>249</sup> Lawmakers attempting to regulate (or ban) mercenaries repeatedly point out this inherent trait as an “evil.”<sup>250</sup> The secondary definition echoes this theme but lowers the threshold by describing the requisite compensation as “significant private gain,” doing so without providing a benchmark.<sup>251</sup> The evidentiary problems remain insurmountable.

242. Milliard, *supra* note 20, at 63.

243. See U.N. Convention Against Mercenaries, *supra* note 73, art. 5.

244. See generally Press Release, General Assembly, Mercenaries Often a Presence in Terrorist Attacks, Special Rapporteur Tells Third Committee as it Begins Discussions on Self-Determination, U.N. Doc. GA/SHC/3650 (Oct. 31, 2001).

245. U.N. Convention Against Mercenaries, *supra* note 73, art. 19.

246. For a current list of contracting states, see <http://treaties.un.org/doc/publication/mtdsg/volume%20ii/chapter%20xviii/xviii-6.en.pdf> (last visited Oct. 11, 2008) (listing a current record of contracting states).

247. See Milliard, *supra* note 20, at 65. “The original signatories were Angola, Republic of the Congo (formerly Congo-Brazzaville), Democratic Republic of Congo (formerly Zaire . . .), Cameroon, Morocco, and Nigeria.” *Id.* at 65 n.371.

248. *Id.* at 65 (quoting HERBERT M. HOWE, *AMBIGUOUS ORDER: MILITARY FORCES IN AFRICAN STATES* 187 n.4 (2001)). Up to eighteen African nations have hired mercenaries since the 1960s. Wheatley, *supra* note 176, at 10 n.60 (citing HOWE, *supra* at 228).

249. Milliard, *supra* note 20, at 60 (citing 15 OFFICIAL RECORDS 196, CDDH/III/SR.57, Apr. 29, 1977 (statement of Mr. Alkaff, Yemen: “Mercenaries [have] always been attracted by the hope of gain . . .”).

250. *Id.* at 60.

251. U.N. Convention Against Mercenaries, *supra* note 73, art. 1(2)(b).

ble for the unfortunate prosecutor tasked with proving illicit motivation.<sup>252</sup> Even if proven, the illegality of *being* a mercenary under the convention has no enforcement mechanism beyond domestic legislation that each contracting state was to enact<sup>253</sup>—something they were free to do before the convention.

The secondary definition of the U.N. Convention Against Mercenaries most likely does not apply to PMF contractors.<sup>254</sup> This is true because PMF contractors are not recruited to participate in a “concerted act of violence” aimed at overthrowing or undermining a state.<sup>255</sup> Also, it is a herculean task to prove that the motive for contracting is financial gain.<sup>256</sup> With at least two criteria falling short, PMF contractors as they are currently operating will not find themselves afoul of the Convention Against Mercenaries anytime soon.

Without exception, the Convention Against Mercenaries purports to prohibit individual and state use of mercenaries.<sup>257</sup> With only sixteen percent of the Member States of the U.N. party to it and wide-spread state practice contrary to its terms, the Convention cannot reasonably be argued as indicative of customary international law. Accordingly, the 162 Member States *not* party to the convention are free of its strictures.<sup>258</sup>

#### F. *Tracking the Trend*

Though only a handful of the U.N. instruments discussed truly reflect customary international law with regards to the use of mercenaries, taken together they begin to reshape the field. The numerous non-binding resolutions and even the off-the-mark conventions whittle away at the traditional law of war. In

252. See Milliard, *supra* note 20, at 61 n.338.

253. Gaston, *supra* note 93, at 232 (citing Convention Against Mercenaries, art. 3(1)).

254. *Id.* at 233 (citing Emanuela-Chiara Gillard, *Business Goes to War: Private Military/Security Companies and International Humanitarian Law*, 88 INT’L REV. RED CROSS 525, 568–70 (2006) (discussing why most PMFs do not meet the six-point cumulative definition of “mercenary”).

255. See U.N. Convention Against Mercenaries, *supra* note 73, art. 3(1).

256. Gaston, *supra* note 93, at 233 (citing Protocol I, *supra* note 73, art. 47(2) and U.N. Convention Against Mercenaries, *supra* note 73, art. 1(b)).

257. U.N. Convention Against Mercenaries, *supra* note 73, arts. 2, 5.

258. Compare United Nations, <http://un.org/members/list.shtml> (last visited Sept. 17, 2008) (listing the 192 current Member States of the United Nations), with United Nations Treaty Collection, *supra* note 246 (listing the thirty-one Member States who have ratified the U.N. Convention Against Mercenaries).

this, a handful of Member States have been successful in laying a foundation upon which future accessions and restrictions might be built.

The sage counsel of Burmester<sup>259</sup> and Cotton<sup>260</sup> cautioning against the reduction of protections has fallen upon deaf ears. Though Professor Cameron admits that “weakening of protection for a group of persons is highly unusual and goes against the tenor of . . . humanitarian law,” she promotes the practice in order to “discourage [would-be mercenaries] from putting themselves in . . . a vulnerable position . . . .”<sup>261</sup> For now, no such binding “structures” have been built upon this ill-advised foundation. In fact, opponents of PMFs reluctantly concede that current attitudes among the international community render innovations like the U.N. Convention Against Mercenaries as instruments of “‘anti-customary’ [international] law.”<sup>262</sup> Still, insofar as the ineffective U.N. Convention Against Mercenaries and non-binding Resolutions discourage contractors from entering the field of battle, the view of commentators like Cameron seems to be: *mission accomplished*.

#### IV. ARE CONTRACTORS OF PRIVATE MILITARY FIRMS ABOVE THE LAW?

Though PMF contractors are not subject to international laws on mercenarism,<sup>263</sup> it would be incorrect to think them altogether without accountability. Extraterritorial criminal jurisdiction over PMF contractors can be—and has been—achieved by three different statutory devices: the Special Maritime and Territorial Jurisdiction of the United States (“SMTJ”), the Military Extraterritorial Jurisdiction Act (“MEJA”), and the recent amendment to Article 2(a)(10) of the UCMJ. An exercise of jurisdiction under SMTJ and/or MEJA rests with the Attorney General through the respective U.S. Attorneys’ Offices; the expanded court martial authority by the military ultimately resides, to the

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259. See *supra* note 210 and accompanying text.

260. See *supra* note 211 and accompanying text.

261. Cameron, *supra* note 131, at 579–80.

262. Salzman, *supra* note 15, at 879.

263. See generally Jonathon Finer, *Holstering the Hired Guns: New Accountability Measures for Private Security Contractors*, 33 YALE J. INT’L L. 259, 260 (2008) (noting that security contractors do not fit neatly under the U.N. Convention Against Mercenaries).

surprise of many, with the Department of Justice (“DOJ”).<sup>264</sup>

### A. *SMTJ*

The SMTJ originally created eight express areas of special jurisdiction that purported to extend to the ends of the earth.<sup>265</sup> If not that far, then the SMTJ reached at least to those areas where U.S. citizens or property were in jeopardy, but no other government was effectively safeguarding those interests.<sup>266</sup> The USA PATRIOT Act added a ninth area: offenses committed by or against a U.S. citizen or national or on/in a facility used for U.S. foreign missions or operations.<sup>267</sup> This basis, and one other—offenses committed by or against U.S. citizens or nationals in a location outside the jurisdiction of *any* nation (read: failed states)<sup>268</sup>—prove the most germane to combat zones and contingency operations of today’s armed conflicts.

Despite its expansive reach, only one prosecution has come under the SMTJ since the Global War on Terrorism began. David Passaro, a contract interrogator for the CIA, was convicted for aggravated assault in connection with the death of Abdul Wali after a two-day “interrogation” at a U.S. base in Afghanistan in 2003.<sup>269</sup> This prosecution, brought in the Eastern District of North Carolina, was made possible by the PATRIOT Act expansion of the SMTJ.<sup>270</sup>

### B. *MEJA*

MEJA builds upon the SMTJ by extending U.S. jurisdiction to crimes committed by personnel operating with or near the U.S. military outside of U.S. territory, provided the offense is punishable by more than one year imprisonment.<sup>271</sup> It includes concurrent court martial authority in some cases.<sup>272</sup> Any custo-

264. Memorandum from Robert Gates, Sec’y of Defense to Sec’ys of the Military Dep’ts et al. (Mar. 10, 2008) (on file with author) [hereinafter Gates Memo].

265. Anthony Giardino, *Using Extraterritorial Jurisdiction to Prosecute Violations of the Law of War: Looking Beyond the War Crimes Act*, 44 B.C. L. REV. 699, 715 (2007).

266. *Id.* at 715 n.117.

267. *Id.* at 715 n.121 (citing 18 U.S.C. § 7(9) (2001)).

268. The USA PATRIOT Act, 18 U.S.C. § 7(7) (2001).

269. *See CIA Worker Is Jailed Over Beating*, BBC NEWS, <http://news.bbc.co.uk/2/hi/americas/6359657.stm> (last visited Oct. 4, 2008).

270. *See* Giardino, *supra* note 265, at 117.

271. Military Extraterritorial Jurisdiction Act, 18 U.S.C. § 3261(a)(1) (2000).

272. 18 U.S.C. § 3261(c) (2000).

dial actions must be taken by Department of Defense (“DOD”) law enforcement officers with transfer to foreign criminal justice systems possible, but only by order of a U.S. judge or the Secretary of Defense under military necessity.<sup>273</sup> MEJA is limited, however, to civilian employees and contractors of the DOD and those dependents accompanying them overseas.<sup>274</sup>

MEJA has a troubled past and a doubtful future. Signed into law under President Bill Clinton, the limitations of MEJA became immediately apparent in the aftermath of Abu Ghraib—only the DOD contractors and enlisted soldiers were within prosecutorial reach.<sup>275</sup> Congress rushed to close this loophole by including within its scope all contractors “supporting the mission of the Department of Defense.”<sup>276</sup> As Ian Kierpaul astutely notes in his recent article, Congress only made matters worse by potentially offending the void for vagueness doctrine and political question doctrines with this change.<sup>277</sup>

After the Nusoor Square incident, Congress looks to replace one poorly drafted amendment with another, substituting “supporting the mission” with “work[ing] under [a] contract . . . carried out in an area, or in close proximity to an area . . . where the Armed Forces is conducting a contingency operation.”<sup>278</sup> Absent definitions and guidance from Congress, the Bush Administration expressed its concerns over the continued ambiguity<sup>279</sup> but the bill has been dormant in the Senate without modification since October 2007.<sup>280</sup>

### C. UCMJ

The most recent change to extraterritorial jurisdiction is the UCMJ expansion of court martial authority over civilian contrac-

273. 18 U.S.C. §§ 3262–3264 (2000).

274. 18 U.S.C. §§ 3267(1), (2) (2000).

275. Ian Kierpaul, *The Mad Scramble of Congress, Lawyers, and Law Students After Abu Ghraib: The Rush to Bring Private Military Contractors to Justice*, 39 U. TOL. L. REV. 407, 416 (2008) (noting that contractors from the Department of the Interior were also present and participating, but entirely beyond the reach of Military Extraterritorial Judicial Act).

276. *Id.* at 417.

277. *Id.* at 417–21.

278. *Id.* at 422 (citing H.R. 2740, 110th Congress (2007)).

279. *Id.* at 422 (citing Jonathan Weisman, *House Acts in Wake of Blackwater Incident*, WASH. POST, Oct. 5, 2007, at A6).

280. For the latest information on H.R. 2740 see <http://thomas.loc.gov/cgi-bin/bdquery/z?d110:h2740>: (last visited Nov. 4, 2008).

tors accompanying the military by adding “or a contingency operation” to Article 2(a)(10).<sup>281</sup> Senator Lindsey Graham sponsored the amendment to bring contractors within the control of military commanders.<sup>282</sup> The chief question put forward by numerous legal commentators is whether or not the statute is constitutional.<sup>283</sup> Another objection is the absence of procedural guidance from Congress.<sup>284</sup>

### 1. Historically Speaking

Military authority over accompanying civilians was unquestioned from before the Constitution,<sup>285</sup> until 1970 when then the Court of Military Appeals interpreted “in time of war” to mean only *declared* wars.<sup>286</sup> That case, *United States v. Averette*,<sup>287</sup> sounded the “death knell” for civilian court martial authority.<sup>288</sup> The presumption that controlled after *Averette* was that civilian contractors were largely beyond the reach of convening authorities in the military.<sup>289</sup> That is, until the October 2006 amendment to Article 2(a)(10) of the UCMJ.

### 2. Initial Criticisms

The procedural aspects were lacking when the amendment was first introduced. In fact, recommendations from the Joint Chiefs of Staff were not submitted until January 2008.<sup>290</sup> The lament of missing procedural directives was answered in March 2008 when Secretary of Defense Robert Gates issued a memoran-

281. Uniform Code of Military Justice, art. 2(a)10, 10 U.S.C. § 802(a)(10) (2008) [hereinafter “UCMJ”].

282. See generally Cara-Ann M. Hamaguchi, *Between War and Peace: Exploring the Constitutionality of Subjecting Private Civilian Contractors to the UCMJ During Contingency Operations*, 86 N.C. L. REV. 1047 (2008).

283. *Id.* at 1050.

284. See *id.*

285. Finer, *supra* note 263, at 261. For a masterfully written and refreshingly objective survey of Supreme Court jurisprudence on the question of military courts martial of civilians, see Kara M. Sacilotto, *Jumping the (Un)constitutional Gun?: Constitutional Questions in the Application of the UCMJ to Contractors*, 37 PUB. CONT. L.J. 179, 189 (2008).

286. Geoffrey S. Corn, *Bringing Discipline to the Civilianization of the Battlefield: A Proposal for a More Legitimate Approach to Resurrecting Military-Criminal Jurisdiction over Civilian Augmentees*, 62 U. MIAMI L. REV. 491, 495 (2008).

287. *United States v. Averette*, 19 C.M.A. 363 (C.M.A. 1970).

288. Finer, *supra* note 263, at 261.

289. See Corn, *supra* note 286, at 495–96.

290. See Sacilotto, *supra* note 285, at 187.



dum outlining a deferential policy of prosecution.<sup>291</sup> The Department of Justice has the first bite at the apple and only if it declines to prosecute are military commanders permitted to exercise their newly restored court martial authority over civilian contractors.<sup>292</sup>

There remain many critics who challenge the constitutionality of Article 2(a)(1) by citing to the Supreme Court opinion in, among others, *Reid v. Covert*.<sup>293</sup> The difficulty with *Reid* is that its holding was narrowly focused on a different statute and facts divergent from those relevant to PMF contractors. The statute, then codified as UCMJ Art. 2(11), was held unconstitutional by the Supreme Court because the statute granted court martial authority over civilian dependents accompanying military personnel overseas during peace time.<sup>294</sup> Justice Black expressly distinguished former Article 2(10), the predecessor of UCMJ Article 2(a)(10), as *not* at issue and *not* within the scope of the Court's decision.<sup>295</sup> In any event, *Reid* was a plurality decision and cannot be viewed as the final word on the question of civilians and courts martial.

### 3. The Test Case: *United States v. Ali*

How military commanders might use this new-found authority and whether the procedural differences between Article III courts and Article I military courts would be tolerated has only been speculated upon until now.<sup>296</sup> The case of Alaa "Alex" Mohammad Ali, a contract interpreter who stabbed another con-

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291. Gates Memo, *supra* note 264.

292. *Id.*

293. *Reid v. Covert*, 354 U.S. 1, 40–41 (1957). One commentator substantively incorporating *Reid* is Ian Kierpaul. See Kierpaul, *supra* note 275, at 412–14, 426.

294. *Reid*, 354 U.S. at 3–5.

295. *Id.* at 34 n.61.

296. Michael J. Navarre & John O'Connor, Steptoe & Johnson LLP, International Law Advisory: Contractors "In the Field" Now Subject to Military Justice (Mar. 12, 2007), <http://www.steptoe.com/publications-4325.html> (citing the applicability of Article 92 of the UCMJ at n.3:

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

tractor in the chest after an argument, was the first to make use of the expanded court martial jurisdiction.<sup>297</sup> After the DOJ declined to take the case, it was referred by the convening authority for court martial on the charge of aggravated assault on May 10, 2008.<sup>298</sup>

The military attorney representing Ali intended to contest jurisdiction on the theory that Congress specifically intended the expanded court martial authority to reproach only United States citizens operating as security contractors overseas, not interpreters who are not even United States citizens, and should therefore be dismissed.<sup>299</sup> Instead of trying the case, Alaa Mohammad Ali “pleaded guilty to wrongful appropriation of a knife . . . obstruction of justice for wrongfully disposing of the knife . . . and making a false official statement to military investigators.”<sup>300</sup> Still, the case is expected to create important precedent that may eventually reach American security contractors.<sup>301</sup>

#### 4. Tying It All Together

Senator Graham has opined that the use of private contractors is the way wars will be waged in the future and that the law needs to adapt to these changing realities.<sup>302</sup> As codified, the MEJA-enhanced jurisdiction of the SMTJ applies only to DOD civilian employees, contractors and the dependents accompanying them overseas. The pending amendment to broaden its scope to all contractors working in proximity to the military was poorly conceived and is likely too vague to withstand constitutional review, if it passes.

If not under MEJA, PMF contractors certainly are within the scope of the recent changes to the UCMJ. While Article 2(a)(10) is likely the best way to restore the accountability missing since *Averette*, the court martial jurisdiction includes matters

297. Michael R. Gordon, *U.S. Charges Contractor at Iraq in Stabbing*, N.Y. TIMES, Apr. 5, 2008, at A6; see also *Civilian Contractor Convicted at a Court-Martial*, U.S. FED. NEWS, Jun. 23, 2008, available at 2008 WLNR 11856253.

298. See generally *Civilian Contractor Convicted at a Court-Martial*, *supra* note 297.

299. Michael R. Gordon, *Military Role Overseeing Contractors Tested in Iraq*, N.Y. TIMES, Apr. 6, 2008, at A16. Alaa Mohammad Ali is a dual Iraqi-Canadian citizen working as an interpreter for the Titan Corporation, which provides interpreters for the U.S. military. *Id.*

300. *Civilian Contractor Convicted at a Court-Martial*, *supra* note 296.

301. See Gordon, *supra* note 297.

302. See Gensheimer, *supra* note 13.

of *discipline* under the UCMJ, not just criminal acts.<sup>303</sup> Serious questions on whether or not convening authorities may exercise the same degree of control of fundamental rights over contractors as they do service members are on the horizon. As to prosecuting violent acts, arguably the goal of Article 2(a)(10), *United States v. Ali* may provide the Supreme Court with the opportunity to decide the question definitively.<sup>304</sup>

### CONCLUSION

Despite the historic use of mercenaries in warfare, their conduct during the decolonization period of the 1950s and 1960s turned international opinion against their use. To date, international instruments that address mercenarism are largely ineffective because they lack broad support from the Member States of the United Nations and contrary state practice militates against the rules becoming norms under customary international law. Even if there was broader consensus and the conventions, protocols and resolutions represented the will of the international community, the definitions themselves are doomed from poor draftsmanship. Nevertheless, there is a developing trend against mercenarism in international law.

Another undeniable trend is the use of PMFs in force protection roles in close proximity to military units during armed conflicts. Meanwhile a segment of legal commentators work to brand PMF contractors as mercenaries. Events like Nusoor Square, regardless of what truly happened that day, are certain to be seized upon to condemn PMFs as deserving to be regulated out of existence. Until that day comes, however, PMF contractors are not “mercenaries” as the term now stands—and neither are most mercenaries.

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303. Gates Memo, *supra* note 291.

304. The last military prosecutions of civilian contractors occurred during the Vietnam War, all of which were struck down by the United States Supreme Court. *See Court-martial Ordered for Civilian Contractor*, L.A. TIMES, May 12, 2008, at 6, available at 2008 WLNR 8909973.