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## HAVE RIFLE WITH SCOPE, WILL TRAVEL: THE GLOBAL ECONOMY OF MERCENARY VIOLENCE

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### INTRODUCTION

Mercenary activity has not declined since the end of the Cold War. On the contrary, the international black market of military services is flourishing. While Cold War counterinsurgencies and covert actions were fought by shadowy commandos with suspicious connections to the Pentagon, current low-intensity conflicts are fought by mercenaries with impeccable resumes who negotiate contracts openly and give interviews to the press. A number of different explanations have been offered for this increased mercenary activity, including the spread of armed conflicts associated with the formation of new States,<sup>1</sup> and the sale of military services by detachments of national

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1. According to the United Nations Special Rapporteur on Mercenaries, Enrique Bernales Ballesteros:

In practice what is happening is that a process of international restructuring has begun in which the end of bipolarity has left exposed and vulnerable areas formerly in liege to one of the two axes of world power. The disappearance of decisive ideological influence, the cutting-off of economic assistance and the withdrawal of military control forces have given rise, almost naturally, to complex processes of rearrangement and transition . . . .

*Report on the Question of the Use of Mercenaries as a Means of Violating Human Rights and*

armies in order to pay their members and avert dissolution.<sup>2</sup> Worldwide military downsizing may have encouraged former career military personnel to view “any armed conflict [as] an opportunity to become involved in exchange for pay.”<sup>3</sup> Or, as one mercenary explained, “this might be our only chance to see an honest-to-God shooting war on the European continent in our lifetime and dammit, we were *not* going to miss it.”<sup>4</sup>

The form of mercenary activity has also changed over the past twenty years. Mercenary soldiers are now often acting as “trainers” and “advisors” to armies that have contracted for their martial services. A number of private companies, such as Executive Outcomes (South Africa) and Military Professional Resources, Inc. (USA), bid for overseas military assistance contracts with the knowledge of their respective governments. Occasionally, such consultant mercenaries execute the foreign policy aims of their governments, allowing the governments to eschew responsibility for politically sensitive covert operations. But just as often these military consultant organizations pursue their own private economic ends. Most of the personnel of these private military organizations are former high-level retired military officers with extensive contacts within the defense community.<sup>5</sup>

While States have been the most common employers of mercenary forces, insurgent and opposition groups are now commonly using mercenaries. Foreign mercenaries have been or are being used by opposition groups in Chechnya,<sup>6</sup> Tajikistan,<sup>7</sup> Azerbaijan,<sup>8</sup> Georgia,<sup>9</sup> Kashmir,<sup>10</sup> Sierra Leone,<sup>11</sup>

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*Impeding the Exercise of the Right of Peoples to Self-Determination*, U.N. ESCOR, 50th Sess. at 15, U.N. Doc. E/CN.4/1994/23 (1994) [hereinafter *1994 Report on the Question of the Use of Mercenaries*].

2. See *id.* at 16.

3. *Id.* at 44. Many of the mercenaries who were hired by the Popular Movement for the Liberation of Angola (MPLA) enlisted after being laid off by the South African Defense Force (SADF). See Al J. Venter, *Merc Work: Angola: Hired Guns Fight on Both Sides in Endless Civil War*, SOLDIER FORTUNE, Aug. 1993, at 34.

4. Rob Krott, *Looking for War in All the Wrong Places*, SOLDIER FORTUNE, Sept. 1992, at 57. Another mercenary claimed simply that he “abhorred the idea of a humdrum existence.” PETER TICKLER, *THE MODERN MERCENARY* 128 (1987).

5. See Stan Crock, *Trouble is Our Business*, BUS. WK., Nov. 20, 1995, at 52.

6. Russian Defense Minister Pavel Grachev said that Russian, Ukrainian, Baltic, and Middle Eastern mercenaries were among the 400 killed in the fighting for Bamut on May 23, 1996. See *Some 2,000 Mercenaries Fighting in Chechnya*, ITAR-TASS, May 25, 1996, available in LEXIS, World Library, Tass File.

7. See *1994 Report on the Question of the Use of Mercenaries*, *supra* note 1, at 35-36.

8. See *id.* at 26-28.

9. See *id.* at 29-30.

10. See *India's Secret Army in Kashmir*, (Hum. Rts. Watch, New York, N.Y.), May 1996. On June 7, 1996, Indian Army troops killed four non-Kashmiri combatants, including a Chechen, in Arizal, Kashmir. See *Chechen Among Four Mercenaries Killed in Indian Kashmir*, AGENCE FR.-PRESSE, June 7, 1996, available in 1996 WL 3866998.

11. See Jim Hooper, *Peace in Sierra Leone: A Temporary Outcome?*, JANE'S INTELLIGENCE REV., Feb. 2, 1997, at 91, available in 1997 WL 2006699.

In June 1996, Sankoh hired at least two Belgian mercenaries whose presence in

Zaire,<sup>12</sup> and East Timor and Papua New Guinea.<sup>13</sup>

Mercenary activity no longer takes place solely in the context of armed conflict. Mercenaries are now joining organizations of arms dealers, smugglers, or drug-traffickers, forming criminal rather than purely military associations.<sup>14</sup> These criminal associations may hire themselves out for any number of illicit purposes, not necessarily involving armed conflict.

Nor is it unusual for these illegal groups to exchange identities; a terrorist group might also be said to be composed of mercenaries when it moves to the territory of another State in order to provide protection to drug traffickers in exchange for payment, engage in sabotage . . . or take part in a domestic armed conflict.<sup>15</sup>

The participation of mercenaries in armed conflicts has not been harmless. Irregular paramilitary units are known to have been involved in massacres, executions, looting, and rape in a number of recent conflicts.<sup>16</sup> Because mercenaries are often not part of the hierarchical command structure of regular military forces, lack ethnic or cultural connections to the civilian populations, and were often discharged from prior military service because of disciplinary problems, mercenaries may be more likely than regular soldiers to engage in systematic human rights abuses and violations of the laws of war.<sup>17</sup> According to the U.N. Special Rapporteur on Mercenaries, Enrique Bernales Ballesteros, the presence of mercenaries "is a factor which tends to

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Sierra Leone was discovered through radio intercepts the day they crossed the border from Guinea. Using the noms de guerre "Henri" and "Michael", they were apparently air defence specialists tasked with either training the RUF [Revolutionary United Front] or shooting down EO's [Executive Outcomes] helicopters themselves.

*Id.*

12. See William Wallis, *Mercenaries Train Soldiers in Zaire*, *Sources Say*, REUTERS, Jan. 8, 1997. According to Zairian Prime Minister Kengo wa Dondo's spokesman, Sombo Dibebe: "I have no knowledge of this presence of mercenaries. The only mercenaries I know of operating on Zairean soil are fighting with (rebel leader) Laurent Kabila." *Id.*

13. Allan Hetherington-Cleverly, a British mercenary, worked with the East Timor resistance groups and with the Free Papua Movement (OPM). After the OPM seized 26 hostages in January 1996 in Mapnduma, Irian Jaya, Hetherington-Cleverly was asked by the OPM to intervene. See *British Mercenary Asked to Help Free Hostages: Report*, AGENCE FR.-PRESSE, Mar. 8, 1996, available in 1996 WL 3818405. On May 15, Indonesian special forces freed the hostages. See *Irian Hostages Rescued*, PITTSBURGH POST-GAZZATTE, May 16, 1996, at A8.

14. See 1994 Report on the Question of the Use of Mercenaries, *supra* note 1, at 41.

15. *Id.* at 44.

16. Unarmed Bosnian-Croat civilians were massacred in Maljine and Doljani on June 8, and 27-28, 1993 by irregular units of foreigners calling themselves "mujahidin," and operating in conjunction with the 7th Brigade of the army of Bosnia and Herzegovina. *Id.* at 26.

17. For example, a 22-year-old Swedish mercenary was sentenced to 13 years in prison for war crimes at Capljina prisoner of war camp in Bosnia in September 1995. See *Bosnia Jails Swede for War Crimes*, AGENCE FR.-PRESSE, Sept. 9, 1995, available in 1995 WL 7854273. The Swede had served with the French Foreign Legion before joining Bosnian Croat troops in 1993. See *id.*

increase the violent and cruel nature of specific aspects of the conflict in which they are involved.”<sup>18</sup> The presence of mercenaries may extend the duration of the conflict. According to the Special Rapporteur, “financial considerations and the desire for illicit gain through looting which is associated with the participation of mercenaries may be of crucial importance in extending the conflict.”<sup>19</sup> Furthermore, because the business of mercenaries is war, they have no incentive to encourage the peaceful resolution of the conflict.

Over the past few decades, mercenaries have received considerable attention. Human rights non-governmental organizations have taken an interest in the mercenary’s role in violations of the laws of war. The “problem” of mercenaries has inspired a number of law review articles concerned with the inadequacies of the current legal regime.<sup>20</sup> This article asks a different question: Why are mercenaries so objectionable to governments, human rights organizations, international lawyers,<sup>21</sup> and certain journalists? Why is there a substantial body of public international law (including treaties, conventions, protocols, and United Nations resolutions)<sup>22</sup> geared at outlawing, in name if not in fact, mercenaries? Why do so many countries also have

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18. 1994 Report on the Question of the Use of Mercenaries, *supra* note 1, at 13.

19. *Id.* at 14.

20. For example, see James L. Taulbee, *Myths, Mercenaries and Contemporary International Law*, 15 CAL. W. INT’L L.J. 339, 343 (1985); Note, *American Mercenaries and the Neutrality Act: Shortening the Leash on the Dogs of War*, 12 J. LEGIS. 175, 183 (1985); Lenox Hinds, *The Legal Status of Mercenaries: A Concept in International Humanitarian Law*, 52 PHILA. L.J. 395, 408 (1977); Allaoua Layeb, *Mercenary Activity: United States Neutrality Laws and Enforcement*, 10 N.Y.L. SCH. J. INT’L & COMP. L. 269, 281 (1989).

21. According to Chief R.O.A. Akinjide of the International Law Commission: “In Africa, the mercenary is seen as the representative of colonialism and of racial oppression—an assassin hired to kill freedom-fighters in wars of national liberation and wars against racial oppression.” Chief R.O.A. Akinjide, *Mercenarism and International Law*, Address at the International Law Seminar, Geneva, Switz. (May 27, 1995).

22. The United Nations has passed a number of resolutions condemning the recruitment and use of mercenaries in specific conflicts, and calling on States to enact legislation. Resolution No. 3103 reaffirmed Resolutions 2548 (XXIV) of December 11, 1969 and Resolution 2727 (XXV) of December 14, 1970, declaring that using mercenaries against national liberation movements was a criminal act. In Resolution 3103, the U.N. General Assembly declared that “the practice of using mercenaries against national liberation movements in the colonial Territories constitutes a criminal act . . .” *Basic Principles of the Legal Status of the Combatants Struggling Against Colonial and Alien Domination and Racist Regimes*, G.A. Res. 3101, U.N. GAOR, 28th Sess., C.6 Supp. No. 30, at 142-43, U.N. Doc. A/9030 (1974). Presumably, mercenaries fighting on behalf of national liberation movements are not criminals. See L.C. Green, *The Status of Mercenaries in International Law*, 9 MAN. L. REV. 201, 230-31 (1979). The Security Council also called upon “all states to exercise the utmost vigilance against the danger posed by international mercenaries.” S.C. Res. 405, U.N. SCOR Res & Dec., 32nd Sess., at 18, U.N. Doc. S/INF/33 (1977). General Assembly Resolution 3314, which amended the U.N. Charter’s definition of aggression, provides that, regardless of a declaration of war, sending “armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State” constitutes an act of aggression. *Definition of Aggression*, G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 31, at 142-43, U.N. Doc. A/9631 (1974).

domestic legislation proscribing the use of mercenaries? And yet why are mercenaries so appealing to adolescent boys, readers of *Soldier of Fortune*, and many U.S. Army soldiers?

This article explores why and how a distaste for mercenaries came to exist and why this aversion to mercenaries has become reified in legal forms. It begins with the proposition that military labor circulates as a commodity in an international market. It is a “contested commodity” to the degree States cannot control it.<sup>23</sup> The commodification of mercenary violence appears illegitimate when contrasted with “appropriate” State violence. Yet, military knowledge was not always a commodity contested by States. Historically, military skill was fully alienable in the international market.<sup>24</sup> States did not “monopolize” military violence, but only “captured” or exploited it. The slow process by which the State monopolized the use of force suggests that military institutions have no *natural* or dependent relationship to the State, but may exist autonomously from it. Indeed, current mercenary participants in the international military marketplace continue to operate outside of States, as externalities of the State system. To control this blackmarket military economy, States have restricted the sale of individual military know-how through the codification of domestic neutrality laws and have regulated the international marketplace of military labor through international conventions. In conclusion, this article suggests a connection between partial commodification of private military labor and the global economy of violence.

## I. MILITARY VIOLENCE AS A CONTESTED COMMODITY

Military labor and knowledge circulate as commodities to be bought and sold on the world market. Military skill—essentially the management and deployment of violence—is a contested commodity. The predominant cultural view, reflected in legal and ideological prohibitions, is that military skill should not be bought and sold, that it should not be conceived of or treated as a commodity. It is viewed as “noncommodifiable.” “When something is noncommodifiable, market trading is a disallowed form of social organization and allocation.”<sup>25</sup> From the perspective of the State, mercenaries, like hit-men and prostitutes, engage in a prohibited commodification of “things” which should not in theory be marketable. Mercenary activity puts

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23. Much of the discussion on commodification was inspired by MARGARET JANE RADIN, *CONTESTED COMMODITIES* (1996). Dr. Margaret Jane Radin is the Wm. Benjamin Scott and Luna M. Scott Professor of Law at Stanford Law School, where she is also Co-Director of the Program in Law, Science, and Technology. Radin is a noted property theorist, who has written extensively about “commodification,” exploring the limits of markets and market rhetoric.

24. Much of the discussion on the history of prohibition of mercenaries is based on JANICE E. THOMPSON, *MERCENARIES, PIRATES, AND SOVEREIGNS: STATE-BUILDING AND EXTRATERRITORIAL VIOLENCE IN EARLY MODERN EUROPE* (1994).

25. RADIN, *supra* note 23, at 20.

military knowledge and technique back into the marketplace.

But why is the commodification of military skill so objectionable? The "problem" of mercenaries becomes apparent when their commodification of violence is contrasted with the non-market military ideology of State violence.<sup>26</sup> The unauthorized, externally deployed violence of mercenaries is structurally opposed to the legitimate, organized State violence of the armed forces. The State ideology of the use of military force is the preeminent cultural construction of "appropriate" violence. In the United States, it is taken for granted that the military serves the State, that military knowledge is or should be outside of the marketplace, and that soldiers have a unique, non-transferable competence in organized, systematic killing. Mercenaries, on the other hand, have little loyalty to any State. Both their violence and military knowledge are commodified and alienable within the marketplace, and their military skills are transferable. According to the State-oriented hegemonic view, mercenaries defy military norms and thus lack moral legitimacy.

The armed forces of the United States, like other military entities, promote a particular ethical world-view. While this perspective may differ between units, between officers and enlisted men, and between branches of the armed services, Vice Admiral James Stockdale provides a pithy summary of the military world-view: "The military ethos is or should be one of duty, individual sacrifice, and group dedication. The traditional virtues of the military calling are loyalty, obedience, and courage."<sup>27</sup>

This statement displays a number of the fundamental underpinnings of State military ideology. First, it assumes that the military exists to serve the State.<sup>28</sup> According to this view, military officers engage in the "management of violence" to ensure "the military security of his client, society."<sup>29</sup> The service that the military ostensibly provides is the defense of the polis. Military rhetoric reinforces the notion that becoming a member of the armed forces "whether through enlistment or induction, involves a commitment to the United States, the service, and one's fellow citizens and servicemembers . . ."<sup>30</sup> The military thereby connects itself to a political community; military service is sometimes viewed as an aspect of the rights and duties of citizenship.<sup>31</sup> Individual members of the armed forces may be called upon to sacrifice their lives so that the political community will continue to exist.

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26. For a general theory of State ideology as manifested in official discourse, see FRANK BURTON, *OFFICIAL DISCOURSE: ON DISCOURSE, ANALYSIS, GOVERNMENT PUBLICATIONS, IDEOLOGY, AND THE STATE* (1979).

27. RICHARD GABRIEL, *TO SERVE WITH HONOR: A TREATISE ON MILITARY ETHICS AND THE WAY OF THE SOLDIER* xiv (1982).

28. See Sir John Withrop Hackett, *The Military in the Service of the State*, in *WAR, MORALITY, AND THE MILITARY PROFESSION* 110, 110 (Malham W. Wakin ed., 1979).

29. SAMUEL HUNTINGTON, *THE SOLDIER AND THE STATE: THE THEORY AND POLITICS OF CIVIL-MILITARY RELATIONS* 19 (1957).

30. 32 C.F.R. § 41.3(b)(1) (1998).

31. See MORRIS JANOWITZ, *MILITARY CONFLICT* 70-88 (1975).

The military demands this “sacrifice of the lives of its members in pursuit of the community’s right to self-defense.”<sup>32</sup>

Among soldiers, this ethos of service is unchallenged—every soldier is thoroughly indoctrinated to believe that she is performing a duty to her country. When asked why they serve, few soldiers will answer that it is because they enjoy killing or blowing things up. Even when this is the case, the public acknowledgment of a secondary motivation would *feel* inappropriate. It would expose the secret at the heart of military ideology—that the rhetoric of military service conceals the ecstasy of violence.

Mercenaries may “serve” a State by offering their services for pay, yet they are disconnected from any political community. They make no permanent commitment to a government, nor do they perform a sacrificial service for their fellow citizens. For mercenaries, military activity is wholly unrelated to the duties or privileges of citizenship. Mercenary violence is not cloaked in a rhetoric of service and sacrifice to a State or political community. From the perspective of the State, mercenary violence is violence for its own sake.

Despite the service rhetoric surrounding State armies, it would be a gross oversimplification to conclude that the connection of the State armed forces to civil society is unproblematic. States, including the United States, often have a strained, tenuous relationship with their armed forces. Although the military allegedly exists to serve the State, the State isolates the military instrument from civilian society. The military is dangerous and liminal and must be quarantined, restricted. This structural relationship, creating an opposition and separation between civil society and the armed forces, is established in the U.S. Constitution. Article II, section 2, identifies the President as Commander-in-Chief, placing ultimate authority over the military in the hands of a civilian.<sup>33</sup> Article I, section 8, gives Congress the power to declare war and to raise and support armies, assuring that war is undertaken with the consent of the political community.<sup>34</sup>

Although these Constitutional provisions ensure civilian control of the armed forces, in the United States, the military is accorded a high degree of deference and is treated as distinct from civil society. The Code of Federal Regulations, which governs the armed forces, specifies that “military service is a calling different from any civilian occupation.”<sup>35</sup> Similarly, as the U.S. Supreme Court noted in *Parker v. Levy*:<sup>36</sup>

This Court has long recognized that the military is, by necessity, a specialized society separate from civilian society. . . . [It has] developed laws and traditions of its [own]. . . . “An army is not a deliberative body. . . . No

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32. HUNTINGTON, *supra* note 29, at 19.

33. U.S. CONST. art. II, § 2.

34. U.S. CONST. art. I, § 8.

35. 32 C.F.R. § 41.3(b) (1998).

36. 417 U.S. 733 (1974).

question can be left open as to the right to command in the officer, or the duty of obedience in the soldier" . . . .<sup>37</sup>

The segregation of the military instrument from civil society, and the current of anxiety that underlies this relationship, is an atavistic reminder of military entities' existence outside of (and potentially in opposition to) the State.<sup>38</sup>

Second, as the Stockdale quote above indicates, the military sees itself as fundamentally outside of the marketplace. War is, and should not be a business. In part, this distinction is necessary because the tasks of military and business entities are simply different. "Military systems, especially the small unit subsystems that are expected to bear the burden of killing, are categorically unlike anything in the business world."<sup>39</sup> However, at a deeper level, the logic of war and the logic of capitalism are fundamentally opposed. "Econometric models do not work on the battlefield; death in combat is always an uneconomic, irrational decision for the one who is doing the dying."<sup>40</sup> For many, the Vietnam War exemplifies the erroneous attempt to treat war as a business, the success of which could be quantified in a body-count. Defense Secretary Robert McNamara "tried to run the Vietnam conflict as if it were the Ford Motor Company . . . ."<sup>41</sup> Transplanting business ethics and ideas into a military situation was perceived as dangerous. "The military's loss of some of its traditional values and their replacement with the values of the economic marketplace can lead to the abandonment of ethical precepts . . . to the point that combat effectiveness itself is effected."<sup>42</sup>

Mercenaries challenge this ideological system by making war a business. They challenge the exclusion of military skills from the marketplace by engaging in the management and deployment of violence for pay. In some sense they also explode the simplistic anti-economic construction of warfare because as all defense contractors know, armed conflict is profitable.

The third element of hegemonic State military ideology is the military profession's claim to a unique competence in the technique and technology of killing. The expertise and knowledge necessary to carry out the systematic application of violence on behalf of the State requires extensive training and education. "The techniques of the military profession are not widely available and, in point of fact, can only be legitimately acquired and prac-

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37. *Id.* at 743-44 (quoting in part *In re Grimley*, 137 U.S. 147, 153 (1890)).

38. See discussion *infra* Part III.

39. RICHARD A. GABRIEL & PAUL L. SAVAGE, *CRISIS IN COMMAND: MISMANAGEMENT IN THE ARMY* 61 (1978).

40. *Id.* at 95.

41. GABRIEL, *supra* note 27, at xv (quoting Vice-Admiral James Stockdale, USN (retired)).

42. *Id.* at 58.

ticed within the confines of the profession itself.”<sup>43</sup> Thus, knowledge is restricted and its commodification outside of the confines of the “profession” is prohibited. “The officer is not a mercenary who transfers his services wherever they are best rewarded . . . .”<sup>44</sup> The military has a monopoly on the skills associated with warfighting. The skills, particularly those associated with combat operations, are not legitimately transferable to other employers either military or civilian. Soldiers cannot simply decide to switch armies; the ideology of patriotism and loyalty prevents the skill from entering the marketplace. “[O]nce a soldier leaves the military he is outside the brotherhood forever. Technically, one could become a soldier of fortune, but still one would no longer be part of a profession per se.”<sup>45</sup>

The competence of mercenaries in the profession of arms destroys the professional soldier’s claim to a unique skill. Mercenaries, most of whom are former soldiers, “steal” the military training and education provided by States and practice these acquired skills outside the profession. By practicing their killing trade outside of the confines of the State military system, mercenaries violate the concept of a “military profession.” They are equally as professional, and perhaps more so, because their motivation is financial rather than ideological.

The fourth element of State military ideology requires that the military officer remain politically neutral yet loyal to the nation-State and the profession. Politics should not intrude on military decision making; political considerations should be hammered out at the policy-making stage. “The most effective forces and the most competent officer corps are those which are motivated by ideals rather than by political or ideological aims.”<sup>46</sup> The fundamental nature of military professionalism is not political loyalty, but loyalty to a particular ideology of service. Samuel Huntington, in *The Soldier and the State*, first articulated the now common view that officers are professionals whose loyalty should be to the profession.<sup>47</sup> Individual careerism and financial advancement are a form of self-interest damaging to the military service ethos.<sup>48</sup> “The military quality of the professional is independent of the cause for which he fights.”<sup>49</sup> Of course, the same might be said for

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43. *Id.* at 84.

44. Samuel Huntington, *Officership as a Profession, in WAR, MORALITY, AND THE MILITARY PROFESSION*, *supra* note 28, at 19.

45. GABRIEL, *supra* note 27, at 87.

46. HUNTINGTON, *supra* note 29, at 40.

47. *See id.* at 29. Samuel P. Huntington is currently the Albert J. Weatherhead III University Professor at Harvard, the Director of the Olin Institute, and Chairman of the Harvard Academy for International and Area Studies. His most recent book is *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER* (1996).

48. *See* Philip M. Flammer, *Conflicting Loyalties and the American Military Ethic, in WAR, MORALITY, AND THE MILITARY PROFESSION*, *supra* note 28, at 163, 167-68. As in any profession, many officers are self-centered careerists. The ideological structure of the military ethic, however, delegitimizes careerist ambitions.

49. HUNTINGTON, *supra* note 29, at 40.

mercenaries.

This brief discussion sketches the ideological backbone of the State's monopoly on violence and indicates how mercenaries challenge the State's ideological structures. It partially answers the question of why mercenaries are dangerous enough to States to be prohibited from commodification. The question arises, how did States delegitimize mercenaries? How did States come to monopolize the use of force, to claim ownership and control of it, and to prevent its market alienation by private actors?

## II. THE UNNATURAL RELATION OF VIOLENCE AND THE STATE

It is commonly assumed by legal scholars and political theorists that the State holds a monopoly on the use of force, and that States alone have the power to make war. Max Weber,<sup>50</sup> for example, identified the State as that entity which "successfully upholds a claim to the *monopoly* of the *legitimate* use of physical force in the enforcement of its order."<sup>51</sup> Charles Tilly<sup>52</sup> also saw the State as "controlling the principal means of coercion within a given territory . . ." <sup>53</sup> More recently, Anthony Giddens<sup>54</sup> defined the nation-State as having "direct control of the means of internal and external violence . . . [within] a territory demarcated by boundaries (borders)."<sup>55</sup>

While the State may hold a monopoly on the use of force, there is nothing *natural* about this arrangement. Until the mid-nineteenth century, military knowledge and labor were an alienable commodity in an international market. Sovereignty bore little or no relation to the control of organized violence.<sup>56</sup> States have not always controlled the deployment of extra-territorial

50. Max Weber, considered by many to be a founder of sociology, is best known for his work on religion and economics. See, e.g., MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* (1905).

51. MAX WEBER, *THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION* 154 (A.M. Henderson & Talcott Parsons trans., 1947).

52. Charles Tilly's work focuses on large-scale social change and its relationship to contentious politics, especially in Western Europe since 1500. Currently he is the Joseph L. Buttenwieser Professor of Social Science at Columbia University. His work includes *BIG STRUCTURES, LARGE PROCESSES, HUGE COMPARISONS* (1984); *COERCION, CAPITAL AND EUROPEAN STATES A.D. 990-1990* (1990); *EUROPEAN REVOLUTIONS, 1492-1992* (1993).

53. Charles Tilly, *Theories of Political Transformation, in THE FORMATION OF NATIONAL STATES IN WESTERN EUROPE* 638 (Charles Tilly ed., 1975).

54. Anthony Giddens, currently the Director of the London School of Economics and Political Science (LSE), is well known for his writing in the areas of sociology, politics, and social theory.

55. ANTHONY GIDDENS, *2 A CONTEMPORARY CRITIQUE OF HISTORICAL MATERIALISM*, 121 (1985).

56. See THOMPSON, *supra* note 24, at 3:

The contemporary organization of global violence is neither timeless nor natural. It is distinctively modern. In the six centuries leading up to 1900, global violence was democratized, marketized, and internationalized. Nonstate violence dominated the international system. Individuals and groups used their own means of violence in pursuit of their particular aims, whether honor and glory, wealth, or political

violence. Between the period of 1300 and 1900, privateers, mercantile companies, and mercenaries were fixtures of the international system. Military manpower was a commodity to be bought and sold in the marketplace. The use of mercenaries remained a legitimate State practice for about three centuries. "Long before absolute monarchy arose, soldiers offering themselves for hire had constituted a major export trade of the Middle Ages, and one of the first to establish a European market."<sup>57</sup> Between 1300 and 1450, Free Companies composed of ragged groups of soldiers flourished in Europe. Foreign mercenaries were common in Renaissance Italy.<sup>58</sup> Charles VII of France in 1445 integrated mercenaries into his standing army or when necessary, simply bought army units.<sup>59</sup> During the eighteenth century most European States utilized foreign mercenaries as troops.<sup>60</sup> During the U.S. War of Independence, for example, Britain used 18,000 Hessian mercenaries.<sup>61</sup>

Organized, systematic violence has no "natural" relation to the State, but has an independent existence as an externality of the State. Gilles Deleuze<sup>62</sup> and Felix Guattari<sup>63</sup> have advanced the theory that military organization is not indigenous to the State, but pre-exists it.<sup>64</sup> Indeed, the an-

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power. People bought and sold military manpower like a commodity on the global market. The identity of the suppliers or purchasers meant almost nothing.

*Id.*

57. V.G. Kiernan, *Foreign Mercenaries and Absolute Monarchy*, in *CRISIS IN EUROPE, 1560-1660*, at 121 (Trevor Aston ed., 1965).

58. See ANTHONY MOCKLER, *THE NEW MERCENARIES* 7 (1987).

59. See *id.* at 14.

60. See THOMPSON, *supra* note 24, at 61-68.

61. See MOCKLER, *supra* note 58, at 5. The use of Hessian mercenaries was, in fact, an unparalleled disaster. The Hessian mercenaries surrendered en masse at the battles of Trenton and Saratoga Springs and over 5000 mercenaries deserted to join the growing ranks of German settlers. See *id.* For a history of Hessian mercenaries see CHARLES W. INGRAO, *THE HESSIAN MERCENARY STATE: IDEAS, INSTITUTIONS, AND REFORM UNDER FREDERICK II, 1760-1785* (1982).

62. Although Gilles Deleuze's work has received little critical attention outside of France, his writing in the areas of critical philosophy and "unconventional" literary criticism is considered by many scholars to be among the best of the twentieth century. See JOHN LECHTE, *ROUTLEDGE, FIFTY KEY CONTEMPORARY THINKERS* (1994). Deleuze's most noteworthy works include *DIFFERENCE AND REPETITION* (Paul Patton trans., 1995) and *ESSAYS CRITICAL AND CLINICAL* (Daniel Smith & Michael Greco trans., 1997).

63. Félix Guattari, a Lacanian psychoanalyst, and Deleuze co-authored two volumes of *CAPITALISM AND SCHIZOPHRENIA: ANTI-OEDIPUS* (1985) and *A THOUSAND PLATEAUS: CAPITALISM AND SCHIZOPHRENIA* (Brian Massumi trans., 1992). Their basic thesis is that capitalism is a schizophrenic system insofar as it profits from the individual by subverting territorial groupings such as the church and the family, yet produces reterritorializations of new social forms in order to function. For a basic explanation and overview of their influential social theory, see CHARLES J. STIVALE, *THE TWO-FOLD THOUGHT OF DELEUZE AND GUATTARI: INTERSECTIONS AND ANIMATIONS* (1998).

64. See Gilles Deleuze & Felix Guattari, *Treatise on Nomadology: —The War Machine*, in *A THOUSAND PLATEAUS: CAPITALISM AND SCHIZOPHRENIA* 352 (Brian Massumi trans., 1992). Deleuze and Guattari theorize the existence of a "war machine" which is "irreducible to the State apparatus, . . . outside its sovereignty and prior to its law: it comes from else-

thropological record of “primitive” and tribal warfare indicates that many non-State cultures have invented highly complex forms of combat that State armies have adopted or mimicked.<sup>65</sup> Plains Indians, Mongolian nomads, Manuan Polynesians, and the Masai all utilized discipline and command, speed and surprise, fortification and mobility in their military practices.<sup>66</sup>

States develop military institutions by appropriating and reigning in the groups residing within their territories who have already organized themselves for warfare.<sup>67</sup> According to Deleuze and Guattari, “[t]he State has no war machine of its own; it can only appropriate one in the form of a military institution, one that will continually cause it problems.”<sup>68</sup> Ample historical evidence supports the view that States appropriated pre-existing military institutions. During the thirteenth century, for example, European rulers sanctioned non-State violence in the form of privateering.<sup>69</sup> States relied on private organizations with their own military power to undertake foreign ventures, such as founding colonies, which States themselves lacked the revenue to finance. “The [nineteenth century] process by which control over violence was centralized, monopolized, and made hierarchical entailed not the state’s establishment and defense of a new legal order but the state’s *imposing itself as a defender* of that order.”<sup>70</sup> States incorporated or “captured” the violence of privateers—a form of violence external to the State—and selectively sanctioned it when profitable.<sup>71</sup>

Even now, military organizations exist outside of or on the margins of States. These mercenary organizations assume two main forms. They may

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where.” *Id.*; see also PIERRE CLASTRES, SOCIETY AGAINST THE STATE 357 (Robert Hurley trans., 1977).

65. See HARRY HOLBERT TURNEY-HIGH, PRIMITIVE WARFARE: ITS PRACTICE AND CONCEPTS 26, 39-90, 130, 132 (1991).

66. See *id.*

67. Charles Tilly, for example, discusses the struggle by States to extract coercive capabilities from individuals and groups within their territory. See Charles Tilly, *Reflections on the History of European State Making*, in THE FORMATION OF NATIONAL STATES IN WESTERN EUROPE, *supra* note 53, at 38.

68. Deleuze & Guattari, *supra* note 64, at 355.

69. See THOMPSON, *supra* note 24, at 22-23. Thompson distinguishes between privateers and pirates, thus: “[T]he former acts under the authority of a state that accepts or is charged with responsibility for his acts, while the latter acts in his own interests and on his own authority.” *Id.* at 22.

70. *Id.* at 3 (emphasis added).

71. James I’s advisors recommended, when considering the establishment of the Virginia colony, that if the Spaniards complained, the King could blame the London Company:

If it take not success . . . it is done by their owne hedges. It is but the attempt of private gentlemen, the State suffers noe losse, noe disreputation. If it takes success, they are your subjects, they doe it for your service, they will lay at your Majesty’s feet and intress your Majesty therein.

Thomas J. Wertenbaker, *Virginia Under the Stuarts, 1607-1688*, in THE SHAPING OF COLONIAL VIRGINIA 29-30 (1914). Plausible deniability continues to be one of the incentives for States to sanction the private use of force.

organize themselves as multinational commercial entities that pursue particular economic goals or as loose, informally organized bands of adventurer-mercenaries that exploit military opportunities as they arise. Both of these types of organizations are *outside* the State and may function as a “war machine,” autonomous and unrelated to the State.<sup>72</sup>

[T]he outside of States cannot be reduced to “foreign policy,” that is, to a set of relations among States. The outside appears simultaneously in two directions: huge worldwide machines branched out over the entire ecumenon at a given moment, which enjoy a large measure of autonomy in relation to the States (for example, commercial organization of the “multinational” type, or industrial complexes, or even religious formations like Christianity, Islam, or certain prophetic or messianic movements, etc.); but also the local mechanisms of bands, margins, minorities, which continue to affirm the rights of segmentary societies in opposition to the organs of State power. What becomes clear is that bands, no less than worldwide organizations, imply a form irreducible to the State and that this form of exteriority necessarily presents itself as a diffuse or polymorphous war machine.<sup>73</sup>

This passage from Deleuze and Guattari describes two types of organizations which are external to the State: segmentary, marginal bands and multinational entities. We examine them in turn.

### III. MERCENARY PRACTICE AT THE MARGINS

#### A. *The Adventurer-Mercenary*

Loose bands of mercenaries have been common participants in small, obscure wars since the mid-1960s. These assemblages of adventurer-mercenaries share a number of common features regardless of national origin, level of combat experience, or the particular conflicts in which they fought.

Many of these adventurer-mercenaries experienced disciplinary problems while serving in State armies. John Banks, who organized the recruitment of mercenaries for Angola in the 1970s, was dishonorably discharged from the British Army’s Parachute Regiment.<sup>74</sup> Some of the mercenaries who served in Angola in the early 1970s had been in prison, and some joined to escape from the police.<sup>75</sup>

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72. As Deleuze and Guattari write, “the war machine is directed against the State, either potential States whose formation it wards off in advance, or against actual States whose destruction it purposes.” Deleuze & Guattari, *supra* note 64, at 359.

73. *Id.* at 360.

74. See MOCKLER, *supra* note 58, at 155. According to Mockler, Banks and his comrades “had a dominating prejudice: against the British officer class . . . which they both resented and envied.” *Id.*

75. See TICKLER, *supra* note 4, at 71. One mercenary named Barker said at trial in his own defense:

Mercenary units often have a weak command structure and disciplinary problems. Unlike State armies, where the legitimacy of command rests unquestioningly in the officers, mercenary assemblages are often characterized by military Darwinism, which requires that commanders prove their strength. The imposition of military discipline within mercenary units has generally required violence.<sup>76</sup> As Deleuze and Guattari point out, "discipline is the characteristic required of armies after the State has appropriated them. The war machine answers to other rules. . . . [T]hey animate a fundamental indiscipline of the warrior, a questioning of hierarchy, perpetual blackmail by abandonment or betrayal, and a very volatile sense of honor. . . ."<sup>77</sup> Where States have "captured" or utilized mercenary violence, this lack of discipline often causes problems. For example, the Croatian Army discharged its First Dutch Volunteer recon unit because they were rowdy, disorderly, and caused innumerable discipline problems.<sup>78</sup> Looting by mercenaries has been a consistent problem. One former French Foreign Legionnaire in Bosnia said, "I've only made about five hundred pounds here in the last year. Though it has its perks, you know what I mean? You run by a dead body, know what I mean, and he's wearing a Rolex. What the f[\*\*]k."<sup>79</sup>

While it is commonly believed that mercenaries are motivated by pecuniary gain, many mercenaries profess political or ethical motivations. One American who had formerly served in the Eighty-Second Airborne Division and Special Forces in Vietnam explained why he volunteered to escort food supplies to Northern Bosnia: "I am here as an unpaid adviser in both civil and military affairs. If the Serbians were the ones suffering I would have gone with them, but it's Moslem families who are being slaughtered, so they're the ones I came to help."<sup>80</sup> In 1975, mercenaries who had been re-

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[W]e was told we was to go to Angola, West Africa, to help train an army of natives whose morale was very low. . . . I was out of work and things was expensive in England. . . . I was wanted by the police for assault in December 1975 and I was on a £200 sterling bail.

*Id.* at 72.

76. Perhaps the most horrible example of imposition of discipline in a mercenary unit occurred in Angola in 1976. A mercenary commander named Callan executed 13 British mercenaries who were unwilling to fight because they had not been trained for the tasks they were assigned. *See id.* at 79-91. They were forced to remove their clothes and were then shot by their comrades. *See id.* When other mercenaries in Angola heard of the execution, they in turn executed one of the men responsible after a summary court martial. *See id.*

77. Deleuze & Guattari, *supra* note 64, at 358.

78. *See* Tom Chittum, *Day of the Jackass: Dutch Dirty Dozen Decommissioned in Croatia*, *SOLDIER FORTUNE*, Mar. 1993, at 56.

79. Rob Krott, *Achtung Baby: Croatian Troops More Interested in Styling Than Soldiering: Remaining Foreign Mercs Unpredictable*, *SOLDIER FORTUNE*, Aug. 1993, at 33.

80. Peter Douglas, *Along Bosnia's Ho Chi Minh Trail: American SF Vet Advises Moslem Freedom Fighters*, *SOLDIER FORTUNE*, Feb. 1993, at 37. Similarly, one 17-year-old volunteering with the Croatia National Guard said: "I saw some stuff on the news about how Croatia is fighting for freedom, so I thought I'd come down and see what I could do to help."

crucited for the Rhodesian independence organization backed out when it became known that they would be fighting against the white Rhodesian government.<sup>81</sup> Although the pay was substantial, the recruits were unwilling to fight “white soldiers for a black boss.”<sup>82</sup> Both of these examples suggest that mercenary labor is not fully commodified. On the contrary, sentimentality, notions of justice, and political values intrude on the pure monetary transaction.

Money, in fact, can hardly serve as the primary motivation for mercenaries serving in low-budget wars in the Balkans. In Croatia, the King Tomislav Brigade was willing

to accept additional *experienced* personnel but they ha[d] to pay their own way [over] . . . and even then there [we]re no guarantees of acceptance. Making money can't be a prime motivation as the current pay for a sergeant is about \$30 a month (paid in German currency). It would take several years at that wage just to pay the cost of your airfare to Zagreb.<sup>83</sup>

One mercenary had not been paid during his three months in Croatia

even though the expected pay was only equivalent to about £100 (U.S. \$160). That's 4,600 Hrvaski dinars per month, which is sufficient to live where one carton of cigs costs 300 dinars and all public transport for soldiers is free . . . . Anyone who expects big money fighting in Croatia can forget it. . . . What kept me there was the character and loyalty of the Croatians with whom I served. Individually, as people, they are great guys—but as soldiers, in general, they couldn't fight sleep.<sup>84</sup>

The International Brigade of the Croatian Army, disbanded in 1993, provided work for numerous adventurer-mercenaries as long as they had their own weapons and equipment.<sup>85</sup> Similarly, a Serbian thirty-two-year-old combat commander who worked in Zaire explained:

I fought for nearly four years in the war, commanded a behind-the-lines

*Dogs of War*, SOLDIER FORTUNE, Feb. 1992, at 38.

81. See TICKLER, *supra* note 4, at 69.

82. *Id.* This is not to suggest that the political views of mercenaries are always so “liberal.” One mercenary in the failed coup in the Seychelles volunteered because “the Seychelles is a Communist tyranny run by Soviets and Marxists and the Libyan regime.” *Id.* at 104. Some mercenaries have no well-defined political views at all and are astoundingly ignorant of the political and military activities in which they participate. One mercenary admitted that “I received \$1,000 down payment and never met the person who paid us. But I believe it was done on behalf of the former President. Mongon? Montson? I am not sure of his name.” MOCKLER, *supra* note 58, at 263. The first president of the Seychelles after independence, who was forced on the citizens of the Seychelles in 1976, was James Mancham. See *id.*

83. Colonel Robert K. Brown, *SOF Team Trains the King's Cadre: On the Firing Line With Bosnia's King Tomislav Brigade*, SOLDIER FORTUNE, Apr. 1993, at 38.

84. “Skippy” Hampstead, *Bushwacked in the Balkans: International Catch Serbs in Crossfire*, SOLDIER FORTUNE, Aug. 1992, at 37.

85. The International Brigade probably numbered at the most 140 men, with perhaps 40 more of Croatian ancestry. See Krott, *supra* note 4.

commando unit and was wounded. . . . Today I have just enough money every day for bread, a pack of cigarettes and a drink. I am working for less than \$90 a month for a man who never fought and became rich as a war profiteer.<sup>86</sup>

While adventurer-mercenaries seek out a provisional existence at the margins of States, they nevertheless take their professional duties seriously. Ironically, professional mercenaries in Bosnia often had more military expertise than the regular army soldiers with whom they fought. Due to lack of resources and urgent need, the Croatian Army was primarily composed of new, poorly trained recruits with inferior weapons: "It seems like every yahoo in the country was issued a uniform and a Kalashnikov."<sup>87</sup> The mercenaries in Bosnia with previous military experience generally found the Croatian volunteers to be underprepared at best:

First there were the guys who didn't give a toss; . . . [I]t was damn near impossible to find a Croat who didn't stink of alcohol and wasn't half wasted. Second, there were men whose main concern was to look good. . . . I'd say they watched too much television: armed to the teeth, grenades hanging from their belts . . . , carrying the biggest knives they could find, and whatever berets they fancied— instant Para, instant Green Beret.<sup>88</sup>

This mercenary's description of Croatian regular army soldiers reverses the stereotype; the mercenaries were the professionals, while the soldiers seemed to be playing at arms.

This discussion has shown how adventurer-mercenaries sell their military labor as a commodity in the world market. Yet, the commodification is incomplete where mercenaries establish limits on who can purchase their labor. Many adventurer-mercenaries profess an unwillingness to fight for an unjust cause; this vestigial sense of honor offends our concept of "mercenary" as a kind of prostitute who must sell to any willing buyer in a market. Their claim to "professionalism" no doubt also strikes one as naive at best. Nevertheless to accept the State generated perception of mercenaries as money-hungry, amoral soldiers of fortune who will sell their skills to the highest bidder, ignores the significance and meaning which mercenaries claim for themselves outside the ideological system of States on which they feed.

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86. Jonathan C. Randal, *Serb Troops Paid to Go to War—In Zaire*, WASH. POST, Mar. 19, 1997, at A13.

87. Krott, *supra* note 4, at 67.

88. Hampstead, *supra* note 84, at 35.

## B. Multinational Military Corporations

### 1. South African Corporations

The second form of mercenary organization is the multinational military corporations with a purely commercial purpose. Executive Outcomes (EO), a South African private company, was a mercenary multinational corporation who sold their military labor on an international market.<sup>89</sup> During its existence, EO represented an inversion of the commodity system in at least two ways. First, they were an autonomous military organization which usurped the economic and political power of States. Second, EO produced a convincing counter-ideology which legitimated the alienability of military labor albeit with certain restrictions.

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89. EO closed down on January 1, 1999, apparently in response to the new Republic of South Africa Regulation of Foreign Military Assistance Act (1998) [hereinafter 1998 Act], designed to regulate foreign military activity by its nationals. See Thomas K. Adams, *The New Mercenaries and the Privatization of Conflict, Parameters* (visited Sept. 24, 1999) <<http://carlislewww.army.mil/usawc/parameters/99summer/adams.htm>>. Before the passage of the 1998 Act, the 1957 Defence Act (Act No. 44 of 1957), section 121(A) prohibited members of the SADF, the reserves, or auxiliary members from serving as mercenaries or providing mercenary services. The Second Amendment to the Penal Code (Act No. 126 of 1992), adopted prior to the promulgation of the new constitution, the 1987 Security Officers Act, and the National Keypoints Act (Act No. 102 of 1980) also contained provisions applicable to security service companies operating inside South Africa. For example, such companies were prohibited from using firearms and explosives, training their personnel in certain types of military or paramilitary operations, etc. Although EO was licensed in South Africa as a private security company and was not in violation of any South African laws before the 1998 Act was passed, the 1998 Act would have hindered EO' operations. Although the 1998 Act prohibits mercenary activity under section 2, it regulates the rendering of foreign military assistance either inside or outside of South Africa by requiring authorization from the National Conventional Arms Control Committee as constituted by the National Executive by the decision of August 18, 1995, under sections 4 and 5. Authorization would not be granted under section 7 if, for example, approval would conflict with South Africa's obligations in terms of international law, infringe on human rights and fundamental freedoms, contribute to regional instability, or be unacceptable for any other reason. The 1998 Act also gives the Minister of Defense veto power over the authorization under section 4, subsection 3. Essentially, the 1998 Act would allow the government of South Africa to decide what contracts EO could accept, thereby exerting State control over private military operations. According to the financial director of EO, Nico Palm: "African countries are busy working out solutions in Africa. Let's give them a chance. I am going to get involved in other things which keep me out of the limelight. I am going to close the company and I will not be involved in the security business." Anton La Guardia, *Mercenaries: Executive Dogs of War Have Had Their Day*, ASIA-PAC. NETWORK, Jan. 3, 1999. Ironically, the closure of EO will force governments to rely more heavily on the free-lance mercenaries once common in Africa. Jakkie Cilliers, Executive Director of the Institute of Security Studies in Johannesburg, said the closure of EO would change little because its activities were spread through a large network of security companies, many of them outside South Africa. See La Guardia, *supra*. Strangely, however, EO' Pretoria offices remain staffed, and its employees in Sierra Leone have begun working for a new firm called Lifeguard. See Adams, *supra*. Former EO employees are reportedly working for the national government of Angola and the National Union for the Total Independence of Angola (UNITA) rebels. See *Can Anyone Curb Africa's Dogs of War?*, ECONOMIST, Jan. 16-22, 1999, at 41.

EO was paid generously by the governments who contracted with them.<sup>90</sup> In September 1994, for example, EO was awarded a contract by the Angolan government for military training worth \$40 million.<sup>91</sup> Contracts for security and military training were estimated to be between \$20 million to \$100 million per year.<sup>92</sup> In addition to direct payments, EO, its parents and affiliates sometimes received mining and energy concessions from the employing nation.<sup>93</sup> While it was in operation, EO established a stable military and political environment and then began

to exploit the concessions it . . . received by setting up a number of associates and affiliates which engage[d] in such varying activities as air transport, road building, and import and export, thereby acquiring a significant, if not hegemonic, presence in the economic life of the country in which it wa[s] operating . . . .<sup>94</sup>

EO had a considerable impact on African politics. According to EO' chief executive, Nic Van Den Bergh, because EO' efforts forced UNITA to the negotiating table they "changed the balance of power in Angola quite dramatically . . . ."<sup>95</sup> EO certainly improved the domestic political situation in Angola. "Angola was notorious for its diamond smuggling, weapon smuggling, ivory smuggling, precious wood smuggling and our presence there put an end to that."<sup>96</sup> According to EO' founder and general manager, Eben Barlow, "[w]e have had a major impact on Africa. We have brought

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90. EO also paid its employees well. EO mercenaries in Sierra Leone earned up to \$2000 per week. See *Africa-Politics: Among Mercenaries, Mad Mike's Out, Trainers In*, INTER PRESS SERVICE, May 22, 1995, available in 1995 WL 2261211.

91. See Philip Winslow, *Why Africa's Armies Open Arms to Elite Fighters From S. Africa*, CHRISTIAN SCI. MONITOR, Oct. 19, 1995, at 1, available in LEXIS, News Library, CSM File.

92. See Lynne Duke, *Dogs of War' on a Loose Leash; South Africa Weighs Reining In Peddlers of Mercenary Ex-Soldiers*, WASH. POST, Mar. 20, 1996, at A22. For governments, the money was well spent: "Between mid-1993 and late 1994, EO trained 4000 to 5000 [Angolan] government troops and [approximately] thirty pilots." *Angola: Between War and Peace: Arms Trade and Human Rights Abuses Since the Lusaka Protocol*, ARMS PROJECT/HUM. RTS. WATCH AFR. (Hum. Rts. Watch, New York, N.Y.), Feb. 1996, at 17 [hereinafter *HRW Angola Report*].

93. Strategic Resources Corporation, a Bahamas-based holding company that controls EO, also owns part of a company called Branch Mining. See Danielle Gordon, *No Peace for South Africa's Wand'ring Warriors*, BULL. ATOM. SCIENTISTS, May/June 1996, at 6, available in 1996 WL 8994334. Branch Mining was awarded diamond-mining concessions as partial payment for its work in Sierra Leone in 1995. See Winslow, *supra* note 91. Other companies linked to EO include Branch Energy in Cabinda, Bridge Resources, and Corporate Trading International. See *HRW Angola Report*, *supra* note 92, at 19.

94. Thalif Deen, *United Nations: Mercenaries Seek Stake in Diamond Mines*, INTER PRESS SERVICE, Nov. 5, 1996, available in 1996 WL 13588933 (quoting the U.N. Special Rapporteur on Mercenaries Enrique Bernales Ballesteros).

95. Kevin Whitelaw, *Have Gun, Will Prop Up Regime*, U.S. NEWS & WORLD REP., Jan. 20, 1997, at 47.

96. *Interview of Executive Outcomes' Head Eben Barlow*, BBC SUMMARY OF WORLD BROADCASTS, Jan. 24, 1997, available in LEXIS, ASIAPC Library, BBCSWB File.

peace to two countries almost totally destroyed by civil wars.”<sup>97</sup>

Before a South African Act of Parliament drove EO out of business, EO’ consolidated economic and military power base was beginning to rival that of the States it once defended and served. If this trend had continued, “Executive Outcomes w[ould have] become ever richer and more potent, capable of exercising real power, even to the extent of keeping military regimes in being. If it [had] continue[d] to expand at th[at] . . . rate, its influence in sub-Saharan Africa [w]ould [have] become crucial.”<sup>98</sup> That a private multinational mercenary company could amass enough political and economic power implies that States, at least some African States, have lost the monopoly on organized military violence. As the Special Rapporteur on Mercenaries pointed out in his 1997 Report, EO

rivals a function traditionally assigned to the State, namely, security, not only that involving police functions, but also national security, which includes the organization of the armed forces and the maintenance of public order, the sovereign exercise of the authority of the State and the integrity of the national territory.<sup>99</sup>

Where States can no longer control the private violence in their own territories, alternative military or paramilitary entities will usurp this function. Numerous mercenary corporations provide private security for companies doing business in countries where the local security forces cannot guarantee the safety of their foreign industrial installations.<sup>100</sup> These companies become profitable when the police are either understaffed, incompetent, or corrupt. In South Africa, for example, more people are now employed by private security companies than the police force.<sup>101</sup> In East Africa, especially in Angola and Zaire, the security industry is growing at twenty to twenty-eight percent per year.<sup>102</sup>

This change in military relationship between States and private entities suggests that some States no longer exert explicit control over military technology or manpower. Military skill is becoming increasingly privatized and

97. Khareen Pech & David Beresford, *Corporate Dogs of War Who Grow Fat Amid the Anarchy of Africa*, OBSERVER, Jan. 19, 1997, at 19, available in 1997 WL 7809257.

98. *Id.*

99. *Report on the Question of the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, U.N. ESCOR, 53d Sess., Annex, Agenda Item 7, ¶ 64, U.N. Doc. E/CN.4/1997/24 (1997) [hereinafter 1997 *Report on the Question of the Use of Mercenaries*].

100. Securicor (Great Britain), for example, grew out of a small guarding company formed in 1935 by the Marquis of Willingdon. See Patrick Tooher, *The Changing of the Guard*, INDEP. (London), Mar. 31, 1996, at 6, available in 1996 WL 4066220. Securicor hires retired police chiefs, ex-military personnel, and financiers. See *id.* Sir Peter Imber, former Commissioner of the London Metropolitan Police sits on the board of directors. See *id.*

101. See Micaela Wrong, *Fear Drives Africa’s Boom Business: Security Companies Trade on Lawlessness and Crime*, FIN. TIMES, May 8, 1996, at 6.

102. See *id.*

commodified.<sup>103</sup> “Increasingly companies, not nations, own and manage the crown jewels of the global military industrial enterprise.”<sup>104</sup> While the reasons for this change are complex, according to EO’ founder,

[t]here has been a scaling down of armies after the Cold War era. A lot of armies have decided to become leaner and meaner, and often they lose very valuable skills in going through these processes, and have to contract people in afterward in order to redress the balance within the armies. I don’t think it’s a privatization of war as such, but possibly a privatization of training.<sup>105</sup>

Because their entire purpose is to engage in violence, professional mercenaries like EO sometimes prove to be more efficient than the States own armed forces. According to John Leigh, Sierra Leone’s envoy to Washington, “[t]he government of Sierra Leone believes EO can do a better job [providing security] than the Sierra Leone army . . . . Their deployment in the diamond districts has permitted the resumption of diamond mining in Sierra Leone . . . .”<sup>106</sup>

In the process of military privatization, EO acquired the skill, knowledge, and manpower that States have lost. States like Angola and Sierra Leone are once again in the position of having to purchase a commodity provided by an outside supplier. EO like other military consulting organizations, acquired this military skill and knowledge by pilfering the human refuse of State armies.<sup>107</sup> EO personnel included a number of SADF officers

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103. Similarly, States no longer fully control the commodity flow of equipment and technology in the world market. Historically, States exerted political control over the circulation of weapons in the world market through devices such as export controls. Since the end of the Cold War, however, major arms-producing States “have promoted the export of advanced weapons and the associated technologies to the developing world.” WILLIAM W. KELLER, *ARM IN ARM: THE POLITICAL ECONOMY OF THE GLOBAL ARMS TRADE* 9 (1995). The globalization of military industry has resulted in the loss of political control over potent weapons. *See id.* at 10. Economic forces, rather than calculated political decisions, increasingly determine the worldwide allocation of weapons. Finished weapons and the technical knowledge necessary to produce weapons are increasingly available to whomever can pay the market price.

104. *Id.* at 10.

105. *Interview of Executive Outcomes’ Head Eben Barlow, supra* note 96.

106. Whitelaw, *supra* note 95.

107. Security firms also hire employees with prior military experience. For example, Keeni Meeni Services (KMS), a private British military-consulting firm, was founded by David Walker, an ex-Special Air Service (SAS) major, and James Johnson, a former Guards officer. KMS worked for the Sultan of Oman on a contract worth \$12 million and was subsequently hired by the Sri Lankan government in their counterinsurgency action against the Tamils. There is some evidence that KMS was engaged in active combat missions. *See* TICKLER, *supra* note 4, at 127. The KMS team that trained and flew missions for the Contras in Honduras was led by a former Royal Air Force pilot, Michael Borlace, who had previously served in the Rhodesian Army during Ian Smith’s regime. *See id.* Jardine Securicor Gurkha Services (Hong Kong) is run by former British Army Major Chris Hardy and employs over 900 former members of the British Army’s Gurkha Regiment. *See* Keith B. Richburg, *Long Fabled as Military Fighters, Gurkhas Turn to Private Security*, *HOUS. CHRON.*, Sept. 3, 1995, at 46. Defense Systems Limited (Great Britain), who specialize in protecting embassies, recruit former Gurkhas and SAS members. *See* Wrong, *supra* note 101.

and non-commissioned officers from the Thirty-First and Thirty-Second “Buffalo” Battalions and Koevoet (Crowbar) paramilitary police.<sup>108</sup> “We only use people who are South African, or they served in the South African armed forces, and we have some members who used to be in the ANC’s [African National Congress] military wing as well.”<sup>109</sup> The founder of EO, Eben Barlow, was a former member of the South Africa Intelligence Service.<sup>110</sup> EO’ commander in Sierra Leone was Brigadier Burt Sachs, former commanding officer of the South African Fifth Reconnaissance Commando.<sup>111</sup>

Armies discharge soldiers for a variety of reasons that have nothing to do with fitness or competence. Many former soldiers

find themselves without a job. They have no other skills. So first of all to him it’s a job. Secondly, . . . [EO] do[es] offer, I suppose, an excitement that the army doesn’t offer, and the guys do work in foreign countries, they get exposed to different cultures, they get exposed to different military scenarios and all that coming from the background they come from is very exciting.<sup>112</sup>

Private consulting organizations gladly recruit these men, already provided with excellent military training by States. EO repackaged the skills and resold them to States.

Despite the fact that EO functioned autonomously from States, and in fact had effectively broken the State’s monopoly on the use of organized violence, EO’ military force was incompletely commodified—it could only be purchased by States: “[W]e are only employed by governments, and governments are not going to employ us in order to overthrow them.”<sup>113</sup> EO refused contracts from opposition groups: “Our work has always been with legitimate governments, under legitimate contracts.”<sup>114</sup> EO refused work in the Sudan because it believed the regime supports terrorism.<sup>115</sup>

EO demonstrated a strange loyalty both to those who hired them and the international system of States in general. In Sierra Leone, for example, EO prevented a coup by a group of army officers following the election, and

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108. See 1994 Report on the Question of the Use of Mercenaries, *supra* note 1, at 18.

109. Interview of Executive Outcomes’ Head Eben Barlow, *supra* note 96. EO was reported to hire former commandos from the British SAS, Selous Scouts from the former Rhodesia, and military technicians from the Soviet Union. See Duke, *supra* note 92.

110. See Howard French, *S. African Consultants Called Guns for Hire: Contractors Play Role in Conflicts Abroad*, DALLAS MORNING NEWS, June 11, 1995, at 38A. Barlow served as an agent in the Civil Cooperation Bureau of the Thirty-Second Battalion, which carried out covert operations during the Apartheid Era. See Duke, *supra* note 92. Barlow founded EO after seventeen years in the South African Army. See Winslow, *supra* note 91.

111. See Jim Hooper, *Sierra Leone: The War Continues*, JANE’S INTELLIGENCE REV., Jan. 1996, at 41, available in 1996 WL 9483513.

112. Interview of Executive Outcomes’ Head Eben Barlow, *supra* note 96.

113. *Id.*

114. *Id.*

115. See Whitelaw, *supra* note 95.

was discreetly thanked by the government and other international organizations.<sup>116</sup> Where it could have exploited a vulnerable situation, EO backed the elected government. As one EO executive noted, “[w]e are not going to help anyone that is not a legitimate government or which poses a threat to South Africa, or that is involved in activities really frowned upon by the outside world.”<sup>117</sup> EO seemed unwilling to incur the approbation of States by participating in any “outlawed” activities.

Because of the legal and ideological proscriptions on mercenary work, EO has denied participating in combat operations.<sup>118</sup> However, in Angola EO employees flew combat sorties in Soviet Mi-17 helicopters and MiG fighters<sup>119</sup> and the town of Soyo was seized in a 1994 operation conducted by EO.<sup>120</sup> In Sierra Leone, in October 1995, EO helped government troops to retake four townships in the region from the Revolutionary United Front (RUF).<sup>121</sup>

In 1995, an EO member discussed direct involvement in a military operation in Angola:

A team went ahead to clean up Cafunfo. We followed up later and, on the way to Cafunfo, we killed about 300 enemy soldiers. Executive Outcomes was engaged in attacks all the time. It did give some training as well, but the successes of the MPLA could be directly attributed to Executive Outcomes' involvement.<sup>122</sup>

Barlow acknowledged that EO was involved in military engagements with UNITA in Angola:<sup>123</sup> “[W]e were on . . . [occasion forced] into a position

116. See Hooper, *supra* note 11:

[D]isgruntled senior RSLMF [Republic of Sierra Leone Military Force] officers whose illicit diamond trading was threatened by the installation of the new government, began planning a coup. . . . [T]he conspirators were quietly advised by the South Africans that they supported the election results and would respond vigorously to any attempt to overthrow the government to which they were contractually bound. The result was that one member of the disbanded junta was posted abroad for a two-year staff course, the plot evaporated, and EO was discreetly thanked by various international bodies.

*Id.*

117. Pech & Beresford, *supra* note 97.

118. See *HRW Angola Report*, *supra* note 92, at 17. Andy Brown, a spokesman for EO in Freetown, Sierra Leone said that EO had only trained infantry units and that no EO personnel fought on the ground, although intelligence, logistics, communications, strategic planning, and operational command were being run by EO. See Sam Kiley, *Sierra Leone Faces Aid Cut Over Apartheid Soldiers*, *TIMES* (London), July 19, 1995, available in 1995 WL 7684870.

119. See *HRW Angola Report*, *supra* note 92, at 17.

120. See JANE'S MIL. EXERCISE & TRAINING MONITOR, Oct.-Dec. 1995, at 8.

121. See Christo Johnson, *Troops Foil Coup in Sierra Leone*, *INDEP.* (London), Oct. 4, 1995, at 15, available in 1995 WL 9813258.

122. *HRW Angola Report*, *supra* note 92, 19.

123. In December 1995, Angolan President Jose Eduardo dos Santos canceled EO' contract following pressure from the United States in order not to jeopardize the peace process

where we had to take action to defend ourselves and if threatened, we'd carry out pre-emptive strikes."<sup>124</sup> In characterizing themselves as "trainers" and "advisors" EO avoided the stigma of being simple mercenaries.<sup>125</sup>

To retain their clientele of States, EO disassociated themselves from "mercenaries" who are sometimes used by States, but always shunned. Adventurer-mercenaries like Bob Denard were objectionable to EO on the grounds that they were motivated by private, selfish interests and cared little for the State system: "He [Denard] . . . effectively ran the Comoros for a while until he was ousted . . . . [P]eople such as him really travel around the world looking for conflicts, and join armies, and build up their own army."<sup>126</sup> EO seemed proud that although they posed a threat to States, they provided a service to States. "There is a very distinct line between what we do and what mercenaries do," says EO' Chief Executive Nic Van Den Bergh.<sup>127</sup> "We are providing a professional military advising service."<sup>128</sup>

States were apparently willing to agree with EO' assessment. In November 1995, the government of Angola issued a statement which asserted that EO did not fall under the definition of mercenary in the 1989 International Convention Against the Recruitment, Use, Financing and Training of

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with UNITA. EO officially pulled out of Angola in mid-January 1996, although a number of the men employed by EO may have remained in Angola to work for front companies, such as Saracen International, Stuart Mills International, and Shibata Security. See Jeff Zerbst, *The World This Week: Tenacious Advisors*, MAIL & GUARDIAN (Johannesburg), Dec. 26, 1996, available in LEXIS, MDEAFR Library, AFRNEWS File. Portuguese security companies employed by the MPLA government, such as Tele Services, may have absorbed some EO personnel. See *Diamond Build-Up for SPE*, AFR. ENERGY & MINING, Mar. 27, 1996, available in LEXIS, MDEAFR Library, AFRNEWS File. Mercenaries engaging in active combat operations are still commonly employed by the Angolan government. In May 1996, the Angolan Armed Forces (FAA) based in Malange Province were using Katangese mercenaries. See *Angolan Army Chief Gets Advice From Chissano*, AGENCE FR.-PRESSE, May 15, 1996, available in 1996 WL 3854726.

124. Gordon, *supra* note 93, at 5. Concerning pre-emptive actions taken by EO in Sierra Leone see Al. J. Venter, *Sierra Leone's Mercenary War: Battle for the Diamond Fields*, INT'L DEF. REV., Nov. 1, 1995, at 65, available in 1995 WL 14421808.

125. Security firms also deny any involvement in active combat operations, even when the evidence clearly indicates their participation. In February 1995, Gurkha Security Guards (GSG) were subcontracted to train the RSLMF. See Hooper, *supra* note 111. Although GSG denied it was involved in combat operations in Sierra Leone, after GSG arrived, government forces using two Russian Mi-24 helicopter gun ships flown by Belarussian mercenaries attacked a series of rebel bases. On February 24, 1995, the Gurkhas' commander, American Colonel Bob McKenzie (a Vietnam vet who had worked with the Rhodesian SAS and in Bosnia) was killed trying to rescue one of Strasser's advisors in an offensive operation. See Jim Hooper, *Rag-Tag Rebel Band Holds a Nation to Ransom: Impoverished Sierra Leone Must Pay Mercenaries to Fight Its Territories*, SUNDAY TELEGRAPH (London), Mar. 12, 1995, at 28, available in 1995 WL 7989924. Because of the association of the Gurkhas with the British army, the British Foreign Office feared that it would be interpreted by the RUF as direct intervention. Nick Bell, the head of GSG stated that the Gurkhas "are not in Sierra Leone in an offensive role . . ." *Id.*

126. Pech & Beresford, *supra* note 97.

127. Whitelaw, *supra* note 95.

128. *Id.*

Mercenaries.<sup>129</sup> The government called EO “foreign military and industrial security specialists” hired on a cooperation basis and argued that the cooperation agreements and contracts signed with the Ministry of Defense were legal and in accordance with Article 15 of Presidential Decree No. 2/93 on military policy.<sup>130</sup>

Despite the fact that EO minimized the threat it posed to States, the very fact of competent, commodified military skill threatens the State’s long held monopoly on the use of force.<sup>131</sup> Aziz Pahad, South Africa’s Deputy Foreign Minister expressed this fear perfectly: “[T]oday they’re there to defend you, tomorrow those forces will be there to overthrow you.”<sup>132</sup> The South African Government responded to this threat by proposing neutrality laws and by trying to persuade the Organization of African Unity (OAU) to condemn EO and other firms to no avail.<sup>133</sup> EO, however, did not object to South Africa’s proposed legislation restricting foreign enlistment, “[i]n fact, we [EO] welcomed the legislation when it was initially announced. We . . . believe that there will then be some form of regulation.”<sup>134</sup>

## 2. U.S. Corporations

Military Professional Resources, Inc. (USA) (MPRI) is another multinational mercenary corporation. MPRI, in fact, claims it is “the greatest corporate assemblage of military expertise in the world.”<sup>135</sup> A number of high-ranking former U.S. officers are employees of MPRI, including Gen. Carl E. Vuono, who served as the Army Chief of Staff until 1992 (and was Colin Powell’s mentor), and Gen. Crosby E. (“Butch”) Saint, who was the commander of the U.S. Army in Europe from 1988-1992. MPRI’s team in Croatia was headed by retired two-star U.S. Army General Richard Griffiths. Retired Army Lieutenant General Harry Soyster, formerly the head of the Defense Intelligence Agency, is MPRI’s vice president for international operations.<sup>136</sup>

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129. See *HRW Angola Report*, *supra* note 92, at 18.

130. *Id.* at 18.

131. According to Human Rights Watch Consultant Alex Vines, EO was not covertly furthering the foreign policy of any State. See Interview with Alex Vines, Human Rights Watch Consultant, in Wash. D.C. (June 24, 1996). On the other hand, Greg Mills of the South African Institute of International Affairs argued that EO may be furthering the foreign policy aims of South Africa by aiding the government of Angola, a long-term ally. See Duke, *supra* note 92.

132. Winslow, *supra* note 91.

133. See *id.*

134. *Interview of Executive Outcomes’ Head Eben Barlow*, *supra* note 96.

135. Mark Thompson, *Generals for Hire: Confronted With Its Trickiest Task in Bosnia, the U.S. Has Made Plans to Pay Someone Else to Do It*, TIME MAG., Jan. 15, 1996, at 34 (quoting a MPRI brochure).

136. See Paul Harris, *Have Guns Will Travel: Corporate Mercenaries With Links to Arms Sellers and the Pentagon Are Fulfilling US Policy Aims by Proxy*, SCOT. ON SUNDAY, May 5, 1996, at 15, available in LEXIS, UK Library, SCOTSM File.

MPRI does business with the American government and with foreign States. MPRI has annual billing revenues of about \$12 million, but expected a profit of \$230,000 in 1995.<sup>137</sup> MPRI holds a number of contracts for the Department of Defense in areas of training and doctrine development, and equipment testing and evaluation.<sup>138</sup>

Because MPRI is outside the State, it can be used for sensitive operations without jeopardizing the U.S.' neutral status. When the Croatian government sought advice from the United States on how to construct a civilian-controlled army and to provide leadership skills training, the Pentagon referred the Croatian Defense Minister to MPRI.<sup>139</sup> According to a State Department spokesman, the expertise provided by MPRI was "crucial to Zagreb's stated goal to avoid excesses or atrocities in military operations."<sup>140</sup> Although MPRI denies conducting offensive operations, the recapture of Krajina in August 1995, utilized typical American operational deployment, including integrated air, artillery, and infantry movements, as well as the use of maneuver warfighting techniques to destroy Serbian command and control networks.<sup>141</sup> MPRI was also hired by the Bosnian Muslim-Croat Federation to arm and train the Federation Army.<sup>142</sup> In fact, the United States was instrumental in bringing MPRI and the Muslim-Croat Federation Army together. In early January, James Pardew from the Pentagon went to Sarejevo to urge the Bosnian government to hire MPRI or other consultants such as Science Applications International (SAIC) to begin training their army prior to the lifting of the arms embargo.<sup>143</sup>

This discussion indicates the benefits that States derive from the continued existence of mercenary organizations. They provide a convenient pool of labor that can be tapped when necessary and can be used for politically sensitive actions that States can plausibly deny. Yet, mercenaries are a

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137. See Crock, *supra* note 5.

138. For example, MPRI field-tested the M109-A6 Paladin howitzer at Fort Leavenworth. See *id.* MPRI also introduced the M2/M3 Bradley armored fighting vehicles to the National Guard. See *id.* MPRI has also worked in Taiwan and briefed the Swedes on Operation Desert Storm. See *id.*

139. See Roger Cohen, *U.S. Cooling Ties to Croatia After Winking at Its Buildup*, N.Y. TIMES, Oct. 18, 1995, at A1.

140. *US Military Consultants Advising Croatians*, AGENCE FR.-PRESSE, Aug. 7, 1995, available in 1995 WL 7840504. MPRI's activities were approved by the Pentagon, who determined that the training course did not involve tactical training or otherwise violate the 1991 U.N. Security Council arms embargo on Yugoslavia. This embargo made direct military assistance illegal.

141. Reports indicate that a number of high-level meetings and computer simulations were conducted in the days immediately preceding the Krajina offensive. See Cohen, *supra* note 139.

142. See Barbara Starr, *US Firm to Train Muslim Federation in Bosnia*, JANE'S DEF. WKLY., June 5, 1996, at 5, available in 1996 WL 9481406. The total value of the "equip and train" program is estimated to be \$700-800 million. The US has also agreed to provide refurbished equipment worth \$98.4 million. See *Bosnia Chooses Virginia Firm to Train, Equip Army*, REUTERS, May 29, 1996.

143. See Thompson, *supra* note 24.

dangerous tool which can be turned against one master as easily as another. For example, in March 1997, several hundred Serbian mercenaries hired by Zaire's President Mobutu began firing on the Zairian Army when Kabila's rebels attacked Kisangani.<sup>144</sup> States may be able to temporarily "capture" this violence—control of it may be much more elusive. The following section explores the legal mechanisms by which States have attempted to control the commodification of violence.

#### IV. LEGAL CONTROLS ON THE COMMODIFICATION OF VIOLENCE

A State's toleration of the buying and selling of military manpower depends on the level of control that States exert. When States do the buying and selling, tolerance for commodification of military skills is very high. Employment of foreign citizens in a regular army is a non-prohibited, "acceptable" commodification of military manpower. The French Foreign Legion, for example, is a standing army composed of multiple nationalities.<sup>145</sup> Similarly, the ruling Al Khalifa family of Bahrain have used foreign security officers as police and as internal intelligence agents since the early 1960s. Both the British and the Indian Army recruit Nepalese citizens (Gurkhas) for service in their standing armies.<sup>146</sup> During the Vietnam War, the U.S. Army assembled the Fifth Special Forces Group's Civilian Irregular Defense Group (CIDG), a 50,000 member force primarily composed of tribal minorities such as the Montagnard.<sup>147</sup>

State "rental" of another State's troops is another form of non-contested buying and selling of military manpower.<sup>148</sup> During the 1969-76 Dhofar War

144. Kabila, who accused the mercenaries of fighting alongside Hutu extremists responsible for the Rwandan genocide, had warned that any mercenaries captured would be executed on the spot. See Chris McGreal Kinshasa, *Zaire's Dogs of War Maul Their Masters*, OBSERVER NEWS PAGE, Mar. 16, 1997, at 22, available in 1997 WL 7811651.

145. For a history of the French Foreign Legion, see TONY GERAGHTY, *MARCH OR DIE: A NEW HISTORY OF THE FRENCH FOREIGN LEGION* (1986).

146. The British East India Company began recruiting Gurkhas in 1815 and the recruiting continues under the Kathmandu Agreement of 1947. The term "Gurkha" applies to any Nepali serving in the armed forces. The term comes from the Kingdom of Goorka, a town west of Kathmandu. For a history, see BANSKOTA PURUSHOTTAM, *THE GURKHA CONNECTION: A HISTORY OF THE GURKHA RECRUITMENT IN THE BRITISH INDIA ARMY* (1994).

147. See Colonel David Hackworth, *Does Uncle Sam Need a Foreign Legion?*, SOLDIER FORTUNE, Mar. 1994, at 51.

148. States complicit in providing mercenaries generally deny any involvement in the sale of mercenary talent. In 1997, for example, Serbia and other former Yugoslav republics supplied arms and mercenaries to Zaire. Although the Yugoslav Foreign Ministry denied any government involvement in the deals with Zaire, according to one Western diplomat: "The mercenaries are just the icing on the cake. . . . The equipment represents the real money for Belgrade and Pale . . . ." Randal, *supra* note 86. Furthermore, the former commander of the Yugoslav Army's Federal Directorate for Supply and Procurement, which handles overseas weapons sales, General Jovan Cekovic, helped set up a dummy Egyptian tourism company that arranged refueling and overflight rights for aircraft taking mercenaries and arms to Zaire. See *id.*

in Oman, the British Army asked for volunteers for "loan service" to the Sultan's forces.<sup>149</sup> The Sultan paid the wages of the loaned soldiers, and the same amount to the British Army for the expense of training them.<sup>150</sup> During the Vietnam War, the United States purchased the services of South Korean, Thai, and Philippine troops.<sup>151</sup> The governments of these States were paid an overseas allowance, an allowance for rank, and a per diem allowance.<sup>152</sup> The United States also paid all expenses associated with deploying those forces in Vietnam.<sup>153</sup>

The ad hoc purchase of military skill, whether by States or insurgent groups, is only prohibited when it is not condoned by the States who are "providing" the labor. This type of mercenary was common during the 1960s and 1970s in Africa. Several hundred French, Belgian, British, and Rhodesian mercenaries served in the Congo from 1960-1968.<sup>154</sup> Thousands of mercenaries fought in Rhodesia during the mid-1970s.<sup>155</sup> In 1969, during the Nigerian Civil War, hundreds of mercenaries volunteered to fight for secessionist Biafra.<sup>156</sup> In 1975, French mercenary Bob Denard toppled Abdallah's regime in the Comores.<sup>157</sup> In a later coup, Denard reinstated Abdallah and was rewarded with control of the army and presidential guard, which were primarily composed of European mercenaries.<sup>158</sup>

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149. For a discussion on the operation, see MICHAEL DEWAR, *BRUSH FIRE WARS: MINOR CAMPAIGNS OF THE BRITISH ARMY SINCE 1945*, at 165-80 (1984).

150. See TICKLER, *supra* note 4, at 124.

151. See THOMPSON, *supra* note 24, at 94.

152. See *id.*

153. See ROBERT M. BLACKBURN, *MERCENARIES AND LYNDON JOHNSON'S "MORE FLAGS": THE HIRING OF KOREAN, FILIPINO, AND THAI SOLDIERS IN THE VIETNAM WAR* (1991).

154. For a first-person history of the war in the Congo written by a mercenary commander, see MIKE HOARE, *MERCENARY* (1984).

155. See WILFRED BURCHETT & DEREK ROEBUCK, *THE WHORES OF WAR: MERCENARIES TODAY* (1977); see also MOCKLER, *supra* note 58, at 154-162 (discussing the recruiting practices in Great Britain for the war in Rhodesia).

156. Many European mercenaries supported Biafra for humanitarian reasons; none fought with the Nigerian forces. Count Carl Gustav Von Rosen, a national hero of Finland who single-handedly bombed Russian positions during the invasion in 1939, assembled a make-shift airforce for Biafra and successfully attacked Nigerian forces. He said:

[W]hen I understood the Biafrans were a people . . . headed by a legal government[.] . . . then I went all out to try and stop this terrible killing of innocent women and children . . . . [I]f you . . . have gone to fight for Finland because it was close to your own country . . . , there is no excuse for backing out of a similar situation because it is further away and the people are black.

MOCKLER, *supra* note 58, at 137-38.

157. See *id.*

158. The Comores became a mercenary paradise. Denard converted to Islam, married a local woman and went on a hajj to Mecca. See *id.* at 156. It is widely believed that Denard murdered Abdallah in 1989, after he threatened to expel the mercenaries. See Lynn Duke, *Dogged Soldier of Fortune Strikes Again*, WASH. POST, Sept. 29, 1995, at A19. After France deployed 3000 troops to the region, Denard went into exile in South Africa. See *id.* In 1995, 66-year-old Denard again seized the Comores, suspended the constitution, and declared a

The commodification of mercenary labor is sometimes prohibited when States have not given their permission. Under the U.S. Immigration and Nationality Act of 1952,<sup>159</sup> for example, American citizens who enlisted in the armed forces of a State *without the permission of the Secretary of State and the Secretary of Defense* lose their citizenship.<sup>160</sup> Foreign enlistment was permitted only if the executive authorized it.<sup>161</sup> Similarly, section 4 of the British Foreign Enlistment Act prohibits British citizens from accepting, "*without the license of Her Majesty . . . [.] any commission or engagement in the military or naval service of any foreign state at war with any foreign state at peace with Her Majesty . . .*"<sup>162</sup> This alienation of military services for sale in an open market to the highest bidder is proscribed because *it cannot be controlled by States*. Foreign nationals serving in *standing* State armies and the leasing of military manpower provoke almost no approbation, because the State *controls* the flow of the commodity.<sup>163</sup>

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military junta. See *id.* After French paratroopers stormed the island, Denard surrendered. See *id.* For an early history of the Comores coups, see MOCKLER, *supra* note 58, at 236-257. For later developments, see Duke, *supra*.

159. Section 1481(a)(3) of the Immigration and Nationality Act (8 U.S.C.A. § 1481(a)(3) (Lexis L. Pub. 1997) currently reads:

- (a) A person who is a national of the United States whether by birth or naturalization, shall lose his nationality by voluntarily performing any of the following acts with the intention or relinquishing United States nationality--
- (3) entering, or serving in, the armed forces of a foreign state if (A) such armed forces are engaged in hostilities against the United States, or (B) such persons serve as a commissioned or noncommissioned officer . . .

*Id.*

160. Section 1481(a)(3) of the Immigration and Nationality Act formerly provided that a person could lose their citizenship by "entering, or serving, in, the armed forces of a foreign state unless, prior to such entry or service, such entry or service is specifically authorized in writing by the Secretary of State and the Secretary of Defense." In *Afroyim v. Rusk*, however, the U.S. Supreme Court found the non-voluntary deprivation of citizenship unconstitutional on due process grounds, holding that citizenship conferred by the Fourteenth Amendment is absolutely vested and cannot be forfeited unless an individual makes a specific declaration of the intent to abandon citizenship in addition to a voluntary commission of an expatriating act (such as voting in a foreign election or serving in a foreign army). See *Afroyim v. Rusk*, 387 U.S. 253, 267 (1967); see also *U.S. v. Terrazas*, 444 U.S. 252, 261 (1980). According to the Attorney General, voluntary relinquishment is "not confined to a written renunciation," but "can also be manifested by other actions declared expatriative under the [A]ct, if such actions are in derogation of allegiance to this country." 42 Op. Att'y. Gen. 397, 400. While service as a mercenary alone would not cause the loss of U.S. citizenship, enrollment in foreign military service in combination with a sworn oath of allegiance might constitute an express waiver of citizenship. See Taulbee, *supra* note 20, at 361 n.93. Following the decision in *Afroyim v. Rusk*, § 1481(a)(3) was amended in 1986 by the Ninety-Ninth Congress to include a provision that nationality could only be lost by "*voluntarily performing any of the following acts with the intention of relinquishing United States nationality . . .*" Pub. L. No. 99-653, § 18(a), 100 Stat. 3655 (emphasis added).

161. See 8 U.S.C.A. § 1481(a)(3) (Lexis L. Pub. 1997).

162. Foreign Enlistment Act, 1870, 33 & 34 Vict., ch. 90, § 4 (Eng.) (emphasis added).

163. See THOMPSON, *supra* note 24, at 97.

### A. Neutrality Laws: Monopolization of Violence

States first came to control the private deployment of violence in the international system through neutrality laws. Neutrality laws, in fact, might be said to be the highest expression of the State's monopolization of violence because they give only *States* the power to make war. Broadly, domestic neutrality laws restrict the right of individuals to use force in an international context by prohibiting enlistment in a foreign military force and recruitment to enlist.

The United States was the first State to codify the rights and duties of a neutral State,<sup>164</sup> and the first State to integrate a monopoly on the use of force into the fundamental constitutional structure. The first U.S. Neutrality Act, enacted in 1794, outlawed private warfare, and gave the President and Congress (rather than private citizens) the power to make foreign policy.<sup>165</sup> Under Article 1, section 8 of the Constitution, only Congress has the power to declare war.<sup>166</sup> The first Neutrality Act implemented this constitutional grant of power by criminalizing military activity that violated Article 1. The Neutrality Act prohibited U.S. citizens from accepting commissions or enlisting in the service of a foreign State.<sup>167</sup> In order to deter U.S. involvement in foreign conflicts, the Act proscribed individuals from providing or preparing the means for military expeditions against a State with which the United States was at peace.<sup>168</sup>

Most States now have some form of neutrality law. Between 1794 and 1938, forty-nine States enacted laws concerning their citizens' foreign military service.<sup>169</sup> The Australian Crimes (Foreign Incursions and Recruitment) Act of 1977, for example, prohibits the recruiting, advertising, facilitation, or promotion of the use of mercenaries to serve in the armed forces of another country.<sup>170</sup> The French Penal Code prohibits any hostile action that would expose the State to a declaration of war.<sup>171</sup> The Canadian Foreign Enlistment Act makes it an offense to enlist in the armed forces of "any for-

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164. The 1794 Act is generally recognized as the first instance of municipal legislation in support of the international obligations of neutrality. For a discussion of the history of U.S. neutrality laws, see *U.S. v. Three Friends*, 166 U.S. 1, 52 (1897).

165. Act of June 5, 1794, ch. 50, § 5, 1 Stat. 381. After the original Neutrality Act was repealed in 1818, involvement of U.S. citizens in the Spanish Civil War prompted Congress to pass a second Neutrality Act, which survives in modified form at 18 U.S.C. §§ 958-967.

166. U.S. CONST. art. I, § 8.

167. Act of June 5, 1794, ch. 50, § 5, 1 Stat. 381. A misdemeanor was committed "if any citizen of the United States . . . within the territory or jurisdiction of the same, accepted and exercised a commission to serve a foreign prince or state in war by land or sea . . ." *Id.*

168. This section of the Act is still in force and is codified at 18 U.S.C. § 960.

169. See THOMPSON, *supra* note 24, at 81.

170. See Australian Crimes Act, 1977, No. 13 (Austl.). Australian citizens who are recruited outside of Australia, however, are not prohibited from enlisting under the Act. See L.C. Green, *The New Law of Armed Conflict*, CAN. Y.B. INT'L L. 3, 18-19 (1977). An Australian citizen may recruit mercenaries outside of Australia. See *id.*

171. See C. PÉN. arts. 84, 85 (1810) (Fr.).

eign state at war with any friendly foreign state . . . .”<sup>172</sup> Recruiting is prohibited in Canada for the “armed forces of any foreign state or other armed forces operating in that state.”<sup>173</sup> Although the South African Defense Act of 1957 prevents armed expeditions by private individuals, the government has failed to restrain the activity of mercenary groups.<sup>174</sup> The proposed 1997 South African legislation is designed to curtail the involvement of South Africans in mercenary activities by subjecting the sale of military or intelligence services to the same licensing process as military hardware.<sup>175</sup>

Neutrality laws share three noteworthy features that serve to illustrate the State’s “strategy” for the monopolization of violence. First, embedded within neutrality laws is an entrenched notion that the responsibility of States extends only so far as their territory does. This connection of territory and violence is at the heart of neutrality laws. Second, neutrality laws do not distinguish between States and belligerents. It simply does not matter if mercenaries volunteer to fight for States or insurgents—neutrality laws still apply. Finally, neutrality laws draw a strange distinction between the conditions of war and peace.

### 1. Territorial Limitations

Neutrality laws only became possible once violence was “territorialized” in the nineteenth century and States were finally held “accountable for the transborder coercive activities of individuals residing within their borders.”<sup>176</sup> During the Napoleonic Wars, for example, the activities of mercenaries and privateers threatened to draw the United States into the war.<sup>177</sup> Mercenary recruitment within the borders of a State was seen as an attack on sovereignty itself. Thomas Jefferson argued that “the granting of military commissions, within the United States, by any other authority than their own, is an infringement on their sovereignty, and particularly so when granted to their own citizens, to lead them to commit acts contrary to the duties they owe their own country.”<sup>178</sup>

In 1896, the U.S. Supreme Court determined in *Wiborg v. United States*,<sup>179</sup> that an overt act must occur *within* U.S. territory for the Neutrality

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172. Foreign Enlistment Act, R.S.C., ch. F-29, § 4 (1970) (Can.).

173. *Id.* § 11(1). Presumably, this would criminalize enlistment in national liberation movements fighting within a State territory.

174. The South African government supported UNITA in Angola, which for a number of years was heavily recruiting South African mercenaries. See Al J. Venter, *Merc Market Booming on Dark Continent*, SOLDIER FORTUNE, Dec. 1993, at 60.

175. See Pech & Beresford, *supra* note 97.

176. THOMPSON, *supra* note 24, at 19.

177. See *id.* at 77.

178. *Id.* at 77. By the nineteenth century, citizens *owed* political loyalty and military duty to their country. No longer was military skill a commodity to be bought and sold in an international market.

179. 163 U.S. 632 (1896).

Act to apply.<sup>180</sup> The Court held that the Act did not prohibit voluntary enlistment in a foreign army or the conduct of private hostile acts against a foreign State by U.S. citizens abroad.<sup>181</sup> Because the Act did not prevent individuals from leaving the United States to enlist in a foreign army, the Act did not prevent mercenary activity per se, but only the actions that occurred within the territory of the United States.<sup>182</sup> The current U.S. neutrality law, the Foreign Relations Act, prevents acts carried out within U.S. territory for the purpose of enlisting in a foreign military force,<sup>183</sup> but was held by the Supreme Court not apply to individuals who leave the United States to enlist in a foreign army.<sup>184</sup>

Mercenary activities occurring outside U.S. jurisdiction thus do not violate U.S. law.<sup>185</sup> Except in rare cases, the United States does not exert jurisdictional claims over the extra-territorial conduct of its citizens.<sup>186</sup> Unlike French criminal law, which applies to all citizens at home or abroad, criminal behavior of U.S. citizens abroad is generally not punishable under U.S.

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180. See *id.* at 655-56.

181. See *id.* at 653.

182. Within U.S. borders, individuals have no right to bear arms and form private armies under the Second Amendment. See *Vietnamese Fishermen's Ass'n v. Knights of the Ku Klux Klan*, 543 F. Supp. 198, 210 (S.D. Tex. 1982) (holding that the Second Amendment does not imply an individual right to establish private armies and to bear arms); *U.S. v. Hale*, 978 F.2d 1016, 1019 (8th Cir. 1992), *cert. denied*, 507 U.S. 997 (1993) (stating that "we cannot conclude that the Second Amendment protects the individual possession of military weapons."). Private armies formed in the United States, with no intention of entering military service overseas, are not constitutionally protected and may be liable to prosecution under anti-militia laws.

183. 18 U.S.C.A. § 959(a) (Law. Co-op. 1996) provides:

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

*Id.*; see also *U.S. v. Nunez*, 82 F. 599 (C.C.S.D.N.Y. 1896).

184. See *U.S. v. O'Brien*, 75 F. 900 (C.C.S.D.N.Y. 1896).

185. See *Gayon v. McCarthy*, 252 U.S. 171 (1920) (affirming the conviction of a Mexican national who recruited U.S. citizens to fight for the Mexican revolutionaries); *U.S. v. Three Friends*, 166 U.S. 1, 52 (1897); see also Robert E. Cesner, Jr. & John W. Brant, *Law of the Mercenary: An International Dilemma*, 6 CAP. U. L. REV. 339, 358 (1977).

186. U.S. citizens who commit the crimes of treason, income tax evasion, and draft evasion, however, are liable to U.S. laws by virtue of their U.S. citizenship. See LOUIS HENKIN ET AL., *INTERNATIONAL LAW: CASES AND MATERIALS* 445 (1980). National security may also necessitate extra-territorial jurisdiction. In *Haig v. Agee*, the U.S. Supreme Court found that the executive has the power to restrict an individual from undertaking international travel when the purpose of the travel is likely to cause serious damage to the national security or foreign policy of the U.S. See *Haig v. Agee*, 453 U.S. 280 (1981). For a general overview, see Jennifer Myers, *Passport Controls: Revocation of Passports for National Security Reasons*, 23 HARV. INT'L L.J. 163 (1982). For an argument that mercenaries could be restricted from leaving the country on these grounds, see Note, *American Mercenaries and the Neutrality Act: Shortening the Leash on the Dogs of War*, 12 J. LEG. 175, 188-94 (1985).

law. In *United States v. Dane*,<sup>187</sup> for example, Dane, a British national, had pleaded guilty to a charge of possession of illegal firearms in a U.S. court.<sup>188</sup> After serving his sentence, Dane was given probation.<sup>189</sup> While on probation, Dane handled weapons, had his personal weapons shipped to Mexico from the United States, and engaged in armed insurrection in Rhodesia.<sup>190</sup> Although the court characterized this as evidence of a return to mercenary life justifying revocation of probation, the court noted that the acts themselves were not in violation of U.S. laws: “[T]he acts cited by the court . . . were committed outside the United States and violated no law of the United States.”<sup>191</sup>

## 2. Applying Neutrality Laws to Insurgents

The second element of neutrality laws which exposes the State’s strategy for monopolization of force is the application of neutrality laws to insurgents. Through neutrality laws, the United States monopolized private violence deployed on behalf of States, and private violence deployed on behalf of insurgents. In *United States v. Nunez*,<sup>192</sup> a New York court held that the purpose of section 959 of the Neutrality Act, which prohibits foreign enlistment, was “to prevent entanglements between th[e U.S.] government and foreign powers, by prohibiting expeditions from this country interfering with belligerents, or with the relations between a mother country and its *insurgent people* . . . .”<sup>193</sup>

The United States need not recognize the belligerent status of the political entity in order for the Act to apply; actual conflict triggers application of the Act. In the *United States v. Three Friends*,<sup>194</sup> the U.S. Supreme Court held that a Spanish colony not recognized by the United States nevertheless had the status of a belligerent nation.<sup>195</sup> The Court had been

informed of the existence of an actual conflict of arms in resistance of the authority of a government with which the United States are on terms of peace and amity, although acknowledgment of the insurgents as belligerents by the political department has not taken place; and it cannot be doubted that, this being so, the act in question is applicable.<sup>196</sup>

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187. 570 F.2d 840 (9th Cir. 1977).

188. *See id.*

189. *See id.*

190. *See id.*

191. *Id.* at 845.

192. 82 F. 599 (C.C.S.D.N.Y. 1896).

193. *Id.* at 599 (emphasis added).

194. 166 U.S. 1 (1897).

195. *See id.* at 65-66.

196. *Id.* at 65-66.

Similarly, in the *Santissima Trinidad*,<sup>197</sup> the U.S. Supreme Court recognized a state of civil war between Spain and her colonies:

Each party is therefore, deemed by us a belligerent nation, having, so far as concerns us, the sovereign right of war, and entitled to be respected in the exercise of those rights. We cannot interfere to the prejudice of either belligerent, without making ourselves a party to the contest, and departing from the posture of neutrality.<sup>198</sup>

Conditions of actual conflict apparently confer belligerent status and trigger the application of neutrality laws.<sup>199</sup>

### 3. War and Peace

The third noteworthy element of U.S. neutrality laws is the distinction made between war and peace. Historically, the United States prohibited almost every instance of planning or financing of a military expedition or enterprise against a foreign State, colony, or people under 18 U.S.C. § 960 with whom the United States was “at peace.”<sup>200</sup> Receiving a commission in a foreign army with whom the United States was “at peace” was also prohibited under 18 U.S.C. § 958.<sup>201</sup> This law applies whenever there is *no actual armed conflict* between the United States and a foreign State. When there is war between the United States and a foreign State, mercenaries are *immune* from prosecution. In *United States v. Elliott*,<sup>202</sup> which concerned a

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197. 20 U.S. (7 Wheat.) 283, 336 (1882).

198. *Id.* at 337.

199. The U.S. recognition of the belligerent status of insurgents reflects an expansive view of the power of non-State entities to make war. These cases also draw on a U.S. legal doctrine by which actual conditions of conflict, rather than declarations of war, confer belligerent status. See *Brig Amy Warwick*, 67 U.S. (2 Black) 635 (1862) (U.S. Confederacy treated as a belligerent even though the Union had not declared war).

200. 18 U.S.C.A. § 960 (Law. Co-op. 1996) provides:

Whoever, within the United States, knowingly begins or sets on foot or provides or prepares a means for or furnishes the money for, or takes part in, any military or naval expedition or enterprise to be carried on from thence against the territory or dominion of any foreign prince or state, or of any colony, district, or people with whom the United States is at peace, shall be fined under this title or imprisoned not more than three years, or both.

*Id.*

201. 18 U.S.C.A. 958 (Law. Co-op. 1996) provides:

Any citizen of the United States who, within the jurisdiction thereof, accepts and exercises a commission to serve a foreign prince, state, colony, district, or people, in war, against any prince, state, colony, district, or people, with whom the United States is at peace, shall be fined under this title or imprisoned for not more than three years, or both.

*Id.*

202. 266 F. Supp. 318 (D.N.Y. 1967).

conspiracy to destroy a railroad bridge in the Republic of Zambia, the U.S. district court held that the statute applied because the United States was “at peace” with Zambia.<sup>203</sup> On the other hand, in “situations such as North Vietnam or the Bay of Pigs . . . government complicity would effectively bar prosecution.”<sup>204</sup>

The ambivalent character of recent low-intensity operations—which are neither war nor peace but something in between—has changed how “at peace” can be interpreted. Where any covert operations are occurring, courts are unlikely to find that the United States is “at peace” in that region. Sections 956(b), 958, and 960, therefore, cannot be applied. In *United States v. Terrell*,<sup>205</sup> for example, defendants were charged with shipping and transporting weapons to the Nicaraguan Contras.<sup>206</sup> The U.S. district court held that the United States was not “at peace” with Nicaragua and dismissed the indictment.<sup>207</sup> The court found that declarations of war had become passé “in these modern times of covert activities and undeclared warfare.”<sup>208</sup> The court rejected the contention that the United States was “at peace” with Nicaragua after Congress passed the Boland III Amendment<sup>209</sup> in October

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203. *Id.* at 322. Through 18 U.S.C. § 956(b), the United States reserves the power to punish conspiracy to destroy the property of a foreign State. Section 18 U.S.C.A. § 956(b) (Lexis L. Pub. Supp. 1999) provides:

Whoever, within the jurisdiction of the United States, conspires with one or more persons, regardless of where such other person or persons are located, to damage or destroy specific property situated within a foreign country and belonging to a foreign government or any political subdivision thereof with which the United States is at peace, or any railroad, canal, bridge, airport, airfield, or other public utility, public conveyance, or public structure, or any religious, educational, or cultural property so situated, shall, if any of the conspirators commits an act within the jurisdiction of the United States to effect any object of the conspiracy, be imprisoned not more than 25 years.

*Id.* Conspiracy raises an interesting problem because although the conspiracy may take place in the United States, the result of the conspiracy might be overseas. In *Elliott*, the district court found that the United States has “the power to prosecute conspirators for an agreement made within its borders even though the substantive offense is without its jurisdiction.” *Elliott*, 266 F. Supp. at 323.

204. *Elliott*, 266 F. Supp. at 324; see also *U.S. v. Laub*, 385 U.S. 475 (1967).

205. 731 F. Supp. 473, 475 (S.D. Fla. 1989).

206. See *id.* at 473-74.

207. See *id.* at 477.

208. *Id.* at 476.

209. The Boland Amendments were public laws enacted by Congress during the 1980s that denied military and eventually direct economic and intelligence aid to the CIA-sponsored anti-Sandinista Contras whose goal was the reversal of the “Marxist” anti-Somosa 1979 revolution in Nicaragua. The Boland Amendments were riders to Department of Defense Appropriation Acts. Boland I became law on December 21, 1982 and delimited the military appropriations budget of fiscal year 1983 as follows:

None of the funds provided in this Act may be used by the Central Intelligence Agency or the Department of Defense to furnish military equipment, military training or advice, or other support for military activities, to any group or individual . . . for the purpose of overthrowing the government of Nicaragua . . .

1984, because the “facts also show that the Contras, funded in part by the executive branch, continued their attempt to overthrow the Sandinista government.”<sup>210</sup> While this legal interpretation would seem to suggest an exception to the State’s monopoly on the use of force, in sensitive low-intensity operations the State has no need to fully occupy the killing field. Nominally private front organizations are sometimes better for covert operations where the State risks losing political legitimacy if its involvement became known. Thus, when the United States is engaged in covert operations overseas, mercenaries can act with impunity.<sup>211</sup> The interpretation of U.S. neutrality laws offered in *Terrell* indicates that not just a war, but *any armed conflict whatsoever* is sufficient to block prosecution of mercenaries. Again, actual conditions of conflict rather than political declarations dictate application of the law.

This brief discussion illustrates how States have not only maintained a monopoly on the use of force, but have harnessed the illegitimate use of force by individuals, and managed to remain blameless. These laws restrict acts of individuals, but do not limit the State’s participation in the international military market. Neutrality laws do not prevent individuals from leaving U.S. territory to enlist in a foreign army—thus, mercenary activity *per se* is not prohibited. Nor do these neutrality laws target the behavior of propping States (i.e., the buying and selling of military manpower). These laws do prevent States from being held responsible for individual acts of citizens, and simultaneously allows a shadow market for violence to exist. Because States have not proscribed their own behavior vis-à-vis the buying and selling of military manpower the market continues to flourish, but does so *outside* of the State system. It is therefore hardly surprising that although

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Department of Defense Appropriations Act for Fiscal Year 1983, Pub. L. No. 97-377, § 793, 96 Stat. 1833, 1865 (1982). Boland I remained in effect until November 1983. Boland II limited Contra funding to \$24 dollars. See Intelligence Authorization Act for Fiscal Year 1984, Pub. L. No. 98-215, § 108, 97 Stat. 1473, 1475 (1983); Department of Defense Appropriations Act for Fiscal Year 1984, Pub. L. No. 98-212, § 775, 97 Stat. 1421, 1452 (1983). The Boland II Amendment limited Congressional funding to the Contras until October 1, 1984. In 1984 it was publicly disclosed that the CIA had been involved in mining Nicaraguan harbors, which caused a strong loss of support for the Contras in Congress. As a result, Congress passed Boland III, which cut off all aid to the Contras:

During fiscal year 1985, no funds available to the Central Intelligence Agency, the Department of Defense, or any other agency or entity of the United States involved in intelligence activities may be obligated or expended for the purpose or which would have the effect of supporting, directly or indirectly, military or paramilitary operations in Nicaragua by any nation, group, organization, movement, or individual.

Continuing Appropriations Act for Fiscal Year 1985, Pub. L. No. 98-473, § 8066, 98 Stat. 1837, 1935 (1985). During the period when Boland III was in effect, Lt. Col. Oliver North “privatized” aid to the Contras. See *Terrell*, 731 F. Supp. at 475.

210. *Terrell*, 731 F. Supp. at 476.

211. Courts will bend over backwards to admit exonerating evidence under § 960 prosecutions. See *Casey v. U.S.* 413 F.2d 1303 (5th Cir. 1969), *cert. denied*, 397 U.S. 1029 (1969).

the Foreign Relations Act remains viable law, it has not been used to prosecute mercenaries from the United States.<sup>212</sup> The United States, in fact, has not only failed to prosecute, but has protested the treatment of U.S. mercenaries in foreign courts.<sup>213</sup>

Domestic neutrality laws, which are an expression of the State's monopoly on violence, restrict the unauthorized participation of individuals in the international military marketplace. International law, on the other hand, regulates the military marketplace by clearly demarcating the commodity to be regulated (defining who is a mercenary), and by providing disincentives to would-be mercenaries (no combatant status). In international law, mercenaries are defined by their financial motivation for acts of war. The stress on pecuniary rewards as the motivating factor shows that States are concerned in particular with the mercenary *market*. The following discussion chronicles the various conventions, protocols, and customary international law dealing with mercenaries.

## *B. International Response to Mercenaries*

### *1. Treaty-Based International Law*

The 1972 Organization of African Unity Convention for the Elimination of Mercenaries in Africa<sup>214</sup> was the first convention prohibiting mercenaries and was intended to control the use of mercenaries by insurgent groups and coup-makers. It did not prohibit States from hiring mercenaries. Mercenaries were defined only as those men who sold their services to a "person, group or organization" engaged in insurgency against a State.<sup>215</sup> By

212. Similarly, no prosecutions have been brought under the British Foreign Enlistment Act of 1870 in over 100 years. Although the Act remains in force, it is ambiguous and outdated. See Peter Morris, *The Foreign Enlistment Act, 1870: When Will It Be Abolished?*, 130 SOLIC. J. 271 (1986).

213. Remarking on the execution of U.S. mercenaries in Angola in 1976, Secretary of State Henry Kissinger stated that

[t]here is absolutely no basis in national or international law for the action now taken by the Angolan authorities. The "law" under which Mr. Gearhart was executed was nothing more than an internal ordinance of the MPLA . . . issued in 1966, when the MPLA was only one of many guerrilla groups operating in Angola. Furthermore, no evidence whatsoever was presented during the trial of Mr. Gearhart in Luanda that he had even fired a shot during the few days that he was in Angola before his capture.

Neutrality and Nonbelligerency: Mercenaries, 1976 DIGEST § 4, at 714.

214. Organization of African Unity Convention for the Elimination of Mercenaries in Africa, O.A.U. Doc. CM/433/Rev. L., Annex 1 (1972) [hereinafter OAU Convention].

215. Article I defined mercenaries as any non-nationals employed by

a person, group or organization whose aim is: (a) to overthrow by force of arms or by any other means the government of the Member State of the Organization of African Unity; (b) to undermine the independence, territorial integrity or normal working of the institutions of the said State; (c) to block by any means the activi-

permitting their own use of mercenaries, while controlling circulation among non-State actors, States established a pool of legitimate purchasers of military manpower.

The OAU Convention also allowed States to continue to monopolize the market for alienable military skills.<sup>216</sup> Under the Convention, mercenarism can only be committed by States or individual actors who have the “aim of opposing by armed violence a process of self-determination, stability or the territorial integrity of another State . . . .”<sup>217</sup> Signatory States, therefore, could continue to use mercenaries as they see fit as long as they did not violate another State’s territorial integrity or interfere in self-determination. Again, this Convention limits the legitimate consumers of mercenary manpower to those States that do not oppose self-determination. Insurgent groups or White governments opposing Black self-determination would thus be prohibited from using mercenaries.

The Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) does not prohibit the use of mercenaries by States or other entities.<sup>218</sup> Protocol I is unusual because it does not regulate the international military market, or restrict consumption to certain categories of consumers. Rather, Protocol I simply deprives mercenaries of the status as participants in armed conflict, and denies protections afforded to other combatants. Under Protocol I, “[a] mercenary shall not have the right to be a combatant or a prisoner of war.”<sup>219</sup> Article 47, section 1 of Protocol I is counter to the general thrust of international humanitarian law to extend protection to as many civilians and combatants as possible.<sup>220</sup>

Why does the subject of mercenaries cause international jurisprudence to regress by restricting the application of international humanitarian law?

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ties of any liberation movement recognized by the Organization of African Unity.

*Id.* art. 1.

216. OAU Convention, O.A.U. Doc. CM/817 (XXIX) Annex II Rev. 3 (1977). This Convention has been in force since 1985 when it was ratified by 17 signatories: Benin, Egypt, Ethiopia, Ghana, Lesotho, Liberia, Mali, Niger, Rwanda, Senegal, Seychelles, Sudan, Tunisia, Tanzania, Burkina Faso, Zaire, and Zambia.

217. *Id.* art. 1, § 2.

218. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict (Protocol I), art. 47(1), *adopted* June 8, 1977, 1125 U.N.T.S. 3, 16 I.L.M. 1391 [hereinafter Protocol I]. For additional commentary, see Green, *supra* note 169.

219. Protocol I, *supra* note 218, art. 47(1). The United States has declined to ratify Protocol I. Although the document containing the specific objections of the Joint Chiefs of Staff to the ratification of Protocol I remains classified, unclassified sources suggest that the Protocol’s definition of mercenaries was objectionable. See Howard S. Levie, *The 1977 Protocol I and the United States*, 38 ST. LOUIS U. L.J. 469, 480 (1993-94); see also Abraham D. Sofaer, *Agora: The U.S. Decision Not to Ratify Protocol I to the Geneva Conventions on the Protection of War Victims*, 82 AM. J. INT’L L. 784 (1988).

220. See Edward Kwakwa, *The Current Status of Mercenaries in the Law of Armed Conflict*, 14 HASTINGS INT’L & COMP. L. REV. 67, 88-89 (1990).

In Protocol I, States are “outlawing” mercenaries, literally putting them outside of the international legal system. Denial of combatant status has serious and deadly consequences, including execution.<sup>221</sup> By engaging in a prohibited commodification, mercenaries violate international military and social norms, and are therefore not extended the protection of the State system that they both challenge and violate. However, the Protocol I definition is so restrictive that almost no one will fall into the category.<sup>222</sup> One military historian remarked that, “any mercenary who cannot exclude himself from this definition deserves to be shot—and his lawyer with him!”<sup>223</sup> Because Protocol I provides the most comprehensive and widely accepted definition of “mercenary,”<sup>224</sup> and illuminates the State perception of who can be classified as a “mercenary,” it is examined here in detail.

Protocol I is targeted at a very particular type of mercenary. Financial motivation is at the heart of the Protocol I definition. Article 47, section 2(c) requires that mercenaries be motivated by private gain.<sup>225</sup> Mercenaries motivated by ideology are outside the ambit of the Protocol.<sup>226</sup> Section 2(c) also requires that mercenaries be paid substantially more than ordinary sol-

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221. Of course, most soldiers with any combat experience whatsoever are quick to point out that the laws of war, including the Geneva Conventions, are in their entirety, pure nonsense. In practice, a law is only as good as its enforceability, and what legal regime actually exists to enforce the laws of war? To many soldiers, the laws of war are merely an aspirational dream of liberal jurists who know not of what they legislate.

222. Under article 47(2), a mercenary is any person who:

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

Protocol I, *supra* note 218, art. 47(2). Protocol I applies to international armed conflict. Yet as the Special Rapporteur on Mercenaries pointed out, mercenaries are most often found in non-international armed conflicts. *Report on the Question of the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, U.N. ESCOR, 44th Sess., at 28-29, U.N. Doc. E/CN.4/1988/14 (1988).

223. GEOFFREY BEST, *HUMANITY IN WARFARE* 375 n.83 (1980).

224. The U.K. referred to it as “[t]he only internationally agreed definition of who is a mercenary . . .” 37 U.N. SCOR, 2359th mtg., para. 29, U.N. Doc. S/PV.2359 (1982).

225. Protocol I, *supra* note 217, art. 47 (2)(c).

226. *See XV Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, 4th Sess., para. 21, at 193, Doc CCH/III/SR.57 (1977). The 1976 British government’s Diplock Report on the recruitment of mercenaries pointed out, “[m]ercenaries, we think, can only be defined by reference to what they do, and not by reference to why they do it.” *Report of the Committee of Privy Counsellors Appointed to Inquire Into the Recruitment of Mercenaries*, Cmnd. 6569, ¶ 7 (Aug. 1976).

diers.<sup>227</sup> This requirement distinguishes mercenaries from volunteers who presumably would accept the pay of an ordinary soldier out of an ideological commitment.<sup>228</sup> By requiring under article 47, section 2(a) that persons be “specially recruited locally or abroad in order to fight in an armed conflict,” volunteers who join a foreign army on a permanent basis (i.e., French Foreign Legion, International Brigade), or those who enter a foreign army by arrangement of their home nation are excluded.<sup>229</sup> Article 47, section 2(f) requires that mercenaries voluntarily enlist on their own account and not on behalf of a third State,<sup>230</sup> thereby preventing those soldiers sent by their own governments from being considered as mercenaries.

Active combatant status is also required under article 47 of Protocol I. Section 2(b) requires that mercenaries take direct part in the hostilities.<sup>231</sup> Article 47, section 2 of Protocol I “excludes mere advisers by requiring that to be a mercenary, one must in fact take a direct part in hostilities, that is, become a combatant [sic], albeit an illegitimate one.”<sup>232</sup> Experts who do not take direct part in combat are regarded as civilians under international law,<sup>233</sup> although liberation movements may regard such military advisors as combatants.<sup>234</sup> Of course, advances in remote-operated weaponry capabilities may make it more difficult to identify which combatants are taking “direct” part in the hostilities.

The Protocol I definition of mercenaries also requires that a mercenary be disconnected from any State. A mercenary cannot be a member of the armed forces of a party to a conflict under section 2(e).<sup>235</sup> The Special Rapporteur on Mercenaries has pointed out that

[i]n some cases, legal devices are used to . . . make the mercenary appear to be a national of the country in whose armed conflict he is involved. Although the use of a device of this type conceals the actual status of the mercenary, the origin of the contractual relationship, payment, the type of services agreed upon, the simultaneous use of other nationalities and passports, etc.[.] must serve as a means of establishing the true nationality of

227. See Protocol I, *supra* note 218, art. 47(2)(c).

228. See INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 479-80 (Yves Sandoz et al. eds., 1987).

229. Protocol I, *supra* note 218, art. 47(2)(c).

230. See INTERNATIONAL COMMITTEE OF THE RED CROSS, *supra* note 228, at 581.

231. Protocol I, *supra* note 218, art. 47(2)(b). Article 47(2)(b) states that a mercenary is any person who “does, in fact, take a direct part in hostilities[.]” *Id.*

232. XV *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, 4th Sess., para. 25, at 454, Doc. CDDH/407/Rev.1 (1977).

233. INTERNATIONAL COMMITTEE OF THE RED CROSS, *supra* note 228, at 579.

234. Polisario intended that the French technicians captured in Mauritania be treated as mercenaries. *Le Polisario Traite en ‘Mercenaires’ les Techniciens Francais de Mauritanie*, LE MONDE, May 24-25, 1977, at 1, cited in Green, *supra* note 22, at 243.

235. Protocol I, *supra* note 218, art. 47(2)(e). Article 47(2)(e) states that a mercenary is any person who “is not a member of the armed forces of a Party to the conflict[.]”

the persons involved in an armed conflict . . . .<sup>236</sup>

A mercenary need only enlist in the armed forces of a party to the conflict to escape liability. Alternatively, States using mercenaries can declare the mercenaries to be members of their armed forces. The Croatian Army, for example, commissioned a number of foreign mercenaries as officers.<sup>237</sup> Croatia's official position was that its military units did not include mercenaries, but volunteers of Croatian origin or descendants of Croatian immigrants, who by virtue of the principle of *jus sanguinis* should be regarded as Croats.<sup>238</sup>

The 1989 International Convention Against the Recruitment, Use, Financing and Training of Mercenaries,<sup>239</sup> which is not yet in force,<sup>240</sup> provides another example of the attempt by the State system to restrict the international mercenary market. Like other conventions and protocols, this convention focuses on the financial motivation of mercenaries. Article 1, section 1(b) requires that mercenaries be

motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar rank and functions in the armed forces of that party[.]<sup>241</sup>

236. 1994 Report on the Question of the Use of Mercenaries, *supra* note 1, at 14.

237. At the end of 1991, Eduardo Roses Flores, a Spanish ex-journalist, was commissioned as Commander-in-Chief of the First International Company of Croatia. See 1994 Report on the Question of the Use of Mercenaries, *supra* note 1, at 26. This brigade operated in the Osijek operations zone and was composed of former French Foreign Legionnaires and other mercenaries. See *id.* It allegedly operated on its own in the region of Eastern Slavonia and committed massacres against Serbian civilians in the villages of Divos, Ernestinovo, Tenjski Antunovac and others. See *id.*; see also KEITH CORY-JONES, WAR DOGS 76 (1996).

238. See Communication from Mr. Mate Granic, Minister for Foreign Affairs and Deputy Prime Minister of the Republic of Croatia, to the U.N. Special Rapporteur on Mercenaries, (Aug., 26 1993), cited in 1994 Report on the Question of the Use of Mercenaries, *supra* note 1, at 25.

239. International Convention Against the Recruitment, Use, Financing and Training of Mercenaries, G.A. Res. A/44/34, U.N. GAOR, 44th Sess., Annex, Agenda Item 144, U.N. Doc. A/RES/44/34 (1989), reprinted in 29 I.L.M. 89 [hereinafter Convention Against Mercenaries].

240. Ten States are currently parties to the Convention Against Mercenaries: Barbados, Cyprus, Maldives, Seychelles, Surinam, Togo, and Ukraine ratified the convention soon after it was adopted by the U.N. *United Nations Treaty Collection* (visited Nov. 1, 1999) <[http://www.un.org/Depts/Treaty/final/t52/newfiles/part\\_boox/viiiiboo/xviii\\_6.html#refiNA19aOLAA](http://www.un.org/Depts/Treaty/final/t52/newfiles/part_boox/viiiiboo/xviii_6.html#refiNA19aOLAA)>. Cameroon, Georgia, and Italy are the most recent parties to the convention. See *id.* Sixteen States have signed but not yet ratified the Convention: Angola, Belarus, the Congo, Germany, Morocco, Nigeria, Romania, Uruguay, Yugoslavia, and Zaire. See *id.*

241. Convention Against Mercenaries, *supra* note 239, art. 1(1). While the Convention's definition is similar to the Protocol I definition, the Convention also includes in the definition of mercenary those persons who participate "in a concerted act of violence aimed at . . . [o]verthrowing a government or otherwise undermining the constitutional order of a State or undermining the territorial integrity of a State." *Id.* This constitutes a tacit recognition that the

## 2. Customary International Law

Customary international law, like treaty-based international law, restricts the circulation of military labor as a commodity in an international market through a prohibition on recruiting of mercenaries within neutral States. Under customary international law, nations have a duty to prohibit the initiation of hostile expeditions by persons within their territory against other nations.<sup>242</sup> States have a duty to protect the rights of other States within their dominions;<sup>243</sup> they are required to use due diligence to prevent the commission of criminal acts against other States or peoples.<sup>244</sup> Article 4 of the Hague Convention of 1907 on the Rights and Duties of Neutral Powers and Persons in War on Land<sup>245</sup> provides that “corps of combatants cannot be formed nor recruiting agencies opened on the territory of a neutral power to assist the belligerents.”<sup>246</sup>

Customary international law focuses on the threat posed by organized groups of mercenaries rather than individuals. While unorganized armed volunteers pose no serious threat to the sovereignty of States,<sup>247</sup> autonomous military organizations threaten the State’s monopoly on military violence.<sup>248</sup>

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market for mercenary services includes not only States but insurgent organizations.

242. See M. GARCIA-MORA, INTERNATIONAL RESPONSIBILITY FOR HOSTILE ACTS OF PRIVATE PERSONS AGAINST FOREIGN STATES 49-53, 61-66 (1962); Note, *Nonenforcement of the Neutrality Act: International law and Foreign Policy Powers Under the Constitution*, 95 HARV. L. REV. 1955 (1982); Jules Lobel, *The Rise and Decline of the Neutrality Act: Sovereignty and Congressional War Powers in United States Foreign Policy*, 24 HARV. INT’L L.J. 1, 64 (1983).

243. See *Island of Palmas (U.S. v. Neth.)*, 2 U.N. Rep. Int’l. Arb. Awards 829 (1928). Some legal scholars have argued that States which fail to prevent harmful acts against other States, such as mercenary activity, violate the international obligation to deter aggression and preserve order. See Garcia-Mora, *supra* note 242, at 109; see also Roy Emerson Curtis, *The Law of Hostile Military Expeditions as Applied by the United States*, 8 AM. J. INT’L L. 1, 36 (1914) (“If the sovereign has knowingly suffered the harm to be done to another State, it may be said to be an accomplice in the act itself.”).

244. See *S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10, at 88 (Sept. 7). Where the State lacks the authority to prevent the excursions of private armies into neighboring States, however, the State cannot be held responsible. See Lobel, *supra* note 242, at 66 n.336; see also Richard A. Falk, *The Beirut Raid and the International Law of Retaliation*, 63 AM. J. INT’L L. 415 (1969).

245. Convention Respecting the Rights and Duties of Neutral Powers and Persons on Land, *adopted* Oct. 18, 1907, 36 Stat. 231, T.S. No. 540 [hereinafter Hague Convention].

246. *Id.* art. 4.

247. See Hinds, *supra* note 20, at 414.

248. In his most recent report, the Special Rapporteur on Mercenaries also shows a heightened concern about how the use of mercenaries is impacting the sovereignty of States:

Can it be that the mercenaries’ behaviour is changing so profoundly that they now constitute the rank and file of the personnel recruited by private companies to contract with African Governments to provide internal security services, safeguard public order and even put an end to internal armed conflicts? If such contracts are, indeed, being concluded, the Governments signing them must be doing so on the basis of a sovereign decision; but is not responsibility for a country’s internal order and security an inalienable obligation that a State fulfills through its police and

Article 6 of the Hague Convention states that “the responsibility of the neutral power is not engaged by the fact of persons crossing the frontier separately to offer their services to one of the belligerents.”<sup>249</sup> A State’s obligation to prevent these acts only incurs when they are committed by *organized groups*.<sup>250</sup> In *Nicaragua v. United States*,<sup>251</sup> the International Court of Justice ruled that a nation will be found to have engaged in the use of force against another nation by “organizing or encouraging the organization of irregular forces . . . for incursion into the territory of another State.”<sup>252</sup>

Domestic neutrality laws work to establish a State monopoly on violence by limiting the acts of individuals to territories outside of State boundaries. Simultaneously, by not regulating their own purchasing behavior, States allow a black-market in military manpower to exist, which States can then exploit when necessary. International law, on the other hand, serves to regulate the military market by restricting who can purchase and consume black-market military labor and by defining who exactly is a mercenary. All of these laws entail certain preconceptions about the socio-legal universe; they presuppose the territorialization of violence, they enjoin individuals from making certain market choices and they reserve violence to the State.

## CONCLUSION

Treaty-based and customary international law is a cultural artifact in which the political ambitions of States are embedded. The desire to monopolize the deployment of military force and to exercise control over military resources resulted in the construction of an aspirational legal regime that reflects a nineteenth-century nationalist military ideology of duty, honor, and obedience. The legal regime prevents the complete commodification of military skill by structuring various guidelines about when and how military skill and labor can circulate.

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armed forces? Is it not a grave infringement of that State’s sovereignty to hand over such responsibilities to companies registered in third countries which sell security services staffed by foreigners, presumably mercenaries? Who will be responsible for any repressive excesses that the security companies may commit against the civilian population, especially where representatives of the political opposition are concerned? Who will take responsibility for any violations of international humanitarian law or human rights they may commit?

1997 *Report on the Question of the Use of Mercenaries*, *supra* note 99, ¶ 93.

249. Hague Convention, *supra* note 245, art. 6.

250. See I OPPENHEIM, *INTERNATIONAL LAW, A TREATISE* 292-93 (8th ed. 1955); Layeb, *supra* note 20, at 269.

251. 1986 I.C.J. 14 (June 27) (merits).

252. *Id.* at 18 (quoting United Nations General Assembly Resolution 2625 (XXV)); see also *id.* at 101-23, 126-27, 146-47. For a full discussion of international law and covert warfare, see Jules Lobel, *Covert War and Congressional Authority: Hidden War and Forgotten Power*, 134 U. PA. L. REV. 1035 (1986).

Margaret Radin argues that incomplete commodification occurs most in those things related to human beings' homes, work, food, sexuality, and political life. Such "pervasive incomplete commodification is related to appropriate ideals of personhood and community . . . ."253 This article has explored the way in which military life is conceived in terms of political community and service, which is antithetical to the world of capital and business. The persistent rhetoric of inalienability of military skills reinforces an idea that military force is something that does not circulate and has no commodity value. Yet, as we have seen, military skills actually do circulate in a number of different types of markets. Neutrality laws and customary international laws provide regulation for the exchange system in military skill. These types of "[r]egulated markets represent incomplete commodification . . . ."254

Why is military violence incompletely commodified? The anti-market rhetoric surrounding the military in general conceals the way in which killing and death themselves are commodities. The nonalienability of military skill also keeps violence anchored to the State—the State's preservation of an illusion of a monopoly on force provides assurance that there is not a war machine. It fundamentally denies the existence of military organizations that exist outside the State.

Radin argues that if sex were openly commodified, sexual discourse would reflect this commodification and actual lived experience would be changed. The market would render an understanding of women in terms of sexual dollar value and it would make the ideal of nonmonetized sharing impossible.<sup>255</sup> Similarly, if military skill were openly commodified, the market would render an understanding of soldiers in terms of military dollar value. It would make the ideal of nonmonetized death impossible. A world in which violence and death are bought and sold is an empty and cold place. Why not unleash market forces onto our discourse and very conceptions of prostitution and mercenaries? By preserving a discourse of nonalienability of military skill, we preserve the illusion that the State controls war, and that a soldier's death cannot be bought.

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253. Radin, *supra* note 23, at 113.

254. *Id.* at 116.

255. *See id.* at 133.

