

1-1-2006

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## Publication Information

Ryan M. Scoville, *Toward an Accountability-Based Definition of Mercenary*, 37 *Geo. J. Int'l L.* 541 (2006). Posted with permission of the publisher, The Georgetown Journal of International Law © 2006.

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## Repository Citation

Scoville, Ryan M., "Toward an Accountability-Based Definition of Mercenary" (2006). *Faculty Publications*. Paper 287.  
<http://scholarship.law.marquette.edu/facpub/287>

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# TOWARD AN ACCOUNTABILITY-BASED DEFINITION OF “MERCENARY”

RYAN M. SCOVILLE\*

## I. INTRODUCTION

Mercenary violence is an increasingly serious threat to international security.<sup>1</sup> From a legal perspective, the development of this threat is problematic because the international treaties that regulate “mercenaries” operate on a flawed definition of the concept. Even the most recent definition neither accounts for changes in global security over the past decade nor reflects the fundamental problem with mercenaries—the fact that they are not state-accountable actors. These deficiencies have contributed to the spread of mercenary activity by complicating treaty enforcement and undermining state support for the current law.

This Note therefore proposes a new definition of “mercenary.” The proposed definition expands the range of activity in which mercenaries participate and abandons elements of the existing definition that do not relate to accountability.

Part I provides context for this proposal, first by describing how a combination of geopolitical, economic, and legal influences has caused an expansion of mercenary activity since the end of the Cold War. The Part then explains why this expansion should be a source of concern for the international community, arguing that although mercenaries are often rightly viewed as problematic because of their propensity to commit abuses and contribute to instability, the harms of mercenary violence are best understood as byproducts of the more fundamental problem that mercenaries are not accountable to national governments. Part I concludes by outlining existing international legal efforts to define and regulate mercenaries, focusing in particular on the International Convention Against the Use, Recruitment, Financing and Training of Mercenaries.

Part II critiques the existing international legal definition of “merce-

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1. See DEBORAH D. AVANT, THE MARKET FOR FORCE 8 (2005) (“News reports of mercenary and/or private security activity have mushroomed.”); Montgomery Sapone, *Have Rifle with Scope, Will Travel: The Global Economy of Mercenary Violence*, 30 CAL. W. INT’L L.J. 1 (1999) (“[T]he international black market of military services is flourishing.”).

nary” for containing several requirements that should be irrelevant due to lack of any connection to the fundamental issue of accountability, for unnecessarily complicating treaty enforcement, and for being under-inclusive. In particular, the Part takes issue with three components of the existing definition: (1) the limiting condition that mercenaries must operate with the specific intent to undermine the security of a state; (2) the requirement that mercenaries operate for profit; and (3) the requirement that mercenaries be neither nationals nor residents of the government which they target.

Finally, Part III offers an alternative definition of “mercenary” and assesses its merits and deficiencies. The most prominent feature of the proposed definition is that it makes absence of accountability to a state the fundamental determinant of mercenary status. The definition extends the possibility of this status to unaccountable individuals who are specifically recruited even in non-traditional security contexts, and it abandons the requirements of profit motive, non-nationality, and non-residency. It is argued that incorporating such a definition would enable international law to more effectively control mercenary violence.

## II. CONTEXT

### A. *The Rise of Mercenarism*

The end of the Cold War was the catalyst for the growth of modern mercenarism. Analysts provide several explanations for this conclusion. First, on the supply side, the United States and Soviet Union found it more difficult to support massive military budgets in the absence of the superpower rivalry. Consequent budget reductions caused personnel layoffs and forced trained soldiers to look for private employment. For these individuals, mercenary activity was a logical source of income.<sup>2</sup> Second, on the demand side, the end of the Cold War initially allowed the United States and Russia to show less concern for the security of weak states. In many cases, this treatment forced weak states to fend for themselves. A common strategy was to employ private sources of security to supplement small and frequently poorly trained national

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2. See ABDEL-FATAU MUSAH, *MERCENARIES: AN AFRICAN SECURITY DILEMMA*, 3-4 (2000); U.K. FOREIGN & COMMONWEALTH OFFICE, *PRIVATE MILITARY COMPANIES: OPTIONS FOR REGULATION*, 2001-2, H.C. 577, at 12, available at <http://www.fco.gov.uk/Files/kfile/mercenaries,0.pdf> [hereinafter U.K. Green Paper].

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armies.<sup>3</sup> Third, mercenary organizations arguably have been able to proliferate by repackaging their roughhewn, soldier-of-fortune images into the euphemistic form of the "private security firm."<sup>4</sup> These firms have employed traditional corporate hierarchies and have combined professionalism and effective marketing techniques to gain an increasingly significant role in the provision of security.<sup>5</sup> The general movement toward privatization in the wake of the Cold War created favorable conditions for these firms by emphasizing the efficiency of the private sector over government.<sup>6</sup> Finally, and most importantly for our purposes, "one of the greatest problems in combating mercenary activities is the absence of a clear, unambiguous and comprehensive legal definition of a mercenary."<sup>7</sup> The absence of an effective definition has undermined support for the relevant international treaties and complicated law enforcement efforts.<sup>8</sup>

As a result of these influences, mercenary activity has been observed in a large number of conflicts over the last decade.<sup>9</sup> States or militant non-state organizations have reportedly employed mercenaries in

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3. Doug Brooks, *Messiahs or Mercenaries? The Future of International Military Services*, 7 INT'L PEACEKEEPING 129, 132 (2000).

4. James R. Coleman, *Constraining Modern Mercenarism*, 55 HASTINGS L.J. 1493, 1499 (2004); see also AVANT, *supra* note 1, at 29-30.

5. See Ellen L. Frye, *Private Military Firms in the New World Order: How Redefining "Mercenary" Can Tame the "Dogs of War"*, 73 FORDHAM L. REV. 2607, 2608-10, 2618-19 (2005); Jon D. Michaels, *Beyond Accountability: The Constitutional, Democratic, and Strategic Problems with Privatizing War*, 82 WASH. U. L.Q. 1001, 1022 (2004).

6. AVANT, *supra* note 1, at 35-38.

7. U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights, *Report on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, ¶ 37, U.N. Doc. E/CN.4/2004/15 (Dec. 24, 2003) (*prepared by* Enrique B. Ballesteros) [hereinafter *Report on Mercenaries 2003*]. For a general critique of current definitions, see P.W. Singer, *War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law*, 42 COLUM. J. TRANSNAT'L L. 521, 524 (2004) ("[T]he very definitions that international law uses to identify mercenaries include a series of vague . . . requirements, such that it is nearly impossible to find anyone in any place who fulfills all of the criteria . . . . Thus, the underlying legal concepts that would support any guiding parameters establishing the privatized military industry's place in the law are often of little assistance.").

8. See generally U.K. Green Paper, *supra* note 2 (discussing the limitations of the existing definitions of "mercenary" and also recent developments in private military violence).

9. One commentator states that the "mercenary world is permanently awash with activity" and that "[f]reelance mercenaries have been reported as participating in almost every recent conflict over the past ten years." James Larry Taulbee, *Mercenaries, Private Armies and Security Companies in Contemporary Policy*, 37 INT'L POL. 433, 433-34 (2000).

Chechnya,<sup>10</sup> Georgia,<sup>11</sup> Sierra Leone,<sup>12</sup> Papua New Guinea,<sup>13</sup> Azerbaijan,<sup>14</sup> Tajikistan,<sup>15</sup> and Equatorial Guinea,<sup>16</sup> among others.<sup>17</sup> Some have even argued that U.S.-based private security firms in Iraq are mercenaries.<sup>18</sup> While many of these reports are based on colloquial notions of mercenarism, rather than the definition established under international law, the reports still reflect a broader post-Cold War erosion of states' monopoly on the use of force.<sup>19</sup> The rise of terrorism, international narcotics organizations, and private police and security firms are some indicia of this trend.

### B. *The Problem of Unaccountability*

Many commentators have argued that the presence of mercenaries in military conflicts correlates with human rights abuses, threatens state sovereignty, and contributes to various forms of international criminal

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10. Sergei Ostanin, *Some 2,000 Mercenaries Fight in Chechnya*, THE RUSSIAN INFO. AGENCY ITAR-TASS (RUSS.), May 23, 1996.

11. See ECOSOC, Comm'n on Human Rights, *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*, ¶¶ 78-86, U.N. Doc. E/CN.4/1994/23 (Jan. 12, 1994) (prepared by Enrique B. Ballesteros) [hereinafter *Report on Mercenaries 1994*].

12. *Report on Mercenaries 2003*, *supra* note 7, ¶¶ 22-23.

13. *British Mercenary Asked to Help Free Hostages*, AGENCE FR.-PRESSE, Mar. 9, 1996.

14. *Karabakh Army Strong Enough to Fight Azerbaijan*, BBC MONITORING TRANS-CAUCASUS, Nov. 13, 2004.

15. *8 UN Observers Are Kidnapped by Mercenaries amid New Unrest*, CHI. TRIB., Dec. 21, 1996, at 4.

16. ECOSOC, Comm'n on Human Rights, *Report on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of Peoples to Self-Determination* ¶¶ 34-45, U.N. Doc. E/CN.4/2005/14 (Dec. 8, 2004) (prepared by Shaista Shameem) [hereinafter *Report on Mercenaries 2004*].

17. See, e.g., ECOSOC, Comm'n on Human Rights, *Report on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, ¶¶ 48-61, U.N. Doc. E/CN.4/1996/27 (Jan. 17, 1996) (prepared by Enrique B. Ballesteros) (describing mercenary activity in the Islamic Federal Republic of the Comoros) [hereinafter *Report on Mercenaries 1996*].

18. Leslie Wayne, *America's For-Profit Secret Army*, N.Y. TIMES, Oct. 13, 2002, at A1.

19. See Clifford J. Rosky, *Force, Inc.: The Privatization of Punishment, Policing, and Military Force in Liberal States*, 36 CONN. L. REV. 879, 881 (2004) (noting that private armies "challenge[] . . . one of our most fundamental, venerated axioms of liberal thought—the idea that 'the state' has, must have, or should have a 'monopoly of force.'"); cf. Anna Leander, *Globalisation and the State Monopoly on the Legitimate Use of Force 14-16* (Syddansk Universitet [University of Southern Denmark], Politologiske Skrifter [Pol. Sci. Pubs.] No. 7, 2004) (Den.), available at <http://www.sam.sdu.dk/politics/publikationer/anl7.pdf> (last visited Mar. 26, 2006) (arguing that, while states still claim a monopoly on the legitimate use of force, the concept of "monopoly" has changed to mean that states are simply entitled to regulate the privatization of coercion).

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activity such as terrorism and narcotics trafficking.<sup>20</sup> However, these problems are only secondary manifestations of the fundamental problem with mercenaries—they are not state-accountable actors.<sup>21</sup> To the extent that mercenaries are more likely to commit abuses, it is largely because they operate secretly and separately from the armed forces of a state and are thus relatively immune to the taming influences of public opinion and national law.<sup>22</sup> The mobility of mercenaries allows them to elude sanction even when states seek punishment, and it mitigates national and cultural ties that might otherwise discipline the use of force.<sup>23</sup> Mercenaries may also be more likely to undermine state sovereignty because no external authority curbs a mercenary’s decision to use force. By contrast, diplomatic relations, institutions such as the Security Council, and international law at least marginally constrain state action in this realm.<sup>24</sup>

Scholarship on public administration is fruitful territory for understanding precisely how mercenaries lack accountability. Scholars in this area generally<sup>25</sup> define “accountability” as a synonym for “answerability”;<sup>26</sup> to be accountable is to be “answerable to authority that can mandate desirable conduct and sanction conduct that breaches identified obligations.”<sup>27</sup> More specifically, the term can be viewed as having the following requisite components: “a higher authority vested with responsibility for oversight or supervision; a criterion or measure used by the higher authority to assess performance or compliance; a mecha-

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20. See, e.g., David Isenberg, *Soldiers of Fortune Ltd.: Profile of Today’s Private Sector Corporate Mercenary Firms* (Summer 1997) (unpublished manuscript, Center for Defense Information Working Paper), <http://www.ciaonet.org/wps/isd03/> (last visited Apr. 25, 2005).

21. See Juan Carlos Zarate, *The Emergence of a New Dog of War: Private International Security Companies, International Law, and the New World Disorder*, 34 STAN. J. INT’L L. 75, 119 (1998) (arguing that “the crucial factors distinguishing acceptable and unacceptable types of military services offered by foreigners are transparency and state accountability.”).

22. Isenberg, *supra* note 20.

23. See Sapone, *supra* note 1, at 3-4.

24. See generally Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469 (2005) (arguing that the potential legal and collateral consequences of treaty violation operate as incentives for states to comply with treaties).

25. Scholars frequently debate about the meaning of “accountability” and disagree about how to properly measure the concept. See Robert Gregory, *Accountability in Modern Government*, in HANDBOOK OF PUBLIC ADMINISTRATION 557, 566 (B. Guy Peters & Jon Pierre eds., 2003) (agreeing with the proposition that accountability is “one of the most basic yet most intractable of political concepts.”).

26. See, e.g., *id.* at 558-59.

27. Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229, 1260 (2003).

nism for reporting compliance to the higher authority; and, the prospect of penalty or reward based on performance.”<sup>28</sup> In an organizational context, accountability may exist both within an organization and between an organization and an external authority.<sup>29</sup>

Accountability has a variety of potential sources. With regard to the use of force, Robert Keohane argues that there are eight such sources, four of which are relevant for our analysis: hierarchical accountability, legal accountability, market accountability, and public-reputational accountability.<sup>30</sup> Hierarchical accountability applies to relationships within organizations and exists when superiors are able to guide and discipline their subordinates.<sup>31</sup> Legal accountability refers to the “requirement that agents abide by formal rules and be prepared to justify their actions in those terms, in courts or quasi-judicial arenas.”<sup>32</sup> Market accountability, on the other hand, exists with regard “to principals . . . whose influence on their agent is exercised in whole or in part through markets, and the information communicated through them.”<sup>33</sup> This form of accountability exists, for example, when investors are able to sell stock and reduce access to capital for firms that make poor business decisions. Finally, public-reputational accountability “is meant to apply in situations in which reputation, widely and publicly known, provides a mechanism” for restraining and directing behavior even in the absence of other sources of accountability.<sup>34</sup> The effectiveness of each form of accountability varies based on context. For example, market accountability will be less effective for privately-held corporations than for public corporations, and the efficacy of public-reputational accountability will vary based on the accuracy and availability of relevant information.

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28. Kevin P. Kearns, *Accountability in a Seamless Economy*, in HANDBOOK OF PUBLIC ADMINISTRATION, *supra* note 25, at 581, 583.

29. Michael J. Trebilcock & Edward M. Iacobucci, *Privatization and Accountability*, 116 HARV. L. REV. 1422, 1422-23 (2003).

30. Robert O. Keohane, *The Concept of Accountability in World Politics and the Use of Force*, 24 MICH. J. INT’L L. 1121, 1131-33 (2003). Other scholars describe similar sources. *See, e.g.*, Barbara S. Romzek & Patricia W. Ingraham, *Cross Pressures of Accountability: Initiative, Command, and Failure in the Ron Brown Plane Crash*, 60 PUB. ADMIN. REV. 240 (2000) (identifying four types of accountability: hierarchical, legal, professional, and political).

31. Keohane, *supra* note 30, at 1131.

32. *Id.* at 1132. This form of accountability may be established through contracts and licenses. For a description of legal accountability and its mechanisms, see Kearns, *supra* note 28, at 584-85.

33. Keohane, *supra* note 30, at 1132.

34. *Id.* at 1134.

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Under most of the categories that Keohane identifies, colloquially-defined mercenaries are almost entirely unaccountable actors. First, hierarchical, market, and public-reputational accountability are at best occasional constraints on mercenary decisionmaking. Mercenaries that operate in small groups or alone will necessarily face little or no hierarchical accountability. With larger mercenary organizations, this form of accountability will not function effectively when the hierarchy and its rules are not clearly defined. And in either situation, even disciplined mercenary leaders may not be able to prevent their subordinates from using force inappropriately. Mercenaries similarly encounter very little market accountability, as few traditional mercenary organizations have shareholders or other investors who may discipline decisions regarding the use of violence.<sup>35</sup> Public-reputational accountability is likewise problematic, as mercenary operations are usually cloaked in some level of secrecy.<sup>36</sup> The result is that timely information on mercenary operations will likely be unavailable to the public, inaccurate, or some combination of both. Even assuming that information poses no problem, moreover, public opinion is fickle and even irrelevant.<sup>37</sup> While the public may oppose some mercenary operations, it may just as easily support others when the perceived purpose is legitimate; either way, public support may be irrelevant to the mercenaries themselves.

Second, neither the market, nor private organizational hierarchies, nor public opinion necessarily renders mercenaries accountable to states—the traditional locus of military capacity. This is important because even if a mercenary organization renders its members hierarchically accountable, and even if mercenary leaders are accountable to the market or public opinion, these sources of accountability may at times push mercenaries toward activity that is at odds with state policy. Effective hierarchical accountability may run counter to state interests, for example, when the leader of a mercenary organization orders his

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35. *But see* Michaels, *supra* note 5, at 1020-23 (noting inter alia some shift toward corporatization in the provision of private military services).

36. *See* ECOSOC, Comm'n on Human Rights, *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*, ¶¶ 32, 64-65, 78, U.N. Doc. A/50/390 (Aug. 29, 1995) (*prepared by* Enrique B. Ballesteros) [*hereinafter* *Report on Mercenaries 1995*].

37. *See* Karen A. Mingst, *Domestic Political Factors and Decisions to Use Military Forces*, in *DEMOCRATIC ACCOUNTABILITY AND THE USE OF FORCE IN INTERNATIONAL LAW* 61, 70-73 (Charlotte Ku & Harold K. Jacobson eds., 2002) (arguing in the context of government policy that public opinion often evolves to support the status quo). Mingst's argument illustrates one way in which public opinion can be unsteady.



subordinates to conduct attacks on government forces.<sup>38</sup> Market accountability is similarly unhelpful because, to the extent that it exists, shareholders' desires for profit may encourage mercenary firms to use violence even when state policy dictates otherwise.<sup>39</sup> Finally, public opinion may encourage mercenary activity against an unpopular government or other targets deemed blameworthy by a belligerent group.

Most importantly for our purposes, because of deficiencies in current international law,<sup>40</sup> many mercenaries are also de facto legally unaccountable. Commentators have widely criticized the existing international treaties on mercenaries as ineffective due to poor drafting and weak adherence.<sup>41</sup> Yet, it is important to realize that these critiques apply to the law as it now exists rather than to any inherent limits to legal accountability; law in abstract is in fact far less problematic than any other source of accountability for mercenaries. Effective legal accountability conforms the use of violence to state interests, and it is much more likely to govern consistently the use of force by private actors. For these reasons, it is important to redefine "mercenary" in a way that improves the efficacy of current international law and renders mercenaries legally accountable to states.

### C. *The U.N. Convention*

Two international<sup>42</sup> treaties regulate the evolving problem of mercenarism: Protocol I to the Geneva Conventions of 12 August 1949

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38. Machiavelli argues that effective mercenary leaders are in fact uniquely likely to disobey state orders, since these leaders "aspire to their own greatness" rather than that of their state employer. NICOLÒ MACHIAVELLI, *THE PRINCE* 40 (George Bull trans., Penguin Classics 2d ed. 2003).

39. Assuming for a moment that private military firms are in fact mercenary, this form of accountability may be particularly weak because, in many cases, investors will derive proportionally greater profit from higher levels of military activity. Unscrupulous investors may have strong incentives to demand military engagement wherever and whenever possible. See Leander, *supra* note 19, at 17 (concluding that "market discipline and self-regulation have a poor record" in the private military industry). Moreover, even assuming that a firm's investors are socially-minded rather than purely driven by profit, information on the social utility of a firm's military activities will be unavailable in many cases, making it difficult for investors to punish firms that engage in socially disadvantageous operations. See Archon Fung, *Making Social Markets: Dispersed Governance and Corporate Accountability*, in *MARKET-BASED GOVERNANCE* 145, 158-59 (John D. Donahue & Joseph S. Nye, Jr. eds., 2002).

40. See *infra* Part III.

41. See, e.g., Singer, *supra* note 7, at 524.

42. The Convention for the Elimination of Mercenarism in Africa also regulates mercenary violence, but that treaty's membership is limited to African states. See OAU Convention for the Elimination of Mercenarism in Africa, July 3, 1977, OAU Doc. CM/817 (XXIX), Annex II (3d rev.), available at <http://www.icrc.org/ihl.nsf/FULL/485?OpenDocument> [hereinafter OAU Convention].

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(Protocol I),<sup>43</sup> and the International Convention Against the Recruitment, Use, Financing and Training of Mercenaries (U.N. Convention).<sup>44</sup> Protocol I, which entered into force in 1978, only briefly addresses the issue. Article 47(1) in effect punishes the status of "mercenary" by establishing categorically that mercenaries "shall not have the right to be a combatant or a prisoner of war."<sup>45</sup> Article 47(2) then defines the term "mercenary."<sup>46</sup> Because Protocol I only regulates international armed conflicts, its provisions in most cases do not apply to mercenaries involved in civil wars or other forms of internal strife.<sup>47</sup>

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43. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 47, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I].

44. U.N. GAOR, 44th Sess., Supp. No. 43, U.N. Doc. A/RES/44/34 (Dec. 4, 1989) (entered into force Oct. 20, 2001) [hereinafter U.N. Convention].

45. Protocol I, *supra* note 43, art. 47(1).

46. The definition states:

A mercenary is any person who:

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

*Id.* art. 47(2).

47. "International armed conflict" refers to any case of "declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties [to the Geneva Conventions], even if the state of war is not recognized by one of them." *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 2, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 2, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War art. 2, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 2, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135. Protocol I's definition of "international armed conflict" covers not only the conflicts described in common article 2, but also the "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination." *See* Protocol I, *supra* note 43, art. 1(4). Under the Geneva Conventions, the

The result is that a state party must deny lawful combatant and P.O.W. status to a mercenary in the context of an international armed conflict, but it may confer these statuses in a non-international armed conflict.

At the time of its adoption, Article 47 was significant because it broke from the prior legal approach to mercenaries, which was to condition the legality of mercenary activity on the existence of an agency relationship between the private soldier and his state sponsor.<sup>48</sup> Instead of permitting mercenary agents for national governments and criminalizing only non-state-sponsored mercenaries, the Article 47 definition indirectly punishes the recruitment of private soldiers for violent purposes by denying lawful combatant and P.O.W. status regardless of sponsorship.<sup>49</sup>

Protocol I enjoys broader adherence than the U.N. Convention,<sup>50</sup> but the latter, which entered into force in 2001, represents a far more significant attempt to eliminate mercenary violence. Protocol I criminalizes both “mercenaries . . . who participate directly in hostilities or in a concerted act of violence” and “[a]ny person who recruits, uses, finances, or trains mercenaries.”<sup>51</sup> Drafters of the Convention incorporated verbatim the definition of “mercenary” that is employed in

legal status of mercenaries is undecided in any conflict that does not fit into one of the above categories.

48. Article 4(A) (4) of Geneva Convention (III) Relative to the Treatment of Prisoners of War (POW) entitles to P.O.W. status “[p]ersons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization, from the armed forces which they accompany.” Geneva Convention Relative to the Treatment of Prisoners of War, art. 4, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135. One could reasonably argue that state-sponsored mercenaries fell within the scope of these terms, at least until Protocol I entered into force. See Arthur John Armstrong, *Mercenaries and Freedom Fighters: The Legal Regime of the Combatant Under Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 30 JAG J. 125, 159-61 (1978).

49. For the sake of topical focus, this Note brackets debates about the proper punishment for mercenaries and whether international law should punish the mere status of “mercenary” as opposed to acts of “mercenarism.” For a general critique of Article 47’s approach of withholding lawful combatant and prisoner-of-war status from mercenaries, see Armstrong, *supra* note 48.

50. One hundred ninety-three states are party to Protocol I of the Geneva Conventions. See Int’l Comm. of the Red Cross [ICRC], *States Party to the Geneva Conventions and Their Additional Protocols*, [http://www.icrc.org/Web/eng/siteeng0.nsf/html/party\\_gc](http://www.icrc.org/Web/eng/siteeng0.nsf/html/party_gc) (last visited Apr. 6, 2005). By contrast, only 28 states have signed and ratified the U.N. Convention. See ICRC, *International Humanitarian Law: International Convention Against the Recruitment, Use, Financing and Training of Mercenaries*, <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=530&ps=P> (last visited Dec. 8, 2005).

51. Protocol I, *supra* note 43, arts. 2-3.

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Protocol I and added language<sup>52</sup> that expands the variety of situations in which mercenary activity may occur. For enforcement, the U.N. Convention establishes a try-or-extradite regime that obligates states parties to prosecute or extradite alleged offenders present in their respective territories.<sup>53</sup> Other provisions mandate information sharing<sup>54</sup> and mutual assistance<sup>55</sup> between states parties in order to facilitate prosecution. Unlike Protocol I, the U.N. Convention applies regardless of whether a mercenary is involved in an international or non-international armed conflict.

Proponents of the U.N. Convention’s definition of “mercenary” argued that it was an overdue replacement for the Protocol I definition.<sup>56</sup> The problem, they believed, was that Protocol I emerged from an idiosyncratic Cold War security context. When European powers

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52. The U.N. Convention, *supra* note 44, uses the exact text of the Protocol I definition and then also states:

A mercenary is also any person who, in any other situation:

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

*Id.* art. 1(2).

53. *See id.* art. 12 (“The State Party in whose territory the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State.”).

54. *Id.* art. 10(2).

55. *Id.* art. 13(1) (“States Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of the offences set forth in the present Convention, including the supply of all evidence at their disposal necessary for the proceedings. The law of the State whose assistance is requested shall apply in all cases.”).

56. *See* Todd S. Millard, *Overcoming Post-Colonial Myopia: A Call to Recognize and Regulate Private Military Companies*, 176 MIL. L. REV. 1, 57 (2003).

retreated from many of their colonies during the 1960s and 1970s, they left power vacuums that quickly produced instability and, in many cases, war.<sup>57</sup> The presence of private soldiers often exacerbated these conflicts. At times, the soldiers were present because opponents to a new regime would hire them, or because foreign states with an interest in the conflict would send them.<sup>58</sup> In other situations, new governments would actively recruit the soldiers to bolster state defenses.<sup>59</sup> Undefined in positive international law at the time, private soldiers participated in conflicts in the Congo, Guinea, and Benin, among others.<sup>60</sup> The African states that suffered from these conflicts responded by lobbying intensely for international regulation<sup>61</sup> and then, after some dissatisfaction with the resulting adoption of Protocol I, drafting a regional anti-mercenary treaty of their own.<sup>62</sup>

While an important victory at the time, Protocol I was drafted during an era when states and policymakers viewed the sources of insecurity more narrowly than they do today. Realism and notions of state primacy predominated during the 1960s and 1970s. Most theories viewed security and insecurity as emerging almost entirely from the state itself—the former through an adequate military defense and the latter often through arms races and interstate wars. The concept of security was thus narrowly defined; policymakers and academics thought of it as a low or absent risk of warfare between states.<sup>63</sup> In this context, Article 47(2)(a)’s requirement that the mercenary be recruited in order to “fight in an [international] *armed conflict*” (emphasis added) made sense. Application of the concept of “mercenary” to other contexts would have been an overreaction to violence that did not implicate vital state interests.

Since the waning years of the Cold War, however, the concept of

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57. See MUSAH, *supra* note 2, at 4.

58. *Report on Mercenaries 1995*, *supra* note 36, ¶ 32 (describing how mercenaries have historically been used in Africa for this and other purposes).

59. Kofi Oteng Kufuor, *The OAU Convention for the Elimination of Mercenarism and Civil Conflicts*, in *MERCENARIES*, *supra* note 2, at 198.

60. *Id.* at 199.

61. Organization of African Unity, *Declaration on the Activities of Mercenaries in Africa*, ¶ 9, OAU Doc. CM/St.6 (XVII) (June 23, 1971), available at [http://www.africa-union.org/root/au/Documents/Decisions/com/xCoM\\_1971b.pdf](http://www.africa-union.org/root/au/Documents/Decisions/com/xCoM_1971b.pdf).

62. Singer, *supra* note 7, at 528.

63. See Ronnie D. Lipschutz, *On Security*, in *ON SECURITY* 1, 5 (Ronnie D. Lipschutz ed., 1995) (describing the traditional state-centric concept of security that is focused on self-defense and war).

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security has become more amorphous;<sup>64</sup> threats to security are both perceptually and actually more varied. Terrorism, ethnic conflict, international narcotics organizations, and competition for scarce resources are thought of as relatively new, or at least increasingly prominent, sources of insecurity with which the international community must cope.<sup>65</sup> The U.N. Convention was a response to this evolution. A mercenary under the treaty may not only be a person who “fight[s] in an [international] armed conflict,” as in Protocol I, but also any person who, “in any other situation,” is recruited to participate in violence aimed at “[o]verthrowing a Government or otherwise undermining the constitutional order of a state,” or at “[u]ndermining the territorial integrity of a state.”<sup>66</sup> Thus, as long as the other definitional conditions were met, “mercenary” could conceivably refer to terrorists, operatives in drug cartels, and other non-traditional security threats.

### III. PROBLEMS WITH THE CURRENT DEFINITION

Drafters of the U.N. Convention were right to expand the definition of “mercenary” to cover more non-traditional security threats. But they did not produce a definition without other significant shortcomings. The Convention’s definition suffers from two general deficiencies. First, drafters failed to incorporate fully their insight on non-traditional security threats. As a result, the Convention is incapable of regulating some blameworthy activity that is analytically difficult to distinguish from traditional mercenary violence. Second, the drafters inserted practically and normatively irrelevant requirements into the definition that render the Convention difficult to enforce. These shortcomings are apparent both from the text and from the fact that the treaty has only obtained twenty-eight signatories—none of whom are major powers<sup>67</sup>—in the sixteen years since it was opened for signature and

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64. *Id.* at 1-23.

65. See generally Jessica Tuchman Matthews, *Redefining Security*, FOREIGN AFF., Spring 1989, at 162 (making this argument with respect to environmental problems); Stephen J. Randall, *United States-Latin American Relations in the Post-Cold War, Post-9-11 Years*, J. MIL. & STRATEGIC STUD., Summer 2004, available at [http://www.ciaonet.org/olj/jmss/jmss\\_2004/v6n4/jmss\\_v6n4d.pdf](http://www.ciaonet.org/olj/jmss/jmss_2004/v6n4/jmss_v6n4d.pdf) (describing how the United States and Latin American countries have shifted toward a concept of security that focuses on issues such as terrorism, WMD proliferation, and narcotics trafficking).

66. Compare Protocol I, *supra* note 43, art. 47(2)(a), with U.N. Convention, *supra* note 44, art. 1(2)(a).

67. See ICRC, *International Humanitarian Law: International Convention Against the Recruitment, Use, Financing and Training of Mercenaries*, *supra* note 50 (listing the following as states parties: Azerbaijan, Barbados, Belarus, Belgium, Cameroon, Costa Rica, Croatia, Cyprus, Georgia, Guinea,

ratification. The following section assesses shortcomings in the U.N. Convention's definition of "mercenary" with the aim of producing a definition that is both analytically sound and capable of garnering broader state support.

A. *The Definition Limits the Treaty's Ability to Combat Both Traditional and Non-Traditional Security Threats*

The U.N. Convention extends the definition of "mercenary" to contexts of non-traditional security threats by stating that mercenaries may exist in armed conflict or "any other situation."<sup>68</sup> In doing so, the treaty proscribes the use of mercenaries even in situations other than international armed conflict. A mercenary could theoretically be an individual who uses violence that suppresses an unarmed civilian population during the course of a civil war, cripples an enemy's economy or physical infrastructure, or exploits a scarce resource. This is a useful innovation over the Protocol I definition, but the Convention still requires that the legally cognizable mercenary possess a traditional aim. The Convention states that mercenary violence must be aimed at either "overthrowing a Government or otherwise undermining the constitutional order of a State," or "undermining the territorial integrity of a state."<sup>69</sup>

One problem with this language is that non-state-accountable violence may still be undesirable even if it does not have the aim of undermining a state's territorial integrity or overthrowing a government and its constitutional order. By excluding from the definition of "mercenary" private fighters who aim to achieve all other outcomes, such as assisting a criminal organization or defeating a non-state enemy, the Convention limits the international community's ability to combat less traditional sources of insecurity. This is troubling because colloquially-defined mercenaries have "been [observed] in such activities as arms and drug trafficking, illicit trafficking in general, terrorism, . . . acts related to forcible control of valuable natural resources, selective assassination, abduction and other organized criminal activities."<sup>70</sup>

It is doubtful that all of these activities necessarily aim to overthrow

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Italy, Liberia, Libyan Arab Jamahiriya, Maldives, Mali, Mauritania, Moldova, New Zealand, Qatar, Saudi Arabia, Senegal, Seychelles, Suriname, Togo, Turkmenistan, Ukraine, Uruguay, and Uzbekistan).

68. U.N. Convention, *supra* note 44, art. 1(2).

69. *Id.* art. 1(2)(a).

70. *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, ¶ 54(g), U.N. Doc. A/15/115 (July 2, 2003) (*prepared by Enrique B. Ballesteros*).

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governments, undermine states' territorial integrity, or jeopardize states' constitutional orders. Many of these actions will not occur on a scale large enough that prosecuting authorities could persuasively argue such a grandiose aim was present. Because recruitment of individual mercenaries will in many cases have a more proximate and limited aim, the definition forces prosecutors to argue, first, that the mercenary was recruited for the purpose of achieving the proximate aim and, second, that the proximate aim was in fact part of a more general aim to overthrow a government, undermine a state's constitutional order, or undermine a state's territorial integrity. This requirement is overly restrictive because alternative or more proximate aims will in many cases be independently blameworthy. It should be enough to prove that the aim of the recruitment was to facilitate an activity that is criminal under any existing international law.

Another problem with the current language is that private military activity can undermine the constitutional order or territorial integrity of a state even when recruitment does not *aim* to produce these effects. While the *travaux préparatoires* are unclear about precisely what the Convention's drafters meant by "aimed," the Oxford English Dictionary states that to "aim" is "to calculate, devise, arrange, [or] plan."<sup>71</sup> Plain meaning therefore suggests that "aim" creates a specific intent requirement: the recruiter has to intentionally recruit with the precise purpose of using her recruits to commit violence for the accomplishment of one of the enumerated ends. Subsequent U.N. General Assembly resolutions<sup>72</sup> and Article 1(2)'s use of terms such as "specially recruited" and "purpose" lend support to this interpretation.<sup>73</sup>

With a specific-intent requirement, the Convention fails to reach intentional activity that only knowingly causes regime collapse, or that knowingly violates a state's constitutional order or territorial integrity. For example, assume X is a nongovernmental party in an ethnic conflict that hires a private military to harass and suppress rival clan Y. Article 1(1) of the Convention does not apply because there is, at least initially, no "armed conflict"; violence has not escalated. Article 1(2) also does not apply because X did not hire the private military with the

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71. OXFORD ENGLISH DICTIONARY (2d ed. 1989), available at <http://www.oed.com>.

72. See, e.g., G.A. Res. 52/122, U.N. GAOR, 52d Sess., U.N. Doc. A/RES/52/112 (Feb. 18, 1998) ("Recalling also all of its relevant resolutions in which . . . it condemned any State that permitted or tolerated the recruitment, financing, training, assembly, transit and use of mercenaries with the *objective* [emphasis mine] of overthrowing the Governments of States Members of the United Nations . . .").

73. U.N. Convention, *supra* note 44, art. 1(2)(a).



*aim* of overthrowing a government, undermining a state's constitutional order, or undermining a state's territorial integrity. These are at best the *effects* of X's use of private fighters against its enemy, and the U.N. Convention cannot serve as a basis for prosecution.

Beside the fact that it complicates treaty enforcement, the specific-intent requirement is also problematic under deterrence and retributive theories of punishment. From a deterrence standpoint, the specific-intent requirement is counterproductive because it makes prosecution more difficult. For retributivists, specific-intent requirements are appropriate only when an actor's moral culpability hinges on whether or not she specifically intended to commit a given crime. For mercenaries, however, specific intent and moral culpability do not closely correlate. Private soldiers who fight knowing that they are violating a state's constitutional order or undermining its territorial integrity are at least blameworthy for consciously violating the long-esteemed rights and powers that those concepts embody. If anything, the presence or absence of specific intent should determine the level of punishment, not whether punishment is appropriate.

#### B. *Profit Motive Should Be Irrelevant*

Historically, the defining feature of mercenaries has been their motive to use violence for private material gain.<sup>74</sup> The commentary for Protocol I clarifies that many drafters thought this motive was the critical feature of the Article 47 definition.<sup>75</sup> All of the relevant international treaties contain some form of a profit-motive requirement.<sup>76</sup> Legal commentators, moreover, have broadly accepted the centrality of profit motive in the definition of mercenary.<sup>77</sup>

It is not clear, however, why profit motive should be such a crucial feature to the definition. First, members of national militaries often serve for the purpose of private gain. In the United States, scholarship arrangements, advertisements depicting service as a successful career path, and the chance at a stable source of income draw large numbers

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74. See, e.g., 3 EMMERICH DE Vattel, THE LAW OF NATIONS ch. 2, § 13 (Joseph Chitty trans., 1834) (1758) (defining mercenaries as "foreigners voluntarily engaging to serve the state for money, or a stipulated pay.").

75. Protocol I, *supra* note 43, cmt. ¶1807 (noting that for the "protagonists of [Article 47(2)(c),] this is the crux of the matter.").

76. See U.N. Convention, *supra* note 44, arts. 1(1)(b) & 1(2)(b); Protocol I, *supra* note 43, art. 47(2)(c); OAU Convention, *supra* note 42, art. 1(c).

77. See Millard, *supra* note 56, at 6.

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of citizens to the armed forces.<sup>78</sup> Presumably, at least some recruits who participate in actual combat serve solely due to monetary incentives. Yet no one characterizes this type of recruit as mercenary or even particularly morally blameworthy. From this it is clear that the willingness to use violence in exchange for private monetary gain is not inherently inappropriate under the law. The reason, it seems, is that a profit motive does not reliably indicate the absence of accountability. Even when a recruit is motivated primarily by a desire for private gain, mechanisms such as formal training, a strict hierarchy, and the possibility of criminal sanction for misconduct will constrain his or her behavior. These mechanisms are accepted as sufficient to make the private profit motive unproblematic because they cumulatively make misconduct unlikely, even when the soldier lacks national and other loyalties.

Second, and as noted above,<sup>79</sup> the problematic effects of mercenary activity have little to do with the motive for private material gain. Rather, the effects stem from the fact that mercenaries are unaccountable actors.<sup>80</sup> Even in the absence of a profit motive, those who would otherwise be mercenaries under the current definition are still likely to abuse human rights, threaten state sovereignty, and contribute to international crime to the extent that they are unaccountable to any state authority. Terrorists, for example, act primarily for ideological instead of monetary reasons, and yet these individuals clearly contribute to a host of security and human rights problems. Thus, the international community proscribes terrorism even in the absence of a motive for material gain.<sup>81</sup> It is not clear why international treaties on mercenaries should cling to a profit-motive requirement when legal regimes that regulate other forms of non-state violence do not.

In addition to these analytical weaknesses, the profit-motive requirement makes prosecution under the U.N. Convention extremely difficult. This is because a prosecutor has to establish that the actor was "motivated to take part in . . . hostilities *essentially* by the desire for private gain."<sup>82</sup> The term "essentially" appears to require the prosecu-

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78. See Daniel A. Buford, *Marketing the Military: Should Soldiers Be Sold Like Soap?*, MEDIA & VALUES, Fall 1991, available at [http://www.medialit.org/reading\\_room/article54.html](http://www.medialit.org/reading_room/article54.html).

79. See *supra* Part II.B.

80. See Zarate, *supra* note 21, at 119.

81. See, e.g., Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation art. 1, Sept. 23, 1971, 24 U.S.T. 564, 974 U.N.T.S. 177 (proscribing acts of violence on civil aircraft regardless of the presence or absence of a profit motive).

82. U.N. Convention, *supra* note 44, arts. 1(1)(b) & 1(2)(b) [emphasis added].

tor to prove that the actor both had a subjective desire to make money and that that subjective desire was more influential in causing the actor to take part in hostilities than any other simultaneously held, subjective motivations. Inherent difficulties involved in proving subjective motivation, combined with the mobility and secrecy of many mercenaries, make it highly unlikely that prosecutors will be able to obtain the evidence necessary to fulfill these requirements. Perhaps in part for this reason, there have been no news reports of any prosecutions based on the U.N. Convention since its entrance into force in 2001.<sup>83</sup> The difficulty of prosecution is particularly problematic because it has dissuaded Western governments from joining the Convention.<sup>84</sup> There is simply no incentive to become a state party when the Convention is unable to achieve its sole purpose.

C. *Nationality and Residency Are Probably Irrelevant*

The final problem with the U.N. Convention's definition of "mercenary" relates to its non-nationality and non-residency requirements. Under both Article 1(1)(c) and 1(2)(c), a mercenary can be "neither a national nor a resident of the State against which [an act of violence] is directed." An accountability-based definition may reasonably omit these requirements.

The main reason for rejecting the non-nationality and non-residence requirements is that, again, accountability is ultimately the key determi-

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83. This is true even though there is anecdotal evidence that mercenaries are operating from the territory of some states parties, see *Saakashvili Urges Abashidze to Keep Mercenaries Out of Adzharia*, ITAR-TASS NEWS AGENCY, Mar. 24, 2004 (discussing how mercenaries may be traveling from Ukraine to fight in Georgia), and even though national governments have had opportunities to try mercenaries as such, see *Equatorial Guinea: Prosecution for Death Penalty Against Mercenaries*, BBC MONITORING AFRICA - POLITICAL, Aug. 24, 2004 (explaining that Equatorial Guinea chose to prosecute mercenaries for "offence[s] against the head of state, attempt to overthrow the government, change the form of government, undermining the peace and independence of the country, illegal possession and stocking of weapons and ammunitions as well as terrorism and subversive activities and treason," but conspicuously implying that Equatorial Guinea will not prosecute also for the defendants' status as mercenaries); Michael Wines, *Zimbabwe Frees 62 Coup Suspects*, N.Y. TIMES, May 16, 2005, at A3 (explaining that Zimbabwe convicted numerous South African mercenaries for firearms and immigration violations, again conspicuously implying that Zimbabwe did not convict the mercenaries for their status as mercenaries).

84. See, e.g., U.K. Green Paper, *supra* note 2, at 22 ("The UK, in common with most other Western Governments, has not become a party to the Convention mainly because it does not believe that it could mount a successful prosecution based on the definitions in the Convention. This is because of the extreme difficulty of establishing an individual's motivation beyond reasonable doubt.").

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nant of whether private violence is problematic, and—like profit motive—neither nationality nor residence necessarily indicates anything about a private soldier’s accountability. On one hand, persons who are neither nationals nor residents of a state against which they perpetrate violence may still be accountable in many circumstances. Despite some significant reports of misbehavior, U.S.-based private military firms operating in and out of Iraq may provide an example.<sup>85</sup> Most employees of these firms are presumably neither Iraqi nationals nor residents, but they still face a variety of legal and reputational constraints that limit their ability to use force without regard to state policy.<sup>86</sup> On the other hand, persons who are both nationals and residents of a target state may nevertheless be entirely unaccountable. Citizens of Afghanistan, for example, are in many areas able to perpetrate violence against their government with impunity.<sup>87</sup> The regime’s inability to control its territory and impose criminal sanctions on its citizens allows those citizens to act largely as they choose. This point is particularly important because the states that are most likely to face mercenary threats—i.e., failed states and states encountering civil war<sup>88</sup>—will on average be the least capable of capturing and prosecuting their nationals and residents.

The non-nationality and non-residence requirements are also problematic under an examination of their drafters’ intent. Drafters of Protocol I, who inspired the drafters of the U.N. Convention, appear to

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85. For a general discussion on private military firms in Iraq, see James Dao, Eric Schmitt, and John F. Burns, *Private Guards Take Big Risks, for Right Price*, N.Y. TIMES, Apr. 2, 2004, at A9 (noting that “[a]s many as two dozen companies, employing as many as 15,000 people, are working in Iraq”).

86. Eugene B. Smith, *The New Condottieri and US Policy: The Privatization of Conflict and Its Implications*, PARAMETERS, Winter 2002-3, at 104, 113, available at <http://www.carlisle.army.mil/usawc/Parameters/02winter/smith.pdf>. But see U.S. GOV’T ACCOUNTABILITY OFFICE, REBUILDING IRAQ: ACTIONS NEEDED TO IMPROVE USE OF PRIVATE SECURITY PROVIDERS 20 (2005) (explaining that “U.S. forces in Iraq do not have a command and control relationship with private security providers or their employees,” and that coordination between U.S. forces and private contractors is at times inadequate); T. Christian Miller, *Private Security Guards in Iraq Operate with Little Supervision*, L.A. TIMES, Dec. 4, 2005, at A1 (reporting that, under a 2004 order issued by the Coalition Provisional Authority, contractors involved in wrongdoing in Iraq are to be prosecuted in their home countries, but also explaining that many U.S. contractors have not yet faced prosecution despite strong evidence of misconduct).

87. Pamela Constable, *Afghans’ Goals Facing Renewed Threats*, WASH. POST, Sept. 9, 2003, at A9.

88. It is noteworthy that the majority of states currently dealing with mercenary activity are suffering from broad social or political instability. See *supra* Part II.A (listing Chechnya, Georgia, Sierra Leone, Papua New Guinea, Azerbaijan, Tajikistan, and Equatorial Guinea as states where mercenary activity has recently occurred).

have inserted the requirements in order to help protect the individual who joins her own country's military solely for monetary reasons.<sup>89</sup> The problem is that this rationale is only persuasive if we approve of the profit-motive requirement. Having rejected that requirement above, the non-nationality and non-residence requirements lose their cogency. It seems unreasonable to retain requirements that were initially inserted to help make practical a flawed emphasis on profit motive.

The only remaining question is whether there were any other rationales that the drafters simply failed to articulate. Drafters may have included the non-nationality and non-residency requirements on the assumption that states are more likely to encounter violence from foreigners than from their own citizens and residents. On this assumption, the requirements focus the application of the U.N. Convention on the most likely sources of unaccountable military violence. Yet, non-nationality and non-residency in fact have little to do with an individual's propensity for mercenary activity. Independent of these traits, individuals simply may or may not support a government. This observation is particularly true of the last fifteen years, a period during which factors such as globalization and ethnic division<sup>90</sup> have significantly attenuated the bonds between states and their citizens.<sup>91</sup> If the drafters of the Convention hoped to target the individuals most likely to engage in unaccountable violence, recent conflicts seem to indicate that nationals and residents are similarly capable of offense, and thus—in terms of the risk presented—similarly justifiable targets for regulation.<sup>92</sup>

Alternatively, drafters may have included the non-nationality and non-residence requirements in order to respect state sovereignty and ensure that national governments retain jurisdiction over mercenary activity carried out by their own citizens and residents. Some states may have believed that the international criminalization of unaccountable military violence among the nationals and residents of targeted states

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89. Henry W. Van Deventer, *Mercenaries at Geneva*, 70 AM. J. INT'L L. 811, 813-14 (1976).

90. See ROBERT H. WIEBE, *WHO WE ARE: A HISTORY OF POPULAR NATIONALISM* 209-10 (2001) (explaining that nationalism is in decline and that, outside of Europe, competing ideologies are likely to prevail).

91. See generally IAN CLARK, *GLOBALIZATION AND FRAGMENTATION* (1997) (arguing that globalization undermines nationalism and other traditional loyalties).

92. See, e.g., Michael R. Gordon, *Shifting Fronts, Rising Danger: The Afghan War Evolves*, N.Y. TIMES, Dec. 9, 2001, at A1 (describing the need for U.S. action to counter violence from both Taliban rebels and foreign brigades in Afghanistan); James Risen & David E. Sanger, *Border Clashes as U.S. Pressures Syria over Iraq*, N.Y. TIMES, Oct. 15, 2005, at A1 (citing U.S. intelligence reports to explain that about ninety-five percent of the insurgents in Iraq are Iraqi citizens).

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would inject excessive international influence into otherwise purely domestic conflicts. Yet this view, too, has significant limitations. One is that mercenary activity seems most likely to occur in weak states that are particularly unable to bring mercenaries to justice.<sup>93</sup> The result is that, as explained above, the non-nationality and non-residency requirements render the treaty useless in precisely those contexts where a legal framework for international assistance would be most valuable.

The other problem with the potential sovereignty-based rationale is that eliminating the non-nationality and non-residency requirements would not itself allow greater interference with state sovereignty under the authority of the Convention. Even if private soldiers fighting against their own governments are mercenaries, nothing in the U.N. Convention creates an obligation for other states parties to intervene in the internal affairs of a targeted state simply due to the presence of mercenaries. The Convention's jurisdictional provisions only require a state to act when the defendant is one of its nationals, or when the defendant is located in its territory.<sup>94</sup> Rather than viewing these provisions as a source of unjustified foreign interference, it seems that a targeted state would welcome the proposed definition as a way of making it easier to capture and prosecute mercenaries. The definition would, for example, help states parties to take advantage of the Convention's information-sharing provisions, both in conflicts that involve foreign mercenaries and conflicts that involve only domestic participants.<sup>95</sup>

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93. *Cf. supra* Part II.A.

94. *See* U.N. Convention, *supra* note 44, art. 9.

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over any of the offences set forth in the present Convention which are committed:

- (a) In its territory or on board a ship or aircraft registered in that State;
- (b) By any of its nationals or, if that State considers it appropriate, by those stateless persons who have their habitual residence in that territory.

2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over the offences set forth in articles 2, 3 and 4 of the present Convention in cases where the alleged offender is present in its territory and it does not extradite him to any of the States mentioned in paragraph 1 of this article.

3. The present Convention does not exclude any criminal jurisdiction exercised in accordance with national law.

*Id.*

95. *See id.* art. 8 ("Any State Party having reason to believe that one of the offences set forth in the present Convention has been, is being or will be committed shall, in accordance with its

If anything, customary international law—not the U.N. Convention under the proposed definition—is the most likely source of interference for states concerned about retaining exclusive jurisdiction over their nationals and residents. Non-targeted states may be able to assert jurisdiction over the nationals or residents of targeted states as a matter of custom. The Restatement of Foreign Relations Law explains that “[t]here is wide international consensus that the links of territoriality or nationality, while generally necessary, are not in all circumstances sufficient conditions for the exercise of [prescriptive] jurisdiction.”<sup>96</sup> Non-targeted states will thus not necessarily be excluded from exercising jurisdiction. These states may have a legitimate claim to jurisdiction on the basis of the effects and passive personality principles because mercenary activity in one state can destabilize and target the nationals of others. Nationality and residency would typically outweigh claims to jurisdiction based on these principles, but mercenary activity in what will often be failed states may present a unique case. Section 403(2) of the Restatement explains that “all relevant factors” will determine the reasonability of state claims to jurisdiction.<sup>97</sup> Certainly one relevant consideration should be a state’s inability to suppress activities that adversely affect the security of other states.<sup>98</sup>

#### IV. TOWARD AN ACCOUNTABILITY-BASED DEFINITION

Despite the shortcomings of the U.N. Convention’s definition of “mercenary,” specific proposals for an alternate definition are lacking. Commentators have long criticized some of the basic components of the modern definition of “mercenary.”<sup>99</sup> Some have identified mercenary activity as fundamentally a problem of unaccountability.<sup>100</sup> At least

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national law, communicate the relevant information, as soon as it comes to its knowledge, directly or through the Secretary-General of the United Nations, to the States Parties affected.”).

96. 1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 cmt. a (1987).

97. *Id.* § 403(2).

98. In this situation, § 402(3) may be the appropriate basis for prescriptive jurisdiction. That section provides that “a state has jurisdiction to prescribe law with respect to . . . certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests.” *Id.* § 402.

99. H.C. Burmester, *The Recruitment and Use of Mercenaries in Armed Conflicts*, 72 AM. J. INT’L L. 37, 37-38 (1978) (recognizing the difficulty of defining mercenarism and criticizing the profit-motive requirement).

100. *See, e.g., Zarate, supra* note 21, at 119 (explaining that “state accountability” is one of the key determinants of acceptable private military activity, but choosing not to provide a specific definition of “mercenary” based on that insight).

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one has proposed a specific alternative to the current definition.<sup>101</sup> None, however, have both recognized that mercenary violence is an accountability problem and specifically proposed an alternate definition that transforms accountability into the crucial determinant of mercenary status. For the most part, the literature has also failed to reconcile the need to create a definition that is analytically sound with the practical necessity of obtaining state support.<sup>102</sup> This Part aims to remedy these shortcomings by proposing a definition of “mercenary” that hinges on the absence of a private soldier’s accountability to a national government. The Part first lays out the contours of this new definition and explains how to operationalize the concept of legal accountability. It concludes by discussing the various advantages and potential disadvantages that are likely to be associated with the proposed definition.

### A. *An Accountability-Based Definition*

The U.N. Convention’s definition of “mercenary” should be reformulated to account for non-traditional security threats and focus on the fundamental problem of unaccountability. On the security issue, the reformulation should recognize as “mercenary” those individuals who,

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101. The only specific proposal in the literature provides the following:

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

- (a) in a country or territory of which he is not a citizen or subject; other than engaging in armed self-defense of state officials or private persons under rules of engagement permitting proportionate return of fire if fired upon or upon reasonable belief of imminent threat to the life or safety of the protected person or persons, such use of force in self-defense to be limited to the use of side arms or firearms limited against enemies in visual range; and
- (b) is motivated to take part by the desire for private monetary or material gain; and
- (c) acts independent of any legal obligation, regulation, or order by the state of which he is a citizen or subject to participate in such activity. (Active duty members of a state’s armed forces, participating with consent of their government on official duty are in any event not mercenaries, regardless of whether they are citizens or subjects.)

Frye, *supra* note 5, at 2658. It should be noted that this definition retains the requirements of profit motive, non-nationality, and non-citizenship. As explained in *supra* Part II, none of these requirements closely correlate with the defendant’s accountability or, accordingly, culpability.

102. Compare Frye, *supra* note 5, at 2658 (retaining requirements—such as private profit motive—that complicate treaty enforcement), with U.K. Green Paper, *supra* note 2, at 22 (explaining that the U.N. Convention lacks support from national governments in large part because it is difficult to enforce).



even in the absence of specific intent, use violence that overthrows a government, that undermines a state's constitutional order or territorial integrity, or that otherwise conflicts with state security or international law. On the accountability issue, the new definition should abandon the private profit-motive requirements of Articles 1(1)(b) and 1(2)(b) and eliminate the non-nationality and non-residency requirements of Articles 1(1)(c) and 1(2)(c).

The new definition should also explicitly make the absence of accountability a defining feature of the mercenary soldier. Given the problems associated with Keohane's hierarchical, market, and public-reputational forms of accountability in this context, the definition will need to focus on the absence of legal accountability.<sup>103</sup> A proper approach might be to add the requirement that a mercenary is one who operates without legal approval and direction from a government. This requirement would mean, for example, that military firms or other private fighters that contract with or receive licenses from a government are not mercenaries and thus not subject to the terms of the U.N. Convention. The rationale in this context is that the license or contract that governs the relationship between the government and the private fighter renders that person accountable and avoids the fundamental problem with private military action.

The following definition incorporates these reforms:

A mercenary is any person who, in any situation:

- (a) Is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at, *or having the reasonably foreseeable effect of*:
  - (i) Overthrowing a Government or otherwise undermining the constitutional order of a State;
  - (ii) Undermining the territorial integrity of a State;or
  - (iii) *Causing or aiding and abetting any acts otherwise criminal under international law.*
- (b) Has not been sent by a State on official duty;
- (c) Is not a member of the armed forces of the State on whose territory the act is undertaken; and

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103. U.S. law has adopted a similar textual approach to the definition of some unrelated legal statuses. *See, e.g.*, 10 U.S.C. § 2773a(b)(2) (2002) ("An employee or member of the armed forces described in this subsection is an employee or member who . . . (2) is *not otherwise accountable* under subtitle III of title 31 or any other provision of law for payments made on the basis of . . . vouchers.") (emphasis added).

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(d) *With regard to the said concerted act of violence, is not otherwise legally accountable to [a / his or her own]<sup>104</sup> government by means of a contract or license whose parties are the person and that government.*

There are multiple notable differences from the current definition. First, (a) now includes the language “or having the reasonably foreseeable effect of” and, under (iii), “causing or aiding and abetting any acts otherwise criminal under international law.” Another change is that the proposed definition collapses the former Articles 1(1) and 1(2) into one definition because they are largely repetitive and add nothing to the scope of the Convention. Finally, the new definition eliminates Articles 1(1)(b), 1(2)(b), 1(1)(c), and 1(2)(c) of the Convention. The definition retains the former Articles 1(2)(d) and 1(2)(e) because these are objective and useful indicia of legal accountability. The new definition would presumably require drafters to rework some other provisions of the U.N. Convention, but this Note sets that issue aside for the sake of topical focus.

#### B. *Metrics for Legal Accountability*

Assuming that the defining feature of mercenary status should be the absence of legal accountability to a state, questions remain about how, precisely, to define and operationalize the concept of legal accountability. It remains to be explained what types of legal mechanisms states can employ to create legal accountability, and at what point legal accountability mechanisms can be judged sufficient to remove private soldiers from mercenary status. Clear answers to these questions are necessary in order for the proposed definition to generate state support and create an effective basis for prosecution.

Perhaps the most important mechanism for creating legal accountability is the legal contract between the private soldier and his or her state sponsor.<sup>105</sup> Contracts can hold private militaries legally accountable by defining the respective duties of the parties, establishing

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104. I am not sure whether to use the article “a” or the phrase “his or her own” to modify government. For discussion on this point, see *infra* Part IV.D.

105. Cf. Laura A. Dickinson, *Government for Hire: Privatizing Foreign Affairs and the Problem of Accountability Under International Law*, 47 WM. & MARY L. REV. 135, 142 (2005) (arguing that contracts are one of three mechanisms that states can use to enhance the accountability of private actors in international affairs); Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285 (2003) (explaining that contracting enables governments to incorporate public values into the decision calculus of private actors).

penalties for noncompliance or nonperformance, and triggering the application of public laws that relate to the status of the government contractor. In the United States, for example, the Military Extraterritorial Jurisdiction Act enables the United States government to hold U.S. defense contractors criminally liable for overseas misconduct.<sup>106</sup> Thus, even if the terms of a contract are inadequate, its mere presence may help to net offending agents. Moreover, by linking the actions of a private military to its state sponsor, a contract can force states to use private militaries responsibly. The formality of a written contract in particular may help parties to avoid misunderstanding, clearly articulate their expectations and standards, and deter violations by providing for specific penalties. Whether a private soldier is a mercenary could therefore reasonably depend on the presence or absence of a government contract in a particular case.

Effective contracts with private militaries likely will need to contain several features in order to establish legal accountability. First, they will need to articulate clear performance standards, goals, and output requirements. Each of these components will help to ensure that private soldiers only operate as directed by their state sponsors. Specifically defining both desired and unacceptable conduct will enable a contract to serve as a reminder of relevant laws of war, render those laws more effective by articulating their relationship to the private military in a particular context, help private soldiers to know precisely what types of actions are permitted, and even establish standards more stringent than those under the existing laws of war. Clear descriptions of the state sponsor's goals, on the other hand, will help to ensure that private military action comports with state interests even when private soldiers must exercise discretion in choosing the course of action due to unforeseeably vague, ambiguous, or incomplete contract terms.

In addition to articulating goals and performance standards, a contract will also need to establish the private military's liability in cases of nonperformance or noncompliance, including violations of the laws of war. For egregious violations by individuals, criminal sanctions are probably the most appropriate penalties from a deterrence standpoint. For organizations, a form of respondeat superior liability that triggers financial or other economic penalties may be the most effective because that approach will encourage organizations to train and regulate

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106. See 18 U.S.C. §§ 3261-3267 (West Supp. 2005) (criminalizing "offenses committed by certain members of the Armed Forces and by persons employed by or accompanying the Armed Forces outside the United States" and applying explicitly to contractors and their employees).

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their employees.<sup>107</sup> The effect of these mechanisms will be to allocate liability to private soldiers and militaries to the extent that they abuse discretion or otherwise violate a contract's terms. The very existence of the contract, by contrast, will operate as a liability for a government sponsor that misuses private military forces because the contract creates a control relationship between the sponsor and the private forces that renders the sponsor accountable under the international law on state responsibility.<sup>108</sup>

Some commentators have argued that even with clear articulations of performance standards, goals, output requirements, and penalties, contracts are limited in their capacity to create legal accountability. One cited problem is that an agent such as a private military organization may have incentives to comply only with the letter of its contract because minimal performance lowers costs while maximizing the profit of performance.<sup>109</sup> Another identified problem is that contracts "do very little to encourage the development of a *professional ethos* of accountability" among private agents.<sup>110</sup> Yet another possible objection, it seems, is that contracts are only as effective as their compliance-monitoring mechanisms. With agents involved in secret military operations, monitoring difficulties could render contracts difficult to enforce.

While these critiques are reasonable, there are several reasons to reject them. Most importantly, the desirability of the proposed definition of "mercenary" should be assessed in comparative terms, not solely in a vacuum. The question should not be whether contracts are foolproof mechanisms for generating accountability, but whether a

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107. One approach here might be to adopt a doctrine similar to that articulated in *In re Yamashita*, 327 U.S. 1 (1946). There, the U.S. Supreme Court held that a military commander has a "duty to take such appropriate measures as are within his power to control the troops under his command for the prevention of . . . violations of the law of war." *Id.* at 15. Based on this doctrine, the Court held that a Japanese military commander was strictly liable for violations of the laws of war committed by his troops in the Philippines during World War II. *Id.* at 15-18, 26.

108. See Draft Articles on Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, Annex, U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/10 (Dec. 12, 2001) [hereinafter Draft Articles on State Responsibility], available at [http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9\\_6\\_2001.pdf](http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf). Article 8 states that the conduct of a "person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct." *Id.* While still mere drafts, the articles that attribute private conduct to states, including Article 8, are "generally traditional and reflect a codification rather than any significant development of the law." Daniel Bodansky & John R. Crook, *The ILC's State Responsibility Articles: Introduction and Overview*, 96 AM. J. INT'L L. 773, 783 (2002).

109. See Kearns, *supra* note 28, at 582.

110. *Id.*

definition of “mercenary” that hinges on the presence of mechanisms such as government contracts will be more effective than the current definition at reducing unaccountable military violence. In other words, is it easier to control the unaccountable use of military force by requiring prosecutors to prove a mercenary recruiter’s specific intent, a mercenary’s desire for monetary gain, and a mercenary’s non-citizenship and non-residency? Or is it easier to control the same problem by relying on contracts that are admittedly fallible but objectively discernable to prosecuting authorities? As discussed above, an affirmative answer to the second question is justified not only because the proposed definition facilitates prosecution once a trial has begun, but also because, as explained below,<sup>111</sup> the definition is more likely to attract state support and thus the accompanying resources that make prosecution possible.

Further, the proposed definition’s partial reliance on contracts is justified even on its own terms. An agent’s incentive to comply only minimally with contract requirements is not a reason to conclude that the agent is unaccountable. He or she is simply no more accountable than the contract requires. States remain free to carefully draft contract terms to ensure that private soldiers carry out state policies in a way that serves state interests.

The second critique, described above, that contracts do not generate professionalism among agents is similarly dubious. A contract may be unable to generate professionalism beyond that which is mandated by its provisions, but contract-based penalties for nonperformance or noncompliance would still help to deter the worst tendencies of private military activity. Moreover, private military organizations and soldiers who hope for future contracts have strong incentives to operate precisely as required. The possibility of future business would supply at least some discipline to current exercises of discretion.

The final and most persuasive critique of contract-based accountability in the context of private military agents is that compliance monitoring is extremely difficult. Battlefield conditions, the argument goes, may be unclear or change rapidly, and agents have strong incentives to avoid reporting their own violations. The response is threefold. First, as wars in the Balkans, Afghanistan, and Iraq have shown, abuses tend to find their way into the media.<sup>112</sup> Facing this risk, private military agents

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111. *See infra* Part IV.C.

112. Colum Lynch, *Ex-U.N. Officer Sues U.S. Firm over Dismissal*, WASH. POST, June 23, 2001, at A20 (describing a lawsuit related to sexual misconduct by a contractor’s employees in the Balkans); Richard A. Oppel, Jr. & Ariel Hart, *Contractor Indicted in Afghan Detainee’s Beating*, N.Y.

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would have strong incentives at least to avoid egregious violations of their contracts. Second, even if reports of a violation never leave the ranks of the private military organization involved, superiors would likely discipline their offending subordinates for placing the organization in legal jeopardy with the state sponsor. An agent's employees would therefore have some reason to comply with the requirements of the state sponsor even if that sponsor is unlikely to find out about violations. Finally, it is important to note that the problems associated with operations conducted by a private military pursuant to a government contract apply similarly to operations by national armed forces. Regardless of whether private soldiers are involved, it will always be difficult to monitor compliance with the laws of war, and it will always be difficult to sufficiently train soldiers to avoid criminal activity on the battlefield.

In situations where a contract appears incapable of independently creating sufficient legal accountability, states may rely on other mechanisms under the proposed definition. Licensing, for example, could either replace or supplement contractual arrangements. As with the system established under the U.S. Department of State's International Traffic in Arms Regulations (ITAR),<sup>113</sup> states could require private soldiers and private military organizations to apply for authorization before exporting combat-related services. In doing so, the authorizing state could regulate the nature and duration of the proposed service to ensure that its provision serves state interests. Licensing would also allow states to bar applicants with questionable backgrounds from providing services. By doing so, states could reduce the risk of misconduct after the license has been granted.

Like a contract, a license could render the licensee accountable by establishing financial or other penalties in cases of misuse. Moreover, once a state chooses to use licensing procedures for its private military agents, there will be strong incentives for the state to license responsibly. Incidents of misconduct by private soldiers are likely to raise questions not only about why the soldier misbehaved, but also about why his state sponsor supplied him with a license. Careful use of licensing procedures would enable states to promote their interests more effectively by reducing the risk of diplomatic embarrassments.

Having described the most likely tools for creating legal accountabil-

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TIMES, June 18, 2004, at A1 (describing abuses by a contractor in Afghanistan); Kate Zernike, *Ex-Detainees Sue Companies for Their Role in Abuse Case*, N.Y. TIMES, June 10, 2004, at A12 (describing abuses committed by contractors in Iraq).

113. 22 C.F.R. §§ 120-130 (2005).

ity, this section's final step is to propose a standard for assessing the sufficiency of legal accountability mechanisms in any given context. Because the efficacy of these mechanisms will likely vary by case, none of them should necessarily remove state-sponsored private soldiers from mercenary status. At the same time, states parties to the U.N. Convention should be able to assess *ex ante* whether their legal accountability mechanisms are sufficient to distance their private soldier-agents from mercenary status. A clear standard will allow states to utilize private soldiers confidently when accountability exists, and it will aid prosecution when private soldiers are insufficiently accountable.

One way to resolve the tension between demands for contextualization and predictability is to recognize that legal accountability is in some sense a synonym for state control. State militaries are legitimate, and colloquially-defined mercenaries illegitimate, because the former operate only in a manner that reflects official state interests, while the latter at best occasionally do so. The reason for this difference is a matter of state control; national armies alone are treated as legitimate because states can control them to operate in accordance with national priorities and to promote national welfare. Mercenaries, by contrast, may promote any interest regardless of its compatibility with state goals.

In light of this difference, it is reasonable to evaluate the sufficiency of a state's accountability mechanisms by asking whether those mechanisms enable the state to substantially influence how and when the private military uses force. Mechanisms should be deemed insufficient if they are unable to prevent the use of private military force when the context or manner of such use is inimical to state interests. Prosecutors trying to determine whether accountability was present in a given case can ask whether a state's contract or license in aggregate gave the state an ability to direct with legal authority how, when, and where the defendant used force. This approach is contextualized because it requires a factual inquiry to determine mercenary status, but the objective nature of legal control should also allow states to protect with confidence entire groups of private soldier-agents.

Another possible way to determine the sufficiency of a state's accountability mechanisms is to assess not only the degree of control that those mechanisms confer to the state, but also the manner in which they operate. Here, the appropriateness of the "mercenary" characterization will grow proportionally with the attenuation, informality, and

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secrecy of the state-soldier relationship.<sup>114</sup> This is because the traditional harms associated with mercenaries are more likely to occur as private militaries act secretly and without close government supervision. Informality raises the risk of misconduct by leaving the private military without any clear goals or standards to guide its conduct. Indirectness risks diluting the state's control by impeding communication and complicating the chain of command.<sup>115</sup> And secrecy makes it easy for the private military to hide its own abuses. On the other hand, a public, direct, and formal relationship with a government should protect private soldiers from mercenary status not only because the state will be more capable of guiding soldiers' conduct in that context, but also because such a relationship makes it easier for the international community to hold the state-sponsor accountable. In this sense, sufficient legal accountability triggers other sources of accountability.<sup>116</sup> Legal accountability may enhance Keohane's public-reputational accountability, for example, if the former exists by means of a publicly disclosed contract or license.

#### C. *Merits of the Accountability-Based Definition*

Adoption of the proposed definition would carry several benefits. The first is that the definition would enhance the symbolic and deterrent value of the U.N. Convention by making prosecution much easier. One reason is that states concerned with limiting mercenary activity would no longer have to prove either profit motive or specific intent. The legal analysis would instead focus on the objective and more pertinent issues of whether the alleged mercenary operated under any legal mechanism that renders her accountable to a government and whether the alleged mercenary's acts would have any of the reasonably foreseeable effects that are proscribed. The suggested changes would also facilitate prosecution by allowing states to pursue individuals recruited for a greater variety of violent activities.

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114. See Elaine Ciulla Kamarck, *The End of Government as We Know It*, in MARKET-BASED GOVERNANCE, *supra* note 39, at 257.

115. One implication of this point may be that private military organizations should be prohibited from subcontracting work to other private entities.

116. See Dickinson, *supra* note 105, at 173 (explaining that contracting can "aid other mechanisms of accountability"); cf. Janna J. Hansen, *Limits of Competition: Accountability in Government Contracting*, 112 YALE L.J. 2465, 2474 (2003) ("In many ways, legal structures do not contribute independent forms of accountability but provide a formal background to enforce the accountability goals of the system as a whole and to allow the operation of other accountability structures.").



The second advantage of the new definition is that it is more likely to garner state support. As mentioned above, Western governments have not acceded to the current U.N. Convention in large part because its strict definitional requirements render it incapable of serving as an effective basis for prosecution.<sup>117</sup> The suggested changes should resolve this problem by making prosecution easier. Additionally, the proposed definition should not raise national-security or sovereignty concerns among states because the legal accountability element guarantees that formally state-sponsored private actors cannot be labeled mercenaries. The definition only reaches persons who are recruited to use violence without any type of formal state approval—precisely the individuals whom states are most interested in punishing.

Third, the above definition could allow states to argue that non-state-sponsored terrorism is a category of mercenary activity and thus punishable under the U.N. Convention. Non-state-sponsored terrorists will typically meet the proposed definition of mercenary; the primary difference is simply that influential legal definitions of “terrorist” require an additional purpose to “intimidate a population, or to compel a Government or an international organization to do or abstain from doing any act.”<sup>118</sup> The proposed definition could thus serve as a backup route for prosecuting terrorists otherwise not convictable due to the difficulty of proving purpose to intimidate, the absence of a comprehensive international convention on terrorism, or limits to the various parochial anti-terrorism conventions.

#### D. *Seven Problems and Potential Answers*

Despite the above advantages, the proposed definition may give rise to several concerns. First, the definition could be used to characterize as mercenaries members of violent self-determination movements that oppose oppressive regimes. This is an admitted shortcoming to the definition. However, it is probably not fatal. On one hand, it may be possible to add a clause that excludes participants in certain forms of self-determination movements from the scope of the proposed definition. The only problem is that it is difficult to imagine precisely what that clause should say. Validating any violent self-determination movement, it seems, could galvanize and tacitly lend legitimacy to less justifiable movements in other contexts, and it would be difficult to

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117. See U.K. Green Paper, *supra* note 2, at 22.

118. See Ad Hoc Comm. Est. by G.A. Res. 51/210 of 17 Dec. 1996, *Draft Comprehensive Convention on International Terrorism*, art. 2(1), U.N. Doc. A/57/37 (Feb. 11, 2002).

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enforce fair standards for deciding when non-state violence is defensible. The concept of an exception for participants in limited forms of violent self-determination movements is not itself problematic, but its implementation very well could be. Although it is difficult to imagine language that would avoid serious enforcement problems, commentators more creative than I may be able to create a workable exception.

Assuming for the sake of argument that such an exception is not possible, a categorical prohibition on non-state-accountable violence may be justifiable. It is widely accepted, for example, that states appropriately monopolize the authority to determine the legitimate use of force.<sup>119</sup> Without such a monopoly, it is likely that neither democracies nor market economies could function. Additionally, self-determination movements may still achieve their aims without resorting to violence. Opponents of a variety of regimes across modern history have been able to substitute violence with tools such as international pressure, public opinion, and economic leverage in order to achieve their aims. Native citizens of India used some of these tactics to achieve independence from their British colonizers in 1947.<sup>120</sup> Moroccans acted similarly to achieve independence from France in 1956,<sup>121</sup> as did Lithuanians with regard to the Soviet Union in 1990<sup>122</sup> and citizens of Lebanon with regard to Syria most recently.<sup>123</sup> We should not be too ready to condone the use of violence in light of this precedent. Finally, even assuming that violence is justified for some movements, it is possible that the benefits of an effective anti-mercenary convention will outweigh the harms suffered by a small

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119. Indeed, the very concept of the "state" assumes this monopoly. See MAX WEBER, *THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION* 156 (A.M. Henderson & Talcott Parsons trans., 1947) (explaining that the possession of a monopoly on the legitimate use of force within a certain geographical area is a crucial attribute of states). For arguments justifying the monopoly, see generally DOUGLASS C. NORTH, *STRUCTURE AND CHANGE IN ECONOMIC HISTORY* (1981); Mancur Olson, *Dictatorship, Democracy, and Development*, 87 *AM. POL. SCI. REV.* 567, 568 (1993) (arguing that stability is gained when violence is monopolized by a "stationary bandit" and governments are not formed by voluntary entry into social contracts, but because of "rational self-interest among those who can organize the greatest capacity for violence.").

120. Tony Smith, *A Comparative Study of French and British Decolonization*, 20 *COMP. STUD. IN SOC'Y & HIST.* 70, 96-97 (1978).

121. See generally Benjamin Rivlin, *The United States and Moroccan International Status, 1943-1956: A Contributory Factor in Morocco's Reassertion of Independence from France*, 15 *INT'L J. AFRICAN HIST. STUD.* 64 (1982).

122. John M. Goshko, *'Captive Nations' Policy Yields to New Realities*, *WASH. POST*, Mar. 12, 1990, at A11.

123. Hassan M. Fattah, *Last Syrian Units Pack to Pull Out of Lebanon*, *N.Y. TIMES*, Apr. 25, 2005, at A8.

number of self-determination movements as a result of the new definition. As mentioned above,<sup>124</sup> mercenary activity is increasingly prevalent around the globe, and it contributes significantly to a host of security threats.

A second potential problem is that even with the new definition there is no guarantee that parties will draft effective contracts to govern the use of force by private militaries or that governments will issue their contracts and licenses responsibly. In this view, governments may face incentives to regulate their private-soldier employees just enough to avoid liability for employing mercenaries, but no further. This criticism may be persuasive with regard to crumbling regimes that have little concern for international reputation or future legitimacy,<sup>125</sup> but it is probably not true for most other states. Governments concerned with effective tactical planning will want to strictly regulate the missions and manner of conduct of their private agents in most cases. Failure to do so could not only create public-relations problems,<sup>126</sup> but also undermine a government's ability to win battles. Additionally, the proposed definition gives states a uniquely strong incentive to effectively regulate their private soldiers because failure to do so may expose the soldiers to prosecution under the Convention and call into question the legitimacy of the state's authorization to use force. In doing so, the definition could help to resolve current problems with unaccountability among private military corporations in places such as Iraq.<sup>127</sup>

Third, even with the new definition, there is still a potential for states to employ private soldiers to attack other states or engage in otherwise destabilizing or abusive activities. The proposed definition would admittedly do nothing to proscribe those actions because the private soldiers involved would presumably hold some type of formal legal relationship with their employer government. However, this argument is not a reason to reject the proposed definition. Adopting a definition of "mercenary" that includes state-sponsored militaries would be unworkable due to the likelihood of strong state opposition and the difficulty of distinguishing between mercenaries and traditional soldiers. Moreover, even if some soldiers cannot be held accountable under the U.N.

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124. *See supra* Part II.

125. *See* THOMAS C. SCHELLING, *THE STRATEGY OF CONFLICT* 45 (1980) (discussing how a state's incentives for future cooperation will significantly shape its current behavior toward other states).

126. John Tierney, *Hot Seat Grows Lukewarm Under Capital's Fog of War*, N.Y. TIMES, May 20, 2004, at A14 (quoting Senator Byrd on how abuse of prisoners at Abu Ghraib by private security firms has dealt a significant blow to U.S. prestige and the U.S. public relations campaign in Iraq).

127. *See* Wayne, *supra* note 18.

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Convention by virtue of their state sponsorship, the state sponsor can be held accountable by the international community under the law of state responsibility.<sup>128</sup> As the identities of potential state sponsors are widely known, static, and finite, it should—in comparison to the difficulty involved in identifying and tracking down individual mercenaries—be easy for the international community to impose on misbehaving states punishments such as sanctions, public condemnation, and/or the use of force. The possibility of receiving such punishments gives states ample reason to use private militaries judiciously.

While it is conceivable, moreover, that the potential for liability would simply encourage states to evade sanction by maintaining only covert and informal relationships with the private militaries they hire, this result is unlikely. Private soldiers would be reluctant to work for governments in the absence of a formal contract or license because informality would expose those soldiers to criminal liability for mercenary status. Additionally, the U.N. Convention not only criminalizes mercenary actions, but also any state sponsorship of such actions, whether formal or informal. Article 5(1) states that "States Parties shall not recruit, use, finance or train mercenaries and shall prohibit such activities in accordance with the provisions of the present Convention."<sup>129</sup> The phrase "recruit, use, finance or train" covers most conceivable relationships between states and private militaries and does not appear to require any level of relational formality or legal accountability in order to trigger state responsibility. Thus, regardless of the nature of the relationship between the state and the private soldier, the state itself can become liable; the question is simply how. If the relationship is formal and the private military legally accountable to its sponsor, that military will not be mercenary, and state liability will only arise if the state's use of the private force otherwise violates some aspect of international law. If the relationship is informal and the private military legally unaccountable to its sponsor, that military becomes mercenary, and the state becomes liable under Article 5 of the U.N. Convention.

Fourth, many commentators would criticize the accountability-based definition for legitimizing legally accountable private military organizations. According to these commentators, private military organizations are categorically problematic because they undermine the morale of national armed forces and complicate national military strategies,<sup>130</sup>

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128. See Draft Articles on State Responsibility, *supra* note 108, art. 8.

129. U.N. Convention, *supra* note 44, art. 5(1).

130. See Michaels, *supra* note 5, at 1095-98.

allow governments to circumvent traditional democratic and constitutional checks on the use of force,<sup>131</sup> and tend to violate human rights.<sup>132</sup> While it should be noted that the policy debate over the wisdom of relying on private military organizations is far from decided,<sup>133</sup> this Note sets aside that well-worn discussion and asks the reader instead to consider two possibilities. First, assume that, based on the policy analysis carried out elsewhere, private military organizations are in fact useful to states and generally beneficial for a variety of strategic, economic, and legal reasons. If this is the case, the proposed definition is not at all problematic, as it allows states to distance private soldiers from mercenary status by contracting with firms that on balance confer net social benefits. Second, assume in the alternative that private military organizations are undesirable from a policy standpoint. Even if that were true as an academic matter, a wide variety of national governments are convinced that private militaries are strategically quite useful,<sup>134</sup> and these governments are unlikely to discontinue their use. The question, then, is not whether the proposed definition is problematic in light of the arguable and abstract undesirability of private military organizations, but whether the definition is justified as a more effective way to control unaccountable military violence in a world where the private military organization has become a well-settled institution in international affairs. Even if legally accountable private military organizations are bad, unaccountable private military organizations are worse. The proposed definition may validate the operations of some private military organizations, but, in doing so, it enhances the ability of states to counter the most egregious forms of private military violence.

The fifth potential problem is that states may resist the proposed definition due to its tendency to enhance state accountability for the acts of private soldiers. The soldier's legal accountability in effect heightens the state's accountability to public opinion and the international community by formally bonding the state sponsor and agent. While states may be eager to control the unaccountable use of force,

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131. See, e.g., *id.* at 1062-83.

132. See Dickinson, *supra* note 105, at 151-53.

133. See, e.g., *id.* at 189 (arguing that "when the government privatizes military functions, individuals seeking redress may actually have *more* avenues to pursue legal accountability than when the government performs military functions directly"); Zarate, *supra* note 21, at 150-52 (explaining the various benefits produced by private military organizations).

134. For an explanation of their perceived utility, see *supra* Part II.A and *infra* notes 136-142 and accompanying text.

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they are not eager to create greater liabilities for themselves. States may also oppose the definition to the extent that it requires greater regulation of private military corporations. The rationale for relying on private militaries is that, in comparison to actual state militaries, they lower the profile of the state sponsor, provide cost savings, and provide the sponsor with greater flexibility in its decisions to use force.<sup>135</sup> Regulation arguably mitigates these benefits.

Despite these objections, there are several reasons why states could support the proposed definition over the definition employed in the current U.N. Convention. First, as explained above, the accountability-based definition is probably a more effective basis for prosecution. The definition thus removes one of the primary reasons for anemic state support for the current Convention. Second, contractual or license-based regulation of private soldiers does not eliminate the comparative advantages of reliance on private forces over state militaries. The use of legally accountable private soldiers does not necessarily raise the profile of the state sponsor, for example, because these soldiers will operate under a different organizational name, wear non-state uniforms, and adhere to contracts or licenses that are far less visible than the public deployment of a national military. As long as contracts and licenses create sufficient legal accountability, evidenced by state control, these instruments do not necessarily have to be publicly disclosed.

Nor does the proposed definition eliminate the financial benefit of reliance on private militaries. As one commentator has noted, contractors are less expensive in part because efficiency is their *modus operandi* and in part because they do not encounter compliance costs under the wide range of statutes and regulations that apply exclusively to government actors.<sup>136</sup> For example, as a non-public entity, a private military organization in the United States is not subject to requirements under the Administrative Procedure Act.<sup>137</sup> As a result, many constraints typically encountered by federal agencies—e.g., notice and comment procedures<sup>138</sup> and reporting requirements under the Freedom of Information Act<sup>139</sup>—do not apply. In the United States, a private military's non-public status also potentially allows it to avoid

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135. See Michaels, *supra* note 5, at 1037-48 (describing traditional rationales for the use of private military companies).

136. *Id.* at 1037-38.

137. 5 U.S.C. §§ 551-559 (2000).

138. See 5 U.S.C. § 553.

139. 5 U.S.C. § 552.

*Bivens* liability.<sup>140</sup> A contractual or licensing relationship with a state sponsor will likely not change the agent's position under these areas of law. One final point on the issue of cost is that, even if the proposed definition mitigates the financial rationale for relying on private forces, there may be a tradeoff between the state sponsor's interest in cost savings and its interest in effective battlefield control. To the extent that the latter is more important, states will have little reason to oppose the proposed definition even if it raises the cost of hiring private militaries.

The accountability-based definition is also unlikely to undermine the flexibility that states enjoy in the use of private security forces. Much like the cost savings referenced above, flexibility is largely a product of non-public status, and a contractual or licensing relationship with a national government does nothing to change that status. Flexibility exists in part because citizens tend to exhibit less concern for the lives of private soldiers than they do for soldiers in their government's armed forces.<sup>141</sup> Sponsoring states are thus capable of deploying private soldiers in contexts where the risk to human life would otherwise be unacceptably high in relation to the weight of the interest pursued. Flexibility also exists in part because statutory constraints tend to apply more to the use of national armed forces than to the use of private forces. Again using the United States as an example, the War Powers Resolution applies only to the "introduction of United States Armed Forces" into hostilities.<sup>142</sup> Because the mere presence of a contract or license does nothing to negate the private status of a private military, it is unlikely that the proposed definition would eliminate the flexibility that states appear to enjoy in the use of such forces.

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140. See *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971) (establishing that citizens can obtain damages for injuries caused by the unconstitutional acts of federal agents). Whether or not private militaries may be held liable under *Bivens* depends largely on whether their actions constitute "state actions." The answer is not entirely clear. On one hand, the Supreme Court has held that a *Bivens* remedy is unavailable against a private corporation that is under contract with a federal agency. See *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 71 (2001). On the other hand, courts occasionally recognize actions taken by private entities as state actions when the entities are specifically authorized to act by the government, carrying out public functions or carrying out activities in close cooperation with the government. For an explanation of these authorities, see Daphne Barak-Erez, *A State Action Doctrine for an Age of Privatization*, 45 SYRACUSE L. REV. 1169, 1172-83 (1995).

141. See Dickinson, *supra* note 105, at 191-92 (explaining that, by reducing troop deaths, reliance on private contractors made it easier for the United States to intervene in Kosovo and Iraq).

142. See 50 U.S.C. §§ 1541-1548 (1973).

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Sixth, proponents of the existing definition may argue that its components, in aggregate, effectively indicate an absence of accountability, even if each component does not do so independently. In this view, it is inapt to separately critique the definition's components because they do not operate in isolation. This is admittedly a reasonable argument; soldiers who meet all aspects of the current definition are in most cases not likely to be accountable to a state. However, there are two reasons to nevertheless reject the non-nationality, non-residence, and profit-motive requirements. First, the difficulty of establishing profit motive still stands as an independent reason for rejecting that criterion. Prosecutors will be unable to punish unaccountable military activity as long as that requirement remains. Second, because none of these requirements on their own necessarily indicate anything about a defendant's level of accountability, a defendant could avoid prosecution for reasons that are normatively irrelevant. Assume for example that a defendant satisfies every part of the existing definition except the non-nationality requirement—she has citizenship in the failed state against which she will use violence. In that case, the U.N. Convention would provide no basis for prosecuting the defendant, the target state will presumably be incapable of doing so, and other states will be barred from prosecuting on the ground of mercenary status because the defendant is a national of the target state and thus not a mercenary at all. The current definition produces this result even though the defendant is unaccountable to any state, and even though there is a strong moral argument that the defendant is culpable. A hypothetical involving the profit-motive requirement produces a similar result.

To illustrate one final concern, imagine that a group of U.S. citizens contracts to fight for a foreign government in a conflict that otherwise does not involve the United States or its interests. The U.S. government has not authorized the deployment. Assume also that the contract involved contains terms sufficient to create legal accountability under the criteria described above; the citizens are thus not mercenaries under the proposed definition. In this situation, one could reasonably argue that the citizens should still be characterized as mercenaries because, although they are legally accountable to a government, they are not legally accountable to their own government. There is a reasonably strong policy argument that the unauthorized participation of one nation's citizens in a foreign conflict should be proscribed regardless of their legal accountability to a foreign state because that participation interferes with the foreign policy of the state of citizenship and risks entangling that state in an otherwise unrelated conflict.



It is hard to imagine that a government would not feel compelled to respond, for example, if its own citizens were killed or mistreated during the course of a foreign war. The potential effect would be to escalate local or regional conflicts into international wars. To help prevent this problem, the current language in part (d) of the proposed definition, which allows a private soldier to avoid mercenary status by means of legal accountability to “a government,” should arguably be changed to permit only the private soldier who is legally accountable to “his or her own government.” The rationale for this position is the same rationale that motivates neutrality laws.<sup>143</sup>

The argument for the change seems compelling. There are, however, two issues that should determine our ultimate position on this point. One is the empirical question of whether neutrality laws are adequately drafted and enforced by the various national governments around the world. If they are, then the change seems duplicative and loses its primary rationale. If they are not, then the change could help states to fill in gaps left by poor drafting or inadequate enforcement of the current laws. Although it is difficult to reach a conclusion on this issue without collecting data, my guess is that neutrality laws are imperfectly drafted and enforced in at least some cases.<sup>144</sup> The second

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143. With neutrality laws, governments bar their own nationals from assisting or serving in foreign militaries without authorization. *See, e.g.*, 18 U.S.C. § 959(a) (1994).

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.*; 18 U.S.C. § 960 (1994).

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.*

144. There is some basis for concluding that, historically, these laws have been selectively enforced in the United States and abroad. *See* Paul W. Mourning, *Leashing the Dogs of War: Outlawing the Recruitment and Use of Mercenaries*, 22 VA. J. INT'L L. 589, 598 (1982) (explaining that both “international and U.S. laws regarding mercenaries have . . . relied on similar, selective enforcement schemes”). It is unclear whether state practice has changed in recent years.

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issue is whether the change would enhance accountability. Here again, the answer is somewhat uncertain. On one hand, lacking anything other than a business relationship to its private soldier-agents, a foreign government may be the most likely to demand strict compliance with the terms of its contract or license. Factors such as the nationalism of the sponsoring state and the unfamiliarity of the contracting parties could reinforce this tendency. On the other hand, a foreign government may be more willing to use private soldiers from foreign countries to carry out odious government objectives because the foreign face of the soldier-agent helps to distance his acts perceptually from those of the government-principal. A cautious approach to accountability may use the phrase "his or her own government" in part (d) of the proposed definition, but, of course, even then there would remain a possibility of irresponsible deployment by mercenaries' home states.

### V. CONCLUSION

As a prominent form of non-state violence, mercenary activity is a significant threat to international security. This Note has argued that mercenary violence is also fundamentally a problem of accountability; the associated harms largely occur when private soldiers operate without the direction and control of a government. Unfortunately, the definition of "mercenary" that is employed in Protocol I and the U.N. Convention does not reflect this fact, as it includes several components that are irrelevant to the issue of accountability. As a result, the related, substantive treaty provisions are difficult to enforce and lack broad state support. This situation is particularly problematic because law is the one source of accountability that does not face inherent limitations in its ability to manage private military violence. Without a redefinition of mercenary status, mercenary violence is likely to continue as a significant source of instability and abuse. This Note has sought to resolve these issues and improve on the existing literature by proposing a specific definition that transforms accountability into the central determinant of mercenary status. To the extent that states are attracted by a definition that facilitates enforcement and improves on the analytical weaknesses of its predecessor, the accountability-based definition will strengthen international efforts to deter and punish mercenary violence.