THE PRIVATE MILITARY COMPANY: A LEGITIMATE INTERNATIONAL ENTITY WITHIN MODERN CONFLICT

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The opinions and conclusions expressed herein are those of the student author and do not necessarily represent the views of the U.S. Army Command and General Staff College or any other government agency. (References to this study should include the foregoing statement.)

ABSTRACT

THE PRIVATE MILITARY COMPANY: A LEGITIMATE INTERNATIONAL ENTITY WITHIN MODERN CONFLICT by MAJ Scott C. Goddard, RA INF, Australia, 112 pages

This thesis investigates the post-Cold War evolution of private military companies. Specifically this study will focus on the measure of international legitimacy that is afforded to private military companies that conduct active military assistance operations that have a strategic impact on the political and security environments in which they are contracted to operate.

The thesis has focussed the contract operations conducted by Executive Outcomes (Republic of South Africa), Sandline International (United Kingdom), and Military Professional Resources Incorporated (United States of America) within the time frame of 1988 to the present.

The study concludes that at the international level, active military assistance operations conducted by private military companies are indeed legitimate, but that measurement of legitimacy can only be assessed as being de-facto and amoral. Moreover these missions are being conducted within a vacuum of effective regulation and accountability at the international and national levels that is decidedly inappropriate for the international realm in the twenty first century.

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ABBREVIATIONS AND ACRONYMS

AECA	Arms Export Control Act
ACRI	African Crisis Response Initiative
AR	Army Regulation
DA	Department of the Army
DOD	Department of Defense
FM	Field Manual
FMS	Foreign Military Sales
ISO	International Standards Organization
IMET	International Military Education and Training
ITAR	International Traffic in Arms Regulations
KLA	Kosovo Liberation Army
MOOTW	Military Operations Other Than War
MPRI	Military Professional Resources Incorporated
OAU	Organisation for African Unity
ODTC	Office of Defense Trade Controls
PAM	Pamphlet
PMC	Private Military Company
UN	United Nations
US	United States of America
UK	United Kingdom

CHAPTER 1

INTRODUCTION

Private Military Companies

This thesis will attempt to answer the question of whether the actions of private military companies (PMCs) that conduct direct combat operations, combat support, or specific training for such operations are indeed legitimate undertakings or mercenary operations. This research will also assist to inform ongoing international debate, as to the legal application and utilization of private military companies' capabilities, by nations and world bodies within the framework of modern conflict.

The spectrum of modern conflict extends from the conduct of military operations other than war (MOOTW) to conventional operations. While conventional operations are conducted at various degrees of intensity (low, mid, and high), MOOTW are designated by the nature or core element of the environment or military operation, such as humanitarian operations, peace operations, and national security operations. The structure and capabilities of modern PMCs parallel the range of operations within the spectrum of modern conflict. However, the vast majority of PMCs are structured and equipped to conduct logistic support operations (Brown and Root, US), security operations (Defence Systems Ltd, UK) and-or training support operations (Cubic, US). These operations typically represent "outsourced" contracts, intended to support extant military operations and training regimes. These contracts are passive in that the services rendered by the PMCs do not directly alter the environment within which they are contracted to operate.

As the diversity of conflict has magnified since the end of the Cold War, so too have the capabilities of a minority of PMCs. These PMCs have been structured with additional resources that enable the conduct of military style operations that can deliberately transform the security environment within which they are contracted to operate. The primary PMCs within this framework are Executive Outcomes (defunct as of January 1999), Sandline International, and Military Professional Resources Incorporated (MPRI).

This thesis will focus on the PMCs that conduct "active military assistance that have a strategic impact on the political and security environments of the countries in which they operate."[1] The intent is not to historically examine the actual conduct of operations by these PMCs, but rather to analyze the international legal status of PMCs and the effects and ramifications of utilizing such PMCs.

The thesis will also analyze the construct that a nation's military power should remain a monopoly vested within and solely exercised by the nation's armed forces. This construct is based upon the Clausewitzian model of trinity that is said to exist within a nation among the government, the military, and the people. PMCs have abruptly challenged this model by their conduct of active military assistance operations. Some analysts and academics decry such a contemporary challenge and assert that PMCs are indeed operating under the tenets of a de facto and amoral legitimacy.

The thesis will contrast the structures of PMCs and national armed forces and moreover the means and processes of regulation and accountability. The intent is to derive the legitimate framework of a nation's armed forces as the basis for contrast

against the framework of selective PMCs that conduct direct combat operations, combat support, or specific training for such operations.

Overview

Samuel Huntington, one of the West's most eminent political scientists argues that "the moment of euphoria at the end of the Cold War generated an illusion of harmony, which was soon revealed to be exactly that. The world became different in the early 1990's, but not necessarily more peaceful."[2] The end of the Cold War averted the threat of global and nuclear war between the superpowers;[3] however, it unleashed a surge in interethnic and internecine conflicts throughout many parts of the world, from the Balkans to Sub-Saharan Africa and Asia.[4] While conflict within and among states in these regions was not exceptional, the use of PMCs by legitimate nation-state governments as a force multiplier, to conduct direct combat operations against their adversaries, was unprecedented. The monopoly of force, previously vested in the armed forces of nation-states for the purpose of their own integral defense and security, was now being exercised by commercial entities and specifically for financial profit.

The evolution of PMCs abruptly challenged the extant international conventions that defined mercenary status. This thesis will attempt to inform a viable delineation between operations conducted by mercenaries and PMCs. The evolution of PMCs has not and will not displace the mercenary organization from the modern battlefield. Rather, PMCs are the modern manifestation of corporate security companies, predominant during the Cold War era. Their evolution is attributable to four main factors, commensurate with the ending of the Cold War.

First, the bipolar order of the Cold War had previously established an international order structured by *horror ad vacuum*--whereby every state had some utility for the main (protagonists) in that it was important to prevent its control by the rival.[5] The defeat of the Soviet Union as a superpower nullified this framework of international relations. The West[6] responded by the pursuit of a new direction of *active disengagement* from nation-states and regions, reassessed as declining in strategic interest. Furthermore, some nation-states became peripheral to declared vital national interests. Presence, commitment, and political solidarity were replaced by a determination for localized responsibility for peace, security, and economic development. The West was no longer eager to try to and manage distant regional ethnic and nationalist conflicts as intimately as it had during the Cold War.

Secondly, the United States (US) loss of 18 dead and 73 wounded military personnel, in Mogadishu on 3 October 1993, as part of the failed United Nations (UN) Mission in Somalia,[7] initiated a fundamental reshaping of the West's perceptions of responsibility and obligation, to respond to foreign crises. The West became (politically) unwilling to commit and risk its own military forces in an effort to resolve regional conflicts and humanitarian disasters for fear again of "crossing the Mogadishu Line." Lacking determined international action in the form of direct intervention from the West, less powerful and developed nation-states could not guarantee their own security, nor provide for and raise effective national armies against interstate wars and internal civil wars. This situation resulted in an increasing world demand for PMCs that could create and contribute to nation-states' security.

Thirdly, the end of the Cold War resulted in the rapid downsizing of the characteristic massive standing armies of the East and the West. Between 1985 and 1994, nation-states militaries were reduced in strength by five million personnel.[8] The US alone reduced its armed forces manpower strengths by approximate 30 percent.[9] These former military personnel forged a pool of very experienced and readily available skilled professional recruits for PMCs.

Lastly, the collapse of the Soviet Union triggered depressed economic conditions within the majority of its former client states. As a deliberate measure to obtain foreign currency with which to rebuild their economies, nation-states readily sold lucrative former Soviet assets. This action resulted in the unprecedented availability of sophisticated military equipment and trained personnel, to nonaligned Western nations and commercial interests, particularly the versatile fleet of Soviet helicopter transport and gunship aircraft.

These events enabled the formation of PMCs with resources and capabilities comparable to those of first world military forces. Moreover, PMCs declared their readiness and willingness to become directly involved in unstable Third World security situations, in support of legitimate states, that the West would not. The emergence of professionally trained and capable PMCs satisfied a niche demand by both the West and weak nations. PMCs filled the void that was the realm and responsibility of the West at the conclusion of the Cold War.

Today, the West also utilizes PMCs as measured exponents, assisting in the discrete execution of foreign policy. This is a comparable development to that of the demand by Third World nation-states for such services. Western governments are

increasingly utilizing the services of commercial contractors, which in some situations negates the conduct of publicly sensitive operations by uniformed personnel. In 1995, the US government authorized MPRI to conduct “leadership training” for the Croatian military. After six months “leadership training” the Croatian military successfully conducted Operation Storm in August, that resulted in the recapture of the Serb-held Krajina region during the Balkans War in the former Yugoslavia. Moreover, the conduct of Operation Storm physically depicted the rapid transformation of the Croatian military from a Soviet structure to that of a modern western combined arms military versed in the tenets of maneuver warfare.

Research Question

Are PMCs that conduct active military assistance operations that result in a strategic impact on the political and security environment of the countries in which they operate a legitimate application of force within modern conflict?

The purpose of this thesis is to address the issue of international legitimacy within the constructs of extant international law and convention. Subordinate questions that follow up the primary research question are:

1. Are the operations of PMCs effectively regulated at either the international or national levels?
2. Can PMCs or other agencies of government be held accountable for their actions and conduct?

Assumptions

The assumptions that will be used throughout the development of this thesis are:

1. The demand for active military assistance operations conducted by

PMCs is unlikely to cease within in the near future.

2. The PMC industry is without effective regulation at the industry and international levels.

3. The current lack of effective regulation at the industry and international level is deliberate.

4. National legislation concerning PMCs is not in accordance with any international standards or conventions.

Definitions

The research of PMCs and their functions transcends the realm of the international and national political arenas, nation-states' armed forces, international and national vested interest groups and academic groups. For reasons of simplicity, this thesis will narrow the parameters of key terms used that are frequently utilized.

Active Military Assistance Operations. Specific military style operations that are planned or conducted by contracted representatives of a PMC, in isolation or conjunction with the armed forces of the contracting party, that could not otherwise be successfully prosecuted, and are designed to result in an advantageous position for that contracted party over an adversary.

Contractor. A civilian or commercial entity that provides products or services limited to those functions of life support, construction, engineering, weapon systems support, and other technical services, and who are not combatants but civilians accompanying a military force.

Legitimate. Actions that are in accordance with recognized and enacted world bodies of international law that include the Laws of Armed Conflict, Geneva Conventions, and relevant international convention and legislation.

Mercenary. An individual or organization financed to act for a foreign entity within a military style framework (including conduct of military-style operations) without regard for ideals, legal or moral commitments, and domestic and international law.

Private Military Company. A registered civilian company that specializes in the provision of contract military training (instruction and simulation programs), military support operations (logistic support), operational capabilities (special forces advisors and command and control, communications and intelligence [C3I] functions) and or military equipment, to legitimate domestic and foreign entities.

Private Security Company. A registered civilian company that specializes in providing contract commercial services to domestic and foreign entities with the intent to protect personnel and humanitarian and industrial assets within the rule of applicable domestic law.

Strategic Impact. An induced change within the national will, military capability, or national security of a nation that could not otherwise be achieved by integral national means.

Limitations

The scope of services offered within the PMC industry is very expansive. The majority of services conducted by PMCs satisfy routine outsourced contracts that do not attract significant comment or debate. This thesis will focus on deriving how

international legitimacy is afforded to PMCs that conduct active military assistance operations that have a strategic impact on the political and security environments of the countries in which they operate. The period of research is limited from 1988 to the present.

The research will be limited to the measurements of legitimacy by international standards. Measurements of legitimacy by national measurements will be discussed to balance the research but will not be exhaustive or definitive.

Delimitations

Due to the plethora of PMCs, the scope will be further limited to an analysis of three principal PMCs: Executive Outcomes, Sandline International, and MPRI. Executive Outcomes is regarded as the leading proponent that effectively established PMCs as an industry. Sandline International and MPRI represent the spectrum of PMCs that are not only configured for but capable of conducting active military assistance operations today.

Sandline International has been widely documented for its active military assistance operations that have centered on the enduring crisis in Sierra Leone and its aborted contract with the government of Papua New Guinea for resolution of the conflict on the island of Bougainville.

MPRI is widely known for its military leadership and training focus within the US ROTC program. In addition to conducting leadership training with the Croat Army in 1996, MPRI has also conducted military training operations with the Bosnian Croat-Muslim Federation Army; the Kosovo Liberation Army (KLA); and the Colombian Ministry of Defence with employees currently in Macedonia, Croatia, Bosnia, Saudi

Arabia, and Nigeria.[10] MPRI is currently involved with the implementation of the Clinton administration's African Crisis Response Initiative (ACRI) in Senegal.

Significance of Study

The proliferation of interethnic and internecine conflicts throughout many parts of the world that directly contributed to the evolution of PMCs continues unabated within the new millennium. Conventional warfare remains as the classic but least executed form of warfare within the last ten years. This period has seen minimal corresponding structural change within the armed forces of first world nations. The collective emphasis remains on a structure that was designed against the requirements for conventional warfare modeled on Cold War scenarios, yet adaptable to the demands of modern MOOTW. Today, the West is conducting military deployments to asymmetric conflicts throughout the world at an exponential rate, more than conflicts centered on conventional warfare.

The West's commitment to the current asymmetric conflicts in the Balkans, Kosovo, Sierra Leone, and East Timor is inducing potentially unsustainable high operational tempos within the armed forces of contributing nations. The current high operational tempo experienced by the US Army in multiple commitments to peace operations within the Balkans is allegedly a contributing factor impacting upon morale and retention.

The Clinton administration's ACRI represents a deliberate government initiative to train African soldiers to conduct peace operations within the African continent. The ACRI has been described as enabling an African solution for an African problem.

Moreover it represents a deliberate measure designed to avoid commitment of US armed forces to the enduring security problems within the African continent.

The Clinton administration's Plan Columbia is a further deliberate government measure designed to train, equip, and prepare another nation's armed forces for direct combat operations against an insurgent threat while seeking to avoid a deployment of US armed forces in support of a vital regional ally. US support is pivotal to the ongoing war against the manufacture and export of illicit drugs from Columbia.

The military is inherently conservative. Ralph Peters, a retired US Army officer who has written extensively on modern conflict, argues that "the notion that the pen is mightier than the sword is a fantasy. Yet the pen can inform the sword."[11] The significance of this thesis is that it will determine and articulate an objective measurement of the contemporary extent of international legitimacy that can be afforded to PMCs that conduct active military assistance operations. This measurement of international legitimacy will in turn enable a stronger, more robust, and informed national US position, ready for future debate within the international realm as to the proper roles and associated ramifications of the utilization of PMCs.

PMCs are not a panacea to cease all interethnic and internecine conflicts. Additionally PMCs are not a panacea to the issues of high operational tempo and readiness. However PMCs may represent an additional capability that can be selectively committed throughout the world, to effect and shape an enforced peace settlement within modern conflict. Such settlements may lead to security and stability in otherwise vanquished nation-states or more lateral methods of conducting traditional United Nations peacekeeping missions and regionally sponsored peace enforcement initiatives.

It is acknowledged that not all interethnic and internecine conflicts can be solved by application of military force alone and that the role and responsibilities of nation-states and their integral armed forces are not diminished by such an international capability. However, when the application of such force is deemed necessary to support a legitimate nation-state by the nation-state itself, the United Nations, or any other form of legitimate grouping of nation-states, then a more ready and viable measure may be available unlike the current status quo.

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[1]David Isenberg, "Combat For Sale: The New Post Cold War Mercenaries," 13.

[2] Samuel P. Huntington, *The Clash of Civilizations*, 31.

[3]Superpowers are defined as the USA and the USSR.

[4]William Shawcross interviewed by Jennifer Byrne, 1.

[5]Jaime Nogueira Pinto, "The Crisis of the Sovereign State and the Privatization of Defense and Foreign Affairs," 5.

[6]The West is defined as the governments of the USA, UK, Canada, and France. The leading role and contribution by these governments in any international crises strongly influences any collective response by other Western governments.

[7]This decision was significantly influenced by the actions of certain international media outlets in broadcasting graphic footage of the bodies of the slain servicemen being dragged through the streets of Mogadishu. These US servicemen were killed in a separate security operation directed against the clan leadership of Mohammed Farrah Aideed as distinct from the UN sponsored humanitarian operation.

[8]Henry Sanchez, "Why Do States Hire Private Military Companies?" 2.

[9]Larry Taulbee, "Mercenaries and Private Military Companies in Contemporary Policy," 434.

[10]Steve Alvarez, "MPRI: A Private Military," 1.

[11]Ralph Peters, *Fighting for the Future*, IX.

CHAPTER 2

LITERATURE REVIEW

Introduction

PMCs have, by their very nature of being commercial entities applying military skill sets and capabilities effected a diverse but non homogenous state of descriptive literature. A minority of PMCs have developed and marketed select Western military capabilities and skills for commercial sale. The commercial marketing of such select military capabilities and skill sets, have uniquely transcended the monopoly that has previously been vested within the roles and responsibilities of a nation's armed forces. Nations have exercised direct authority over their armed forces by combination of government directives and component measures, such as integral national military doctrine. This thesis seeks to authenticate the sources and the extant framework that afford international legitimacy to the contractual operations conducted by PMCs within foreign nation-states.

The intent of this chapter is to present the current framework of international literature in a manner that provides an insight as to the suitability and quality of the literature used. This chapter is critical to the latter context of the thesis. It will articulate a model of defining literature that will become the credible core for subsequent analysis. This analysis will in turn enable substantive conclusions to be drawn from this thesis.

The current framework of literature will be reviewed within the five functional groupings of international convention and legislation, military doctrine, industry references, academic sources, and vested interest group writings.

International Convention and Legislation

The term “private military company” does not exist within any extant International Convention or Legislation. The nearest comparative functional term is that of “mercenary”, detailed within the 1977, Additional Protocol 1 to Article 47 of the Geneva Conventions of 12 August 1949, relating to the Protection of Victims of International Armed Conflicts. The Convention is the sole primary source document of international standing that is extant today. However, the date of ratification immediately indicates that its framework does not encompass the evolution of PMCs that occurred in the latter period of the late 1980s and early 1990s.

The Convention elucidates the term mercenary against the backdrop of the period in which it was drafted. Therefore, the applicability and relevance of this Convention as a definitive means for the current legal context of PMCs is substantially degraded. The document does not address the evolution of PMCs and their application within modern conflict. It may be argued that the framework of this document has served not only to reinforce the prescriptive measures of mercenary conduct, but more so the necessary framework to distinguish between the operations of mercenary organizations and PMCs, thereby affording de facto legitimacy.

A second ramification owing to the declining relevance of this Convention is that any subsequent international convention or legislation designed on the basis of this document will also be erroneous in application to the current context of PMCs.

The term “mercenary” is the definitive basis of the UN *International Convention against the Use, Financing, and Training of Mercenaries*, of 4 December 1989. The International Convention has yet to be ratified by the prerequisite minimum number of 22

member nation-states. This document is therefore assessed as informative and descriptive but not definitive, as it does not possess any enforceable legal application within the international community.

The framework of the Convention is based on the previously addressed 1977, Additional Protocol to Article 47 of the Geneva Conventions. The principal weakness in the drafting of this Convention is that it repeats and reinforces the deficiencies identified within the framework of the Additional Protocol.

The UN standing appointment of the Special Rapporteur on Mercenaries within the Office of the Commission on Human Rights was established in 1988. The sole appointment holder, a Peruvian, Mr. Enrique Bernales Ballesteros acknowledges that the framework of "international legislation has not taken account of new forms of mercenary activities."[1] In essence, though Mr. Ballesteros may professionally view PMCs as indicative of mercenary organizations, the current proposed legislation does not reflect this. The document does not define PMCs or the conduct of contractual operations by PMCs as being mercenary. Therefore by default, PMCs are afforded a further modicum of international legitimacy.

Additionally, by reading between the lines, the framework of the Convention further serves to illustrate those measures required to further distinguish between the operations conducted by mercenary organizations and the operations conducted by PMCs.

Finally, the Organisation for African Unity (OAU) has also released a *Convention for the Elimination of Mercenaries in Africa,* dated 3 July 1977. The Convention does not include any reference to the application of the term "private military company" and is

comparative in structure to the framework of the 1977 Additional Protocol to Article 47 of the Geneva Conventions. The same weaknesses in application to PMCs are reinforced. Additionally the OAU Convention is limited in application to integral member nations.

The lack of viable and credible international convention or legislation, that is definitive of PMCs and their operations, effectively affords an indirect or de facto measure of international legitimacy. This situation is indicative of the rapid evolution and growth of the PMC industry since the end of the Cold War. However, it is also an indication of an international community that is currently devoid of a serious commitment to regulate the expansion of military power beyond the application by nation-states armed forces. In the void of definitive modern convention or legislation, PMCs have assumed legitimacy by conducting their commercial operations in a manner that is contrary to that definitive of mercenary operations.

Relevant US Military Doctrine

The principal basis for the US Army's legal role is expressed in Title 10, United States Code (USC), Section 3062. This document is the national legal authority for the formation and operation of the US Army that is commanded by and responsible to the Federal Government. PMCs do not have a comparable legal framework of international standing. The term "private military company" does not exist within any extant or emerging US Joint or Service doctrine. The nearest comparative operational term within US Army doctrine is that of "contractor," that is detailed within developing US Army Logistics doctrine.

The definition and roles of "battlefield contractors" are detailed within the US Army publications Army Regulations (AR) 715-9, *Contractors Accompanying the Force*

(1999); Field manual (FM) 100-21, *Contractors on the Battlefield (1999);* FM 100-10-2, *Contracting Support on the Battlefield (1999);* and FM 63-11, and Department of the Army (DA) Pamphlet (PAM) 715-16, *Contractor Deployment Guide (1998).*

The US Army Regulation 715-9 is the definitive document that delineates between the actions of contractors and PMCs. This regulation states that contractors can perform potentially any function on the battlefield except *inherently governmental functions.* Inherently governmental functions are defined as those "necessary for the sustainment of combat operations, that are performed under combat conditions or in otherwise uncontrolled situations, and that require direct control by the military command structure and military training for their proper execution."[2] The regulation additionally states that the conduct of any or all of these inherently government functions by contractors may violate the noncombatant status afforded to them under the Geneva Conventions.

The FM 100-21 defines that a contractor is a "person or business that provides products or services for monetary compensation."[3] The products or services are limited to those functions of life support, construction, engineering, weapon systems support, and other technical services. The FM specifically states that contractors are not combatants but civilians accompanying the force and will generally be "assigned duties at Echelons above Division (EAD)."[4] The FM emphasizes that EAD should be indicative of the associated organizational structure as opposed to a location on a map.

FM 100-21 delineates three categories of contractors. Firstly, theater support contractors effect contractual support at the operational level from within the local vendor base. Secondly, external support contractors provide services that are required in theater

but are not available from the local vendor base. An example is the US Army Europe effecting a contract with Brown and Root for the sustainment of its forces in the Balkans. Thirdly, system contractors provide specific support to material systems throughout their life cycle to include vehicles, aircraft, command and control infrastructure, and communications equipment and weapon systems such as the Patriot missile defense system.

The US Army doctrine does not recognize PMCs by term. However, US Army doctrine does distinguishes contractors from such classification by the conduct and tangible effect of their operations. Contractors conduct logistic support and sustainment operations that are passive to the environment in which they are contracted to operate within. This framework of conduct is pivotal to the retention of a recognized status within the Geneva Conventions, as legitimate, noncombatant civilians on the battlefield.

Industry References

Individual corporate web-sites on the Internet are the leading medium by which PMCs espouse the legitimacy of their operations, including the parameters of their contracting principles. These corporate websites infer that legitimacy is afforded to the conduct of their operations by the following facts:

1. PMCs are structured as privately owned and independent businesses.
2. PMCs are nationally registered and incorporated businesses.
3. The executive leadership (Board of Directors) of PMCs are most commonly constituted from former serving senior armed forces leadership, specifically retired General rank appointments.
4. Broad parameters of contractual support and capability are detailed.

5. A selected Corporate Overview is presented within a public domain that infers a form of universal scrutiny.

The most subjective argument expressed by PMCs in support of their own legitimacy is vested in the "badge of honor" or integrity of office, held by former general rank appointments in the employment of such companies. These distinguished persons are usually employed within the Executive Board of Directors in order to maximize the public standing of the company. PMCs enunciate that chivalry, a military tradition vested in courage, honor, justice and a readiness to help the weak, can in turn be found within the commercial sector. PMCs express that the employment of such esteemed retired general rank appointments is indicative of the legal and moral transition and extension of military style capabilities between government and commercial sectors. The MPRI website specifically incorporates this message within its "Organization and Management and Business Philosophy" sections, declaring that "included among its board members and employees are over fifteen retired four star generals--including former chiefs and vice-chiefs of military services and regional commanders-in-chief"[5]

The Sandline International website also details broad ranging academic and professional comments focused on the debate as to the legitimacy of PMCs. Listed sources are from all domains extending from private opinion to journal articles and comment by representatives of national and international agencies. The majority of articles exhibit an underlying facet of argument that is structured to advance public and international acceptance of PMCs as legitimate entities.

The former chief executive officer (CEO) of Sandline International, Lieutenant Colonel (Retired) Tim Spicer, has published his biography titled *An Unorthodox Soldier*

– *Peace and War and the Sandline Affair*. The majority of books published concerning PMCs are predominantly historical accounts of recent operations conducted by PMCs. However, it is Spicer's first-hand accounts of Sandline International's experiences in Papua New Guinea and Sierra Leone that are most significant. These accounts represent the sole definitive book released from within the PMC industry. It also serves as a means to enable Spicer to further publicly express his personal beliefs as to the utility of PMCs and their potential to contribute to conflict resolution.

Academic References

Academic interests represent a further distinct sector of literature about PMCs. Academic literature is subdivided between the pro-PMC camp that identifies and discusses a wider application of military style force in resolution of modern conflict, and the opposing viewpoint that discusses a perceived need for a more limited and defined application of military style force within modern conflict.

The majority of information is descriptive literature and is contained within journal and newspaper articles, being widely accessible via the Internet. The division of application is focussed on two central themes. First, the recording of historical accounts and reporting of modern conflict with a particular emphasis on humanitarian disasters. The current focus is on the enduring conflict in Sierra Leone within the following applications:

1. The previous involvement of Executive Outcomes in defeating the rebel insurgents in 1996 and effecting a Peace Treaty that led to democratic elections and a modicum of stability.

2. The previous involvement of Sandline International in 1997 in planning and preparing to arm and train the Kamajors (guerilla fighters loyal to the legitimate government of exiled President Kabbah) to fight the rebels.

3. Reported involvement of mercenary elements in support of the rebel forces.

4. The British military intervention in October 2000, to prop up the ailing Sierra Leone Defence Force and the United Nations Mission in Sierra Leone (UNAMISIL).

The second theme is the comparative and wider discussion on the potential utilization of PMC within modern conflict. The majority of the discussion is centered on the potential to enhance and improve perceived weaknesses within UN-sponsored peacekeeping and peace enforcement missions.

The minority of information and reference material is contained within books. This medium will most probably remain the minority source of academic literature on PMCs owing to the more pervasive nature of electronic and print media. Additionally such books are currently published within a narrow field of general public interest regarding PMCs.

The division of application for these sources are largely focussed on:

1. The historical accounting and reporting of modern conflict.
2. The historical accounting and reporting of UN operations.
3. The discussion of future warfare concepts.

Finally, a developing trend is that of specific issue websites designed for promotion, discussion, and research of current conflict issues. These websites enable contributors to be either anonymous or listed and promote discussion within an academic arena by all interests including industry, academic, and vested interest groups.

Detailed in table 1 is the functional breakdown of academic sources that have facilitated multiple papers and documents within the literature review for this thesis.

Table 1. Academic Sources

Grouping	Principal Academic Sources
Individuals	Pr. H. Howe Dr. D. Avant Dr. D. Brooks Mr. T. K. Adams Mr. P. Cullen Mr. D. Isenberg Mr. W. Madsen Mr. A. Musah Mr. K. O'Brien Mr. R. Peters Mr. D. Shearer
Organizations	Fort Leavenworth Combined Arms Research Library Janes (UK) RUSI (UK) The Institute for National Strategic Studies (USA) The International Institute for Strategic Studies (UK)
Journals/Periodicals	*Accord – Conflict Trends Magazine* *African Business Magazine* *Christian Science Monitor* *Foreign Affairs* *Foreign Policy* *Foreign Policy In Focus* *Global Beat* *Parameters: US Army War College Quarterly* *SpinTech* *Stars and Stripes* *Time (US)*

Vested Interest Groups

The *Oxford Dictionary* defines vested interest groups as those organized bodies that "have an interest in a state of affairs, usually with an expectation of gain."[6] The

realm of vested interest groups relating to this thesis extends to include human rights groups, consultant organizations to government, economic interest groups, geographic interest groups and the breadth of nongovernmental organizations (faith or humanitarian based). Table 2 details the vested interest groups that have produced multiple papers and documents that have contributed to the literature review for this thesis

Table 2. Vested Interest Groups

Vested Interest Group	Source
Human Rights Groups	International Committee of the Red Cross International Alert Life and Peace Institute
Consultant Organizations	DynCorps DynMeridian Institute for Security Studies Multinational Monitor Center for Defense Information (CDI) Campaign Against Arms Trade (UK) Center for Democracy and Development
Economic Interest Groups	United Nations Economic and Social Council ArmorCorps
Geographic Interest Groups	Organization of African Unity (OAU) Global Coalition for Africa
NGO	Heritage Foundation Toward Freedom

The majority of information is descriptive literature and is contained within journal articles and published reports within the public domain. All sources are widely available on the Internet, being the current and most pervasive means for expression and dissemination of such information.

The discussion concerning the conduct of PMCs is focussed on three areas:

1. The public record of government and UN action and inaction to humanitarian crises and military conflicts.

2. The authority and responsibilities of governments and agencies of government.

3. Review of competing commercial military entities outside of the conventional norms.

Discussion is by nature, subjective and representative of the vested interest group's cause. The Internet represents the most pervasive means for accessibility to such discussion and descriptive literature. This is necessary in order to facilitate and maintain the respective groups:

1. Influence and credibility within the forum of specific debate and awareness.

2. Influence and credibility within its sector of competing interest.

3. Continued existence, donor funding and overall relevance.

The vested interest groups will remain a valuable source of research literature. The literature of vested interest groups seeks to influence general, donor, and government consciousness of the wider scale effects of modern conflict. Their viewpoints will remain an important contribution to enable an overall objective assessment of the legitimacy of the PMCs within the conduct of modern conflict.

Summary of Literature

There is no international literature of authority that adequately or succinctly defines the term "private military company." The current context of international legislation and convention is only definitive of mercenary organizations and operations. These documents are outdated and hence inadequate in application to PMCs. The

significance of current international legislation is the descriptive outline of what actions are not defined as mercenary. This in effect establishes a de facto framework for PMCs to operate within and claim a modicum of international legitimacy.

Developing US Army doctrine is definitive of battlefield contractors, enabling a further measure of delineation between the conduct of legitimate commercial support operations by noncombatants and commercially conducted active military assistance operations.

The lack of clear and definitive international literature pertaining to PMCs is reflective of their rapid evolution since the end of the Cold War. The rapid evolution of PMCs is further demonstrated by the state of academic, industry, and vested interest group literature that is nonhomogenous in nature but mature in argument.

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[1] UN, Report E/CN.4/19999/11,12.

[2] US Department of the Army, AR 715-9: *Contractors Accompanying the Force,* 21.

[3] US Department of the Army, FM 100-21: *Contractors on the Battlefield,* 1-2.

[4] Ibid., 1-10.

[5] MPRI Corporate Brief, Homepage of MPRI. Available from http://www.mpri.com.current/; Internet; accessed 18 July 2000.

[6] *The Concise Oxford Dictionary,* 1365.

[7]

CHAPTER 3
METHODOLOGY

The purpose of this research is to analyze extant international legislation and convention pertaining to mercenaries and mercenary military activity in order to determine the comparative status of active military assistance operations conducted by private military companies. Based on the scope of this thesis, only enacted international legislation and convention currently under discussion will be reviewed. The role and responsibility of nation-state legislation will also be discussed but at a secondary level. The focus of this thesis is to define the central issues at the international level.

The methodology utilized to research and write this thesis is structured on an analytical rationale in concert with deductive and inductive reasoning. Interviews have been conducted with representatives of PMCs in order to provide clarity and context to core issues. Attempts at conducting an interview with the Office of the UN Special Rapporteur on Mercenaries were unsuccessful. This combination of research is necessitated by the complexity of research issues pertaining to PMCs. The conduct of research incorporates the spectrum of objective issues at the international realm, devolving to subjective issues from within the PMC industry itself and associated vested interest groups.

The presentation of analytical data will be conducted in three progressive blocks. The first block of analysis seeks to discuss, in detail, the current framework and structure of enacted international legislation and convention that is definitive of mercenaries and mercenary operations. This framework will be pivotal to the construct of the thesis, as it

will establish the foundation for all further contrasting and definitive analysis between mercenary entities and PMCs.

The second block of analysis seeks to determine the current international legal status of PMCs, via application of international legislation and convention that is definitive of mercenary and mercenary operations. This analysis will answer the primary question of this thesis. The analysis presented will also shape the remaining discussion that will answer the secondary questions of this thesis.

The final block of analysis will discuss, in detail, the potential application and accountability of PMCs within the conduct of modern conflict. This analysis will answer the secondary questions of this thesis. The structure of this thesis will be broken down into six chapters in order to facilitate this analytical methodology.

Chapter 1

Chapter 1 introduces the concept of private military companies and details the rapid evolution of these entities since the conclusion of the Cold War. A discussion of the contributing factors ranging from remodeled international relations, rapid military downsizing, and increasing interethnic and internecine conflicts is detailed so as to provide background information. Key concepts are defined, and the scope and significance of the study are outlined. The definitions and scope of the study are critical to the thesis owing to the inherent argument that PMCs do exist but within a vacuum of defined international legitimacy. This becomes important in chapter 4, in determining exactly to what degree that legitimacy exists within current international legislation and convention.

Chapter 2

In chapter 2, a comparative description of the major sources of literature is presented. In accepting the inherent argument of legitimacy raised in chapter 1, this chapter introduces to the body of literature that will be utilized to facilitate a balanced and credible thesis. Furthermore, the literature is divided into relevant groupings that are indicative of objectivity and subjectivity in answering the primary and secondary questions of this thesis. The intent of the chapter is to provide an insight into the validity, strength, and quality of the research conducted that will generate analysis within chapter 4. The review also highlights to the reader the pervasiveness of the issues within this thesis topic that transcend a myriad of social, economic, national, and international political boundaries.

Chapter 4

This chapter details the core analysis of this thesis. It is also the foundation for further analysis in the follow-on chapters and the resultant conclusions. The framework of this chapter will be discussed within the following inclusive divisions of research:

1. Detailed analysis of extent international legislation and convention that are definitive of mercenaries and mercenary style military operations.

2. Comparative analysis of the applicability of this international legislation and convention to active military assistance operations conducted by PMCs.

3. An objective determination as to the extent of legitimacy afforded to such operations conducted by PMCs, measured against the international legislation and convention.

This chapter will also identify emerging factors that are contributing to an inadvertent fragmentation and weakening of the distinct relevance of such formatted legislation and convention.

Chapter 5

The intent of this chapter is to assert that PMCs will most probably continue to exist in one of a myriad of formats and structures, irrespective of international legislation and convention. This situation is reflective of the realm and framework of international relations and global interaction. Nation-state governments are predominantly inwards focused. These nation-states determine and prioritize strategies to secure and maintain their identified national interests above any binding resolve for international interests.

This chapter will discuss the tandem issues of regulation and accountability, with respect to active military assistance operations conducted by PMCs. The discussion will focus on the corporate structure of PMCs and the analysis will remain focussed at the international level with additional supporting discussion centered on responsibilities exercised at the nation-state level. The concept and application of industry self-regulation will also be discussed.

The issue of how PMCs are remunerated for their services will also be briefly introduced. The construct of predatory capitalism will be defined. This construct leads to the analysis of the ethical issue concerning payment to PMCs in concession format (natural resources and mining concessions) as against strict monetary remuneration.

Chapter 6

This chapter will detail the conclusions drawn from the body of analysis presented within the previous two chapters. The conclusions will represent a substantive

analytical interpretation on the measurement of international legitimacy afforded to PMCs, but will not be presented in any legal construct.

This chapter will also make wider recommendations as to the conduct of further specific research, concerning the complex facets of the ongoing evolution of PMCs. The chapter will summarize the importance of such continuing research in relation to the framework and the significance of this research, as detailed in chapter 1.

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CHAPTER 4
SCOPE OF INTERNATIONAL LEGITIMACY

Introduction

The word "mercenary" has long been utilized as a derogatory designation and has even been referred to as the world's second oldest profession. The negative connotation of the word mercenary has remained constant throughout twentieth-century political ideals. This application has remained true irrespective of the context associated with warfare or other areas of competition. Thomas Adams, a political-military strategist with more than thirty military years of experience in MOOTW, argues that PMCs are indeed mercenaries as they are foreigners hired for their specialized military skills "but who have no special ideological stake in the conflict at hand."[2] Within the new millennium, PMCs will continue to challenge this designation. PMCs assert that such corporate entities can fulfill honourable motives and contest "just" causes. Moreover PMCs argue that their employment can be a stabilizing influence for legitimate foreign governments and not the destabilizing influence that is widely connected with the traditional mercenary paradigm. It is the corporate structure and professional application of "military expertise" that PMCs have publicly highlighted in an attempt to dispel any comparative measurements against the traditional and negative connotations associated with mercenary behavior.

This chapter will seek to define the measure of international legitimacy afforded to PMCs that conduct active military assistance that have a strategic impact on the political and security environments of the countries in which they operate. Measurement will be made directly against extant international legislation and convention.

Legally Registered Corporate Entities

Advertising itself as having "the world's greatest corporate military expertise" Military Professional Resources Incorporated is a legally registered private company under Delaware State law.[3] The company's office headquarters are located in Alexandria, Virginia.

Sandline International is a legally registered as a private company within the Bahamas. The company's office headquarters is located in Chelsea, London with an additional representative office located in Washington, in the District of Columbia.

The selection of the State of Delaware and the Bahamas as the physical locations where these PMCs are actually registered would not be important, but for the reputation that both locations have for low taxation rates and liberal corporate regulations.[4] Irrespective of these issues, MPRI and Sandline International are legally registered corporate entities structured as profit-making bodies selling military expertise that does not reside within a nation-state itself.

Current International Legislation and Convention

The term "private military company" does not exist within any current international legislation or convention. The nearest comparable term is that of mercenary, which is defined in Article 47 of the 1977 Protocol 1 Additional to the Geneva Conventions of 1949. The Additional Protocol "is the only universal international provision in force that contains a definition of mercenaries."[5] The Additional Protocol does not legislate against mercenary activity, but rather acknowledges the existence and practice of such persons within warfare and seeks to define their legal status and codify their standing within the context of international humanitarian law.

The Additional Protocol contains two principle paragraphs:

1. Paragraph 1: excludes the mercenary from the category and rights of recognised combatants and prisoners of war.

2. Paragraph 2: defines the cumulative and concurrent requirements that must be met in order to determine who is a mercenary and who is not.

Under Article 47, a mercenary is any person who satisfies the cumulative and concurrent requirements detailed in Table 3.

Table 3. 1977 Additional Protocol Definition of a Mercenary

Serial	Requirements
2(a)	Is specifically recruited locally or abroad in order to fight in an armed conflict;
2(b)	Does, in fact, take a direct part in hostilities;
2(c)	Is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
2(d)	Is neither a national of a Party to the conflict nor a resident of territory controlled by a party to the conflict;
2(e)	Is not a member of the armed forces of a Party to the conflict; and
2(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.

Additional explanatory remarks within the framework of the additional protocol highlight exceptions to the requirements contained within the subparagraphs. These exceptions enable a broader interpretation of the cumulative requirements but also a means with which to legally nullify the applicability of some of the mandatory requirements. These include:

1. Subparagraph 2(a) excludes volunteers who enter service on a permanent or

long-lasting basis in a foreign army, irrespective of whether as a purely individual enlistment (French Foreign Legion) or on arrangement made by national authorities (Swiss Guards of the Vatican and Nepalese Ghurkas in India and Brunei).

2. Subparagraph 2(b) excludes foreign advisors and military technicians even when their presence is motivated by financial gain. This distinction was included to recognize the very technical nature of modern weapons and support systems that may necessitate the presence of such persons for their operation and maintenance. "As long as these persons do not take any direct part in hostilities, they are neither combatants nor mercenaries, but civilians who do not participate in combat."[6]

3. Subparagraph 2(c) is centered on individual remuneration and parity in payment between mercenaries and nation-state combatants. The focus of this condition is directed against the "freelance" mercenary at the individual level. No detail is made against corporate payments that are in turn finalized in individual bank accounts in foreign countries.

4. Subparagraph 2(e) excludes persons who have been formally enlisted into the armed forces of the nation-state that they are contracted to operate within.

The fundamental basis of the Additional Protocol is that all six requirements listed in subparagraphs 2(a) to 2(f) must be satisfied for the definition to be met. A failure to satisfy one requirement is sufficient to prevent the definition being met.

Another authority that defines "mercenary" is the 1977 Convention of the Organization of African Unity (OAU) for the Elimination of Mercenarism in Africa, which is structured on a similar framework to that of the Additional Protocol. The Convention commences with a Preamble leading into a statement of definition. The

definition requirements are verbatim to those of the Additional Protocol, requiring that all six conditions be satisfied for the definition to be met. A failure to satisfy one requirement is again sufficient to prevent the definition from being met.

However, the Convention then differs from the Additional Protocol, as it seeks to legislate against mercenary activity, outlining responsibilities and obligations of member nation-states towards the prohibition, prevention, and judicial prosecution of mercenary-related military actions. The application of this Convention, however, is not universal but limited firstly to member nation-states within the OAU and secondly, to those member nation-states that have signed and ratified the Convention.

Tabled UN International Convention

On 4 December 1989, the International Convention against the Recruitment, Use, Financing, and Training of Mercenaries was tabled within the General Assembly of the United Nations. The Convention was drafted by the Special Rapporteur on Mercenaries Mr. Enrique Ballestros (Peru), functioning from within the UN Department of the Commissioner on Human Rights. The intent of the UN Convention was to establish universal law beyond the definition contained in the 1977 Additional Protocol by specifically legislating against mercenary activity. As the title of the Convention declares, the document, containing 21 articles, seeks to:

1. Reinforce the existing definition of a mercenary (Additional Protocol 1).
2. Establish and define offences under the Convention for the recruitment, use, financing or training of mercenaries.
3. Establish and define mercenary actions.

4. Establish and define the role, responsibilities and obligations of States.

5. Establish and assert the judicial responsibilities of States and referral of matters to the International Court of Justice if required.

6. Establish universal law after the thirtieth day following receipt of the twenty -second instrument of ratification or accession with the UN Secretary General.

"Thus far, 19 States have ratified or acceded to it; this means that it requires further ratification or accession by only three more States to enter into force."[7] Table 4 details the States that have ratified the Convention.

Table 4. States That Have Ratified the 1989 UN Convention

Azerbaijan	Barbados	Belarus	Cameroon	Cyprus
Georgia	Italy	Maldives	Mauritania	Qatar
Saudi Arabia	Senegal	Seychelles	Suriname	Togo
Turkmenistan	Ukraine	Uruguay	Uzbekistan	

Table 5 details nine other states that have signed but have not yet ratified the Convention.

Table 5. States That Have Signed but Not Ratified the 1989 UN Convention

Angola	Congo	DRC	Germany	Morocco
Nigeria	Poland	Romania	Yugoslavia	

It is very significant that no major First World nation-state government (particularly within the West) has ratified the UN Convention. The latest General Assembly Resolution (A/RES/54/151) that recalled and reaffirmed support for final ratification of the Convention was conducted on 29 February 2000.[8]

The Special Rapporteur acknowledges the fact that the whole basis of the Convention, "article 1, paragraph 1, reproduces almost verbatim the text of Article 47 of Additional Protocol 1 on the definition of a mercenary."[9] Once again, if the cumulative and concurrent requirements of the definition cannot be sustained, the remainder of the Convention cannot be enforced. The additional fact that the convention has still not entered into force some ten years after its adoption by the General Assembly is also indicative of a wider lack of international political will pertaining to international legislation and convention concerning mercenaries.

Inherent Limitations of International Legislation and Convention

The most significant limitation of current international legislation and convention is that it is outdated. There exists no universal law that has kept parallel development with that of corporate private military companies since the conclusion of the Cold War. Current universal law that is definitive only of status, not actions, cannot be applied against the diversity of contracted operations conducted by legally registered corporate entities for legitimate foreign governments. The PMCs are therefore effectively operating within a vacuum of applicable international legislation and convention that has failed to:

1. Acknowledge the development of PMCs since the end of the Cold War.
2. Establish the legal status of PMCs in relation to mercenary entities.

The Additional Protocol established the definition of a mercenary within the context of international humanitarian law. The OAU and UN Conventions have utilized the exact same definition in an attempt to establish regional and international criminal law respectively. As the OAU and UN Conventions have utilized the Additional Protocol definition of a mercenary as the basis of their documents, the original limitations and

weaknesses contained within the Additional Protocol are further exacerbated within these two Conventions.

The most significant limitations contained within the Additional Protocol are:

1. The lack of a generally acceptable and operational definition of the concept of mercenaries for application within modern warfare.

2. The cumulative and concurrent requirements to satisfy the definition of a mercenary.

3. The narrow focus on the status of the individual conducting an action, as opposed to a wider focus on the act of direct intervention in armed conflict as a combatant.

4. The lack of any fundamental differentiation between corporate entities conducting military-style operations and traditional freelance style mercenaries.

The fundamental weakness within the Additional Protocol is that the failure to satisfy one requirement of the definition is sufficient to prevent the definition from being legally sustained.

MPRI has exploited the wide parameters of subparagraph 2(b) that enables foreign advisors and military technicians to be excluded from the definition of being a mercenary. Although the end state from some of the international contracts conducted by MPRI personnel may be the integral equipping and training of a foreign nation-state's personnel for direct combat operations, the individual status of MPRI contracted personnel is not compromised in accordance with the Additional Protocol. The MPRI website specifically states that the company has the resources and expertise to (legally) conduct training programs, force development actions, equipping of armies in transition,

and doctrine and leadership training "short of combat operations." Table 6 details selected international military contracts conducted by MPRI.

Table 6. MPRI International Military Contracts

Year	Nation-State	Activity
1995	Croatia	Leadership Training, Development of NCO Corps during Balkans Crisis. Actions led to successful conduct of Operation Storm in Krajina province. Operation Storm reflected a transition from Soviet tactics to western combined arms tactics.
1996	Bosnian Croat-Muslim Federation	US$400 million contract to equip and train the Bosnian Croat-Muslim Federation Army during the Balkans Crisis
1999	Kosovo	Re-equipping and training of the KLA
2000	Columbia	Re-quipping and training of counter-drug Battalions for offensive operations
2000	Senegal	Re-equipping and training of ACRI Peacekeeping Battalions for operations within Africa

Similarly, Sandline International has exploited the wide parameters of the Additional Protocol. Vide subparagraph 2(e), foreign citizens that are formally enlisted into the armed forces of the nation-state that they are contracted to operate within are not considered to be mercenaries. Tim Spicer, the former Chief Executive of Sandline International, affirms that "Sandline people are always enrolled in the forces, police or military, of the client state; in Papua New Guinea, all of us were appointed as Special Constables and were subject to the same laws, rules and regulations that governed any other government servant. We did not operate as a private army."[10]

Table 7 details some of Sandline International's foreign military contracts.

Table 7. Sandline International Foreign Military Contracts

Year	**Nation-state**	**Activity**
1996	Papua New Guinea	Aborted contract to equip, train, and support an Army Special Forces Unit in neutralizing the rebel leadership of the Bougainville Revolutionary Army (BRA)
1997	Sierra Leone	Aborted contract to equip, train, and support the indigenous Kamajors peoples against the rebel Revolutionary United Front (RUF) insurgents

Sandline and MPRI have also exploited the wide parameters of subparagraph 2(c). Financial remuneration from contracted operations is paid by nation-states directly to the corporate entity. This payment is for the total package provided by the PMC inclusive of all costs associated with manpower, equipment, and resource expenses. Nation-states do not enter into individual contract agreements with the employees of PMCs. Therefore it is very difficult to make any effective and succinct comparison concerning the rates of payment between contract employees and personnel within the armed forces of the host nation. The responsibility for financial remuneration of PMC employees remains solely with that corporate entity and will invariably be finalized in individual bank accounts in a foreign country, though local currency payments (stipends) may be effected to sustain contracted employees in location.

The prescriptive requirements detailed within the Additional Protocol have established a legal definition of a mercenary that was reflective of the period in which it was drafted. However, the lack of an amendment to the Additional Protocol since the conclusion of the Cold War has resulted in these prescriptive requirements also indirectly establishing a framework and scope of legal argument that has been utilized to distinguish between the contract operations conducted by PMCs and mercenary

organizations. Most significantly, the inherent weakness of the Additional Protocol has been further replicated in the OAU and the UN Conventions. Therefore any further attempt to apply these two Conventions against modern private military companies will also be erroneous.

Such an inherent weakness has lead to the cynical assessment that "any mercenary who cannot exclude himself from this definition deserves to be shot--and his lawyer with him!"[11]

In addition to the framework of the legislation itself, another fundamental limitation is the distinct lack of political will for it to be actively incorporated into force within the international realm. Thomas Adams asserts that "part of the problem in obtaining anti-mercenary laws and treaties is that no major power has taken a serious interest in promoting them."[12] This situation has developed because PMCs have also been utilized by governments within the West as discrete and measured exponents with which to execute foreign policy.

Lack of International Political Will

The UN Convention is focused on mercenary actions that are perceived to be a means of violating human rights and impeding the exercise of the right of peoples to self-determination. This focus has centered on events in Africa and other parts of the Third World. The Convention does not consider the potential for a discrete relationship to exist between a PMC and its national government and their practical employment in other parts of the world.

The government of the United States has an overt relationship with US PMCs of which MPRI is but one of many. The MPRI website specifically states that "each of

MPRI's current international contracts is directly with a foreign government – none are controlled by the US government. However each has in place a license from the US Department of State."[13] Therefore MPRI's international contracts must operate with the consent of the US government. It is exactly this linkage to government that has led some academic quarters to assert that PMCs have "quietly taken a central role in the exporting of security, strategy and training of foreign militaries--it's a tool for foreign policy in a less public way."[14] An MPRI spokesman, retired Army Lieutenant General Ed Soyster acknowledges this fact. With reference to the Clinton administration's "Plan Columbia" Soyster agrees that "they are using us to carry out American foreign policy. We certainly don't determine foreign policy, but we can be part of the U.S. government executing its foreign policy."[15] Further analysis of the integral issues of accountability and responsibility of contracted operations conducted by PMCs will be discussed separately in the next chapter.

Another perspective is that the development of PMCs has enabled governments to commit to foreign crises while avoiding the publicly sensitive issue of potentially sustaining troop casualties on missions other than warfighting. According to Thomas Adams, "for the risk-averse, like the US military, employing such private contractors can help to overcome the political reluctance to become involved in situations where risks are high and there is little domestic constituency for involvement of US troops."[16] For example in 1998, DynCorps was awarded a contract to provide civilian verification monitors to the NATO monitoring group in Kosovo while other contributing nations provided officers from their armed forces.

The MPRI 1996 contract to equip and train the Bosnian Croat-Muslim Federation was according to US Democratic Senator Joseph Biden, "the ticket home for Americans--we will not be able to leave unless the Bosnian government is armed and prepared to defend itself."[17] The unstated central issue was that the neutrality of the US government would be compromised if its armed forces were utilized to train the Croat-Muslim Federation. US *Time* magazine argued that "the US fear[ed] Serb attacks on its troops if it use[d] them to train and arm the Bosnians."[18] MPRI, with an established track record in the Balkans Crisis, was selected and approved to discretely execute US foreign policy.

The current MPRI contract in Columbia is also intended primarily to minimize the risk of sustaining American military casualties. Former US Ambassador to Columbia Myles Frechette agrees that "it's very handy to have an outfit not part of the U.S. armed forces, obviously. If someone gets killed or whatever, you can say it's not a member of the armed forces. Nobody wants to see American military men killed."[19]

The US government has also utilized the services of PMCs as a deliberate means with which to reduce the high operational tempo of its armed forces and particularly the conduct of foreign military assistance programs. Brian Sheridan, the senior Pentagon official who oversees the work of MPRI contract operations in Columbia, acknowledges that MPRI personnel are doing precisely what American soldiers have traditionally done. "MPRI was hired not because it has any special expertise, but because US Southern Command in Miami, which oversees American military operations in Latin America, cannot spare 14 men to send to Columbia."[20] Sheridan asserts that it is simply a manpower issue. It is also another cost-effective means of conducting foreign policy while avoiding the direct deployment of US armed forces personnel.

The government of the United Kingdom (UK) also exercised prudent judgment in how it has categorized the legal standing of PMCs, most notably Sandline International and its involvement in the ongoing Sierra Leone crisis. The UK Shadow Defense Secretary, Mr. Iain Duncan-Smith, states "If the legitimate government decides that it needs to use mercenaries: bona fide companies, not just odds and sods, but bona fide companies, then I think that it has to be able to use them, because a government like the one in Sierra Leone just didn't have access to organized armed forces and as a result the RUF were basically winning the war."[21] Again the central issue of the acceptance of a PMC's involvement in such a conflict is the role they play in lessening the requirement for direct intervention by less committed but more capable nation-states. "The problem is that just a simple point-blank refusal to accept that they exist is just like an ostrich sticking one's head in the sand where really there are companies, there are groups, who could be properly organized, who could do the job that's necessary without always having to involve governments like Britain bringing their own soldiers in."[22]

Current domestic law within the US and the UK also reflect a stance that is alternate to the intent of the Additional Protocol and the UN Convention. Both nation-states' domestic law only prohibits the recruitment of mercenaries and the actual conduct of mercenary activities. Being a mercenary in either country is in itself not a criminal activity.

The definitions contained within the Additional Protocol and the UN Convention are not applicable under the UK legal system. The UK government asserts that it would be very difficult to apply the UN Convention within its legal system and therefore there would be no advantage in acceding to it.[23] The UK government does not support the

current Convention and will not propose its accession until the document has been thoroughly redrafted. The UN Special Rapporteur has lobbied most strongly to have the Convention enter into force first and then effect amendments and improvements. The Special Rapporteur assesses that any significant redrafting of the Convention before entering into force will also further substantially delay any new universal law pertaining to mercenaries and PMCs, enabling them to continue their operations with virtual impunity from international law. The result has been an impasse between the UN and both the US and UK governments. These two leading governments within the West remain uncommitted to the ratification of the ten year old UN Convention.

Irrespective of the argument associated with the US and UK governments' use of PMCs and their stance in relation to the framework of the UN Convention, the continuing maintenance of the status quo (non ratification of the UN Convention) remains, most definitely, in the best self-interests of both nations. It is this aspect of a national interest assuming greater significance over a perceived international interest that is the fundamental issue within the lack of a determined international will and determined international leadership towards promoting effective legislation governing PMCs and mercenary entities.

Issue of De facto and Amoral Legitimacy

Colonel Bruce Grant was awarded third place in the 1998 Chairman of the Joint Chiefs of Staff Strategy Essay Competition for his essay titled "U.S. Military Expertise for Sale: Private Military Consultants a Tool of Foreign Policy." Colonel Grant argues

that governments' use of PMCs "upsets the delicate balance of the remarkable Clausewitzian trinity among the government, the military and the people."[24] The balance, or unity, within the Clausewitzian model, is the concept that the application of a nation's inherent military power should remain a controlled monopoly of the state. Despite PMCs having an apparent de facto legitimacy from their use by government as an expeditious tool of foreign policy, there has been a transfer of the "closely held policy instrument from government to the private sector, and permitting it to be accomplished for profit."[25] It is this action of conducting commercial contracts on a proprietary basis outside of direct government oversight that Grant identifies as being a modern adaptation of classic mercenary activity.

The evolution of PMCs has blurred the distinction between professional armed forces personnel who conduct their duties in accordance to a formal allegiance to a nation and contractors who exercise a moral responsibility but work for profit. Grant argues that the military profession is unique in that it maintains on behalf of the nation, the skill sets pertaining to the application of organized and controlled violence. These skill sets fundamentally differentiate the military from all other professions, as there is no comparative commercial service to that of a nation's military power. Most importantly, a nation's military power is only exerted on the formal direction of government.

However, within the post-Cold War international realm, PMCs sell military expertise independent of nations and their military. Significantly, the PMCs are commercially conducting the roles and actions of a nation's military, but are "not bound by the codes, rules and regulations that make the military unique."[26]

The PMCs present government a discrete, cost-effective, and indirect means of executing foreign policy. However, their proprietary basis of employment contradicts the fundamental and inherent measure of legitimacy afforded to the actions of a nation's military. Accordingly, the measure of legitimacy afforded to PMCs cannot be equivalent to that of a nation's military, but rather a de facto and amoral legitimacy. Quite simply, "PMCs contradict the military ethic of selfless service."[27] Selective PMCs are conducting some of the distinct roles and missions of the nation's armed forces but entirely within an alternate framework of commercial enterprise and legitimacy.

Determination of International Legitimacy

The measurement of international legitimacy afforded to PMCs evolves from their legal status in accordance with the 1977 Additional Protocol.

The PMCs and nation-state governments have exploited the inherent limitations and weaknesses within the outdated framework of this legislation. These legally registered corporate entities selling military expertise have heralded their own legitimacy, albeit a de facto and amoral legitimacy, in the absence of a definitive legal determination within the international realm. The UK and US national governments have further reinforced this de-facto and amoral legitimacy by discrete but official sanctioning of their international contracts and operations. Therefore PMCs that conduct active military assistance that has a strategic impact on the political and security environments of the countries in which they operate are in effect, executing a legitimate but amoral application of force within extant but antiquated and inappropriate international law.

The lack of progressive and pertinent international legislation and convention is also strongly indicative of the more than tacit consent for their operations by respective

national governments. The PMC industry has rapidly evolved into a very modern and lateral capability that has become a means with which to selectively and discretely execute national foreign policy in addition to satisfying a Third World demand for additional military expertise to combat enduring interstate and intrastate civil conflicts. In the example of the UK and US national governments, maintaining the status quo of a distinct lack of modern international legislation and convention concerning PMCs remains in their own best national interests.

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[2]Thomas Adams, "The New Mercenaries and Privatization of Conflict," 1.

[3]Corporate regulations require at the minimum, disclosure of the company's name, purpose, organizational structure, initial Board of Directors and method of dissolution.

[4]Approximately 200,000 US companies are incorporated in Delaware, including half of the U.S. Fortune 500 Companies.

[5]UN, "Use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination." General Assembly, Report A/54/326, 19.

[6]International Committee of the Red Cross. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1), 8 June 1977, 5.

[7]UN, General Assembly Report A/54/326, 20.

[8]UN, Resolution Adopted by the General Assembly (A/RES/54/151) 29 February 2000, 1.

[9]UN, General Assembly Report A/54/326, 20.

[10]Tim Spicer, *An Unorthodox Soldier*,24.

[11]Christopher Wrigley, “The Privatisation of Violence: New Mercenaries and the State,” 2.

[12]Adams, “The New Mercenaries,” 7.

[13]MPRI Activities Brief, Homepage of MPRI. Available from http://www.mpri.com.current/; Internet; accessed 18 July 2000.

[14]Justin Brown, “The Rise of the Private–Sector Military,” 3.

[15]Paul De la Garza, “Military Aid from the Private Sector,” 4.

[16]Adams, “The New Mercenaries,” 6.

[17]Mark Thompson, “Generals for Hire,” 1.

[18]Ibid., 2.

[19]Garza, “Military Aid,” 2.

[20]Ibid.

[21]Krishnan Guru-Murthy, “MOD Deny Mercenary Link Up,” 3.

[22]Ibid., 4.

[23]UN, General Assembly Report A/54/326, 14.

[24]Bruce Grant, “U.S. Military Expertise for Sale. Consultants as a Tool of Foreign Policy,” 2.

[25]Ibid., 4.

[26]Ibid., 8.

[27]Ibid., 9.

CHAPTER 5
REGULATION AND ACCOUNTABILITY

Introduction

The expanding operations being conducted by PMCs remain unfettered by international political constraints. Active military assistance operations that have a strategic impact on the political and security environments of the countries in which they operate are being conducted in a vacuum of effective regulation and accountability. The approach of instituting an effective international legal definition of a mercenary has proven to be not viable. The definition contained within the Additional Protocol is unworkable and the UN Convention does not improve it, merely adding noninternational conflict to the context of international legislation. Most significantly the UN Convention has not entered into force for the primary reason that the current status quo remains in the best interest of key Western nations. Any change to the status quo may also directly affect national governments, within whose sovereign territory PMCs have attained registration as legal commercial entities. If a common law state accepts an *ab initio* (status) definition, then it is also accepting potential issues of liability concerning the operations of those PMCs.

A means to avoid the definitional morass associated with PMCs and mercenaries is to transfer the weight and emphasis of legislation from definition to legislation that effectively prohibits certain acts without the express permission of a political authority and then within a prescribed framework of accountability. As with most national forms of criminal and common law, persons are not defined by who they are, but rather by the actions that they conduct.

This chapter will seek to analyze the potential for the effective regulation of PMCs at the international and national levels that will thereby also introduce a framework of accountability. This process of defining the act not the actor represents a fundamental paradigm shift from the actions of the UN Special Rapporteur. It formally recognizes PMCs as legitimate entities within the international realm, rather than as some analysts contend "a necessary evil in out-of-area conflict management in the post-Cold war arena."[1]

Regulation

The Concise Oxford Dictionary defines the term "regulation" as a prescribed rule or an authoritarian direction that controls or subjects an act or an instance to restriction.[2] The fundamental of this definition rests within two conjoining factors.

These factors are first, the existence of a legitimate body of principles, maxims or truths that forms an authoritative measure over a stipulated organization, and secondly the existence of a complementary legitimate body of defined acts or instances governed by those detailed principles, maxims, or truths.

The potential for regulation of PMCs that conduct active military assistance operations will be reviewed against the constructs of industry self-regulation and international and national forms of regulation. These constructs of regulation will be compared against the framework that is applied against the actions of a nation-state's armed forces.

Industry Self-Regulation

Sandline International asserts that in the "absence of a set of international regulations governing Private Military Companies, Sandline has adopted a self-regulatory approach to the conduct of our activities."[3] Sandline International's publicly declared operating principles, state that its contract operations are limited to internationally recognized governments (preferably democratically elected); international institutions such as the UN; and genuine, internationally recognized and supported liberation movements, which are legal and moral; conducted to the standards of first world armies; where possible, broadly in accord with the policies of key western governments; and undertaken exclusively within the national boundaries of the client state.[4]

Sandline International further publicly states that the Company will not become involved with embargoed regimes; terrorist organizations; drug cartels and international organized crime; illegal arms trading; nuclear, biological or chemical proliferation; contravention of human rights; and any activity which breaches the basic Law of Armed Conflict.[5]

The fundamental of industry self-regulation rests on the premise that all PMCs are structured alike and are merely competing commercial interests. This is simply not the case. PMCs are nonhomogenous. Many PMCs have direct and indirect links to government and corporate mining and resource entities that further disguise their real corporate interests beyond financial profit. It is an amoral and fraudulent assertion that a commercial entity plying military skills that directly challenges the state's monopoly over the application of controlled violence can effectively do so without any external oversight or monitoring due to:

1. The executive leadership (retired senior military officers) operating within a

comparable honorable code of ethics and discipline to that within first world armies.

2. Internal corporate procedures and practices being based on those of first world armies.

3. Manpower being drawn from first world armies.

4. Commercial success being dependent upon the maintenance of a respectable business reputation.

The PMCs repeatedly assert their legitimacy as akin to that of a nation's armed forces. The PMCs espouse a like integrity of executive leadership, functional corporate structure, high caliber of trained employee, and professional reputation. However, the real factor of true comparability and indeed legitimacy, effective tiered regulation, does not exist. There exists a measure of self-regulation within the US Army; however this framework is not devoid of additional external regulation. The absence of any form of effective tiered regulation is a fundamental discrepancy between the US Army and US registered PMCs and their respective legitimacy.

The principal basis for the US Army's legal role is expressed in Title 10, US Code (USC), Section 3062. This document is the national legal authority for the formation and operation of the US Army that is commanded by and responsible to the federal government. The Secretary and the Office of the Secretary of Defense have been established to directly ensure the subordination and regulation of the nation's Army in accordance with the instructions of the civilian National Command Authority (NCA). The stringent regulation of the operation of the US Army is maintained by the tiered framework of DOD and DA directives, instructions, publications (regulations and

manuals), administrative instructions and directive type memorandum. There is no comparable framework of such stringent self-regulation by PMCs.

The PMCs are conducting roles and contract operations that have previously been the monopoly of a nation's armed forces. The notion that PMCs are staffed, structured, and operated along a comparable framework to a first world army, such as the US Army, and that this framework legitimizes the PMC, so it can effectively self-regulate its conduct and operations, while a nation's armed forces cannot, is a fallacy.

Clausewitz identified that the virtue of a nation's armed forces lies in the fact that "no matter how clearly we see the citizen and the soldier in the same man, how strongly we conceive of war as the business of the entire nation, opposed diametrically to the pattern set by the *condottieri* of former times, the business of war will always remain individual and distinct."[6] In accordance with Clausewitz's writings, military virtues should not be confused with simple bravery, and still less with enthusiasm for a cause. That PMCs assert that corporate entities can fulfill honorable motives and contest "just" causes is not sufficient in itself to accept their challenge to the state's monopoly of armed force, let alone for it to be conducted in isolation by self-regulation.

International Regulation

The fundamental issue to any discussion within the international realm towards the regulation of PMCs has been the tendency to brand them as mercenary entities. The principal obstacle toward regulation within the international forum has been the UN Special Rapporteur and his stated position that PMCs represent a modern mercenary entity. This impediment could be overcome by a retraction of this stance that would initiate a fundamental paradigm shift as it unequivocally establishes and formally

recognizes the framework of PMCs as legitimate entities within the international realm. This would enable what David Shearer asserts as "constructive engagement"[7] on the issue of regulation at the international and national levels.

At the international level, the UN represents the most logical institution to be charged with the responsibility of initiating "constructive engagement" concerning PMCs. The role of facilitating "constructive engagement" most probably should not be allocated to the Office of the Special Rapporteur. Not only does there exist a structural conflict of interest arising from the current appointment's personal perceptions towards PMCs, but the office retains a very serious role in promoting international action to stem the wider employment of mercenaries within modern conflict. The role could, however, be absorbed by a new appointment structured within the UN Department of Peacekeeping that represents the military arm of the UN and the most appropriate body with which to initiate dialogue among the UN, PMCs, and member states. The International Court of Justice located at The Hague is another appropriate body that could also assist in this process. The wider discussion of the suitability of PMCs working directly for the UN in various roles will be restricted to the following chapter.

The most basic action that the UN could initiate in regulating PMCs would be to establish a list of "approved organizations" that could be measured by:

1. Technical structure and competence.
2. Application of the Laws of Armed Conflict.
3. Adherence to international human rights legislation.

Such a process would necessarily require a multilayered process of regulation. The process would require the production of a set of internationally defined and accepted

operating practices and a schedule of audit or assessment by the UN (or a designated agency) in order to ensure compliance by the PMC. According to Shearer "this tack offers the international community greater leverage to influence the activities of companies that believe legitimacy is the key to their future growth and prosperity."[8] The PMCs similarly argue that those companies that disregard or fail to comply with defined and accepted operating practices would effectively deter clients and thus possibly bring about an end to their own business.

The regulation could be conducted in the form of certification that would infer that the PMC is an internationally acceptable organization. Sandline International has referred to this process as akin to the steps involved in obtaining an International Standards Organization certification. Standards are "documented agreements containing technical specifications or other precise criteria to be used consistently as rules, guidelines or definitions of characteristics, to ensure that materials, products, processes and services are fit for their purpose."[9]

The most significant obstacles that prevent the process of instituting a degree of international regulation over the actions of PMCs are centered on the requirement for a fundamental paradigm shift by the UN and its member states in formally declaring PMCs as legitimate nonmercenary entities. However, continued international apathy as demonstrated against the 1989 UN Convention indicates that this step cannot be readily achieved. The framework of any UN-sponsored international regulation would require a significant redrafting of the UN Convention in addition to the inception of the regulatory legislation that would still be subject to ratification by member nation-states. If the UN Convention has not been ratified in eleven years, what then is a reasonable timeframe

with which to expect an amended and updated UN Convention against mercenaries accompanied by a an innovative framework of regulatory legislation concerning PMCs to be presented for ratification? Most significantly, can there be any guarantee that the UK and the US will actually ratify the legislation, especially as to do so would be most probably contrary to their own national interests?

The willingness of PMCs and national governments to submit to such international legislation is very questionable, particularly when the PMC is being utilized as a discrete tool with which to execute a nation's foreign policy. Effective international regulation may therefore be limited to those contracts wholly between PMCs and either the UN or third-party governments. The PMCs and national governments that enjoy established links between the two might not accept the applicability of such regulation, particularly when the contract incorporates the application of the nation's foreign policy. Again, in such circumstances, PMCs offer a national government a very flexible, discrete, and cost-effective means of asserting its own national interests before that of any international interest. The pivotal measure to any success in the international realm will remain the collective degree of determined international will.

The drive to regulate PMCs has been most passionate when national governments, not foreign governments who contract them, have been affected. This has best been demonstrated by the recent legislative actions in South Africa and the findings from the UK Legg Inquiry over the controversial role of Sandline International in Sierra Leone, known as the "Arms to Africa Affair."[10]

National Regulation

The two most prominent examples of recent national government actions towards the regulation of PMCs are:

1. South Africa: May 1998 Foreign Military Assistance Law.

2. United Kingdom: June 1998 Parliamentary initiated Inquiry by Sir Thomas Legg into the conduct of Sandline International's operations in Sierra Leone in 1998.

Executive Outcomes was founded in 1989 by veterans of the South African Defense Force and registered in Britain in 1993. On 1 January 1999, Executive Outcomes abruptly ceased operations after an extraordinary decade of diverse and controversial military actions across the African continent. While MPRI advertises itself as "the world's greatest corporate military expertise," Executive Outcomes was nothing less than the world's greatest corporate army "that conducted direct combat operations on a sustained basis."[11]

In 1997, the South African Government introduced the Regulation of Foreign Military Assistance Act (Appendix C) that was specifically designed to regulate the operations of PMCs that were based inside South African territory. Under its provisions and due enforcement by South African law, the act sought to compel organizations, such as Executive Outcomes, to seek government authorization for each contract with a foreign government. The most significant portion of the Regulation Act is detailed within Section 1 that establishes its definitions and parameters. As detailed in subparagraph three, foreign military assistance is defined as

> military services or military related services, or any attempt, encouragement, incitement or solicitation to render such services, in the form of:

1. Military assistance to a party to the armed conflict by means of:

(a) advice or training;
(b) personnel, financial, logistical, intelligence or operational support;
(c) personnel recruitment;
(d) medical or para-medical services; or
(e) procurement.

2. Security services for the protection of individuals involved in armed conflict or their property.

3. Any other action that has the result of furthering the military interests of a party to the armed conflict.[12]

The definitions and parameters of the Regulation Act effectively encompassed the vast majority if not all of the operating conditions in which Executive Outcomes had successfully negotiated international contracts over the previous nine years. Moreover the Regulation Act also effectively made the South African government partly responsible for the actions of Executive Outcomes and any other South African based PMC, as it legitimized their standing and conduct of international operations. For undisclosed reasons, the Executive Outcomes Board of Directors decided to terminate all operations and wind down the company rather than risk prosecution by not conforming to the legislation.

However, there are very strong indications that Executive Outcomes structure merely transferred its operations to a series of aligned companies, that included Sandline International, that were unfettered by such national legislation. This example highlights the fragility of regulation at the national level, in that any legislation that is perceived by the PMC as too constraining, may simply force that PMC to relocate its operations to another nation that has less restricting legislation, if any at all. This aspect is a further

indication that some PMCs are merely subcomponents of far larger and extensive transnational companies within the global security, mining, and resource industries.

Table 8 details an overview of the vast array of international contracts that Executive Outcomes conducted over its brief interlude on the African continent. The Table represents the publicly documented Executive Outcomes contract operations.

Table 8. Overview: Executive Outcomes Contract Operations 1989 –1999

Year	Nation-State	International Contracts
1990	South Africa	Specialized training for Special Forces and Para-military.
1991	Botswana	Covert reconnaissance for De Beers (Diamond Company)
1991	Namibia	Covert reconnaissance for De Beers (Diamond Company)
1992	Angola	Recovery of oil equipment in Soyo held by UNITA rebels
1993	Angola	1. Protection of diamond mine in Canfunfo, Lunda Norte 2. Conduct of military training of the 16th Brigade of Forcas Armadas Angolanas (FAA) 3. Conduct of general military training (terminated January 1997) 4. Conduct of combative operations against UNITA
1994	Angola	1. Conduct of air and logistical support for FAA
1995	Sierra Leone	1. Military assistance to President Valentine Strasser against RUF insurgency (training and combative operations) 2. Protection of Kono diamond mines
1995	Kenya	Joint Venture: Security Consulting Company
1995-97	Malawi Mozambique Uganda Zambia	Military training projects (undisclosed)
1996	Sierra Leone	1. Expansion of 1995 contract 2. Destruction of RUF insurgency facilitating peace negotiations and elections. 3. Protection/security of mining facilities
1997	Zaire	Aborted contract to support failing Mobutu regime

Source: Abdel-Fatau Musah, Mercenaries: An African Security Dilemma, 49-62.

In July 1998, the UK (labor) government was embarrassed by the revelation that a British diplomat, the British High Commissioner in Sierra Leone, had given a degree of approval to Sandline International to supply weapons to Sierra Leone, despite an apparent UN embargo. In what became known as the "Arms to Africa Affair," the subsequent (Legg) inquiry determined that the UK export controls relating to arms were wholly outdated, inadequate and "based on legislation dating back to 1939."[13] The same determination concerning the outdated nature of UK arms export controls was also drawn by the 1996 Scott Inquiry after the "Arms to Iraq Affair" involving the then conservative government.

In an interview with Mr. Michael Grundberg, the public information representative of Sandline International, when asked to articulate what Foreign Office or Ministry of Defence policy regulations defined the extent of official government approval that is required before the conduct of an international military style contract, he simply replied "None."[14] The UK has no effective national legislation that requires any UK based PMC to seek government approval before conducting a contract with a foreign government. There is strong evidence, however, that most UK based PMCs do in fact speak informally to government officials, such as was the highlighted case in the "Arms to Africa Affair".

Furthermore, the Legg Report identified that PMCs were simply commercial entities which "are entitled to carry out their business within the law, and for that purpose, to have the access and support which Departments are there to provide British citizens and companies."[15] In response to the Legg Report the Blair Government has drafted a Green Paper[16] that details proposals for the regulation of PMCs at the national

level and the overhaul of its antiquated controls on arms exports. However, the current Blair Labor government is expected to delay the release of the Green Paper until after May 2000, when a general election is expected, because "of fears it will revive the memories of the Arms to Africa affair that mired the government in controversy in 1998."[17] Quite clearly, international interests will almost always remain subordinate to that of national interests and at times, also domestic politics. An analysis of current US policy offers a unique national perspective of actual government regulation concerning PMCs and foreign military assistance contracts.

The US Arms Export Control Act (AECA) of 1976, authorizes the president to control the export and import of defense articles and services in accordance with Title 22 of the USC. "The statutory authority of the President to promulgate regulations with respect to exports of defense articles and defense services was delegated to the Secretary of State by Executive Order 11958."[18]

The AECA also directs the president to designate which commodities constitute defense articles and defense services. Designated items are then included on a further regulatory document titled the US Munitions List. The US Munitions List was designed to introduce a means of instituting government level approval for foreign sales of selected defense articles and defense services. The US International Traffic in Arms Regulations (ITAR) of 1986 is further designed to reinforce this process.

By virtue of the Secretary of State's delegation authority, these regulations have further been delegated for administration and application to the Director of the Office of Defense Trade Controls (ODTC). The ODTC "controls the export (and temporary import) of defense articles and services by taking final action on license applications and

other requests for approval for defense trade exports and retransfers, and handling matters related to defense trade compliance, enforcement and reporting."[19]

The decision-making process to grant a license to a PMC, such as MPRI, requires by law that all manufacturers and exporters of commodities that are prescribed on the US Munitions List must first be legal entities (registered companies or individuals) and secondly be registered with the Department of State. This process is very similar to that detailed in Regulation of Foreign Military Assistance Act introduced by the South African government in 1997.

The ODTC's responsibilities include notifying Congress of export cases involving particular military significance and/or crossing legislatively established dollar value thresholds:

1. All exports of defense articles or services sold under a contract worth $50 million or more.

2. All exports of major defense equipment sold under a contract in the amount of $14 million or more.[20]

The ODTC is also responsible for "ensuring that authorizations of exports take into account all U.S. bilateral and multi-lateral agreements related to arms transfers."[21]

The licensing process executed by the ODTC raises some fundamental issues concerning the effective regulation of PMCs. The current financial parameters for reporting and seeking formal approval by the US Congress for contracts proposed by PMCs are very extensive indeed. Few contracts actually reach $50 million worth of defense articles or services. This rather excessive if not arbitrary ceiling must therefore enable the vast majority of contracts to be approved at the bureaucratic level of government without

congressional oversight. It could be argued that such a loophole within the legislation is not consistent with the intent of the AECA or ITAR legislation.

It could also be argued that the lack of detailed reporting to Congress concerning foreign sales of military services and goods is also most probably not consistent with the functional role of the US Congress. The role of the US Congress is central to the effective and legitimate execution of power by the president. Colonel Bruce Grant, states the functions of Congress are "as a check and balance system on the executive branch for foreign policy through lawmaking, funding, confirmation of personnel, oversight power, war proxy or treaty power."[22] However, due to a perceived ever-increasing degree of congressional oversight, the application of this important function has been viewed by some elements within the executive branch, as being too cumbersome. This unintended consequence has directly contributed to the expedient utilisation of commercial entities as a tool of foreign policy for the provision of foreign security assistance.[23]

The current framework of the AECA and ITAR legislation indicates that the relevant functions of Congress can be effectively and legally bypassed. A fundamental component of any form of regulation is a parallel and supporting framework of accountability that is required to ensure that the prescribed a rule or authoritarian direction that controls or subjects an act or an instance to restriction is actually and consistently complied with. Any form of regulation without a robust framework that promotes accountability and independent oversight is substantially weakened and subject to being compromised, both directly and indirectly.

Table 9 details the publicly listed monetary value of selected PMC contracts.

Table 9. Monetary Value of Selected PMC Contracts

Date	PMC	Contract	Monetary Value
1993	Executive Outcomes	Angola: Protection of diamond mines. Operations against UNITA	US$40m
1994	Executive Outcomes	Angola: Continued operations against UNITA	US$95m
1995	Executive Outcomes	Sierra Leone: Operations against RUF rebels. Assist ECOMOG	US$13.5m
1996	MPRI	Bosnian Croat-Muslim Federation armed forces: Train and equip	US$400m
1996	Executive Outcomes	Sierra Leone: Operations against RUF rebels. Assist ECOMOG	US$35.2m
1996	Sandline International	PNG: Train, equip and support operations on Bougainville Island	US$36m
1997	Sandline International	Sierra Leone: Train, equip and support Kamajors against RUF rebels	US$10m
2000	MPRI	Nigeria: Train and equip mission	US$3.5m
2000	MPRI	Columbia: Train and equip anti-drug Battalions	US$6m

Broader Aspects of Regulation: Predatory Capitalism

Abdel-Fatau Musah, the Research Coordinator at the Center for Democracy and Development, asserts that "it is no longer a secret that a major objective of the new mercenary business is access to natural and mineral resources. Confident that most of the [nations] in desperate need of their services are not in a position to pay in cash, security firms demand payment in the form of mining concessions and oil contracts."[24] Executive Outcomes is alleged to have negotiated contracts with Angola and Sierra Leone worth $40 million and $50 million, respectively. Yet according to the UN Development Program Human Development Index, these two countries are at the very bottom of their list of the world's poorest nations.[25] There exists a very serious issue concerning the operations of some PMCs that become associated with a convoluted network of associate

corporate entities that persue “legitimate” dealings with national governments reliant on the PMC for their security and in some instances actual survival against an armed opposition.

There are very strong indications that PMCs, such as Executive Outcomes and Sandline International, are indeed inter-related business enterprises that are also heavily connected to Western mining and resource companies, such as Heritage Oil and Gas Incorporated, Strategic Resources Corporation, Diamondworks and Branch International that operate throughout Africa. There is a strong indication that a UK-registered company Plaza 107 is at the hub of this network of international mining, oil, and security interests.

The aborted Sandline International contract in Papua, New Guinea, also incorporated post-conflict access to the mineral concessions within the Panguna copper mine (one of the world’s richest copper mines) on the island by a subsidiary of Branch International, Branch Energy. The Sandline International contract was negotiated by Tim Spicer, then CEO of Sandline International and also Mr. Michael Grundberg, the owner of Plaza 107. At the April 1997 Andrew Inquiry into the actions of the government of Papua, New Guinea, and Sandline International, Justice Warwick Andrew concluded that “the information provided by Sandline Holdings that they are entirely separate from Executive Outcomes cannot be correct, but the exact nature of the relationship seems clouded behind a web of interlocking companies whose ownership is difficult to trace.”[26]

Any attempt at regulation must stipulate that a contract between a PMC and a foreign government be settled with a cash fee and no other benefit. Such regulation would also need to disqualify corporate sharing directors or offices with the PMC from

having any aligned or parallel "legitimate" business dealings with that foreign government in order to discontinue what has been termed as "predatory capitalism."[27] Additional discussion of this issue, including methods by which weaker nations source cash payments for PMCs is beyond the parameters of this thesis, but remains a real and significant issue for further research. "In environments of chaos, state collapse and economic decay, a powerful private player with access to significant amounts of money, raw materials, military technology and even a rapid reaction force can decisively pursue his own private agenda."[28]

Abdel-Fatau Musah's research into such networks of interlocking PMCs and mining interests has produced a detailed wire diagram of the alleged Branch Heritage–Executive Outcomes/Sandline International Empire that is enclosed as appendix D.[29]

Accountability

The Concise Oxford Dictionary defines the term "accountability" as being answerable or liable for one's conduct or actions.[30]

In the case of PMCs, accountability would therefore be measured against an extant and legitimate body of principles, maxims, or truths that have been individually accepted and ratified as an authoritative framework within which the PMC is obliged to operate.

The potential for PMCs to be effectively held accountable for their actions and conduct in conducting active military assistance operations will be reviewed against the previously discussed constructs of international and national regulation.

International Accountability

The analysis of international regulation focussed on the potential role of the UN as the leading body within the international realm. A further discussion on a possible framework of international accountability will also remain focused on the role of the UN. The discussion will include an analysis of potential measures that are the responsibility of both the PMC and of the UN.

The fundamental issue expressed by the Special Rapporteur against mercenaries is the belief that mercenaries and therefore by association, PMCs deliberately subjugate international humanitarian law during the execution of their operations. The issue is certainly not due to a lack of international human rights laws but moreover the means and methods of ensuring and confirming a PMCs adherence to such humanitarian laws. David Shearer notes that at the most basic level "during times of war, the employees of military companies fall under the auspices of Common Article 3 of the Geneva Conventions, which is binding on all combatants."[31] Common Article 3 of the 1949 Geneva specifically enshrines the rights of persons taking no direct part in the hostilities, to include members of armed forces who have laid down their arms and those personnel who are sick or wounded. Furthermore, PMCs are also bound by a host nation's obligations to ratified UN and international human rights conventions, by virtue of being employees of the government that has contracted them.

Patrick Cullen, a Research Student in International Relations at the London School of Economics and Political Science, argues that this formal and legal mode of accountability by a "host nation" may be reduced to a mere technicality due to the relationship between the PMC and the government that hires it. Cullen argues that "a

weak state that hires a PMC, while technically accountable for its actions, may not be in a powerful enough bargaining position to enforce this accountability in the form of punitive measures against the PMC."[32] Moreover, it is doubtful that a PMC, such as MPRI, would even allow an American employee to be detained and tried within a weak nation's judicial system. A weak nation may be forced out of strategic necessity to overlook human rights abuses committed by a PMC in order to gain the maximum benefit from that PMC's operations.

The most direct and effective framework for engendering a process of accountability for compliance with international human rights legislation and convention may be to instill the requirement for PMCs to regularly present formal reports and audits of its operations combined with the independent observation and monitoring of their activities. The report and auditing process could be as basic as a formal written declaration of observance and compliance with international human rights legislation and convention. Such a process would not necessarily require a PMC to breach conditions of contract confidentiality or operational secrecy. Should there be any allegations or instances to the contrary, the PMC also has the ability to report what disciplinary, legal or remedial action has been initiated and at what level--by the PMC or by the host nation contracting its services.

This measure could also be strengthened by the use of independent UN military observers or civilian human rights monitors, such as representatives of the International Committee of the Red Cross (ICRC). These observers and monitors could be deployed for the duration of the contract or selectively at the discretion of the relevant international body to further confirm compliance with international legislation and convention.

Robin Kirk of Human Rights Watch argues that the MPRI contract in Columbia is representative of outsourcing war in a way that is not accountable. She further argues that "because the 130,000 strong Colombian military is notorious for human rights violations, it is essential for the United States to provide assistance in accordance with international law and in a transparent manner--not in secret."[33] Senator Patrick Leahy, ranking member of the senate Appropriations Subcommittee of Foreign Operations states a similar concern, "We have no way of knowing if the contractors are training these Colombian soldiers in ways that are fully consistent with U.S. policy, laws and procedures."[34]

The fundamental weakness of seeking to utilize independent UN military observers and civilian human rights monitors in this example is that MPRI is conducting a program on behalf of the Colombian and US governments, both of whom will most probably not agree to such verification actions. Such a verification action would represent an unacceptable and third party or external intrusion in the conduct of each nation's foreign and defense policies. Clearly the deployment of independent UN military observers and civilian human rights verification personnel would be limited in application. With such limitations in the international realm, measures of accountability at the national level assume an increased significance.

National Accountability

The unique nature and role of the military within the US has also been recognized by the development and utilization of the unique framework of military law titled the US Universal Code of Military Justice (UCMJ). The UCMJ was drafted in recognition of the distinct requirement for an additional codified body of military law specifically for those

uniformed citizens who exercise the duty and responsibility of preserving the national security of the US. The framework and applicability of the UCMJ is in addition to US federal and state criminal and common law statutes.

The "Preamble" to Part 1 of the 1995 *Manual of Courts Martial* defines the purpose of military law as being to "promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby strengthen the national security of the United States."[35] The existence and use of the UCMJ is most significant in that all uniformed persons within the US military are without exception, answerable and liable for their actions and conduct under the framework of this body of law at the national level. This is in addition to being subject to the relevant provisions of the Geneva Conventions and humanitarian law at the international level. However, PMCs that assert that they have a legitimate authority to conduct the same operations as a nation's armed forces and for commercial gain have no corresponding integral legal framework of accountability such as the UCMJ at the national level. The actions of PMCs registered within the US remain solely accountable within the framework of civilian federal law. The PMCs are not a component of the military establishment. This is a fundamental discrepancy between the two organizations and a distinct weakness in the accountability of US-registered PMCs.

The current US policy regarding the regulation of international military contracts is contained within the AECA and the ITAR. These legislative documents direct that a PMC must be registered with the Department of State and request a license for each contract that it conducts with a foreign government or military. However, after a license is approved for such a contract, there is no further attention paid to the contract by

Congress or any other legislative body and there is no statutory requirement for the PMC to fulfill any reporting or auditing procedures for the duration of that contract. Quite simply "the regulations under the Arms Control Export Act provide no ongoing oversight after an export license has been granted."[36] The focus of the act is solely on the necessary conditions to obtain a license with no mechanisms to review a contract that may last for months or years.

Congress does, however, conduct considerable oversight of inherent military programs such as the Foreign Military Sales (FMS) program and the International Military Education and Training (IMET) program. The FMS and IMET programs are managed by the DOD and are subject to congressional visibility. "Congressional review of FMS and IMET programs become part of the public record."[37] Indeed, the actions of any uniformed element of the armed forces have been consistently held accountable by the Pentagon, the Congress, and the President as their Commander in Chief and ultimately to the citizens of the United States. This is not the case with the actions of PMCs conducting other than IMET or FMS contracts.

"Under IMET, the U.S. Congress recently provided $15 million in funding to the African Crisis Response Initiative to train eight battalions from seven countries in central Africa to respond to regional hostilities."[38] The management of this program is the responsibility of the DOD. As such, the DOD delivers regular publicly accessible reports to Congress and accounts for its actions and the allocated funds. However, Congress has no oversight of the $6 million contract between MPRI and the Colombian government, that was paid for by the US government, to provide assistance in training antidrug battalions. "Every quarter MPRI reports directly to a senior steering committee in

Washington, including Sheridan the (former) Assistant Secretary of defense for Special Operations Low Intensity Conflict, representatives of SOUTHCOM and Randy Beers the (former) Assistant Secretary of State for International Narcotics and Law Enforcement Affairs."[39] It may be argued that this represents a form of oversight; however, the MPRI reports have not presented before Congress and the steering committee is made up of wholly vested interests within the project. There exists no independent verification of how MPRI is executing this contract. The vested interests include Mr. Sheridan, who recommended MPRI to the Colombian Minister of Defense Mr. Luis Fernando Ramirez.[40]

The issue of vested interests is further manifested by the preponderance of retired senior military officers within executive appointments of PMCs, such as MPRI. Senior retired military officers may cause the Pentagon and State Department officials, as well as members of Congress, to give undue credence to their lobbying efforts that are primarily commercial and profit based. In 1998, MPRI sought government approval to enter Equatorial Guinea and shape a plan to train and equip a national coast guard force. The contract was initially rejected by two State Department desks, holding it up for two years over concerns of the government's record of human rights abuses. "It was approved only after MPRI lobbied the department's Africa desk, arguing that if it was not allowed to do the job, someone else would."[41] Moreover, that someone else may not have been a PMC registered in the US. Furthermore, there are significant issues as to constructing an appropriate framework with which to ensure the actions of such senior retired military officers are also held accountable. Often the most senior military representative in a foreign nation is the military attaché who is rarely of general rank and may not be of the

same service. “Although U.S. embassy officials in the contracting country are charged with general oversight and though firms liaise with U.S. defense attaches, no paperwork is filed, and no one has specific responsibility to monitor how these training contracts are fulfilled.”[42] In such circumstances and particularly in smaller and weaker nations, military attaches are required to informally oversee, in some instances, their former commanders. Such a situation whereby a serving subordinate military officer is required to oversee a former general officer’s actions is not conducive to impartial and effective accountability. The former general officer may no longer directly wear the uniform, but he will exercise all the influence and manner of his former appointment in order to successfully complete his commercial interests.

The MPRI team of contractors that conducted the 1995 leadership training for the Croatian military was headed directly by “General Vuono, General Griffitts and General Crosbie Saint, who from 1988 to 1992 commanded the U.S. Army in Europe.”[43] Additional MPRI personnel who executed this contract with the Croatian military included Lieutenant General Chambers who had previously conducted the Pentagon appointment of Director of Contingency Operations in Bosnia and General Sewall, who had served as the Pentagon’s special advisor to the Muslim-Croat Federation.[44]

The application of congressional oversight is fundamental to the issues of accountability and public visibility of what actions are being conducted abroad in the name of the US government and as a part of its foreign policy. The aspect of public visibility would be far lesser an issue if the “regulatory framework guaranteed adequate executive supervision and congressional oversight.”[45] Deborah Avant, an associate professor at the George Washington University, argues that the developing and deliberate

use of PMCs by the US government effectively reduces the need to involve both Congress and the US public in foreign policy.[46] This action is certainly contrary to the constitutional role of Congress as the overseer of Executive accountability and most probably the effective accountability of the actions and conduct of US registered PMCs.

Measurement of Viability

An analysis of the issues pertaining to an increased formal regulation and accountability of PMCs at the international level has further reinforced the fundamental problem with any form of legislation at this level. Nations, both weak and strong alike do not want to limit their ability to contract PMCs, or any other form of commercial agency, when it suits their preference. Accordingly, as Patrick Cullen argues, "if the international community fails as it has thus far, to create effective international law, regulating PMCs, accountability of PMCs will be left to the formal and informal devices of the individual state."[47]

Effective national legislation may also be subordinated against wider national interests. A nation may use domestic legislation to legally circumvent the activities of a particular PMC that is perhaps politically incompatible with its foreign policy goals, while yet simultaneously "turning a blind eye" to the actions of another when it is expedient to do so. In an era of restrained fiscal spending and military downsizing, PMCs represent a prompt and detached capability to a nation's government with which to discretely execute potentially contentious aspects of foreign policy. Nations will readily regulate their own armed forces and seek to make them accountable by codified military law. However, PMCs that seek to exercise a comparable role to that of a nation's armed forces are not equally stringently regulated nor accountable within public processes.

Nations employing PMCs are legally accountable for their actions; however, this fundamental can be quickly eroded to "an unenforceable technicality" when the national government is dependent on a PMC and its military capabilities for its own very survival.

Therefore the nature and viability for the regulation and accountability of PMCs rests within the very "strengths of the actual individual nation itself and not the strengths of the links that it may have with any PMC."[48]

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[1]Herbert Howe, "African Mercenaries," 1.

[2]*The Concise Oxford Dictionary*,1012.

[3]Sandline International Corporate Overview, Homepage of Sandline International; available from http://www.sandline.com/company/index.html; Internet; accessed 18 July 2000.

[4]Ibid.

[5]Ibid.

[6]Michael Howard, *On Clausewitz*, 187.

[7]David Shearer, "Outsourcing War," 7.

[8]Ibid.,

[9]What are Standards? Homepage of International Organization for Standardization; available from http://www.iso.ch/infoe/intro.htm; Internet; accessed 9 February 2001.

[10]The "Arms to Africa Affair" involved allegations that Sandline International (with bureaucratic approval) procured weapons on behalf of the indigenous (Sierra Leone) Kamajors, in direct contravention of a UN embargo on such actions.

[11]David Isenberg, "Have Lawyer, Accountant and Guns, Will Fight: The New, Post Cold War Mercenaries," 6.

[12]Republic of South Africa, Regulation of Foreign Military Assistance Act, 2.

[13]Andrew Parker, "New Rules Likely on Mercenaries," 2.

[14]Michael Grundberg, interview by thesis author, 11 December 2000, Leavenworth, KS

[15]Christopher Wrigley, "The Privatization of Violence: New Mercenaries and the State," 8.

[16]A Green Paper is an official UK government planning document. The Paper recommends policy to Government based on a consultative research process.

[17]Andrew Parker, "New Rules Likely on Mercenaries," 1.

[18]USC Title 22, Chapter I (Department of State), subchapter M, International Traffic in Arms Regulations, Section 120.1(a), p1.

[19]US Office of Defense Trade Controls Briefing Sheet, Homepage of Office of Defense Trade Controls; available from http://www.pmdtc.org/about.html; Internet; accessed 29 January 2001, 1.

[20]US Export Control System Decision Making Brief, [database;] available from http://projects. sipri.se/expcon/natexpcon/USA/us_decisionmaking.htm; Internet, accessed 29 January 2001, 2.

[21]US Office of Defense Trade Controls, Briefing Sheet, 1.

[22]Grant, "US Military Expertise," 5.

[23]Ibid.

[24]Musah, *Mercenaries*, 23.

[25]Ibid.

[26]Sean Dorney, *The Sandline Affair*, 35.

[27]Wrigley, "The Privatization," 13

[28]Musah, *Mercenaries*, 166.

[29]Ibid., XVI.

[30]*The Concise Oxford Dictionary*, 9.

[31]David Shearer, “Outsourcing War,” 6.

[32]Patrick Cullen, “Keeping the New Dog of War on a Tight Leash,” 5.

[33]Paul de la Garza, “Military Aid… From the Private Sector,” 2.

[34]Ibid., 3.

[35]U.S. Department of Defense, Defense Link: Regulations and Forms - Nature and Purpose of Military Law, 1.

[36]Matt Gaul, “Regulating the Privateers: Private Military Service Contracting and the Modern Marque and Reprisal Clause,” 12.

[37]Grant, “US Military Expertise,” 6.

[38]Ibid., 3.

[39]Garza, “Military Aid,” 5.

[40]Ibid.

[41]Justin Brown, “The Rise of the Private-Sector Military,” 2.

[42]Deborah Avant, “Privatizing Military Training,” 3.

[43]Ken Silverstein, “Privatizing War: How affairs of state are outsourced to corporations beyond public control,” 4.

[44]Ibid., 5.

[45]Gaul, “Regulating the Privateers,” 11.

[46]Avant, “Privatizing Military Training,” 3.

[47]Cullen, “Keeping the New,” 8.

[48]Ibid., 7.

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CHAPTER 6

CONCLUSIONS

Introduction

The purpose of this chapter is to answer to the primary research question posed in chapter 1. That being: Are PMCs that conduct active assistance military operations, that result in a strategic impact on the political and security environment of the countries in which they operate, a legitimate application of force for the modern state?

Additional answers will also be articulated for the supporting research questions that incorporated the tandem issues of:

1. Are the operations of Private Military Companies effectively regulated at either the international or national levels?

2. Can Private Military Companies or other agencies of government, be held accountable for their actions and conduct?

Conclusions: Scope of International Legitimacy

The analysis of the current scope of international legitimacy that can be afforded to PMCs has yielded five correlating conclusions.

First, the present measurement of international legitimacy afforded to PMCs evolves directly from their legal status in accordance with extant international law and convention. Current applicable international law and convention consists solely of the 1977 Additional Protocol 1 to the Geneva Conventions of 1949.

Second, the Additional Protocol details the mandatory and concurrent prerequisites in order for a legal determination of a mercenary status. The framework of

the 1977 Additional Protocol is outdated. The application of the Additional Protocol cannot definitively determine the status of the post-Cold War evolution of the PMCs. The PMCs therefore are flourishing and conducting international contract operations within a vacuum of effective and applicable international legislation that truly defines and establishes their international legitimacy.

Third, latter legislation and convention, such as the OAU and UN Conventions, have merely repeated the outdated structural definition weakness that is contained within the Additional Protocol.

Fourth, national governments have balked at promoting any effective measures to remedy this situation. An international realm devoid of effective and constraining definitional legislation is beneficial to some parties. Moreover, the further maintenance of this status quo decidedly remains to the advantage of the individual nation and the PMC. This situation includes those Western governments who seek to exploit the opportunity to utilize selective PMCs for the discrete execution of contentious aspects of their national foreign policy as well as those nations who seek to contract PMCs for assistance in effecting their own integral national security.

It is this very aspect of PMCs conducting the roles and missions that are the perceived monopoly of a nation's armed forces, that raises further significant discord as to their real legitimacy. The evolution of the PMC has abruptly challenged an entrenched paradigm. That being that a nation's armed forces conduct its duties for reasons of allegiance and selfless service to their nation, as opposed to a PMC structured solely for commercial profit and not bound by the codes, rules, and regulations that make a nation's armed forces unique and accountable.

Finally, the end effect has been that in the twenty first century, PMCs, as legally registered corporate entities selling military expertise for commercial gain, have heralded their own legitimacy that can currently, only be acknowledged as being de facto and amoral. The PMCs that conduct active assistance military operations do so within a vacuum, devoid of a clearly defined and articulated framework of legitimacy within the international realm.

Conclusions: Regulation of PMC Contract Operations

The analysis of the current degree of effective regulation of the actions and practices of PMCs has yielded seven correlating conclusions.

First, the degree of effective regulation is commensurate with the scope of international and national actions that have shaped the international legitimacy of PMCs as being de facto and amoral. A framework of dialogue and a noble intent for such measures exists at the international level; however, truly effective actions are underscored by the current reality of collective national interests that usurp their practical implementation.

Second, self-regulation in isolation from any form of international or national regulation is an unacceptable tenet. That PMCs assert that they can contest active assistance operations that may be honorable and just is not sufficient in itself to be acceptable without a framework of international or national regulation.

Third, effective international regulation is subject to a determined collective international will for it to exist. Such action must first include a fundamental paradigm shift by the Special Rapporteur on behalf of the UN in retracting his stated position that PMCs are indeed mercenary entities. Until this fundamental action is conducted, that will

invoke a true and lasting measure of international legitimacy, effective international regulation will remain at its current impasse.

Fourth, the UN remains the chief institution with the most potential at the international level, to break the deadlock and initiate such contemporary regulatory actions. However, such actions will require substantial international dialogue and consensus on the framework of future legislation or convention for it to be successful. It is rather apparent that such consensus does not exist today.

Fifth, lacking any effective international regulation, the final tier of regulation rests at the national level. The South African government has demonstrated that effective national regulation can be drafted and enacted. The implementation of the South African Foreign Military Assistance Act has also demonstrated that when national legislation is perceived to be too constraining, a PMC may simply elect to cease its operations and relocate its business interests to another nation with less national regulation or none at all.

Sixth, the analysis of national level regulation within the UK and the US demonstrates the broad degrees of formality associated with such regulation when conducted at the national level. There effectively exists no deliberate national regulation of PMCs in the UK. At best, there may be informal liaison and discussion at the bureaucratic level as to the political acceptability of potential international contracts in accordance with the government's foreign policy.

The US has enacted national legislation in the form of the AECA and ITAR that regulates international military contracts and foreign military sales. However, the parameters for approving such contracts by the ODTC, and specifically the dollar value thresholds contained within this legislation are not as rigorous or stringent as that applied

to the actions of its armed forces and DOD programs such as the IMET and FMS Programs. Such actions enable a viewpoint that the regulatory role of the US Congress is effectively and legally being bypassed. Such a perceived climate engenders further disquiet directly relating to the approval process for contentious international contracts being conducted by selective PMCs on behalf of the federal government.

Finally, effective regulation at the national level is subject to a commonality and consistency of effort across a diversity of nations who have dissimilar and competing national interests and foreign policy priorities.

The PMCs are not effectively nor consistently regulated at either the international or national levels. However, real potential in the forms of accreditation, certification, and effective legislation does exist at both the international and national levels for this current situation to be reversed, subject to a determined leadership at both levels.

Conclusions: Accountability of PMC Contract Operations

The analysis of the current degree of effective accountability of the actions and practices of PMCs has yielded five correlating conclusions.

First, sufficient international human rights legislation and laws of armed conflict exist that are binding upon the actions of not only PMCs but also the nations that contract their services. There does not exist a requirement to draft further legislation or convention due to the existence of PMCs. The crux issue in tandem with those of regulation and legitimacy will always remain centered on the processes of oversight to verify their adherence to such international human rights legislation and conventions.

Second, at the international level, the influence of the UN is limited to those contracts that the agency itself or its representative bodies directly engage in with PMCs.

The vast majority of international contracts however, are between, the PMCs and third party nations. These contracts are not negotiated through the auspices of the UN.

In this limited arena of international contracts, the UN may be able to impose the mandated requirement for verification actions by impartial military observers or appropriate civilian monitors, such as the ICRC. Additionally the UN may impose the mandated requirements for the tabling of reports, audits and or declarations of compliance with such international humanitarian law and convention. There exists a real potential for the accountability of the conduct of PMCs in such UN-contracted operations. However, the vast majority of international contracts will not be conducted with the UN and herein lies the real crux of the issue of accountability.

Third, at the national level, any formal framework for the accountability of a PMC's actions or conduct will be strictly administered in accordance with national prerogatives. A government that depends upon a contracted PMC for its very security or continued existence may be confronted with a mutually exclusive dilemma, whereby proper accountability is reduced to an unenforceable technicality owing directly to its security situation. Nations contracting PMCs will utilize their services and capabilities to satisfy their national interests above and beyond any perceived or ratified international obligation. National interests will invariably be conducted and maintained at the expense of broader international interests, irrespective of their nature.

Fourth, nations currently do not maintain a structure or framework of accountability that is commensurately applied against the actions and conduct of its armed forces and nationally registered PMCs. In the example of the US, personnel within the armed forces are subject to the provisions of the UCMJ and are accountable to the

civilian administration in the DOD, the Congress, and the President as the Commander in Chief. However, the nation has no comparable framework for the public accountability of those US registered PMCs that conduct international contracts that incorporate the commercial selling of the "military expertise" invested within its armed forces. The AECA and ITAR contain no provisions for any continuing congressional oversight as conducted for DOD programs, such as IMET and FMS Programs.

Fifth, the presence of former general rank officers who assert that they maintain the honor and creed of their former profession, is insufficient in itself to be acceptable as a measure of accountability. The simple fact that such former military personnel are now conducting the very essence of their former employment for financial reward decries their position as one being of a wholly vested and nonimpartial interest.

The PMCs are not effectively nor consistently held accountable at either the international or national levels. The actual ability to enforce the accountability of PMCs is centered on the strengths of the individual nation itself and not the strengths of the links that the nation has with any PMC.

Legitimate International Entity Within Modern Conflict

Within the context of current international legislation and convention, the PMCs must be regarded as legitimate international entities within modern conflict. The simple fact is that corporate entities that conduct active military assistance operations have flourished in an environment of inadequate and purposeful legislation, regulation, and oversight at the national and international levels.

Moreover, that legitimacy is assessed as distinctly de facto and amoral. Such an assessment cannot be altered unless a determined degree of national and international

leadership emerges to challenge the current status quo that is decidedly inappropriate for the international realm in the twenty-first century.

Areas for Further Research

The narrow focus of this thesis has only researched the fundamental core issues of international legitimacy, regulation, and accountability. The analysis from this research has identified four additional branches that warrant further detailed research.

First, if the UN as the leading institution within the international realm declares that PMCs are indeed legitimate entities, then such a declaration will significantly broaden the capabilities of this organization to deal with aspects of conflict resolution within modern conflict. Most significantly, a truly definable measure of international legitimacy may pave the way for selected PMCs to be contracted by the UN for active assistance missions in the form of peace-enforcement and peacekeeping operations. There exists much academic and professional debate as to the format, selection criteria, and continued capacity of leading Western nations to continually respond and commit resources and personnel to such expanding operations.

It is recommended that further research be conducted into the legality, viability and capacity of PMCs to be contracted by the UN to conduct selective peace-enforcement and peacekeeping operations.

Second, the analysis presented within chapter 5 tendered a brief account of Abdel-Fatau Musah's research into a developing blight being conducted by a minority of PMCs that he has termed as being predatory capitalism. This term is reflective of the actions of a minority of Western PMCs that are in fact inextricably linked within a much larger network of interlocking mineral and resource corporate interests. Such networks of

corporate interests deliberately seek security and active assistance contracts with poor but desperate developing nations, often confronting internal and or external security threats, and negotiate mineral and resource concessions as part of their vast financial remuneration. Such remuneration is legal, though distinctly unethical and potentially undermines the independent sovereignty of such nations. Nations then potentially become committed to such networks of corporate entities not only for ongoing security assistance but also for the protection and development (exploitation) of their mineral resources. Musah alleges that the actions of predatory capitalism are centered on the African continent.

It is recommended that further research be conducted in order to confirm the existence and structure of such frameworks identified by Musah as being predatory capitalism and whether such actions are indeed acceptable to the individual state and the international realm.

Third, the analysis presented within chapter 5 proffered a brief overview of the current national legislative actions that regulate the actions of US registered PMCs in conducting international military assistance contracts. The overview centered on the framework of the AECA and the ITAR and the mandated procedures for approval of such contracts. The analysis presented identified that there exists a very broad margin of financial dollar threshold before the Congress must be formally notified before any approval is given. The vast majority of international contracts is much less than the stipulated $50 million threshold and is potentially approved at the bureaucratic level. Such a situation suggests that the role of Congress is being effectively and legally

bypassed. It could be argued that such a loophole in the execution of this legislation is not consistent the intent of the AECA or ITAR.

It is recommended that further research be conducted into the current framework and applicability of the AECA and the ITAR in order to confirm that the intent of these two pieces of legislation is still relevant and being satisfied. Further research could also establish whether there exists the effective regulation of US registered PMCs that conduct active assistance military operations that result in a strategic impact on the political and security environment of the countries in which they operate.

Fourth, the analysis presented within chapter 5 indicated that after an international contract is approved in accordance with the AECA and ITAR, there exists no formal framework of congressional or public oversight or accountability for the subsequent actions of PMCs that conduct international contracts, let alone active military assistance operations. This situation is in direct contrast to the formal framework and oversight that is stringently applied to the actions and conduct by the nation's armed forces. Such a situation suggests that there may exist a fundamental discrepancy between the measures of accountability applied between the two distinct bodies and that there is a distinct weakness in the accountability of US registered PMCs.

It is recommended that further research be conducted in order to confirm that there exists effective accountability of US registered PMCs that conduct active assistance military operations that result in a strategic impact on the political and security environment of the countries in which they operate. Additional research could also effectively determine the most suitable format and structure for that oversight and accountability.

Summary

The post-Cold War proliferation of interethnic and internecine conflicts throughout many parts of the world that directly contributed to the evolution of PMCs continues unabated within the new millennium. The evolution of PMCs has further continued to the extent that selective PMCs assert that corporate entities can contest honorable and just causes in the name of conflict resolution. For this assertion to be internationally acceptable and practical, PMCs must demonstrate that such corporate entities are indeed legitimate in structure and legitimate in application to conduct selective military operations that may incorporate the application of controlled violence that previously has been an unchallenged monopoly of a nation's armed forces.

The significance of this thesis was to determine and articulate the contemporary extent of international legitimacy that can be afforded to PMCs that conduct active military assistance operations. This measurement of international legitimacy will in turn enable a stronger, more informed national US position, ready for future debate within the international realm as to the proper roles and associated ramifications of the utilization of PMCs within peace and conflict in the dawn of the twenty-first century.

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Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977

Part III: Methods and means of warfare–Combatant and prisoner of war status
Section II – Combatant and prisoner of war status

Article 47 – Mercenaries

1. A mercenary shall not have the right to be a combatant or a prisoner of war.

2. A mercenary is any person who:

(a) is specifically recruited locally or abroad in order to fight in an armed conflict;

(b) does, in fact, take a direct part in the hostilities;

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

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

(e) is not a member of the armed forces of a party to the conflict; and

(f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.

APPENDIX B

International Convention against the Recruitment, Use, Financing And Training of Mercenaries, 4 December 1989

The States Parties to the present Convention,

Reaffirming the purpose and principles enshrined in the Charter of the United Nations and in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,

Being aware of the recruitment, use, financing and training of mercenaries for activities which violate principles of international law, such as those of sovereign equality, political independence, territorial integrity of States and self-determination of peoples,

Affirming that the recruitment, use, financing and training of mercenaries should be considered as offences of grave concern to all States and that any person committing any of these offences should be either prosecuted or extradited,

Convinced of the necessity to develop and enhance international co-operation among States for the prevention, prosecution and punishment of such offences,

Expressing concern at new unlawful international activities linking drug traffickers and mercenaries in the perpetration of violent actions which undermine the constitutional order of States,

Also convinced that the adoption of the convention against the recruitment, use, financing and training of mercenaries would contribute to the eradication of these nefarious activities and thereby to the observance of the purposes and principles enshrined in the Charter,

Cognizant that matters not regulated by such a convention continue to be governed by the rules and principles of international law,

Have agreed as follows:

Article 1

For the purposes of the present Convention,

1. A mercenary is any person who:

(a) Is specifically recruited locally or abroad in order to fight in an armed conflict;

(b) 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;

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

(d) Is not a member of the armed forces of a party to the conflict; and

(e) 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.

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

(a) Is specifically recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at:

(ii) Overthrowing a Government or otherwise undermining the constitutional order of a State; or

(i) 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 or 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.

Article 2

Any person who recruits, uses, finances or trains mercenaries as defined in Article 1 of the present Convention, commits an offence for the purpose of the Convention.

Article 3

1. A mercenary, as defined in Article 1 of the present Convention, who participates directly in hostilities or in a concerted act of violence, as the case may be, commits

an offence for the purposes of the Convention.

2. Nothing in this article limits the scope of application of Article 4 of the present Convention

Article 4

An offence is committed by any person who:

(a) Attempts to commit one of the offences set forth in the present Convention;

(b) Is the accomplice of a person who commits or attempts to commit any of the offences set forth in the present Convention.

Article 5

1. States Parties shall not recruit, use, finance or train mercenaries and shall prohibit such activities in accordance with the provisions of the present Convention.

2. States Parties shall not recruit, use, finance or train mercenaries for the purpose of opposing the legitimate exercise of the inalienable right of peoples to self-determination, as recognized by international law, and shall take, in conformity with international law, the appropriate measures to prevent the recruitment, use, financing or training of mercenaries for that purpose.

3. They shall make the offences set forth in the present Convention punishable by appropriate penalties which take into account the grave nature of those offences.

Article 6

States Parties shall co-operate in the prevention of the offences set forth in the present Convention, particularly by:

(a) Taking all practicable measures to prevent preparations in their respective territories for the commission of those offences within or outside their territories, including the prohibition of illegal activities of persons, groups and organizations that encourage, instigate, organize or engage in the perpetration of such offences;

(b) Co-ordinating the taking of administrative and other measures as appropriate to prevent the commission of those offences.

Article 7

States Parties shall co-operate in taking the necessary measures for the implementation of the present Convention.

Article 8

Any State 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 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.

Article 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 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.

Article 10

1. Upon being satisfied that the circumstances so warrant, any State in whose territory the alleged offender is present shall, in accordance with its laws, take him into custody or take such other measures to ensure his presence for such time as is necessary to enable any criminal or extradition proceedings to be instituted. The State Party shall immediately make a preliminary inquiry into the facts.

2. When a State Party, persuant to this Article, has taken a person into custody or has taken such other measures referred to in paragraph 1 of this Article, it shall notify without delay either directly or through the Secretary-General of the United Nations:

(a) The State Party where the offence was committed;

(b) The State Party against which the offence has been directed or attempted;

(c) The State Party of which the natural or juridical person against whom the offence has been directed or attempted is a national;

(d) The State Party of which the alleged offender is a national or, if he is a stateless person, in whose territory he has habitual residence; and

(e) Any other interested State Party which it considers it appropriate to notify.

3. Any person regarding whom the measures referred to in paragraph 1 of this Article are being taken shall be entitled:

(a) To communicate without delay with the nearest appropriate representative of the State of which he is a national or which otherwise entitled to protect his rights or, if he is a stateless person, the State in whose residence he has his habitual residence; and

(b) To be visited by a representative of that State.

4. The provisions of paragraph 3 of this Article shall be without prejudice to the right of any State Party having claim to jurisdiction in accordance with Article 9, paragraph 1(b), to invite the International Committee of the red Cross to communicate with and visit the alleged offender.

5. The State which makes the preliminary inquiry contemplated in paragraph 1 of this Article shall promptly report its findings to the States referred to in paragraph 2 of this Article and indicate whether it intends to exercise jurisdiction.

Article 11

Any person regarding whom proceedings are being carried out in connection with any of the offences set forth in the present Convention shall be guaranteed at all stages of the proceedings fair treatment and all the rights and guarantees provided for in the law of the State in question. Applicable norms of international law should be taken into account.

Article 12

The State Party is 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.

Article 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.

2. The provisions of paragraph 1 of this Article shall not affect obligations concerning mutual judicial assistance embodied in any other treaty.

Article 14

The State Party where the alleged offender is prosecuted shall in accordance with its laws communicate the final outcome of the proceedings to the Secretary-General of the United Nations, who shall transmit the information to the other States concerned.

Article 15

1. The offences set forth in Articles 2, 3 and 4 of the present Convention shall be deemed to be included as extraditable offences in any extradition treaty existing between States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.

2. If a State which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may at its option consider the present Convention as the legal basis for extradition in respect of those offences. Extradition shall be subject to the other conditions provided by the law of the requested State.

3. States Parties which do not make extradition conditional on the existence of a treaty shall recognize those offences as extraditable offences between themselves, subject to the conditions provided by the law of the requested State.

4. The offences shall be treated, for the purpose of extradition between States Parties, as if they had been committed not only in the place in which they occurred but also in the territories of the State required to establish their jurisdiction in accordance with Article 9 of the present Convention.

Article 16

The present Convention shall be applied without prejudice to:

(a) The rules relating to the international responsibility of States; and

(b) The law of armed conflict and international humanitarian law, including the provisions relating to the status of combatant or prisoner of war

Article 17

1. Any dispute between two or more States Parties concerning the interpretation or application of the present Convention which is not settled by negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration, the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice by a request in conformity with the Statute of the Court.

2. Each State may, at the time of signature or ratification of the present Convention or accession thereto, declare that it does not consider itself bound by paragraph 1 of this Article. The other States Parties shall not be bound by paragraph 1 of this Article with respect to any State Party which has made such a reservation.

3. Any State Party which has made such a reservation in accordance with paragraph 2 of this Article may at any time withdraw that reservation by notification to the Secretary-General of the United Nations.

Article 18

1. The present Convention shall be open for signature by all States until 31 December 1990 at the United nations Headquarters in New York.

2. The present Convention shall be subject to ratification. The instruments of ratification shall be deposited with the Secretary-General of the United Nations.

3. The present Convention shall remain open for accession by any State. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 19

1. The present Convention shall enter into force on the thirtieth day following the date of deposit of the twenty-second instrument of ratification or accession with the Secretary-General of the United Nations.

2. For each State ratifying or acceding to the Convention after the deposit of the twenty-second instrument of ratification or accession, the Convention shall enter

into force of the thirtieth day after deposit by such a State of its instrument of ratification or accession.

Article 20

1. Any State may denounce the present Convention by written notification to the Secretary-General of the United Nations.

2. Denunciation shall take effect one year after the date on which the notification is received by the Secretary-General of the United Nations.

The original of the present Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations, who shall send certified copies thereof to all States.

IN WITNESS WHEREOF the undersigned, being duly authorized thereto by their respective Governments, have signed the present Convention.[1]

APPENDIX C

Republic of South Africa
Regulation of Foreign Military Assistance Act, 1998

To regulate the rendering of foreign military assistance by South African juristic persons, citizens, persons permanently resident within the republic and foreign citizens rendering such assistance from within the borders of the Republic; and to provide for matters connected within.

PREAMBLE

The Constitution of the Republic of South Africa, 1996, provides in section 198(b) that the resolve to live in peace and harmony precludes any South African citizen from participating in armed conflict, nationally or internationally, except as provided for in the Constitution or national legislation. In order to implement aspects of this provision and in the interest of promoting and protecting human rights and fundamental freedoms, universally, it is necessary to regulate the rendering of foreign military assistance by South African juristic persons, citizens, persons permanently resident in the Republic and foreign citizens who render such assistance from within the borders of the Republic.

———

Be it enacted by the Parliament of the Republic of South Africa as follows:

Definition

1. In this Act, unless the context indicates otherwise:
   - (i) "armed conflict" includes any armed conflict between:
     - (a) the armed forces of foreign states;
     - (b) the armed forces of a foreign state and dissident armed forces or other armed groups; or
     - (c) armed groups;
   - (ii) "Committee" means the National Conventional Arms Control Committee as constituted by the National Executive by the decision of 18 August 1995;
   - (iii) "foreign military assistance" means military services or military related services, or any attempt, encouragement, incitement or solicitation to render such services, in the form of:
     - (a) military assistance to a party to the armed conflict by means of:

(i) advice or training;
(ii) personal, financial, logistical, intelligence or operational support;

(iii) personnel recruitment;
(iv) medical or para-medical services; or
(v) procurement of equipment;

(b) security services for the protection of individuals involved in armed conflict or their property;
(c) any action aimed at overthrowing a government or undermining the constitutional order, sovereignty or territorial integrity of a state;
(d) any other action that has the result of furthering the military interests of a party to the armed conflict, but not humanitarian or civilian activities aimed at relieving the plight of civilians in an area of armed conflict;

(iv) "mercenary activity" means direct participation as a combatant in armed conflict for private gain;
(v) "Minister" means the minister of Defence;
(vi) "person" means a natural person who is a citizen of or is permanently resident in the republic, a juristic person registered or incorporated in the Republic, and any foreign citizen who contravenes any provision of this Act within the borders of the Republic;
(vii) "Republic" means the Republic of South Africa;
(viii) "register" means the register of authorisations and approvals maintained in terms of section 6.

Prohibition on mercenary activity

2. No person within the Republic or elsewhere recruit, use or train persons for or finance or engage in mercenary activity.

Rendering of foreign military assistance prohibited

3. No person may within the Republic or elsewhere:
(a) offer to render any foreign military assistance to any state or organ of state, group of persons or other entity or person unless he or she has been granted authorisation to offer such assistance in terms of section 4;
(b) render any foreign military assistance to any state or organ of state, group of persons or other entity or person unless such assistance is rendered in accordance with an agreement approved in terms of section 5.

Authorisation for rendering of foreign military assistance

4. Any person who wishes to obtain the authorisation referred to section 3(a) shall submit to the Committee an application for authorisation in the prescribed form and manner.

The Committee must consider any application for authorisation submitted in terms of subsection (1) and must make a recommendation to the Minister that such application be granted or refused.

The Minister, in consultation with the Committee, may refuse an application for authorisation referred to in subsection (2), or may grant the application subject to such conditions as they may determine, and may at any time withdraw or amend an authorisation so granted.

Any authorisation granted in terms of this section shall not be transferable.
The prescribed fees must be paid in respect of an application for authorisation granted in terms of subsection (3).

Approval of agreement for rendering of foreign military assistance

5. A person who wishes to obtain the approval of an agreement or arrangement for the rendering of foreign military assistance, by virtue of an authorisation referred to in section 3(b) to render the relevant military assistance, shall submit an application to the Committee in the prescribed manner and form.

The Committee must consider an application for approval submitted to in terms of subsection (1) and must make a recommendation to the Minister that the application be granted or be refused.

The Minister in consultation with the Committee, may refuse an application for approval referred to in subsection (2), or grant the application subject to such conditions as they may determine, and may at any time withdraw or amend an approval so granted.

Any approval granted in terms of this section shall not be transferable.

The prescribed fees must be paid in respect of an application for approval granted in terms of subsection (3).

Register of authorisations and approvals

6. The Committee shall maintain a register of authorisations and approvals issued by the Minister in terms of sections 4 and 5.

The Committee must each quarter submit reports to the National Executive, Parliament and the Parliamentary Committees on Defence with regard to the register

Criteria for granting or refusal of authorisations and approvals

7. An authorisation or approval in terms of sections 4 and 5 may not be granted if it would:

(a) be in conflict with the republic's obligation in terms of international law;
(b) result in an infringement of human rights and fundamental freedoms in the territory in which the foreign military assistance is to be rendered;
(c) endanger the peace by introducing destabilising military capabilities into the region where the assistance is to be, or likely to be, rendered or would otherwise contribute to regional instability and would negatively influence the balance of power in such region;
(d) support or encourage terrorism in any manner;
(e) contribute to the escalation of regional conflicts;
(f) prejudice the Republic's national or international interests;
(g) be unacceptable for any other reason.

A person whose application for an authorisation or approval in terms of section 4 or 5 has not been granted by the Minister may request the minister to furnish written reasons for his or her decision.

The Minister shall furnish the reasons referred to in subsection (2) within a reasonable timeframe.

Offences and penalties

8. Any person who contravenes any provision of section 2 or 3, or fails to comply with a condition with regard to any authorisation or approval granted in terms of section 4 or 5, shall be guilty of an offence and liable on conviction to a fine or imprisonment or to both such fine and imprisonment.

The court convicting any person of an offence under this Act may declare any armament, weapon, vehicle, uniform, equipment or other property or object in respect of which the offence was committed or which was used for, in or in connection with the commission of the offence, to be forfeited to the State.

Extraterritorial application of Act

9. Any court of law in the republic may try a person for an offence referred to in section 8 notwithstanding the fact that the act or omission to which the charge relates, was committed outside the Republic, except in the instance where a foreign citizen commits any offence in terms of section 8 wholly outside the borders of the Republic.

Regulations

The Minister, in consultation with the Committee, may make regulations relating to:

(a) any matter which is required or permitted in terms of this Act to be prescribed;
(b) the criteria to be taken into account in the consideration of an application for an authorisation or approval in terms of section 4 or 5;
(c) the maintenance of the register; and
(d) any other matter which may be necessary for the application of this Act.

Exemptions

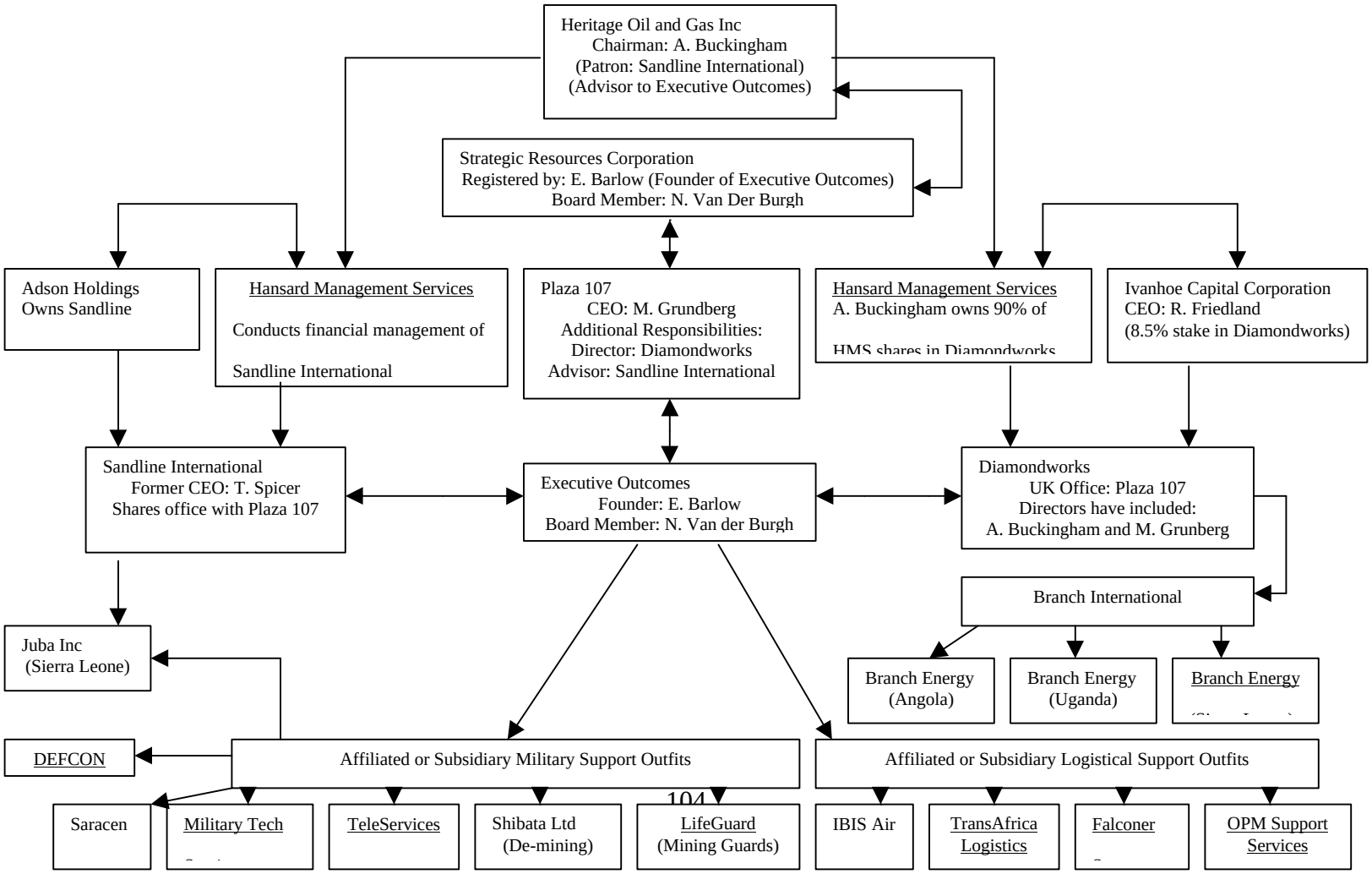
11. The Minister, in consultation with the Committee, may exempt any person from the provisions of sections 4 and 5 in respect of a particular event or situation, and subject to such conditions as he or she may determine.

Short title

12. This Act shall be called the Regulation of Foreign Military Assistance Act, 1998, and shall come into operation on a date fixed by the President by proclamation in the Gazette.

APPENDIX D

The Alleged Branch Heritage – Executive Outcomes/Sandline International Empire



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