

# GLOBAL GOVERNANCE AND NATIONAL INTERESTS: REGULATING TRANSNATIONAL SECURITY CORPORATIONS IN THE POST-COLD WAR ERA

KIM RICHARD NOSSAL\*

*[Since the end of the Cold War, we have seen transnational security corporations ('TSCs'), or private armies, involved in an increasing number of conflicts. The rise of TSCs has led to calls to control or regulate these companies. However, attempts to create a global regulatory regime for private security firms have faced numerous obstacles. First, definitional problems have plagued efforts to regulate the activities of these firms at both a national and a global level. Second, the definitional difficulties are exacerbated by the fact that so many governments have a deep and abiding interest in the continued, healthy existence of a corporatised industry devoted to outsourcing and privatising many military functions. Finally, the most important obstacle to the effective global regulation of the transnational security industry is, ironically, the same factor that prompted this industry to expand so much in the 1990s — the global market. I suggest that the privatisation of war became such a political issue over the course of the 1990s that while there may be an increased demand for the services of TSCs in the early 2000s, the demand for privatised combat services during this period will diminish. This will have follow-on effects: there will be fewer TSCs delivering combat services and thus political demands for regulation will diminish. In other words, the market may yet work its putative magic, making regulation of TSCs by national governments or international organisations unnecessary.]*

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## I INTRODUCTION

One of the most striking features of the political landscape in the post-Cold War era has been the rise of transnational security corporations ('TSCs').<sup>1</sup> Often

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\* BA, MA, PhD (Toronto); Professor and Head, Department of Political Studies, Queen's University at Kingston. Research for this article was supported by Social Sciences and Humanities Research Council of Canada grant 410-99-1498. My thanks to the anonymous referees for their very helpful comments and suggestions.

<sup>1</sup> There is no agreement on an appropriate nomenclature for these firms. While some prefer 'private military company', it is clear that some of these firms do not offer purely *military* services, but all of them are in the business of providing *security*. For this reason, others use the term 'private security company', but this tends to be used to describe the industry that

dismissed as ‘corporate mercenaries’ or ‘private armies’, these firms have become increasingly active in conflict zones as varied as Sierra Leone, Angola, the Balkans, Colombia, the Democratic Republic of the Congo, Sudan and Papua New Guinea (‘PNG’). While in some conflicts TSCs have helped their clients achieve military success, the activities of some of these corporations, particularly those which offer to supply clients with outsourced privatised combat services, have raised concerns in a number of quarters. Since the late 1990s, there have been an increasing number of calls to impose the same kind of control or regulation on TSCs that has been applied to individual mercenary soldiers.<sup>2</sup> Although those uneasy with the growing privatisation of warfare in the post-Cold War era have been inclined to reach for regulatory instruments, attempts to create a global regulatory regime for private security firms have been bedevilled by a number of obstacles. The purpose of this article is to explore the impediments to the global regulation of the transnational security industry.

First, I will show that definitional problems have plagued efforts to regulate the activities of these firms at both a national and a global level. Transnational security has proved to be an industry that is difficult to regulate precisely because it is so difficult to define.

Second, I argue that the definitional difficulties are exacerbated by the fact that many governments have a deep and abiding interest in the continued existence of a healthy corporatised industry devoted to outsourcing and privatising many military functions. Not all of the governments in whose territory TSCs are domiciled have an interest in regulating these firms, since they can often use them to advance their own foreign policy interests. Likewise, even those countries in which TSCs are deployed do not always have an interest in global regulation of these firms. In particular, continued attachment to the ideals of national sovereignty, especially in Africa, has helped to thwart efforts to

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provides purely domestic security services. My own preference is ‘transnational security corporation’, a term which stresses the broader element of security and also the cross-border operations of these firms. There is a growing literature on the phenomenon of TSCs: see, eg, David Shearer, *Private Armies and Military Intervention* (1998); David Isenberg, ‘*Soldiers of Fortune, Ltd: A Profile of Today’s Private Sector Corporate Mercenary Firms*’ (1997) Center for Defense Information, Washington DC <<http://www.cdi.org/issues/mercenaries/merc1.html>> at 20 August 2001; Kim Nossal, ‘Roland Goes Corporate: Mercenaries and Transnational Security Corporations in the Post-Cold War Era’ (1998) 1 *Civil Wars* 16; William Reno, *Warlord Politics and African States* (1998); Greg Mills and John Stremlau (eds), *The Privatisation of Security in Africa* (1999); Jakkie Cilliers and Peggy Mason (eds), *Peace, Profit or Plunder? The Privatisation of Security in War-Torn African Societies* (1999); James Davis, *Fortune’s Warriors: Private Armies and the New World Order* (2000).

<sup>2</sup> Advocates of regulation have included: Enrique Bernales Ballesteros, Special Rapporteur, UN Commission on Human Rights, *Report on the Question of the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, UN Doc E/CN.4/1996/27 (1996); Global Coalition for Africa, *Democracy, the Military and Security in Africa — Summary Report* (1999) <<http://www.gca-cma.org/eseurity.htm#1299>> at 20 August 2001; and from the London-based NGO International Alert, see Damian Lilly, *The Privatization of Security and Peacebuilding: A Framework for Action* (2000) <<http://www.internationalalert.org/pdf/pubsec/privsec.pdf>> at 20 August 2001.

regulate governments' power to decide who they can or cannot engage to help them uphold the sovereign ideals of maintaining military control and monopolising the use of force in their territory.

Finally, I conclude that the most important obstacle to the effective global regulation of the transnational security industry is, ironically, the same factor that prompted this industry to expand so much in the 1990s — the global market. Scholars like Jeffrey Herbst argue that there will be an increased demand for private security services, particularly in Africa, because the industrialised countries of the West have made a conscious and strategic decision to remain disengaged from African politics.<sup>3</sup> In Herbst's view, high market demand will ensure the continuation, if not the expansion, of the supply of such services. In that event, the problems of definition and national sovereignty will again assert themselves, making regulation unlikely.<sup>4</sup>

I do not disagree with Herbst's argument that there is a close connection between market conditions and the global regulation of the transnational security industry. However, TSCs differ considerably in the security services they provide: only a tiny minority supply the combat services that generated so much opposition, and calls for regulation, in the 1990s. I will argue that private *combat* services pose such a political problem that while the demand for the services of TSCs in general may increase, the demand for privatised combat will continue to diminish. This will have follow-on effects: there will be fewer TSCs actually delivering combat services and, without that visibility, political demands for regulation will diminish. In short, the market may yet work its putative magic, making regulation of TSCs by national governments or international organisations unnecessary.

## II THE RISE OF TSCs AND THE PUSH FOR REGULATION

The rise of TSCs in the post-Cold War era has been well documented and does not need to be rehearsed here.<sup>5</sup> However, it is important to note that although the transnational security industry has a number of common elements, the growing number of firms that offer security services on the global market are in fact highly differentiated.

It is true that all these firms have a number of common elements. All have essentially corporate structures and purposes — they are about as open about their business as other firms in the marketplace (in other words, not very); they are all guided by standard business practices and norms; and they all seek profit maximisation. Indeed, so like other businesses are TSCs that over the course of the 1990s there were a number of mergers and acquisitions in the transnational security sector. All these firms have sought to maximise their legitimacy by

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<sup>3</sup> Jeffrey Herbst, 'The Regulation of Private Security Forces' in Greg Mills and John Stremlau (eds), *The Privatisation of Security in Africa* (1999) 125.

<sup>4</sup> Ibid.

<sup>5</sup> See, eg, William Reno, above n 1; Greg Mills and John Stremlau, above n 1; Jakkie Cilliers and Peggy Mason, above n 1; James Davis, above n 1.

hiring themselves out to clients who are widely seen as ‘legitimate’: governments, international organisations, multinational corporations and non-government organisations (‘NGOs’) delivering development or humanitarian assistance. Likewise, all TSCs are in the business of providing their clients with security services broadly conceived.

Not all of them actually engage in armed hostilities on behalf of their clients. Rather, the services of most private security firms are limited to military advice and training, arms supply and procurement, security guard services, intelligence-gathering and logistics. Furthermore, their employees are forbidden to engage in hostilities. Only Executive Outcomes (‘EO’), Gurkha Security Guards and Sandline International (‘Sandline’) engage in combat operations. Table 1 lists the range of services provided, examples of firms and some of their major clients.

**Table 1: TSCs<sup>6</sup>**

<b>Services Provided</b>	<b>Firms</b>	<b>Major Clients</b>
Combat and operational support	EO; Sandline; Gurkha Security Guards	Governments
Military training and advice	Defence Systems Limited; MPRI; Vinnell	Governments
Arms procurement	EO; Sandline; Levdan	Governments
Intelligence-gathering	Control Risk Group; DynCorp; 7Pillars Partners	Governments; Multinational Corporations
‘Business to Business’ security services	Defence Systems Limited; Lifeguard; Gurkha Security Guards; AirScan	Multinational Corporations; Humanitarian Agencies
Logistical support	DynCorp; Brown and Root; International Charter Inc.	Peacekeeping Operations; Humanitarian Agencies

Most political attention to this industry was attracted by the operations of two of these firms: EO and Sandline. EO was hired by the Government of Sierra Leone to help it defeat the rebel forces of the Revolutionary United Front, and in particular to seize control of the key diamond and rutile producing areas under its control, thus restoring to the Government a crucial source of revenue. Between May 1995 and November 1996, EO forces operating in Sierra Leone

<sup>6</sup> Adapted from Shearer, above n 1, 25–6; Lilly, above n 2, 11.

achieved most of the objectives indicated in their US\$40 million contract with the Sierra Leone Government.<sup>7</sup>

Indeed, it was the success of the contract in Sierra Leone that gave Sir Julius Chan, Prime Minister of PNG, the idea of using a TSC to solve a persistent problem his Government faced on the island of Bougainville. In May 1989 a dispute closed the Panguna copper mine on the island, closing off an important source of revenue for PNG. This dispute quickly escalated into a full-scale rebellion when Francis Ona, a former land surveyor, organised a rebel force and declared independence. Efforts by the PNG Government to resolve the dispute, including operations by the PNG Defence Force, were unsuccessful, so in March 1997 Chan contracted Sandline to provide combat capability to PNG. In turn, Sandline subcontracted EO to provide the combat forces. However, when the EO troops arrived in PNG, several units of the PNG Defence Force seized the EO troops and mutinied, forcing the Prime Minister to stand down while an inquiry into the affair was conducted. The EO forces were subsequently expelled.<sup>8</sup>

Sandline was in the news again in 1998, when it was alleged that the firm had organised arms shipments to the Sierra Leone Government in violation of a mandatory arms embargo imposed by the UN Security Council.<sup>9</sup> These operations prompted an increasing number of calls for the regulation of TSCs.<sup>10</sup> Some argued that individual countries should legislate against what were often termed 'mercenary firms' or 'corporate armies'. Others suggested that regulation should occur at a global level by international convention. The UN Special Rapporteur on Mercenaries, Enrique Bernales Ballesteros, routinely called for a zero-tolerance approach to mercenaries.<sup>11</sup> His reports stressed the importance of the complete expulsion of all mercenaries from Africa, stopping the use of mercenaries by governments, the passage of national legislation to make mercenaries illegal and the signing of the *International Convention Against the Recruitment, Use, Financing and Training of Mercenaries 1989* ('1989 Convention').<sup>12</sup> Even Sandline called for the regulation of the industry.<sup>13</sup>

In Britain, the Sandline arms scandal prompted renewed debate regarding TSCs. On 9 February 1999 the Foreign Affairs Select Committee of Parliament issued a report on Sandline and the Sierra Leone arms deal. The Committee

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<sup>7</sup> On EO in Sierra Leone, see Ian Douglas, 'Fighting for Diamonds: Private Military Companies in Sierra Leone' in Jakkie Cilliers and Peggy Mason (eds), *Peace, Profit or Plunder? The Privatisation of Security in War-Torn African Societies* (1999); David Shearer, 'Dial an Army' (1997) 53 *The World Today* 203.

<sup>8</sup> Keith Suter, 'Mercenaries, Mines and Mistakes' (1997) 53 *The World Today* 278, 278. For a detailed account of Sandline's activities in PNG, see Sean Dorney, *The Sandline Affair: Politics and Mercenaries and the Bougainville Crisis* (1998).

<sup>9</sup> Douglas, above n 7, 189–95.

<sup>10</sup> See, eg, Kevin O'Brien, 'Military-Advisory Groups and African Security: Privatised Peacekeeping?' (1998) 5(3) *International Peacekeeping* 78, 97.

<sup>11</sup> See, eg, Bernales Ballesteros, above n 2, [88]–[100].

<sup>12</sup> GA Res 34, 44 UN GAOR (72<sup>nd</sup> plen mtg), UN Doc A/Res/44/34 (1989) (not yet in force).

<sup>13</sup> Sandline International, *Private Military Companies — Independent or Regulated?* (1998) <<http://www.sandline.com/white/regulation.doc>> at 4 September 2001.

pressed the Labour Government of Tony Blair to take a firmer stand on private military companies, both nationally and internationally:

(29) We recommend that the Government reconsider seeking to amend the existing UN Convention against the Recruitment, Use, Financing and Training of Mercenaries but, if this cannot be achieved, that the Government take the lead in initiatives in the European Union, Council of Europe or the United Nations aimed at drawing up a new international legal instrument on the activities of mercenaries.

(30) We recommend that the Government take the lead in initiatives in Europe and/or the United Nations aimed at drawing up an international legal instrument on trafficking or brokering in arms subject to embargo.

(31) We recommend (a) in the case of mercenary activities, the publication, within 18 months, of a Green Paper outlining legislative options for the control of private military companies which operate out of the United Kingdom, its dependencies and the British Islands, and (b) in the case of arms trafficking and brokering, that the legislation to control these activities be introduced no later than in the next parliamentary session.<sup>14</sup>

The Blair Government was sufficiently embarrassed by the Committee's report that it promised to issue a green paper on TSCs.

### III THE DIFFICULTIES OF NATIONAL REGULATORY LEGISLATION

Common to these calls for regulation of the industry was the idea that the regulations governing individual mercenary soldiers could be applied to TSCs. Indeed, several countries have enacted legislation that seeks to regulate or ban mercenary activity. However, as the following brief survey of the national approaches of Britain, Australia, South Africa, and the United States demonstrates, there are considerable difficulties in using national legislation to regulate the phenomenon of privatised warfare conducted by TSCs.

#### A United Kingdom

In Britain, the only relevant legislation is the *Foreign Enlistment Act 1870* (UK) 33 & 34 Vict, c 90 ('*FEA*'). This law does not offer an explicit definition of the term mercenary, but rather seeks to define the offence. Under s 4 of the *FEA*, it is an offence for any British subject within Her Majesty's dominions to accept, or agree to accept, without Her Majesty's licence, any commission or engagement in the military or naval service of any foreign state at war with any friendly state (that is, a foreign state which is at peace with Her Majesty). The *FEA* thus permits any military service abroad that is sanctioned by the British

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<sup>14</sup> Select Committee on Foreign Affairs, House of Commons, United Kingdom, 'Summary of Conclusions and Recommendations' in *Second Report: Sierra Leone*, 9 February 1999, [29]–[31] <<http://www.parliament.the-stationery-office.co.uk/pa/cm199899/cmselect/cm/aff/116/11602.htm>> at 19 September 2001. It should be noted that the Committee's hesitation towards the *1989 Convention* can be explained by the fact that the Convention, as written, was unacceptable to the British Government because it criminalised Gurkhas.

Government. It also by implication permits military service without permission in any force fighting a state at war with Britain.

There has never been a prosecution under the *FEA*. A judicial enquiry, established by the British Government after the execution of three Britons by the Government of Angola in July 1976 for mercenary activity, argued that any attempt to impose a blanket ban on British nationals working abroad as mercenaries would be an unjustified infringement on their freedom.<sup>15</sup> A more appropriate way to regulate this activity would be to ban working as a mercenary in specified countries for foreign policy reasons. To date, however, the *FEA* remains unamended.<sup>16</sup> Moreover, the Blair Government encountered considerable difficulties in formulating policy options for its green paper on mercenary activity. Although it had been promised for November 2000, by September 2001, the green paper had still not been issued, the Government arguing that the delay arose from the complex problems of defining mercenary activity beyond the *FEA*.<sup>17</sup>

### B *Australia*

Under Australian law, it is legal for an Australian to recruit mercenaries abroad, but ss 8–9 of the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth) (*CFIRA*) make it illegal to undertake recruitment in Australia itself. Under s 9(2) it is an offence for any Australian resident to assist in the recruitment or preparation of a mercenary force to serve with a foreign army in a combat or organisational capacity without specific approval by the relevant Minister. Moreover, the Australian Government has indicated its willingness to use the bar against domestic recruitment for mercenary activities. For instance, in 1987 a former Australian soldier was charged under the *CFIRA* for attempting to recruit former colleagues to train West Papuan resistance fighters in Irian Jaya to fight Indonesian troops.<sup>18</sup>

### C *South Africa*

Throughout the apartheid era, the only illegal mercenary activities were acting as a mercenary while a member of the South African military and trying to recruit serving South African Defence Force (*SADF*) members for mercenary

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<sup>15</sup> United Kingdom, *Report of the Committee of Privy Counsellors Appointed to Inquire into the Recruitment of Mercenaries* (Cmnd 6569, 1976).

<sup>16</sup> Yves Sandoz, 'Private Security and International Law' in Jakkie Cilliers and Peggy Mason (eds), *Peace, Profit or Plunder? The Privatisation of Security in War-Torn African Societies* (1999) 217.

<sup>17</sup> See, eg, the exchange in the United Kingdom, *Parliamentary Debates*, House of Lords, 29 January 2001, column 448 (Baroness Ramsey of Cartvale) <[http://www.parliament.the-stationery-office.co.uk/pa/ld200001/ldhansrd/vo010129/text/10129-01.htm#10129-01\\_spnew10](http://www.parliament.the-stationery-office.co.uk/pa/ld200001/ldhansrd/vo010129/text/10129-01.htm#10129-01_spnew10)> at 5 September 2001.

<sup>18</sup> Peter Cronau, 'Another Facet of the PNG Debacle', *Canberra Times* (Canberra, Australia), 14 April 1997, 9.

activity.<sup>19</sup> However, because of the close connection between the white minority Government and mercenary activity in South Africa, the post-apartheid Government of Nelson Mandela was prompted to try to deal with the issue of South African-based mercenary activity and South African-based TSCs like EO, which had deep links to the apartheid regime.<sup>20</sup> Thus, although the introduction of the Regulation of Foreign Military Assistance Bill 1997 (South Africa) by the African National Congress Government on 19 August 1997 had deeper roots, its introduction was immediately linked to the embarrassment that the South African Government suffered as a consequence of the aborted Sandline contract with PNG earlier that year. However, the drafters of the Bill had difficulty with definitions. For nearly nine months legislators grappled with the problem of trying to define ‘mercenary activity’, and putting manageable and enforceable limits on the external operations of TSCs and in particular EO.

The *Regulation of Foreign Military Assistance Act 1998* (South Africa), was finally passed on 14 May 1998.<sup>21</sup> It had two broad purposes. First, under s 2 it sought to prohibit ‘mercenary activity’ — defined by s 1(iv) of the Act as ‘direct participation as a combatant in armed conflict for private gain’ — and the training, recruitment, or use of mercenaries. The second purpose was a sweeping attempt to regulate the offering of military assistance abroad. Under s 3 of the Act, a South African intending to offer military assistance of *any* sort had to have the approval of the National Conventional Arms Control Committee. Moreover, the definition of military assistance under s 1(iii) was sweeping. It included not only the standard forms of assistance — advisory, training, personnel, logistics, finance, operations, recruitment, and procurement of equipment — but also medical assistance and, using a nicely elastic clause, ‘any other action that has the result of furthering the military interests of a party to the armed conflict’.

#### D *United States*

Under US law, being a mercenary is not generally illegal. However, the *Neutrality Act 1937*<sup>22</sup> makes it illegal to recruit mercenaries on American soil if, in relation to the particular conflict for which mercenaries are being recruited, the President has issued a proclamation that a state of war exists between or

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<sup>19</sup> Christo Botha, ‘Soldiers of Fortune or Whores of War? The Legal Position of Mercenaries with Specific Reference to South Africa’ (1993) 15 *Strategic Review for Southern Africa* 75.

<sup>20</sup> EO was founded by Eeben Barlow who had been second-in-command of the reconnaissance unit of SADF’s 32<sup>nd</sup> Battalion which had seen heavy service in the Angolan civil war in the 1980s. Barlow had been a member of the *Burgerlike Samewekingsburo* (the Civilian Cooperation Bureau) which was responsible for destabilisation within South Africa during the final years of the apartheid regime. Generally EO would only hire veterans of the SADF or the South African Police Service — thus ensuring a common standard of training — and most of the soldiers deployed in the field in the 1990s were SADF veterans: see generally, Herbert Howe, ‘Private Security Forces and African Stability: The Case of Executive Outcomes’ (1998) 36 *Journal of Modern African Studies* 307, 310–11.

<sup>21</sup> South Africa, *Parliamentary Debates*, National Assembly, 2<sup>nd</sup> sess, 4–8 May 1998, 1712.

<sup>22</sup> 22 USC §§ 441–57 (2000).

within the state or states involved.<sup>23</sup> However, the legal regime established by the US to cover foreign military assistance is arguably the tightest regulatory regime for the control of TSCs. United States law is not concerned with trying to define mercenaries or mercenary activity. Rather, the focus of the US regulatory regime is on the transfer of knowledge, services and goods. The key piece of legislation is the *International Traffic in Arms Regulations* ('ITAR').<sup>24</sup> This legislation requires that anyone in the US 'manufacturing or exporting defense articles or furnishing defense services' is required to be registered by the Department of State's Office of Defense Trade Controls ('ODTC').<sup>25</sup> Defence services include

the furnishing of assistance (including training) to foreign persons, whether in the United States or abroad in the design, development, engineering, manufacture, production, assembly, testing, repair, maintenance, modification, operation, demilitarization, destruction, processing or use of defense articles.<sup>26</sup>

Moreover, virtually all contracts for defence services in excess of US\$50 million are subject to approval by the ODTC.<sup>27</sup> This regulatory regime allows the US Government to use TSCs domiciled in the US to support its foreign policy objectives (as in Angola, Colombia, or Bosnia).

These brief descriptions of national approaches to regulating mercenary activity demonstrate the difficulty of drafting legislation that defines mercenary activity in such a way as to catch only those TSCs which are engaging in activities not approved by national governments, while leaving other firms whose operations are either tacitly or explicitly approved of alone.

However, even if national legislation is written in a way that captures that important distinction as, for example, the US regulatory regime does, there is a further problem posed by the inherent mobility of TSCs. For it is clear that a TSC facing an unfriendly or tightly regulated regime in one national jurisdiction can simply move its operations to another, more friendly country. TSCs are by their very nature highly mobile: their revenues are derived from personnel operating in conflict zones. None of the TSCs which provide combat support services maintains a standing military force — when personnel are needed, they are recruited on a contract basis as required. Moreover, TSCs need few fixed assets. What equipment they might need is readily leased from a variety of suppliers located in jurisdictions where there is no bar against providing military services to such firms. Well might one American official have said that many

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<sup>23</sup> *Neutrality Act 1937*, 22 USC §§ 441, 448 (2000).

<sup>24</sup> 22 CFR §§ 120–30 (2001).

<sup>25</sup> *ITAR*, 22 CFR § 122.1 (2001).

<sup>26</sup> *ITAR*, 22 CFR § 120.9 (2001).

<sup>27</sup> *ITAR*, 22 CFR § 124.11 (2001).

TSCs ‘basically consisted of a retired military guy sitting in a spare bedroom with a fax machine and a Rolodex.’<sup>28</sup>

It is true that a state can readily make it illegal for its citizens to provide certain kinds of military services offshore, but the only way to do this is to make its legislation extraterritorial in application, as South Africa did. But given the high resistance to extraterritorial legislation in a system still dominated by the ideals of national sovereignty, there are serious difficulties in actually enforcing extraterritorial legislation.

#### IV THE DIFFICULTIES OF INTERNATIONAL REGULATION

The difficulties of regulating the activities of TSCs through national legislation has, not surprisingly, led to the view that this activity could be more effectively regulated by international agreement than by a patchwork of national legislation that leaves too many jurisdictions where TSCs can operate without regulation. However, efforts to regulate these firms through international agreements have fared little better.

The main attempts by governments to subject mercenary activity to the discipline of global governance occurred during the Cold War. These attempts were inspired by the sporadic involvement of Europeans — so-called ‘vagabond’ mercenaries to use Anthony Mockler’s characterisation<sup>29</sup> — who hired themselves out to take part in a variety of African conflicts, particularly civil wars, wars of national liberation, the struggle against apartheid and the occasional coup d’état. The initiative for regulation was taken by a number of African governments, both through the Organization of African Unity (‘OAU’) and the UN.

Initially, governments sought to eliminate mercenary activity by using a roundabout method: rather than an outright ban on mercenary activity, governments embraced the notion that such activity could be eliminated if one created a humanitarian legal environment that was so antithetical to mercenaries that these individuals would be deterred from engaging in mercenary activity. The key element of this approach was to amend international law to deprive mercenaries of the normal protections and rights accorded to combatants and prisoners of war that they had up to that point enjoyed under the *Geneva Conventions* of 1949<sup>30</sup> (and the early *Hague Regulations* of 1907<sup>31</sup>). Instead,

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<sup>28</sup> Quoted in Herbst, above n 3, 117.

<sup>29</sup> Anthony Mockler, *The New Mercenaries* (1985) 9.

<sup>30</sup> *Geneva Convention for the Amelioration of the Condition of the Wounded and the Sick in Armed Forces in the Field*, opened for signature 12 August 1949, 75 UNTS 31; *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, opened for signature 12 August 1949, 75 UNTS 85; *Geneva Convention Relative to the Treatment of Prisoners at War*, opened for signature 12 August 1949, 75 UNTS 135; *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 287 (all of these conventions entered into force on 21 October 1950).

under article 47 of the first *Protocol Additional to the Geneva Conventions*<sup>32</sup> ('*Additional Protocol I*') agreed to in 1977, mercenaries were denied the right to be treated as combatants or prisoners of war.<sup>33</sup> If caught, national authorities could, if they wished, treat mercenaries as criminals or spies rather than as prisoners of war, and were allowed to subject them to the punishments normally meted out to criminals and spies in that jurisdiction, including capital punishment. National authorities were only limited by the requirements of the second *Protocol Additional to the Geneva Conventions*<sup>34</sup> ('*Additional Protocol II*') that guaranteed that all 'captured persons' should be treated humanely, and that the death penalty should not be levied on any captured person who was under the age of 18 when the offence occurred.<sup>35</sup>

The desire to deny mercenaries the protection afforded to regular combatants was by no means coincidental. The rise of mercenary activity in Africa in the mid-1970s occurred at the same time as a round of international negotiations in Geneva between 1974–77 aimed at updating the *Geneva Conventions* on the laws of international armed conflict to take into account the spread of guerrilla warfare. Moreover, in July 1976 the Government of Angola had executed by firing squad an American and three Britons who had been caught fighting as mercenaries for the *Frente Nacional de Libertação de Angola*, demonstrating clearly to the negotiators in Geneva what the consequences of adopting article 47 could be.

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<sup>31</sup> *Convention for the Pacific Settlement of International Disputes*, opened for signature 18 October 1907, 205 ConTS 233; *Convention Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts*, opened for signature 18 October 1907, 205 ConTS 250; *Convention Relative to the Opening of Hostilities*, opened for signature 18 October 1907, 205 ConTS 263; *Convention Respecting the Laws and Customs of War on Land*, opened for signature 18 October 1907, 205 ConTS 277; *Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land*, opened for signature 18 October 1907, 205 ConTS 299; *Convention Relating to the Status of Enemy Merchant Ships at the Outbreak of Hostilities*, opened for signature 18 October 1907, 205 ConTS 305; *Convention Relating to the Conversion of Merchant Ships into War-Ships*, opened for signature 18 October 1907, 205 ConTS 319; *Convention Relating to the Laying of Automatic Submarine Contact Mines*, opened for signature 18 October 1907, 205 ConTS 331; *Convention Concerning Bombardment by Naval Forces in Time of War*, opened for signature 18 October 1907, 205 ConTS 345; *Convention to the Adaptation to Maritime War of the Principles of the Geneva Convention*, opened for signature 18 October 1907, 205 ConTS 359; *Convention Relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War*, opened for signature 18 October 1907, 205 ConTS 367; *Convention Concerning the Rights and Duties of Neutral Powers in Naval War*, opened for signature 18 October 1907, 205 ConTS 395 (all of these conventions entered into force on 26 January 1910).

<sup>32</sup> *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict*, opened for signature 12 December 1977, 1125 UNTS 3 (entered into force 7 December 1978).

<sup>33</sup> *Ibid* art 47(1).

<sup>34</sup> *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflict*, opened for signature 12 December 1977, 1125 UNTS 609 (entered into force 7 December 1978).

<sup>35</sup> *Ibid* art 6(4); see also, Sandoz, above n 16, 208–9.

While there was widespread agreement at Geneva that the kind of vagabond mercenaries who had made their appearance in the Democratic Republic of the Congo in the early 1960s, in Nigeria in the late 1960s and in Angola in the mid-1970s should be eliminated, there was concern that the strictures placed on mercenaries should not be used to limit the rights, or jeopardise the safety, of bona fide combatants. As a result, the *Additional Protocol I* features a complex definition of a mercenary. The definition is a cumulative one, featuring six criteria that must all be met before the person in question can be considered a mercenary, and thus be justifiably stripped of the legal rights afforded to all other combatants:

A mercenary is any person who:

- (a) Is specially recruited locally or abroad in order to fight in an armed conflict;
- (b) Does, in fact, take a direct part in the hostilities;
- (c) Is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
- (d) Is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
- (e) Is not a member of the armed forces of a party to the conflict; and
- (f) Has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.<sup>36</sup>

However, using humanitarian law to try to eliminate mercenary activity was deeply flawed for two reasons. First, as legal scholars like F J Hampson and Dino Kritsiotis have pointed out,<sup>37</sup> humanitarian law is an inappropriate mechanism though which to deal with mercenary activity. International humanitarian law is designed to lay out rights and obligations for those engaged in or affected by warfare, not to deal with *why* people are fighting. Its purpose is simply to *expand* the number of humans and the scope of military activity covered by its precepts.

Second, and more importantly, the definition was written to target a very small group of Europeans who had involved themselves in African conflicts in the 1960s and 1970s. These rules were *not* intended to apply to all other armed forces. As a result, the definition created large loopholes that allowed anyone who chose to organise themselves even slightly differently from the likes of ‘vagabond mercenaries’, such as ‘Mad Mike’ Hoare, ‘Colonel Callan’ and Bob Denard, to engage freely in mercenary activity.<sup>38</sup> For example, any government

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<sup>36</sup> *Additional Protocol I*, above n 32, art 47(2).

<sup>37</sup> F J Hampson, ‘Mercenaries: Diagnosis before Proscription’ (1991) 22 *Netherlands Yearbook of International Law* 3, 15–16; Dino Kritsiotis, ‘The Privatization of International Affairs: Mercenaries and the Privatization of Warfare’ (1998) 22 *Fletcher Forum of World Affairs* 11, 14–15.

<sup>38</sup> See generally Mockler, above n 29.

wishing to hire foreigners to fight on its behalf merely had to give these soldiers citizenship or incorporate them into their national armed forces — an exemption written into the *Additional Protocol I* at the insistence of both the UK, who routinely used Gurkhas from Nepal in its armed forces, and France, whose Foreign Legion was composed of foreigners.

A related effort at international regulation was the *Organization of African Unity Convention for the Elimination of Mercenarism in Africa*<sup>39</sup> ('*OAU Convention*'). This agreement is the only international legal instrument that criminalises mercenary activity.<sup>40</sup> However, it is important to recognise that this convention was written explicitly with the interests of the signatories in mind: it seeks to uphold national sovereignty and advance the struggle for liberation against white minority regimes. Thus the *OAU Convention* bars the use of private force against existing states. It also bars the use of mercenaries 'against ... the people of Africa in their struggle for liberation'.<sup>41</sup> However, the *OAU Convention* used the same definition of a mercenary embraced at Geneva, thus limiting the applicability of the agreement, particularly in the case of TSCs.

Some of the contradictions of *Additional Protocol I* attempt to use humanitarian law to deter mercenary activity were addressed by the *1989 Convention*. In December 1980 the General Assembly had established an ad hoc committee to draft a convention that would outlaw the use of mercenaries, and in December 1989 the General Assembly voted to accept the committee's draft.

The *1989 Convention* seeks to eradicate mercenaries not by deterring mercenary activity through subjecting mercenaries to a less comprehensive humanitarian regime, but rather by making their *use* illegal. Article 2 makes it an offence to recruit, use, finance or train mercenaries. Article 5 binds signatories not to recruit, use, finance or train mercenaries, and to prohibit mercenary activity on their soil. Article 9 obligates signatories to punish violations.

However, if the *1989 Convention* more clearly addressed a key source of mercenary activity — reducing the 'demand' side by making the use of mercenary services illegal — it has its own contradictions. First, the *1989 Convention* uses the definition contained in *Additional Protocol I* as its model for defining a mercenary, and thus fails to avoid the loopholes of that formulation. Given that virtually all TSCs operating in the global marketplace make a point of hiring themselves out only to legitimate actors — governments, international organisations, NGOs, and multinational corporations — it makes it unlikely that any of these firms would even come close to meeting the demanding cumulative definition in *Additional Protocol I*.

Second, by seeking to make the use of mercenary services illegal, the *1989 Convention* could not get around the fact that there were some governments — not to mention international organisations, multinational corporations, and NGOs

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<sup>39</sup> *Organization of African Unity Convention for the Elimination of Mercenarism in Africa*, opened for signature 3 July 1977, 1490 UNTS 89 (entered into force 22 April 1985).

<sup>40</sup> Lilly, above n 2, 27.

<sup>41</sup> Quoted in Herbst, above n 3, 115.

— which had very good reason for wanting to engage the services of TSCs. Likewise, there were some governments with good reason for wanting to be able to supply other governments with the kind of indirect security services that could best be provided by the private sector. Consequently, as Table 2 demonstrates, there has been no great rush to ratify the *1989 Convention*. Moreover, it should be noted that at least three of the signatories — the governments of Angola, Yugoslavia, and the Democratic Republic of the Congo — have engaged or used mercenaries or TSCs.<sup>42</sup>

**Table 2: Status of the 1989 Convention<sup>43</sup>**

Ratified		Signed but not ratified
Azerbaijan	Saudi Arabia	Angola
Barbados	Senegal	Republic of the Congo
Belarus	Seychelles	Democratic Republic of the Congo
Cameroon	Suriname	Germany
Cyprus	Togo	Morocco
Georgia	Turkmenistan	Nigeria
Italy	Ukraine	Poland
Maldives	Uruguay	Romania
Mauritania	Uzbekistan	Yugoslavia
Qatar		

## V MARKET CONDITIONS AND DEMAND FOR REGULATION

The discussion above demonstrates that the existing legal controls for TSCs continue to be highly permissive. National legislation is patchy and structured in such a way as to ensure that the interests of the state in which the TSC is domiciled are maximised. International regulation is limited and structured to sustain the principles of state sovereignty. Moreover, it is clear that there is little willingness to tighten the legal regime. Governments have been slow to embrace the *1989 Convention*, and there seem to be few willing to consider negotiating a new agreement to cover TSCs. In addition, those governments which have been inclined to tighten their national legal regimes have discovered the difficulty of trying to define the activity they want to control or eliminate.

I argue that an additional factor will inhibit the regulation of the transnational security sector. The attractiveness of legal regulation depends heavily on one's view of the future. On the one hand, there are those who argue that the need for regulation springs from the likelihood that TSCs are now very much part of the political landscape. As the British investigation into the Sierra Leone arms affair

<sup>42</sup> See generally, David Shearer, 'Outsourcing War' (1998) 112 *Foreign Policy* 77.

<sup>43</sup> As at 26 September 2001. The *1989 Convention* needs 22 ratifications to come into force.

put it, '[t]hese companies are on the scene and look likely to stay on it'.<sup>44</sup> On the other hand, there are those like Herbert Howe who was predicting as early as 1998 that private military companies like EO 'face an uncertain future'.<sup>45</sup>

How can it be decided which of these two views about the future of private military companies is the most appropriate? One way is to look at the market factors that gave rise to the TSCs in the early 1990s and assess whether those factors will still be present in the short term. For it can be argued that the rise of TSCs was the result of very specific demand and supply factors. On the demand side, we can identify at least two factors. First, after the end of the Cold War there was an increase in the number and intensity of local conflicts, for instance in Yugoslavia, the former Soviet Union and a number of countries in Africa. Second, and as importantly, these conflicts generated increased demand for security services from governments, intergovernmental organisations, humanitarian NGOs delivering services and corporations operating in conflict zones.

On the supply side, there were at least four factors at work. First, as the Cold War came to an end, most armed forces were downsized, releasing large numbers of soldiers with combat skills onto the 'market'. Second, the end of the Cold War resulted in a release of weaponry from the former Soviet Union onto the international market. Some weapons and equipment reputedly made their way onto the international market through the black market, sold by the commanders under whose control they lay. Some equipment, however, was legitimately made available for rental purposes, providing those TSCs who had the ability to pay with sophisticated global airlift and air dominance. Third, was the emergence of a permissive global environment, particularly in Africa. Both the former Soviet Union and the US demonstrated a declining interest in a variety of conflict zones once the Cold War was over. This had the effect of loosening the disciplines that the Soviet-US rivalry had imposed on local conflicts around the world, allowing other actors a deeper involvement than might have been the case during the Cold War. Finally, the rise of TSCs in the 1990s was occurring in the context of the world-wide embrace of a neo-liberal ideology that considered privatisation, 'market solutions' and outsourcing to be normatively good.

Are these demand and supply factors still present? It can be argued that on the demand side there is no end in sight to civil, or intrastate, conflict. Many of the civil wars of the 1990s, in Afghanistan, Chechnya, the Democratic Republic of the Congo, Rwanda, Sierra Leone, Indonesia and Yugoslavia, for example, are not over and other conflicts lie on the horizon. Given this, it is safe to conclude that there will continue to be a demand for security services by humanitarian NGOs, businesses, and, most importantly, governments that recognise that TSCs can provide a relatively cheap force multiplier in certain conflict situations.

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<sup>44</sup> *Report of the Sierra Leone Arms Investigation*, UK Government, July 1998, [11.9] <<http://files.fco.gov.uk/slreport/report.pdf>> at 14 September 2001.

<sup>45</sup> Howe, above n 20, 330.

The supply side, however, has changed somewhat. While at least two ‘supply’ factors remain relatively unchanged — the permissive global environment that resulted from the end of Soviet–US rivalry with the collapse of the Soviet Union, and the availability of Russian equipment to those who are able to pay in US dollars — the other two factors have changed. First, the era of rapid and widespread military downsizing has long passed. In most countries, the ‘peace dividend’ has been realised, with the result that the flow of retired soldiers has slowed compared with the early 1990s.

Second, it can be argued that the enthusiasm for privatisation and ‘market solutions’ has dimmed somewhat as people in many jurisdictions are confronted with some of the more negative consequences of the implementation of neo-liberal ideas. Indeed, it can be argued that when privatisation and outsourcing actually occurred in one of the central functions of the state — fighting wars — there was a distinct lack of enthusiasm. Over the course of the 1990s, it is clear that those firms providing privatised combat services never managed to overcome the problems of legitimacy. Despite the best efforts of firms like EO to pitch their operations in conflicts like Sierra Leone in positive terms such as ‘privatised peacekeeping’ (as the now defunct EO website used to characterise them), those TSCs offering ‘sharp-end’ services were widely criticised. By contrast, TSCs that limited themselves to providing services other than combat were seen as more legitimate. Their operations were rarely the subject of media scrutiny or public criticism. This is ironic since, arguably, firms providing logistics, training and arms invariably have a more pronounced effect on local wars than firms providing combat services.

Much of the reason for this differential treatment is that TSCs offering combat services had difficulty shaking the ‘mercenary’ label. By any objective measure, none of the firms which engaged in direct combat services would qualify as ‘mercenaries’, under either present international law or most national legislation. However, public perception does not make the kinds of fine distinctions that, for example, the South African legislation makes between ‘mercenary activity’ and the provision of ‘foreign military assistance’. Instead, the ideology of nationalism persists in common perceptions and definitions of what is legitimate and illegitimate. Nationalism legitimises putting oneself in harm’s way in defence of the nation; putting oneself in harm’s way for someone else’s nation for nothing more than money is deemed illegitimate.<sup>46</sup> In the context of TSCs, this has meant that *training* someone else’s armed forces for money or *supplying* them with logistics or arms for profit are deemed legitimate activities, but *fighting* someone else’s wars for money is seen as illegitimate.

While it is possible to argue, as Christopher Spearin has,<sup>47</sup> that EO’s operations in Sierra Leone had a few positive effects, it is also evident that too

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<sup>46</sup> See, eg, Mockler, above n 29, 6.

<sup>47</sup> Christopher Spearin, ‘Executive Outcomes in Sierra Leone: Promoting Human Security in an Insecure State?’ (Paper presented at the Canadian Political Science Association conference, Québec City, 28 May 2001).

many people were simply too uncomfortable with the emergence of privatised armies. Governments might have difficulty writing legislative definitions, but ordinary people tend to take the view that they know a mercenary when they see one (much to the chagrin of EO officials, who were rankled by being called mercenaries).<sup>48</sup> Instead, ordinary people tend to be more inclined to the simple (and simplistic) view of the UN Special Rapporteur on Mercenaries that '[m]ercenary activity is paid. Hired mercenaries attack and kill for financial gain, in a country or conflict which is alien to their own nationality'.<sup>49</sup> They are more inclined to the view of David Francis, who describes the argument that these firms should be called private military companies as a 'play on semantics': 'Replacing the "mercenary" stereotype with the term "military company" is more like clothing an illegitimate activity with a cloak of legitimacy'.<sup>50</sup>

## VI CONCLUSION

We are thus left with a paradoxical conclusion. On the one hand, it is likely that demand for the kinds of services that TSCs offer will remain high in the foreseeable future. The number of conflict situations is unlikely to diminish and, by the same token, the number of multinational corporations, NGOs and intergovernmental organisations operating in conflict zones is unlikely to decrease. These firms and organisations will continue to need security to operate in conflict zones, but effective security is unlikely to be provided by states that have been weakened by conflict.

On the other hand, it is equally likely that the supply of TSCs providing sharp-end services will decline. But this will not occur as a consequence of increased regulation either at the national or the global level. Rather, the market will have a determining impact. The simple fact is that TSCs which opt to provide combat services will continue to face intense opposition, hostility and scrutiny. Moreover, this scrutiny may on occasion attract national regulation, as was the case with the regulation that EO brought about in South Africa as a consequence of the PNG imbroglio. For these firms, the environment will become more problematic, securing contracts will become more difficult and, without a steady supply of contract work, it is more likely that the personnel with combat skills who form the backbone of TSCs offering sharp-end services will drift off into other employment. By contrast, those TSCs which stay out of the sharp end of the market will likely do well and, because of the relationship these firms enjoy with their 'home' governments, are unlikely to be regulated.

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<sup>48</sup> Nick van der Burgh, then Chief Executive Officer of EO, once said, '[w]e don't view ourselves as mercenaries. Mercenaries are the type of guys like Bob Denard and these guys, who have overthrown legal governments. We don't do that': Australian Broadcasting Corporation, Background Briefing, *The Diamond Mercenaries of Africa*, Transcript of Radio Broadcast, 4 August 1996 <<http://www.abc.net.au/rn/talks/bbing/stories/s10759.htm>> at 14 September 2001.

<sup>49</sup> Bernales Ballesteros, above n 2, [20].

<sup>50</sup> David Francis, 'Mercenary Intervention in Sierra Leone: Providing National Security or International Exploitation?' (1999) 20 *Third World Quarterly* 319, 324.

