Domesticating International Corporate Responsibility: Holding Private Military Firms Accountable Under the Alien Tort Claims Act

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The spread of sporadic small-scale war will cause regular armed forces themselves to change form, shrink in size, and wither away. As they do, much of the day-to-day burden of defending society against the threat of low-intensity conflict will be transferred to the booming security business; and indeed the time may come when the organizations that comprise that business will, like the condottieri of old, take over the state.[1]

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1. MARTIN VAN CREVELD, THE TRANSFORMATION OF WAR 207 (The Free Press 1991).

> *Executive Outcomes is the small wave of the future in terms of defence and security, because the international community has abdicated that role.*[2]

I. INTRODUCTION

In 1993, Arthur Walker and Carl Alberts, two of the most highly decorated pilots in the South African Air Force, joined the ranks of Executive Outcomes (EO), a private military firm.[3] Lured by a $6000 a month salary, these pilots were two of many arriving in Sierra Leone to support the Valentine Strasser regime, a government recently born from a *coup d'état*.[4] After signing a contract with the Sierra Leone government, EO moved in with its various supplies: two M117s and an M124 Hind (Russian helicopter gunships), two Boeing 727 supply and troop transports, an Andover casualty-evacuation aircraft, and fuel-air explosives (bombs that remove oxygen from the air upon detonation).[5] Immediately, EO began training an elite corps of Sierra Leoneans in the art of war and assisting in putting down the rebellion.[6] Arthur Walker and Carl Alberts, ordered to fly air strikes over the bush in order to drive out the rebels, tell the following story.[7] Unable to distinguish between civilians and rebels, the two pilots radioed back to their commander, asking for guidance.[8] The commander's response: "kill everybody"; the pilots readily complied.[9]

Arising out of the dying embers of the Cold War, private military firms (PMFs)[10] market their military force and skills primarily to decolonialized States, countries overrun with domestic conflict and unable to provide effectively for their own security needs.[11] As a result,

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2. Jeremy Harding, *The Mercenary Business: 'Executive Outcomes'*, 24 REV. OF AFR. POL. ECON. 87, 87 (1997) (quoting Eben Barlow, general manager of Executive Outcomes).

3. *See* Elizabeth Rubin, *An Army of One's Own*, HARPER'S, Feb. 1997, at 47.

4. *See id.* at 46-47.

5. *Id.* at 47. The Sierra Leone "government" further supplied three personnel carriers fitted with 30mm cannons, six Land Rovers equipped with antiaircraft guns, ammunition, artillery, and rifles. *Id.*

6. *Id.*

7. *See id.* at 47-48.

8. *Id.* at 48.

9. *Id.*

10. For a general discussion of the term "private military firms," see P.W. Singer, *Corporate Warriors: The Rise of the Privatized Military Industry and Its Ramifications for International Security*, 26 INT'L SEC. 186 (Winter 2001/02). Singer describes PMFs as corporate bodies specializing in the provision of military skills ranging from tactical combat and intelligence gathering to military training and technical assistance. *Id.* at 186. These military firms comprise an emerging industry offering a host of services. *See id.* at 186-87.

11. *See id.* at 194-95; Robert Mandel, *The Privatization of Security*, 28 ARMED FORCES & SOC'Y 129, 131 (Fall 2001). Essentially, two classes of private military firms have emerged;

PMFs amass unchecked power to affect conflict resolution, world economic stability, and geostrategic negotiations.[12] Indeed, as corporations become larger—both economically and politically—corporate managers increasingly engage in decision-making traditionally exercised by politicians.[13] The decentralization of international security from state-organized militaries not only threatens the traditional Westphalian model of state-monopolized force,[14] but also accentuates the inability of international law to hold private actors accountable.[15]

This Comment argues PMFs' dominion over international security requires regulation. Immune from direct accountability under international law, PMFs can and will run amok unless States seek to enforce international mandates domestically.[16] Part II discusses the emergence of PMFs, using case studies from Sierra Leone, Angola, and the Balkans. This Part will also analyze human rights concerns originating from corporate unaccountability. Part III addresses recent developments in U.S. case law concerning the Alien Tort Claims Act (ATCA), arguing that the recently adopted "aiding and abetting standard" and "joint action test" enable corporations to be held accountable.[17] Finally, Part IV examines these theories of secondary liability specifically with reference to PMFs.

II. THE EMERGENCE OF PRIVATE MILITARY FIRMS (PMFS)

A. Shifting Geopolitics and the Development of PMFs

World War II resulted in the demarcation of bipolar factions, beginning with the development of NATO in 1949, aligning the United

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while some PMFs contract directly with foreign governments to equip, train, and advise militaries, others serve as proximate instruments of their own government's foreign policy. For a discussion of the distinction between PMFs used to prop regimes and PMFs as proxy foreign policy tools, see Steven Brayton, *Outsourcing War: Mercenaries and the Privatization of Peacekeeping*, 55 J. INT'L AFF. 303, 308-12 (Spring 2002). *See also* David Shearer, *Private Armies and Military Intervention*, ADELPHI PAPER NO. 316 (1998).

12. *See* Brayton, *supra* note 11, at 309-12.

13. *See* Eric W. Orts, *War and the Business Corporation*, 35 VAND. J. TRANSNAT'L L. 549, 556-57 (Mar. 2002).

14. The Westphalian model of state-dominated warfare represents "trinitarian warfare," a principle whereby the government directs the war, a state-controlled army fights the war, and the people suffer. *See* VAN CREVELD, *supra* note 1, at 35-39, 49.

15. *See* Ariadne K. Sacharoff, Note, *Multinationals in Host Countries: Can They Be Held Liable Under the Alien Tort Claims Act for Human Rights Violations?*, 23:3 BROOK. J. INT'L L. 927, 929 (1998).

16. *See* discussion *infra* Part II.B-C.

17. Although this Comment will rely on MPRI, a PMF, as an example of a proximate tool of foreign policy, the foreign affairs implications of holding a U.S.-backed PMF responsible for international law violations are beyond its scope.

States with the western powers of Europe, and the Warsaw Pact in 1954, aligning the U.S.S.R. with the eastern powers of Europe—a division known as the "Iron Curtain."[18] Battles between these bipolar factions occurred within colonized territories such as Central America, South America, Africa, and the Asian-Pacific.[19] During the 1970s when the international community supervised the dismantling of the colonial structure imposed upon peripheral countries, it was assumed these battle lines would dissolve.[20] Unfortunately, post-colonized countries continued to function along bipolar lines with power-hungry groups struggling between capitalist Western and socialist Marxist thought.[21] Because the post-colonial structures and conflicts continue to reflect division between Eastern and Western ideology, these decolonized States remain important both geopolitically and geostrategically.[22]

With the end of the Cold War in the late 1980s and the subsequent end to bipolar geopolitical relations, political associations among core countries were no longer divided along the Iron Curtain, resulting in two phenomena.[23] First, great powers, the traditional actors in regional and intrastate conflicts, have markedly decreased interference in such conflicts.[24] Because great powers are unwilling, unable, and often unwelcome to provide military services in regional conflicts, geopolitical power has diffused, leaving power vacuums to be filled by enterprising military contractors.[25] As a result, weak and beleaguered countries, mostly newly decolonized States, have increasingly sought private military sources to fulfill their security needs.[26] The reasons for less

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18. *See* BARRY B. HUGHES, CONTINUITY AND CHANGE IN WORLD POLITICS: COMPETING PERSPECTIVES 1-2 (Prentice-Hall 1997).

19. *Id.*

20. H.J. DE BLIJ & PETER O. MULLER, GEOGRAPHY: REALMS, REGIONS, AND CONCEPTS 30-31, tbl. (John Wiley & Sons, 8th ed. 1997).

21. *See id.* at 343. "Peripheral" countries are those countries that are not considered to be dominant countries in the world power structure, or "core" countries. *See id.* at 30 tbl.

22. *See generally* Singer, *supra* note 10.

23. *See* Juan Carlos Zarate, *The Emergence of a New Dog of War: Private International Security Companies, International Law, and the New World Disorder*, 34 STAN. J. INT'L L. 75, 75-76 & n.2 (1998); Francois Misser & Anver Versi, *Soldier of Fortune: The Mercenary as Corporate Executive*, 227 AFR. BUS. 8-14 (1997).

24. Zarate, *supra* note 23, at 76.

25. *See id.*; Singer, *supra* note 10, at 193-95. The United States, as a result of its experience in Somalia, is one example of a nation unwilling to intervene in a foreign conflict without some existing geopolitical interest. David Shearer, *Outsourcing War*, FOREIGN POL'Y 68, 70 (Fall 1998).

26. Shearer, *supra* note 25, at 70. The collapse of communist rule has resulted in visible regional conflicts characterized by ethnic rivalry. Zarate, *supra* note 23, at 75-76; *see* Joseph S. Nye, Jr., *Peering into the Future*, 73 FOREIGN AFF. 82, 86 (July-Aug. 1994). According to Nye, conflicts existing prior to the development of bipolar blocs are experiencing a resurgence,

involvement by the great powers is three-fold. First, Western States have become more reluctant to intervene because of a political aversion to explaining casualties.[27] Second, even if traditional powers continued to intervene, Western armies, designed in response to projected Cold War conflicts, would be ill-prepared to handle low-level conflicts due to their sophistication.[28] A third condition particular to the United States but increasingly being adopted by other countries is the development of the Weinberger Doctrine, which severely limits the use of the military in foreign affairs.[29] All of these conditions have inhibited Western involvement in intrastate conflicts.

The demise of the Cold War also resulted in an increase in underutilized military personnel.[30] Increasingly, growing isolationism and tighter budgets have led to military downsizing and the closure of military bases.[31] Similarly, international peacekeeping efforts—affected by traditional powers' political fears regarding casualties, expanding conflicts, and rising costs—have experienced a decrease in personnel.[32] With such dramatic displacement of military and peacekeeping personnel, an abundance of military expertise flooded the private sector.[33] Retired intelligence officers, members of special forces, and general

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surfacing in contemporary internal conflicts. *See id.* In particular, African countries such as Rwanda, Mozambique, Sierra Leone, and Angola have experienced less traditional Western influence in their conflicts. *See* Shearer, *supra* note 25, at 70.

27. Shearer, *supra* note 25, at 70; Brayton, *supra* note 11, at 308.

28. Shearer, *supra* note 25, at 70; Brayton, *supra* note 11, at 308. "Low-level conflicts" are characterized by ethnic strife, cloudy boundaries between combatants and civilians, and unstructured military hierarchies. Shearer, *supra* note 25, at 70; Brayton, *supra* note 11, at 308. Simply put, traditional military structures are ill-prepared to deal with anything less than all out warfare.

29. *See* Kenneth J. Campbell, *Once Burned, Twice Cautious: Explaining the Weinberger-Powell Doctrine*, 24 ARMED FORCES & SOC'Y 357, 364-65 (1998). The six conditions for the proper use of U.S. military force under the Weinberger doctrine are: (1) a threat to vital U.S. interests, (2) a clear commitment to victory, (3) clear political and military objectives, (4) appropriately sized forces, (5) reasonable assurance of public support, (6) and the use of force as a last resort. *Id.* at 365. To these conditions then-chairman of the U.S. Joint Chiefs Colin Powell added (1) an *overwhelming* military force and (2) a clear exit strategy. *See* SAMANTHA POWER, "A PROBLEM FROM HELL" AMERICA AND THE AGE OF GENOCIDE 262 (Basic Books 2002).

30. *See* Singer, *supra* note 10, at 193 (finding the world's military downsized by more than six million personnel in the 1990s).

31. Zarate, *supra* note 23, at 76 n.4. For instance, the U.S. withdrawal from Clark Base and Subic Base in the Philippines indicates a willingness to close strategic bases that were once deemed essential. *Id.*

32. Shearer, *supra* note 25, at 70 (finding UN peacekeeping forces have downsized dramatically, decreasing from 76,000 in 1994 to approximately 15,000 in 1998).

33. *See* Singer, *supra* note 10, at 193-94; Mandel, *supra* note 11, at 131; Sam Vaknin, *Analysis: Private Armies—I*, UPI, July 17, 2002, *at* http://www.upi.com (last visited Feb. 28, 2003).

combatants are included among such career military professionals.[34] While this list is not comprehensive, it provides a clear picture of the extent to which small, privatized armies can be staffed.

B. Services for Hire: PMFs Abroad

Most private PMFs have originated in the United States, Great Britain, Russia, South Africa, and other traditional core countries.[35] A throwback to previous mercenary organizations, PMFs contract soldiers to foreign entities in a manner similar to free companies and the Italian *condottieri* of the seventeenth century.[36] Due to their ability to mobilize quickly, remain indifferent to political interests, and cover their expenses without fighting through government bureaucracy, PMFs can readily handle low-level conflicts and ethnic strife.[37] As the former director of South African-based Executive Outcomes (EO), Eben Barlow, stated:

> The withdrawal of Soviet proxy forces has created a new kind of insecurity—war in one country spilling over into another, internal challenges by armed anti-government factions. Any government needs stability and a well-trained army to preserve the integrity of the state, and that is where Executive Outcomes can be of assistance.[38]

As a result, a trend has developed in the international realm for PMFs to provide military training to government troops involved in volatile or potentially volatile conflicts.[39] These "[PMFs] represent a reconstituted form of organized corporate mercenarism that is responding to the need for advanced military expertise in escalating internal conflicts. [PMFs] also present a new means of disguised efforts by their home states to influence conflicts in which the home states are technically neutral."[40] The following case studies illustrate the scope and danger of PMFs.

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34. Singer, *supra* note 10, at 193-94.
35. Vaknin, *supra* note 33.
36. Zarate, *supra* note 23, at 91. The *condottieri* developed as a massive, state-endorsed free company during the seventeenth century. *See id.* at 84. Free companies such as this eventually overtook city-states in the northern provinces of Italy. *Id.* In effect, these freelance military companies provided state leadership, ensuring economic and political development. *Id.*
37. *Id.* at 92.
38. Jeremy Harding, *The Mellow Mercenary*, GUARDIAN, Mar. 8, 1997, at 32.
39. Zarate, *supra* note 23, at 92.
40. *Id.* at 81-82.

1. Executive Outcomes (EO)

Founded in 1989, EO rapidly became a visible force in the private security realm.[41] The organization, comprised of veterans from the pro-apartheid South African Defense Force, drew recruits from some of the most combat-experienced forces in the world.[42] For instance, Eben Barlow, the former director of EO, hailed from South Africa's 32nd Battalion and the Civil Cooperation Bureau (CCB), an organization that implemented covert operations in support of apartheid.[43] EO's personnel, associated with spies, saboteurs, and assassins, includes some of the same individuals responsible for thwarting South African President Nelson Mandela's black majority rule.[44] Indeed, most personnel fought wars attempting to preserve the racist regimes in countries such as Congo, Kenya, Rhodesia (now Zimbabwe), and South Africa.[45] Although EO refused to disclose numbers, estimates of the number of personnel employed range from 500 to 2500.[46]

To market itself as a security force, EO created a brochure detailing services such as: "Clandestine Warfare, Combat Air Patrol, Armored Warfare, Basic and Advanced Battle Handling, and Sniper Training."[47] Moreover, EO guaranteed the following:

- To provide a highly professional and confidential military advisory service to legitimate governments.
- To provide sound military and strategic advice.

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41. *See* Harding, *supra* note 2, at 87. Although EO disbanded in 1999, consideration of its activities continue to be important in any discussion of corporate accountability under international law precisely because EO provided a blue print for the subsequent development of PMFs. Thomas K. Adams, *The New Mercenaries and the Privatization of Conflict*, 29 PARAMETERS: U.S. ARMY WAR C.Q. 103, 107-08 (Summer 1999).

42. Zarate, *supra* note 23, at 93.

43. *Id.* at 93 & n.115; Lynne Duke, *South Africa's Ex-Soldiers Becoming "Dogs of War"; Apartheid Commandos Peddling Skills*, HOUSTON CHRON., Mar. 24, 1996, at 29, *available at* http://web.lexis-nexis.com/universe (last visited June 23, 2003). For more information on Eben Barlow, see, e.g., Misser & Versi, *supra* note 23, at 216. Some critics cite Barlow's experience with the CCB as proof of his ability to help EO cover its tracks in a corporate web. *See id.* Purportedly, this corporate web hides EO's illicit actions and activities ranging from gun deals to diamond mining. *See id.* Tellingly, the CCB has been noted for running death squads against its political foes. Bob Drogin, *Hired Guns Turn Tide in Angola*, L.A. TIMES, Oct. 29, 1994, at A1, A10. Barlow admits to running espionage operations against several anti-apartheid black-ruled countries while a member of South Africa's Directorate of Covert Collection. *Id.* Later, Mr. Barlow moved to the CCB. *Id.* When the CCB closed in 1991, Barlow "began selling specialist security services across Africa, offering everything from espionage to encryption."

44. *See* Drogin, *supra* note 43, at A1.

45. *Id.*

46. *Id.*

47. Rubin, *supra* note 3, at 44.

- To provide the most professional military training packages currently available to armed forces, covering aspects related to sea, air, and land warfare.
- To provide advice to armed forces on weapon and weapon platform selection.
- To provide a total apolitical service based on confidentiality, professionalism, and dedication.[48]

However, EO's contracts with both war-torn Angola and Sierra Leone illustrate how easy it is to stray from lofty goals given financial returns.

With the closure of South Africa's CCB, Barlow's entrepreneurial endeavor received its first contract with an Angolan-based oil company.[49] EO was hired to clear the region around the company's operation of UNITA (National Union for the Total Independence of Angola) guerillas.[50] This led in turn to EO securing a contract in 1993 to restructure and retrain Angola's military.[51] Upon seeing EO's success, Angola's MPLA (Popular Movement for the Liberation of Angola), under the rule of Dos Santos, hired EO to equip its military against the UNITA rebels under Joseph Savimbi.[52]

EO's work in Angola did not begin under the advisory terms guaranteed by its brochure. Rather, EO landed a helicopter in the middle of a UNITA exercise, engaging in heavy combat until the rebels

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48. Adams, *supra* note 41, at 107-08.

49. Drogin, *supra* note 43, at A1.

50. Misser & Versi, *supra* note 23, at 217.

51. *See* Drogin, *supra* note 43, at A10.

52. *See* Jake H. Sherman, *Profit v. Peace: The Clandestine Diamond Economy of Angola*, 53:2 J. OF INT'L AFFAIRS 699 (Spring 2000), *at* http://proquest.umi.com (discussing how EO personnel are working on both sides of the conflict). Angola, with potential to be one of the wealthiest African nations, has been impoverished by civil war since the 1970s. *See* PRS Group, *Country Report, Angola: Trade Policy*, Jan. 1, 2001, *at* LEXIS, Newsfiles, Countries Excluding United States, Angola File. After Portugal's decolonization in 1975, the National Union for the Total Independence of Angola (UNITA) took up arms against the Popular Movement for the Liberation of Angola (MPLA). *Id.* Not surprisingly, both parties originated during the 1970s as opposition groups to the colonial power. *Id.* After briefly attempting joint rule in post-colonial Angola, UNITA went to war against the Marxist-based MPLA regime. *Id.* Initially, UNITA was favored by pro-democratic Western nations, such as the United States, in its fight against the Marxist regime. *See id.* However, during the 1992 elections, an MPLA candidate defeated UNITA candidate Joseph Savimbi, causing Savimbi to accuse the government of rigging the election. Drogin, *supra* note 43, at A10. As a result, UNITA lost western support. PRS Group, *supra*. The UNITA's anti-government guerilla groups, who control the rich diamond fields in the North and the East, have been warring against the MPLA, which controls oil concessions in the South and along the coast. *See* Drogin, *supra* note 43, at A10. Both sides have been using their mineral resources to purchase weapons and military services from foreign entities. *See id.* Interestingly, the former apartheid South African Defense Force, under which many of EO's personnel fought, originally supported the UNITA rebel force against MPLA. *Id.*

withdrew.[53] Despite denials from the EO's upper administrative levels, physical combat and destruction were characteristic of EO's operations.[54] Barlow's claims about EO being a mere "stabilizing force" comprised of "military advisors" rang hollow in the face of a hundred "advisors" participating in an Angolan offensive sent to capture the Cafunfo diamond mines.[55] For example, Du Toit, one of South Africa's top soldiers who gained prestige as a war hero after trying to *destroy* an Angolan oil facility, exemplifies the mercenary thought pervasive throughout EO.[56] After being shot and imprisoned for his Angolan exploit, Du Toit was one of many employees returning to Angola—only this time, he fought for those who almost killed him.[57] Laughing, Du Toit claimed it was "funny" to work for Angola: "I feel liberated. I don't work for any political party. I don't work for any government."[58] This type of mercenary thought has led South African officials to hail EO as a destructive force in Africa.[59] According to David Shearer, a research associate with the International Institute for Strategic Studies in London and a former senior advisor to the United Nations Department of Humanitarian Affairs in Liberia and Rwanda, "[The] willingness to be involved in combat alongside those it has trained distinguishes EO from other companies. Employees believe this is its strength; one argues: 'If you're a boatbuilder it would be unusual not to take your client out on the water.'"[60]

EO's willingness to engage in combat was also evident in Sierra Leone, where its second contract originated from political and economic corruption associated with Sierra Leone's diamond industry.[61] Sierra Leone's bloody history reveals a series of tumultuous *coup d'états* amid economic strife and extreme poverty.[62] EO's intervention in Sierra Leone's politics began a mere three years after a 1992 *coup* launched by Valentine Strasser in the name of the common man.[63] Shortly thereafter, however, Strasser's regime picked up where the previous government had stopped: ransacking the lucrative mining industry and indulging in cocaine and disco parties, all the while driving BMWs and Mercedes

53. Harding, *supra* note 2, at 89.
54. *See* Drogin, *supra* note 43, at A10.
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. David Shearer, *Dial an Army*, 53 WORLD TODAY 203, 203 (Aug.-Sept. 1997).
61. *See* Rubin, *supra* note 3, at 46-47.
62. *Id.*
63. *Id.*

through the impoverished hillsides of Sierra Leone.[64] Under attack from rebels who had originally supported his cause, Strasser hired EO with the prodding of Anthony Buckingham, the president and founder of Heritage Oil & Gas and Branch Energy.[65] The contract called for EO to combat and destroy "terrorist enemies of the state" while restoring internal security and attracting foreign investment.[66]

Despite "closing its business" in January 1999, in response to South Africa's new antimercenary legislation, EO offices in Pretoria continue to remain fully staffed, while its employees in Sierra Leone work for a new company called Lifeguard.[67] Meanwhile, in Angola, former EO employees are working for both the national government and UNITA rebels.[68] While the most notorious, EO is disturbingly not the only, or largest, private security company for hire.

2. Military Professional Resources Incorporated (MPRI)

Increasingly, PMFs are becoming proximate tools of foreign policy.[69] Indeed, since 1975, the United States has used the services of private security companies to avoid sticky foreign involvement.[70] MPRI, in particular, caters to private security needs at the U.S. government's behest.[71] Organized in 1987 by retired U.S. generals, MPRI specializes in military training, evaluations and assessments, war-gaming doctrine, combat simulation, and research and analysis.[72] Overall, "[f]or foreign governments, MPRI represents a private channel through which to gain U.S. military expertise in conditions in which conventional U.S. military assistance programs are not appropriate for political or tactical reasons."[73]

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64. *Id.*

65. *Id.* at 47. Both Heritage Oil & Gas and Branch Energy have corporate interests in Sierra Leone and Angola. *Id.* Furthermore, both Branch Energy and EO belong to Strategic Resources Corporation. Misser & Versi, *supra* note 23, at 217.

66. Rubin, *supra* note 3, at 47.

67. Adams, *supra* note 41, at 109.

68. *Id.*

69. *See* Brayton, *supra* note 11, at 310-12.

70. *See* Zarate, *supra* note 23, at 103-04. For instance, during the Vietnam War, Vinnell Corporation, a subsidiary of BDM International, was allegedly contracted to clean up behind the demobilizing American troops. *Id.* at 103. Since that time, Vinnell's interests have expanded to include activities such as training the Saudi Arabian National Guard and upgrading Egyptian military systems. *Id.* Former U.S. Secretary of State James Baker III and former U.S. Defense Secretary Frank Carlucci are shareholders of the Carlyle Group, a partnership in control of Vinnell Corporation. *Id.* at 103 n.191. These affiliations indicate the level of political involvement in such companies.

71. *Id.* at 104.

72. *Id.* at 104 & n.196.

73. *Id.* at 105. MPRI has worked with Croatia, the Bosnian Federation, Sweden, and Taiwan and has been approached by former Eastern bloc countries interested in becoming more

In particular, these companies also serve as an award for distinguished military brass.[74] The personnel charts indicate a revolving door for retired military personnel into the private military market.[75] For instance, at MPRI, twenty-two of the corporate officers are former high-ranking military figures, including General Carl Vuono, U.S. Army Chief of Staff during the Panama Invasion and the Gulf War; General Ed Soyster, former head of the Defense Intelligence Agency; and General Frederick Kroeson, former commander of the U.S. Army in Europe.[76]

Like EO, MPRI is entangled in an intricate web of multinational corporations.[77] Based in Alexandria, Virginia, MPRI is fortunate to be headquartered down the hall from Cypress International, a well-known international weapons broker.[78] One of MPRI's founders, retired Major General Vernon Lewis, coincidentally happens to be a founder of Cypress International.[79] This affiliation, as well as the web of retired generals and foreign politicians, begs the question of how "private" these security companies really are.[80] According to one report, these high-ranking former officials seem to be in charge of numerous operations, often in conjunction with the U.S. Central Intelligence Agency (CIA) and with presidential approval.[81] According to one military specialist, "[t]he only difference between what these firms do and what mercenaries do is that the companies have gained the imprimatur of government for their actions."[82]

MPRI's most obvious involvement as a foreign policy tool occurred during the Balkan war.[83] In April 1995, MPRI began providing training to the Croatian military.[84] Shortly thereafter, the once-amateur Croatian army launched a series of bloody offenses against Serbian forces.[85] Operation Lightning Storm, the assault on the Krajina region, is of

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compatible with western military standards promoted by NATO. *Id.* Hungary, in particular, is interested in MPRI's services but has failed to hire the company because it wants the United States to pay for the services. *Id.* at 105 n.203.

74. *See* Ken Silverstein, *Privatizing War*, NATION, July 28-Aug. 4, 1997, at 11-14.

75. *See id.*

76. *Id.*

77. *See id.* at 14.

78. Wayne Madsen, *Mercenaries in Kosovo: The U.S. Connection to the KLA*, THE PROGRESSIVE, Aug. 1999, at 29, 30.

79. *Id.*

80. *See* Silverstein, *supra* note 74, at 17; Madsen, *supra* note 78, at 31.

81. Madsen, *supra* note 78, at 31.

82. Silverstein, *supra* note 74, at 17.

83. *See id.* at 14.

84. *Id.*

85. *Id.*

particular note.[86] During the assault, Serbian villages were sacked and burned, hundreds of civilians were killed, and more than one hundred thousand civilians were displaced.[87] Retired Marine Lieutenant Colonel and military researcher, Roger Charles, analyzed the initiative: "No country moves from having a ragtag militia to carrying out a professional military offensive without some help . . . . The Croatians did a good job of coordinating armor, artillery and infantry. That's not something you learn while being instructed about democratic values."[88] A Croatian liaison officer confirmed Roger Charles' report by revealing how, just weeks prior to the offensive, General Vuono met with General Varimar Cervenko, the mastermind behind the Krajina incident, at a secret top-level meeting at Brioni Island off the coast of Croatia.[89] In the five days prior to the offensive, at least ten such meetings occurred.[90] Assuming some doubt remains as to MPRI's involvement in the Krajina offensive, one report of the incident maintained the elite Croat Tiger Brigade wore American uniforms when it stormed the city.[91]

According to some analysts, the real issue does not center on MPRI having had a direct hand in strikes against civilian areas; rather, the fundamental concern is the inability to control the use of lethal skills once learned.[92] "Once you provide training there's no way to control the way that the skills you've taught are used."[93] This concern proves especially true when the skills are supplemented with weapons and personnel.[94] Furthermore, the United States broke a UN sanction when MPRI admitted to training Croatian forces and offering direct assistance to its forces.[95] UN sanctions were further violated when Croatia transferred weapons received from MPRI to other regions of the former Yugoslavia.[96] MPRI clearly played an active role not only in the Croatian offensive, but also in thwarting international sanctions imposed against the region,[97] sanctions the U.S. *government* voted for in the UN Security

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86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*
91. *Tudjman's New Model Army*, ECONOMIST, Nov. 11, 1995, at 48.
92. *See* Silverstein, *supra* note 74, at 14.
93. *Id.*
94. *See id.* U.S. servicemen, on *active duty*, were being deployed to support Croatian and Bosnian-Herzegovina forces. Gregory Copley, *Croatia Prepares for War on Eastern Slavonia*, DEF. & FOREIGN AFF. STRATEGIC POL'Y, Oct. 31, 1995, at 3.
95. *See* Copley, *supra* note 94, at 3.
96. *Id.*
97. *See id.*

Council and an embargo the U.S. military officially helped enforce.[98] However, MPRI's involvement did not stop with the end of the Balkan War.[99]

As one of several private military companies licensed by the Pentagon to support the Kosovo Liberation Army (KLA), MPRI trained KLA forces at secret bases in Albania.[100] This clandestine training represents a sticky point in U.S. foreign policy given the clear U.S. stance against recognizing the Kosovar liberation movement.[101] Furthermore, MPRI's involvement in Kosovo and its relationship with the KLA is questionable because of who the KLA leaders are.[102] A former brigadier general in the Croatian army, Agim Ceku, helped plan the Croatian offensive into the Krajina region, an initiative responsible for the displacement of some 350,000 Croatian Serbs and the destruction of 10,000 Croatian Serb homes.[103] Another head of the KLA is Xhavit Haliti, a former officer of the Albanian secret police, a group renowned for human rights violations in Albania.[104]

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98. POWER, *supra* note 29, at 263.

99. *See* Madsen, *supra* note 78, at 29-30.

100. *Id.* at 29.

101. *See id.* at 29-30. Part of the reason for U.S. hesitancy in recognizing the Kosovo liberation movement results from a mosaic of power struggles present across the shatter zone. The movement seeks nothing less than total independence from Serbia. *See* Chris Hedges, *Kosovo's Next Masters?*, 78 FOREIGN AFF. 24-26 (May/June 1999). U.S. recognition might spur similar causes in neighboring Macedonia. This could in turn ignite a larger conflict between Macedonia, Albania, Bulgaria, and Greece. *See id.*

102. *See id.* at 29.

103. *Id.* The Convention on the Prevention and Punishment of the Crime of Genocide provides in pertinent part:

> [G]enocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethical, racial or religious group, as such:
> (a) Killing members of the group;
> (b) Causing serious bodily or mental harm to members of the group;
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> (d) Imposing measures intended to prevent births within the group;
> (e) Forcibly transferring children of the group to another group.

Convention on the Prevention of the Crime of Genocide, art. 2, G.A. Res. 260A, U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948), 78 U.N.T.S. 277 (entered into force Jan. 12, 1951). Arguably, the KLA's actions satisfy several of these elements. Although Agim Ceku has not been charged with war crimes, the potential for a PMF to aid a potential war criminal and a recognized ethnic cleanser severely undermines the legitimacy of such organizations while raising questions about the accountability of PMFs. *See* Madsen, *supra* note 78, at 29.

104. *Id.*

C. PMFs and International Law

Although the international community has understood the need to regulate mercenaries and mercenary-like activity, developing an acceptable definition has proven particularly problematic.[105] Moreover, even if the international community could agree on a workable definition of *mercenarism*, enforcement of such regulations would continue to pose a stumbling block.[106] Generally, most States are reluctant to become signatories to international resolutions calling for a blanket ban on mercenarism because many expect to use or have used mercenaries.[107] Consequently, any attempts to regulate PMFs cannot occur under the guise of regulating mercenarism. At the same time, ignoring massive human rights abuses—thereby condoning the lack of corporate accountability under international law—is increasingly not politically tenable.

Indeed, human rights concerns are particularly significant.[108] Although PMFs often point to the necessity of a 'good' reputation in order to receive continued business, maintaining a positive reputation requires the customer be satisfied with the results.[109] Unfortunately, guaranteeing customer satisfaction can and does conflict with the need to avoid grave human rights violations, such that "considerations of the commonweal are matters of morality, while the bottom line is fundamentally amoral."[110] The use of fuel air explosives—a highly effective but particularly tortuous weapon—in Angola highlights this point.[111] Moreover, the wholesome image of a corporation providing military career professionals versed in the laws and ethics of war can be deceptive.[112] In particular, the blanket of legitimacy offered by PMFs has the potential to attract characters of ill-repute who are naturally drawn to mercenary work.[113] Because PMFs have an interest in hiring effective personnel, it is not unreasonable to expect that a blind eye may be turned toward an employee's heinous conduct.[114]

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105. H.C. Burmester, *The Recruitment and Use of Mercenaries in Armed Conflicts*, 72 AM. J. INT'L L. 37, 37-38 (1978). Attempts to define mercenaries in light of their motivations has been deemed unworkable due to the difficulties resulting from attempting to determine individual motivation. *Id.*

106. *See* Shearer, *supra* note 25, at 76-77.

107. *See id.*

108. *See* Singer, *supra* note 10, at 214-15.

109. *See id.* at 214.

110. *Id.*

111. *See id.*

112. *See id.* at 214-15.

113. *Id.* at 215.

114. *Id.*

Privatization of force, therefore, does not ensure an inherent compliance with international legal norms; rather, if military professionals and enlisted soldiers are capable of committing atrocities, then PMFs comprised of career soldiers are also capable of committing atrocities. To deny this possibility is to ignore the nature of war, as such conflict is necessarily infused with violence. Accordingly, just as international law seeks to regulate States in their wartime conduct, so should States seek to extend these international norms to PMFs. The Alien Tort Claims Act (ATCA) represents one such available instrument for applying international norms to PMFs.

III. ENFORCING ACCOUNTABILITY DOMESTICALLY: THE ALIEN TORT CLAIMS ACT (ATCA)

Introduced in 1789, the ATCA[115] was rarely invoked for nearly two centuries.[116] The ATCA provides aliens with access to U.S. federal courts for violations of international law.[117] Specifically, "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[118]

The seminal ATCA case, *Filartiga v. Pena-Irala*, permitted a cause of action under the ATCA upon fulfillment of three criteria: (1) an alien (2) must allege a tort (3) committed in violation of the law of nations or a U.S. treaty.[119] Accordingly, the United States Court of Appeals for the Second Circuit retained jurisdiction over an action involving the official torture of a Paraguayan citizen by a former Paraguayan police inspector occurring in Paraguay.[120] The *Filartiga* court noted a plaintiff must prove either a treaty violation or a violation of customary international law in order to invoke the ATCA successfully.[121] Examining various international sources, including the United Nations Charter, the Universal Declaration of Human Rights, and various U.N. General Assembly Resolutions, the court determined that official use of torture violated customary international law.[122] Moreover, the Second Circuit considered Congress to have been properly vested with the authority to

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115. 28 U.S.C. § 1350 (2000).

116. *See* Filartiga v. Pena-Irala, 630 F.2d 876, 887 & n.21 (2d Cir. 1980).

117. *See* 28 U.S.C. § 1350.

118. *Id.*

119. 630 F.2d at 887.

120. *Id.* at 878-79. Appropriate personal jurisdiction was exercised over the defendant because he was living in the United States. *See id.* at 879.

121. *Id.* at 880.

122. *See id.* at 881-84.

prescribe jurisdiction for foreign suits and by its authority to define and punish violations of the law of nations.[123] Consequently, the court read the ATCA not only as an action-granting provision, but also as a forum-granting provision for rights identified under international law.[124] Overall, *Filartiga* stood for four propositions. First, the law of nations is dynamic and should be interpreted according to its presently evolved status.[125] Second, federal courts may apply customary international law as a valid source of law.[126] Third, international law limits a State's treatment of its citizens.[127] And finally, the ATCA enabled federal jurisdiction over specific torts arising under international law.[128]

A. Individual Liability Under the ATCA

In *Tel-Oren v. Libyan Arab Republic*, survivors and relatives of victims murdered during a terrorist attack on an Israeli bus sought damages against, inter alia, the Palestine Liberation Organization pursuant to the ATCA.[129] In a per curiam decision, the United States Court of Appeals for the District of Columbia Circuit dismissed the action, although each judge articulated different reasons for doing so.[130] Refuting Judge Bork's contention that plaintiffs must allege a specific provision of international law giving rise to a private right of action, Judge Edwards agreed with the Second Circuit in *Filartiga*, holding aliens need only allege a specific violation of international law in order to successfully invoke jurisdiction.[131] Noting that commentators had begun to identify certain definable, universal, and obligatory norms of international law, Judge Edwards discussed the scope of liability under international law.[132] In particular, Judge Edwards elaborated on the distinction between two types of individual liability: first, the well-established principle of holding individuals liable for acting under color of state authority, and second, the less favorable notion of holding individuals liable for actions without state authority.[133] While

123. *See id.* at 885; *see* U.S. Const. art. I, § 8, cl. 10.

124. *See Filartiga*, 630 F.2d at 887.

125. *See id.* at 881 (holding "courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today.")

126. *See id.* at 880.

127. *See id.* at 884-85 (holding "international law confers fundamental rights upon all people vis-à-vis their own governments").

128. *See id.* at 885.

129. 726 F.2d 774, 775 (D.C. Cir. 1984).

130. *See id.* at 775-827.

131. *Id.* at 775.

132. *See id.* at 791-94.

133. *Id.* at 793.

disregarding this latter classification of international liability, Judge Edwards did recognize a single crime giving rise to individual liability without state action, namely piracy.[134] Such recognition suggested other international crimes could very well give rise to individual liability independent of state action.[135] Despite recognizing four crimes subject to "unequivocal international condemnation," Judge Edwards declined to endorse individual liability under international law for torture by nonstate actors.[136] To hold individuals liable under international law in this situation would be to "venture out of the comfortable realm of established international law . . . in which states are the actors. . . . requir[ing] an assessment of the extent to which international law imposes not only rights but also obligations on individuals."[137]

Although Judge Edwards declined to exercise jurisdiction over individuals in violation of international law absent the color of law, the Second Circuit revisited the imputation of individual liability in 1995. In *Kadic v. Karadzic*, Croat and Muslim citizens of the former Republic of Yugoslavia brought an action against the "Srpska" President, Karadzic, for genocide, war crimes, and crimes against humanity, including rape, brutality, forced impregnation, torture, forced prostitution, and summary execution.[138] Importantly, Karadzic was being sued in his individual capacity as a State actor, having previously served as the ultimate commander over the Bosnian Serb military.[139] Although the defendants argued international law binds States and State officials, not individuals, the court noted some actions violate international law regardless of who commits the crime.[140] Citing a statement of interest filed by the U.S. State Department, the court noted the Executive Branch had "emphatically restated . . . its position that private persons may be found liable under the [ATCA] for acts of genocide, war crimes, and other violations of international humanitarian law."[141] Accordingly, the Second Circuit determined crimes committed traditionally by individuals—and therefore outside the scope of international law—such as rape, unofficial torture, and murder, could be considered international violations if

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134. *See id.* at 794.
135. *See id.* at 794-95.
136. *Id.* at 795.
137. *Id.* at 792.
138. *See* 70 F.3d, 232, 236-37 (2d Cir. 1995). "Srpska" is a self-proclaimed Bosnian-Serb republic within Bosnia-Herzegovina. *Id.* at 237.
139. *Id.*
140. *Id.* at 239.
141. *Id.* at 239-40.

committed *in furtherance* of genocide or war crimes—crimes resulting in individual liability under international law.[142]

In 2001, the United States District Court for the Southern District of New York in *Tachiona v. Mugabe* further expanded the notion of individual liability articulated in *Kadic* when it held the ZANU-PF political party in Zimbabwe, headed by President Mugabe, collectively liable for violations of international law.[143] Affirming individuals could be liable for international violations, the court questioned whether individual liability was restricted to natural persons or included organizations, collective groups, and institutions.[144] In deciding collective entities could be held liable for violations of international law, the court expressed that extension of liability to nonnatural persons confirmed a vital modern reality:

> Barbaric offenses committed in violation of established international standards do not always spring from spontaneous acts of violence wreaked by random individuals or government agencies. Rather, they sometimes represent the culmination of elaborate schemes devised by expertly-organized and well-financed private groups. These entities give their causes names, banners and emblems for their doctrines and recruits, and bank accounts with which to carry out their inglorious business.[145]

As a result, the court rearticulated *Tel-Oren*'s discussion of the two circumstances in which liability could be imputed to individuals, holding individual action without State authority was no longer beyond the reach of international law.[146]

More recently, federal courts have expressed a willingness to impute liability to corporations for their international transgressions, a trend begun by *Iwanowa v. Ford Motor Co.*[147] In *Iwanowa*, former World War II laborers sued Ford Motor Company for using forced labor during the war.[148] Although the court determined corporations using slave labor could be directly liable under international law, in dicta, the court suggested an alternative theory of liability: corporations working closely with State actors in violating international law incurred joint liability.[149] Relying upon *Kadic*, the court determined "[n]o logical reason exists for allowing private individuals and corporations to escape liability for

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142. *See id.* at 244.
143. 169 F. Supp. 2d 259, 315 (S.D.N.Y. 2001).
144. *Id.* at 311.
145. *Id.* at 312.
146. *See id.* at 313.
147. 67 F. Supp. 2d 424 (D.N.J. 1999).
148. *Id.* at 431-32.
149. *See id.* at 445, 446 n.27.

universally condemned violations of international law merely because they were not acting under color of law."[150] Invoking the Nuremberg Charter and the Rome Statute of the International Criminal Court, the court determined forced labor violated international law.[151] However, the decision was somewhat muddled insofar as the court did not clarify whether forced labor constituted a violation that could always be attributed to individuals or whether forced labor could only be attributed to individuals if perpetuated in combination with war crimes. Significantly, the laborers' ATCA claim against Ford was dismissed not because the corporation was beyond the reach of international law, but because the ten-year statute of limitations for ATCA claims had expired.[152] Similarly, the United States District Court for the Northern District of California seemed willing to extend individual liability to corporations violating international law in *In re World War II Era Japanese Forced Labor Litigation* but dismissed the case due to an expired statute of limitations.[153]

Kadic, *Mugabe*, *Iwanowa*, and *In re World War II Era Japanese Forced Labor* stand for the proposition that individuals, including corporations and collective entities, may be liable for international violations committed in furtherance of genocide and war crimes. However, courts have also begun to develop an alternative theory of individual liability for international crimes *not* committed in furtherance of genocide or war crimes.

B. Secondary Liability Under International Law

After World War II, the Nuremberg Trials immortalized the notion of individual responsibility under international law.[154] No longer considered the primary actors in the international arena, States could no longer treat their citizens however they pleased.[155] Rather, individuals had enforceable rights against the State in addition to corresponding obligations.[156] Indeed, the Nuremberg Tribunal held:

> International law . . . binds every citizen just as does ordinary municipal law. Acts adjudged criminal when done by an officer of the government

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150. *Id.* at 445.
151. *See id.* at 440-41.
152. *Id.* at 461-63.
153. *See* 164 F. Supp. 2d 1160, 1178-79, 1180-81 (N.D. Cal. 2001).
154. *See* "The Flick Case," 6 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS 1192 (1952).
155. *See id.*
156. *See id.*

> are criminal also when done by a private individual. The guilt differs only in magnitude, not in quality. . . . The application of international law to individuals is no novelty.[157]

Thus, although the Tribunal determined forced labor programs to have originated in the Reich government, active participation on the part of industrialists, including solicitation of increased output quotas and knowledge of such solicitation by other involved decision-makers, resulted in individual liability.[158]

The notion of individual liability under international law has expanded to include those responsible for aiding and abetting others in the commission of international violations.[159] Importantly, these notions of individual criminal liability originated in the context of grave human rights violations, including genocide and war crimes.[160] In *Prosecutor v. Furundzija*, the International Criminal Tribunal for the former Yugoslavia (ICTY) found the defendant liable for aiding and abetting rape as a tool of interrogation even though he did not actually commit the act.[161] Relying upon article 7(1) of the ICTY Statute, the Tribunal noted that an individual could be held liable for aiding and abetting genocide, war crimes, or crimes against humanity.[162] However, because no treaty law existed on the subject of "aiding and abetting," the court sought guidance in customary international law.[163] Examining relevant cases originating under the Nuremberg International Military Tribunal and the International Military Tribunal for the Far East (Tokyo Tribunal),[164] the ICTY determined that individual liability could result from a theory of secondary liability.[165]

Specifically, secondary liability in the form of aiding and abetting required an *actus reus* and *mens rea*.[166] In defining *actus reus*, the

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157. *Id.*

158. *See id.* at 1198-1200; *see also* "The Krupp Case," 9 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS 1439-42 (1950).

159. *See* Prosecutor v. Furundzija, 38 I.L.M. 317, 356 (Int'l Criminal Tribunal for the former Yugoslavia 1999).

160. *See id.* at 345.

161. *See id.* at 371-72.

162. *Id.* at 370-71. Article 7(1) of the ICTY statute provides "[a] person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation, or execution of a crime referred to in Articles 2 to 5 of the present statute [grave breaches of the Geneva Conventions of 1949, violations of laws of customs of war, genocide or crimes against humanity] shall be individually responsible for the crime." (quoted in Mehinovic v. Vuckovic, 198 F. Supp. 2d 1322, 1356 (N.D. Ga. 2002)).

163. *See Furundzija*, 38 I.L.M. at 356.

164. *See id.* at 357-62.

165. *See id.* at 364-65.

166. *See id.* at 356, 365.

Tribunal relied upon *Prosecutor v. Tadic*, where it stressed that the conduct of the accused must contribute to the commission of the illegal act by directly and substantially affecting the commission of the offense.[167] Importantly, the actor's conduct need not have been a *condition sine qua non* for the commission of the crime; rather, the "significant" and "directly and substantially" language of the statute only required participation be something more than marginal.[168] Summarizing the *actus reus* requirement, the Tribunal determined the assistance must have had a direct and substantial effect on the commission of the crime, either through "practical assistance, encouragement, or moral support."[169]

Similarly, the Tribunal defined the scope of the *mens rea* requirement, noting mere *knowledge* that an action will assist the perpetrator in the commission of a crime is sufficient for purposes of aiding and abetting when combined with an affirmative action.[170] Recalling its decision in *Tadic*, the Tribunal noted such knowledge may be ascertained from a showing of awareness of the act and a conscious decision to participate—or, "knowing participation"—on the part of the aider and abettor.[171] The *mens rea* requirement does not demand the actor have the same wrongful intent of the principal, but the actor must know his actions will assist the perpetrator in the commission of the illegal act.[172] The aider and abettor need not even be aware of the precise crime intended by the principal, provided he is generally aware of the principal's conduct.[173]

C. Secondary Liability Under the ATCA

1. *Mehinovic* and *Unocal*: The Aiding and Abetting Standard

Relying upon notions of aiding and abetting drawn from the charter and legislation of the Nuremberg Tribunal, the ICTY, and the International Criminal Tribunal for Rwanda (ICTR), the United States District Court for the Northern District of Georgia held a former Serbian soldier liable for torture, arbitrary arrest and detention, and other international crimes on the theory that he not only directly committed such acts, but he also aided and abetted the principal actors in the

167. *Id.* at 362.
168. *Id.* at 364-65.
169. *Id.*
170. *Id.* at 366-67.
171. *Id.*
172. *Id.* at 366.
173. *Id.*

commission of these acts.[174] Determining the defendant had acted in concert with others, the court noted accomplice liability had previously been applied under the ATCA to those who assisted others in the commission of international violations.[175] The court further articulated that such principles of accomplice liability are well-established under international law, established both in conventions and the statutes establishing the Tribunals.[176] Based upon the *actus reus* and *mens rea* requirement adopted in *Furundzija*, the court determined the defendant's practical assistance and encouragement had knowingly aided his accomplices by directly and substantially affecting the commission of the crime.[177] Accordingly, the defendant was found liable under international law on a secondary theory of liability.[178]

Even more recently, the United States Court of Appeals for the Ninth Circuit adopted and applied the "aiding and abetting standard" to an American corporation accused of human rights violations in Myanmar.[179] In 1992, Myanmar Oil & Gas Enterprise (MOGE), a Myanmar corporation, entered into a lease agreement with Total, S.A., a French subsidiary of Total Myanmar Exploration and Production (collectively referred to as Total).[180] The agreement was divided into two parts: a gas production joint venture and a gas transportation joint venture.[181] In 1992, Unocal Corp., a wholly owned subsidiary of Unocal Oil Company (collectively referred to as Unocal), acquired a twenty-eight percent interest from Total in each leg of the project.[182] Under the agreement, Total remained responsible for the acquisition of labor and labor conditions.[183] Additionally, as the gas transportation sector required a pipeline to be built in the Tenasserim region—an area known for its opposition to the military government-the Myanmar military agreed to provide security and other services at the request of Total and its

174. *See* Mehinovic v. Vuckovic, 198 F. Supp. 2d 1322, 1355-56 & n.60 (N.D. Ga. 2002).
175. *Id.* at 1355.
176. *Id.* at 1355-56.
177. *Id.* at 1356.
178. *Id.*
179. *See* Doe I v. Unocal Corp., Nos. 00-56603, 00-57197,00-56628, 00-57195, 2002 U.S. App. LEXIS 19263, at *2-*3 (9th Cir. Sept. 18, 2002). For purposes of this Comment, all references to Myanmar/Burma will specify Myanmar and in no way reflect the author's viewpoint on the political struggle.
180. *Id.* at *3-*4.
181. *Id.* at *4.
182. *Id.*
183. *Id.* at *5.

assignees.[184] Consequently, the pipeline resulted in increased military presence in the region despite little rebel activity.[185]

Throughout the project, Unocal acknowledged its awareness of military presence in the region.[186] Further evidence gained prior to Unocal's involvement in the project confirmed the company's knowledge of forced labor and human rights violations by the military.[187] Among such evidence was a report offered by Control Risk Group, a consulting company, which informed Unocal there was little room for maneuver with regard to Myanmar's forced labor practices.[188] Additionally, during a meeting with human rights advocates, Unocal's president acknowledged Myanmar could be using forced labor, indicating "if forced labor goes hand and glove with the military yes there will be more forced labor."[189] As a result of the labor conditions, plaintiffs from Myanmar brought two actions under the ATCA in the United States District Court for the Central District of California, alleging violations of international law, including forced relocation, torture, rape, summary execution, and forced labor.[190] Following dismissal on summary judgment, the plaintiffs appealed to the United States Court of Appeals for the Ninth Circuit.[191]

As a primary theory of liability, the Ninth Circuit included forced labor within those crimes suggested by *Kadic*, determining rape, torture, and summary execution committed in furtherance thereof could be directly imputed to individuals.[192] As a secondary theory, the Ninth Circuit determined sufficient evidence existed to show Unocal had aided and abetted the Myanmar military in its perpetuation of forced labor and subsequent torts.[193] Importantly, despite acknowledging that plaintiffs had alleged joint venture, agency, negligence, and recklessness as alternative theories for secondary liability, the court proceeded to rely upon the aiding and abetting standard as articulated in international criminal law.[194] In a questionable maneuver, the court found *international*

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184. *Id.* at *6.

185. *Id.* at *6 n.4.

186. *Id.* at *7-*9. For instance, in 1995, Unocal issued a briefing document acknowledging MOGE's responsibility for security. *Id.* at *8-*9.

187. *Id.* at *14-*15.

188. *Id.* at *14 (stating "throughout Burma the government habitually makes use of forced labor to construct roads").

189. *Id.* at *15-*16.

190. *Id.* at *21-*23.

191. *Id.* at *24-*26.

192. *See id.* at *29-*31.

193. *See id.* at *35-*36.

194. *See id.* at *36 n.20.

standards of aiding and abetting constituted part of federal law.[195] Moreover, in applying conflicts of law principles, the court indicated application of international standards is favored over domestic standards in international cases.[196] First, the needs of the international system are better served by an international standard.[197] Second, the relevant policies of the forum cannot be ascertained by disregarding decisions that have favored international law.[198] Third, reliance on international standards of secondary liability promote consistency, uniformity, predictability, and protection of justified expectations.[199] And fourth, the overarching purpose of the ATCA is to provide a civil remedy for violations of international law, a goal furthered by application of international standards.[200]

Addressing the distinction between criminal and civil liability, the court provided three reasons why importing international criminal law standards was appropriate to the decision.[201] As an initial matter, international human rights law has been predominantly developed "in the context of criminal prosecutions rather than civil proceedings."[202] Furthermore, the distinction between criminal and civil liability serves little purpose in the context of international law because a crime in one jurisdiction may be only a tort in another.[203] Finally, the court determined the international standard for aiding and abetting in international criminal law is similar to the domestic law tort standard.[204] As a result, the court concluded the distinction between tort and criminal law was less crucial and noted district courts had increasingly turned to international criminal law for guidance on human rights under the ATCA.[205]

On this theory, the court held sufficient evidence existed to show Unocal "gave practical assistance to the Myanmar Military in subjecting Plaintiffs to forced labor."[206] Moreover, the court held a reasonable factfinder could conclude Unocal had the requisite *mens rea* insofar as it possessed knowledge that a number of crimes were being committed and

195. *See id.* at *39.
196. *See id.* at *41-*43.
197. *See id.* at *42.
198. *See id.*
199. *See id.*
200. *See id.* at *42-*43.
201. *See id.* at *43-*44.
202. *See id.* at *43.
203. *See id.* at *43-*44.
204. *See id.* at *44.
205. *See id.*
206. *See id.* at *52-*54.

intended to facilitate the commission of those crimes.[207] Accordingly, the case was remanded to the lower court for consideration of the charges of aiding and abetting human rights abuses in Myanmar.[208]

2. *Wiwa*: The Joint Action Test

Similarly, the United States District Court for the Southern District of New York recently expressed a willingness to impute liability to a corporation for international transgressions on the theory it jointly participated in international violations.[209] In *Wiwa v. Royal Dutch Petroleum Co.*, three former residents and citizens of Nigeria brought an ATCA action against Royal Dutch/Shell, a Netherlands and U.K. corporation, which wholly owned "Shell Nigeria" (collectively referred to as Shell).[210] The plaintiffs alleged violations of international law, including summary execution, crimes against humanity, torture, arbitrary arrest and detention, violations of the rights to life, liberty, and security of person, and cruel, inhuman, or degrading treatment.[211] In considering defendant's motion to dismiss, the court noted a successful invocation of the ATCA required State action because here the alleged torts had not occurred in furtherance of genocide or war crimes, a finding in accordance with *Kadic*.[212] However, the court carefully noted *Kadic* did not completely foreclose the possibility of an individual being liable without State action.[213]

In order to ascertain whether there was sufficient State action, the court applied the "joint action" test, whereby "private actors are considered state actors if they are willful participant[s] in joint action with the State or its agents."[214] Because the alleged violations had been directly perpetrated by the Nigerian military—allegedly at Shell's request—the court considered whether Shell had engaged in any joint actions with the Nigerian government.[215] The plaintiffs asserted two "joint action" theories.[216] First, where there is a substantial degree of

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207. *See id.* at *54-*55.

208. *Id.* at *83.

209. *See* Wiwa v. Royal Dutch Petroleum Co., 96 Civ. 8386 (KMW), 2002 U.S. Dist. LEXIS 3293 (S.D.N.Y. Feb. 28, 2002).

210. *See id.* at *3-*6.

211. *See id.* at *6-*7.

212. *See id.* at *9.

213. *See id.* "[I]n order to assert a cause of action under the ATCA, *except in a few narrowly defined situations*, plaintiffs must allege facts that satisfy the ATCA's state action requirement." *Id.* (emphasis added).

214. *Id.* at *40-*41 (quotations omitted).

215. *See id.* at *41.

216. *Id.*

cooperative action between the corporation and the State, then an individual will be considered a State actor.[217] Second, where an individual and the State engaged in significant cooperative action accompanied by sufficient knowledge of the State's conduct on the part of the individual, then the individual can be held liable as a State actor.[218] According to the court, the plaintiffs pled adequate evidence to establish a "substantial degree of cooperative action" between Shell and Nigerian officials.[219] In so finding, the court rejected Shell's assertion that plaintiffs had to prove the corporation "acted in concert" with the government.[220] The court determined plaintiffs had alleged sufficient facts to support a claim Shell willfully participated in joint actions with Nigeria or Nigerian officials in order to prevent anti-Shell demonstrations.[221] Finding the first theory of joint action satisfied, the court declined to consider the second theory.[222] Thus, the pleadings were sufficient to invoke the ATCA and, if proven, would result in Shell's liability for violations of international law.[223]

IV. HOLDING PMFS RESPONSIBLE FOR AIDING AND ABETTING VIOLATIONS OF INTERNATIONAL LAW UNDER ATCA

Given the substantial increase of corporate participation in armed conflict and their export of residual lethal force in the form of armed training, regulation of PMFs under international law is more important than ever. Whereas the Geneva Conventions and laws of war govern *State* military actions, a void exists in international law for *corporations* that wage war.[224] Although the international community has attempted to regulate mercenarism, the conventions are wholly inadequate, inconsistent, and aspirational at best.[225] This void in international law not only gives PMFs immunity from international human rights law, it also encourages States seeking a loophole in international restrictions to hire PMFs.[226] The application of international law in this area, long overdue,

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217. *Id.*
218. *Id.*
219. *Id.*
220. *Id.* at *43.
221. *See id.*
222. *Id.* at *41.
223. *See id.* at *43.
224. *See, e.g.*, Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.
225. *See* discussion *supra* Part II.C.
226. *See id.*

has been left to domestic courts.[227] The case law under the ATCA exemplifies this domestic application of international law.[228]

Recent expansive federal court decisions have resulted in two tests for secondary liability under which PMFs potentially could be held responsible for violations of international law.[229] In the case of a PMF merely training state armies and providing arms assistance, the use of the secondary liability standard becomes particularly relevant because the PMF is not directly involved in hostilities as an actual instrumentality of the State. However, between the two tests—the joint action test and the aiding and abetting standard—the joint action test articulated in *Wiwa* may prove more effective in holding PMFs liable for their actions.

Under the *Wiwa* test, an individual suffering international abuses indirectly by a PMF that has trained state armies need only show a substantial degree of cooperation between the State and the PMF.[230] The *Wiwa* court significantly declined to examine whether Shell could be liable under a second theory of the joint action test that more closely resembled the aiding and abetting standard applied in *Unocal*.[231] Rather, the *Wiwa* court chose to focus on the degree of cooperation between the corporation and the State without the requirement of knowledge on the part of the corporation.[232]

The *Wiwa* test will prove more workable for individuals seeking to invoke the ATCA against PMFs for the simple reason that proving a corporation's knowledge is difficult for at least three reasons. First, discovery of corporate records indicative of their knowledge would be timely and costly in any litigation. Moreover, such costs are further maximized for aliens seeking justice in a foreign legal system. Furthermore, in the case of PMFs staffed by former military officials highly trained in intelligence gathering and strategic planning, it should be expected that such companies would be highly effective in concealing damaging information. Second, ascertaining knowledge could require extensive litigation about theories of agency. Namely, particularly relevant inquiries include whether the corporate office in Virginia was aware of atrocities being committed in Angola or whether such atrocities were foreseeable. Moreover, given the nature of PMFs, employing freelance personnel with former military careers, they may be unable to

227. *See* discussion *supra* Part III.
228. *See id.*
229. *See* discussion *supra* Part III.C.
230. *Wiwa*, 2002 U.S. Dist. LEXIS 3293, at *41.
231. *Id.*
232. *See id.*

effectively control their employees, resulting in little discoverable knowledge of atrocities committed by their hired guns. Third, a knowledge requirement would necessitate that the PMF be specifically aware of how their training techniques and supplies were going to be used. Effectively, a PMF could avoid gaining knowledge by willfully blinding themselves to the international implications and repercussions of their services. Thus the *mens rea* requirement articulated in *Unocal* would pose a significant obstacle to aliens suffering at the hands of PMFs and their employees.

The *Unocal* standard proves problematic for additional reasons. At first glance, the court's analysis seems appropriate, but one must ask whether it is open for reversal by the United States Supreme Court, which has yet to rule on the extent of individual liability under the ATCA. Specifically, if international law is part of federal law, according to *The Paquete Habana*, and no congressional act or executive act contravenes the relevant provision being applied, then, seemingly, courts would be obligated to apply the international aiding and abetting standard as part of federal law. Accordingly, the Ninth Circuit could have rested its decision of secondary liability solely on federal common law standards rather than international criminal law, as it is not clear such reliance would have yielded a different outcome.[233] However, because alternative theories of secondary liability were alleged, the court would have done better to articulate a theory of secondary liability more common in domestic law.[234]

Instead, the Ninth Circuit's decision could portend serious consequences for U.S. foreign affairs. Because the United States has declined to sign and ratify the International Criminal Court (ICC) statute, it is not jurisdictionally bound by decisions resulting from that court.[235] However, the importation of international criminal law standards articulated in the ICTY, ICTR, and mirrored in the ICC, ultimately contributes to the development of customary international law. Regardless of whether the United States is a party to the ICC, the United States will continue to be bound by customary international law unless it persistently objects to the development of such standards. Importing international criminal concepts into federal court decisions based on international law severely negates any persistent objection to which the

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233. *See* Doe I v. Unocal Corp., Nos. 00-56603,00-57197, 00-56628, 00-57195, 2002 U.S. App. LEXIS 19263, at *28-*29 (9th Cir. Sept. 18, 2002).

234. *See id.* at *35-*36 & n.20.

235. *See* Felicity Barringer, *U.N. Renews U.S. peacekeepers' Exemption from Prosecution*, N.Y. TIMES, June 13, 2003, at A8.

United States might otherwise lay claim. Accordingly, should the Supreme Court opt to review the scope of individual liability under the ATCA, the international criminal aiding and abetting standard may provide a solid basis for overturning the decision on the theory that it interferes with separation of powers and foreign affairs. The Ninth Circuit would have done greater justice in solidifying secondary liability for international law violations on the basis of a municipal theory of secondary liability. A theory of joint action as articulated in *Wiwa* avoids this complication.[236]

Under a theory of agency or joint liability articulated by the *Wiwa* court, the Ninth Circuit could have introduced a much easier threshold for establishing individual liability.[237] Instead, plaintiffs—at least in the Ninth Circuit—must now satisfy a two-part test: *mens rea* and *actus reus*.[238] This two-part test may actually make it more difficult for plaintiffs to prove their claim under the ATCA than the Ninth Circuit intended, particularly because it relies upon fulfillment of the ATCA's purpose, as a justification for reliance upon the international criminal standard.[239] Establishing this higher threshold was unnecessary for the purpose the Ninth Circuit hoped to achieve. Although the court did not reject alternative theories of secondary liability, its failure to address those theories has ultimately failed to advance the development of the ATCA tort litigation, leaving the door open for district courts within its circuit and other circuit courts to reject those standards. The Ninth Circuit simply missed an opportunity to justify alternative theories of individual liability.

V. CONCLUSION

In conclusion, the federal district court in *Wiwa*, in its articulation of the joint action test, has provided a workable standard of secondary liability that could be used to hold PMFs liable under international law. Under the joint action test, an alien-plaintiff alleging a violation of international law would only have to show a substantial degree of cooperation between the PMF and the State. Accordingly, a PMF providing a substantial degree of tactical and strategic assistance or planning in an assault launched in a heavily populated civilian area could be found to have the requisite degree of cooperation for purposes of liability for war crimes and associated criminal conduct. Knowledge of

236. *See Wiwa*, 2002 U.S. Dist. LEXIS 3293, at *41.
237. *See Wiwa*, 2002 U.S. Dist. LEXIS 3293, at *41.
238. Unocal, 2002 U.S. App. LEXIS 19263, at *51-*55.
239. *Id.* at *42.

such transgressions on the past of the PMF would be irrelevant. Additionally, PMFs engaged periodically in random assaults where civilians could not be distinguished from combatants would be responsible for their indiscriminate killings.

Thus PMFs, heretofore, unaccountable for human rights violations, cannot only be held liable under ATCA, but States that have been circumventing international law by outsourcing their security concerns may find themselves having to take international human rights more seriously.