

MEN WITH GUNS*

JOHN RILEY** & MICHAEL GAMBONE***

ABSTRACT

From the most critical aspects of maintaining their national security to the mundane work of trucking and virtually everything in between, governments have turned to private military corporations (“PMCs”), but as numerous studies have demonstrated, efforts to regulate PMC actions are lagging. Conversely, there is a realization that any efforts to better regulate PMCs has to be done in a way that is congruent with states’ interests. This is not simply a question of states’ geo-strategic interests being an unfortunate equipoise to more effective regulation. Rather, PMCs are playing a fundamental role in states’ efforts to maintain their vital interests and questions of how to more effectively regulate PMCs must be seen from this broader perspective. This paper advances the argument that by outlawing mercenaries, the international community has inadvertently made effective regulation of PMCs all but impossible. More effective regulation would be possible if PMCs were formally legalized and a simple regulatory regime that charged the contracting actor with the responsibility of holding the PMC compliant with international humanitarian law (“IHL”) was created.

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** Assistant Professor, Department of Political Science, Kutztown University, Kutztown Pa, 19530. riley@kutztown.edu.

*** Professor, Department of History, Kutztown University Kutztown Pa, 19530 gambone@kutztown.edu.

INTRODUCTION

The root cause of the business and human rights predicament today lies in the governance gaps created by globalization—between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences. These governance gaps provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation. How to narrow and ultimately bridge the gaps in relation to human rights is our fundamental challenge.¹

Although John Ruggie, the author of the above quote, is addressing the question of corporate responsibility, the dynamic he describes speaks directly to Private Military Corporations (“PMCs”). As detailed below, a governance gap (i.e. absence of national or international accountability) has emerged whereby PMCs are increasingly violating international humanitarian law (“IHL”) and are rarely being held accountable. The reason is twofold. First, the confluence of an ideological shift favoring the privatization of the military and the rapid rise of global markets has led to the proliferation of PMCs. Second, international law has failed to keep pace with these changing market forces. Consequently, regulation of PMCs falls to either a set of anachronistic international laws, incongruent national law enforcement, or to the firms themselves, and all three approaches are proving inadequate. The result is predictable; the rare prosecution of an alleged illegal PMC activity receives high levels of news coverage whereas the day-to-day PMC activity lacks transparent and effective oversight.²

The argument advanced here is rooted in the realist view of international affairs.³ States are the dominant actors in world politics, and the more powerful states are the most influential. States acting in concert have formulated international humanitarian law and other conventions

¹ The Special Representative of the Secretary-General, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprise: Promotion and Protection of All Human Rights, Civil Political, Economic, Social and Cultural Rights, Including the Right to Development, delivered to the U.N. Human Rights Council*, U.N. Doc. A/HRC/8/5 (April 2008) (prepared by John Ruggie).

² The U.S. Department of Justice issued a thirty five-count indictment for voluntary manslaughter and attempt to commit manslaughter of five Blackwater security guards for their actions on September 16, 2007 at Nisoor Square Baghdad, Iraq is a case in point. Department of Justice, *Transcript of Blackwater Press Conference* (Dec. 8, 2008), <http://www.usdoj.gov/opa/pr/2008/December/08-nsd-1070.html>.

³ See, e.g., HENRY MORGENTHAU, *POLITICS AMONG NATIONS* (McGraw-Hill Humanities 2005) (1948); KENNETH WALTZ, *THEORY OF INTERNATIONAL POLITICS* (1979).

that serve as the foundation for international relations today. Consequently, while globalism and its practices may be challenging national sovereignty,⁴ they do so within a well-established context of global power politics.

The thesis advanced here is that bringing PMCs into compliance with international humanitarian standards is broadly consistent with states' interests and that international law ought to be reformed to facilitate the regulatory process. As reviewed below, there is no distinct body of international law governing the use of PMCs. Rather, a set of international conventions prohibiting mercenarism persists. But PMCs are not covered by the definitions of "mercenaries" in these conventions in either form or function. Therefore, attempts to use these conventions as a basis of international regulation are proving counterproductive. More to the point, by continuing to outlaw mercenarism, the international community is inadvertently creating a series of legal loopholes that make effective regulation of PMCs all but impossible.

More efficacious regulation would be possible if PMCs were formally legalized and a simple regulatory regime that charged the contracting actor with the responsibility of holding the PMC compliant to IHL was adopted in its stead. By doing so, the international community would define baseline expectations of what constitutes acceptable behavior. States would then be free to rely on PMCs within reasonable limits and would retain the flexibility to define the manner in which they would hold PMCs accountable either via municipal law or a future convention. Such an approach would be preferable to the status quo and a reasonable first step to the creation of a long term and sustainable regulatory regime.

Part I and Part II of this article examine the role of PMCs in modern militaries and governments' attempts to regulate them. Turning to the international community's efforts to regulate PMCs, Part III reviews the international conventions governing the use of mercenaries and their application to PMCs. Part IV proposes reforms. Part V outlines an alternative regulatory regime of PMCs.

⁴ See, e.g., Danielle S. Petit, *Sovereignty and Globalization: Fallacies, Truth and Perception*, 17 N.Y.L. SCH. J. HUM. RTS. 1139 (2001).

I. THE RISE OF THE PRIVATE MILITARY CORPORATION

The military symbiosis between private corporate interests and the state can be traced back to the Industrial Revolution and the growing complexity of modern warfare. As weapons systems and logistical support evolved and became increasingly elaborate, nations came to rely upon the private sector to provide the means necessary to sustain them. When the United States, for example, embarked upon the creation of blue water navy in the 1880s, it did so through a well-funded partnership with the steel industry.⁵

Subsequent mobilization efforts in both world wars significantly reinforced the relationship between national governments and corporations. The very scope and scale of twentieth century conflict, incorporating millions of citizens in campaigns that spanned the globe, mandated cooperation between the private and public sectors. Qualitative factors played perhaps an even more important role in forging an alliance between public and private cooperation. Technological breakthroughs such as radar, synthetic materials, and atomic weapons proved to be decisive advancements and were fostered by heavily subsidized partnerships between the military and civilian sectors.⁶

After 1945, national military institutions dedicated to prosecuting the U.S. and Soviet national security interests invested enormous sums in the private sector. Whole new industries in telecommunications, transportation, and computers, among others, appeared and were developed at the bequest of a bipolar struggle for power. The Cold War finished what had been a periodic relationship between the corporate world and the state, determined by war and the

⁵ The Army-Navy Gun Foundry Board, created by the Naval Appropriations Act of 1883 is an example. ALLAN R. MILLETT & PETER MASLOWSKI, *FOR THE COMMON DEFENSE: A MILITARY HISTORY OF THE UNITED STATES OF AMERICA* 265-70 (1984); Michael A. Bernstein, *American Economic Expertise from the Great War to the Cold War: Some Initial Observations*, 50 *J. ECON. HIST.* 407, 416 (1990); WARREN W. HASSLER, *WITH SHIELD AND SWORD: AMERICAN MILITARY AFFAIRS, COLONIAL TIMES TO THE PRESENT* 407-16 (1982); *AMERICAN MILITARY HIST.* 294 (Maurice Matloff, ed., 1969).

⁶ Walter E. Grunden et al., *Laying the Foundation for Wartime Research: A Comparative Overview of Science Mobilization in National Socialist Germany, Japan, and the Soviet Union*, 20 *OSIRIS* 79-106 (2005). See also DAVID M. KENNEDY, *FREEDOM FROM FEAR: THE AMERICAN PEOPLE IN DEPRESSION AND WAR, 1929-1945*, at 615-68 (2001); WILLIAM L. O'NEILL, *A DEMOCRACY AT WAR: AMERICA'S FIGHT AT HOME AND ABROAD IN WORLD WAR II* 75-103 (1993).

ensuing national emergency, and solidified it into a permanent “military-industrial complex” for the next fifty years.⁷

The origins of the modern private military corporation may also be found in the conclusion of the U.S.-Soviet conflict. The global decline of military institutions began after 1989 when as many as seven million personnel were demobilized in the decade following the destruction of the Berlin Wall.⁸ The global security industry has benefitted significantly from the end of hostilities. This has especially been the case in NATO countries (e.g. England, Germany, the United States), nations with a large reservoir of well-trained, technologically adept, and experienced veterans.

Many demobilized Cold War soldiers have found employment outside the law, in organized crime in the former Soviet Union, as security for narcotics traffickers in South America, or as mercenary proxies for the ethnic factions that dominated warfare in the Balkans.⁹ Others gravitated toward a host of embryonic private security firms that emerged to combat skyrocketing global crime rates. They provided both military and police expertise for intelligence gathering, threat assessment, physical security, and training. These early companies ran the gamut from loosely-run organizations that were little more than hired guns to highly organized and professional corporations fully endorsed by their host governments.¹⁰

In the United States, the first major impetus for the privatization of military and other government functions occurred during the Reagan administration. In an effort to reduce the public sector even as defense spending increased, U.S. policy makers sought new methods to delegate services to private interests.¹¹ Although policy decisions in the eighties

⁷ See generally, Atsushi Akera, *IBM's Early Adaptation to Cold War Markets: Cuthbert Hurd and His Applied Science Field Men* 76 BUS. HIST. REV. 767 (2002); J Jonathan Soffer, *The National Association of Manufacturers and the Militarization of American Conservatism*, 75 BUS. HIST. REV. 775 (2001); JAMES T. PATTERSON, GRAND EXPECTATIONS: THE UNITED STATES, 1945-1973, at 313-15 (1996); PAUL BOYER, BY THE BOMB'S EARLY LIGHT: AMERICAN THOUGHT AND CULTURE AT THE DAWN OF THE ATOMIC AGE 107-30 (1985); Ben Baack and Edward Ray, *The Political Economy of the Origins of the Military-Industrial Complex in the United States*, 45 J. ECON. HIST. 369 (1985).

⁸ P.W. SINGER, CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY 53 (2003).

⁹ See Robert Filippone, *The Medellin Cartel: Why We Can't Win the Drug War*, 17 STUD. CONFLICT & TERRORISM 323, 323-26 (1994).

¹⁰ For a good examination of this trend see Kevin A. O'Brien, *PMCs, Myths and Mercenaries: The Debate on Private Military Companies*, 145 RUSIJ. 59 (2000).

¹¹ Ann Markusen, *The Case Against Privatizing National Security*, DOLLARS & SENSE, May/June 2004, at 24, 26-27.

initially focused on cost savings in social welfare and educational spending, federal spending cuts also applied to defense budgets after 1986. This trend accelerated after the collapse of the Soviet Union and the successful prosecution of the first Gulf War. Thereafter, lawmakers promoted the so-called “peace dividend” that could translate old defense spending into new domestic programs.

The same logic was applied to American defense spending and military programs in the Clinton years. The conventional wisdom of the time was that the logistical “tail” could and should be outsourced to the private sector so that the military could expend more effort on its “core competency” of waging war. One estimate in 2000 noted that for every dollar the U.S. Department of Defense (“DOD”) spent, approximately 30 percent went to actual combat forces, while 70 percent went to logistical units.¹² This school of thought believed that billions were being wasted for the unnecessary upkeep of outdated bases and the antiquated management of housing, pay, medical care, and food service.¹³ Dr. Jacques Gansler, Under Secretary of Defense for Acquisition and Technology during the Clinton administration, noted that: “My top priority, as Under Secretary of Defense, is to make the Pentagon look much more like a dynamic, restructured, reengineered, world-class commercial sector business.”¹⁴

Consequently, during the nineties, the number of private military contractors in the employ of the United States began to expand significantly. During operations against Iraq in 1991, the ratio of civilian contractors to military personnel was one to fifty.¹⁵ By the time the United States began military operations in Bosnia-Herzegovina in 1995, the ratio was one to ten.¹⁶ Growth continued apace for almost the next decade. Between 1994 and 2002, the U.S. Defense Department issued some three thousand contracts to private firms worth an estimated \$300

¹² Bryan Bender, *Moving with the Times*, JANE’S DEF. WEEKLY, Nov. 15, 2000, at 20-23; Nelson D. Schwartz & Noshua Watson, *The Pentagon’s Private Army*, FORTUNE, Mar. 17, 2003, at 100.

¹³ Bender, *supra* note 12, at 20-23; See Kirsten Sellars, *Old Dogs of War Learn New Tricks*, NEW STATESMAN, Apr. 25, 1997, at 24; Stephen Newbold, *Competitive Sourcing and Privatization: An Essential USAF Strategy*, AIR FORCE J. OF LOGISTICS, Spring 1999, at 28.

¹⁴ Markusen, *supra* note 11, at 28.

¹⁵ Deborah Avant, *Mercenaries*, FOREIGN POL’Y, July/Aug. 2004, at 20, 21.

¹⁶ *Id.*

billion.¹⁷ By 2003-2004, approximately 8 percent or \$30 billion dollars of the U.S. defense budget was spent on private military corporations.¹⁸

The American military establishment perceived many advantages in outsourcing traditional military functions. One key consideration was the ability of private military contractors to plug holes left unfilled by a simple shortage of conventional forces. The significant reduction of ground units after the first Gulf War, coupled with the concurrent increase in unit deployments, left the American military scrambling to find enough personnel for new missions. This gap became even more pronounced after September 11, 2001 when the invasions of Afghanistan and Iraq placed additional pressure on American military manpower.¹⁹ Private military corporations allowed the Defense Department to delegate certain missions such as force protection, convoy security, and bodyguard duties to contractors so that it could preserve the combat power of its conventional units.²⁰ As one senior officer in Baghdad bluntly explained the relationship in 2004, “We fight the war, and they do the shit work.”²¹

The first large-scale contract the U.S. Defense Department signed with a private military company was in 1992 when Kellog, Brown & Root (“KBR”) won the Logistics Civil Augmentation Program (“LOGCAP”). For an initial fee of \$3.9 million, KBR created contingency plans for the deployment of U.S. forces to thirteen different parts of the world.²² The initial contract grew to include logistical support for U.S. missions in Bosnia, Somalia, Afghanistan, Iraq, and Uzbekistan.²³ Between 1999 and 2003, KBR served forty-two million meals and cleaned 3.6 million bags of laundry in support of U.S. forces stationed in the Balkans.²⁴ As part of Operation Iraqi Freedom in 2003, KBR took responsibility for housing, dining facilities, bath and shower units, janitorial services, recreational facilities, water distribution, electrical work, carpentry, construction, and virtually every remaining

¹⁷ Shawn Macomber, *You're Not in the Army Now*, AM. SPECTATOR, Nov. 2004, at 26.

¹⁸ Dave Whyte, *Lethal Regulation: State-Corporate Crime and the United Kingdom Government's New Mercenaries*, 30 J.L. SOC'Y 577 (2003).

¹⁹ Huck Gutman, *Soldiers for Hire*, 56 MONTHLY REVIEW 11, (June 2004)

²⁰ David Simons, *Occupation for Hire: Private Military Companies and Their Role in Iraq*, 149 RUSI J. 68 (June 2004).

²¹ Joshua Hammer, *Cowboy Up*, THE NEW REPUBLIC, May 24, 2004, at 18.

²² Stan Crock et al., *Outsourcing War*, BUS. WEEK, Sept.15, 2003, at 68.

²³ *Id.*; Patrick Toyne Sewell, *Private Security Companies: The Reasons Why*, 31 MIL. TECH. 60, 60-61 (2007).

²⁴ Schwartz and Watson, *supra* note 12, at 100-107.

non-combat effort in the country. The scale of KBR work for the United States government has risen exponentially in the past few years. The estimated value of contracts for operations in Iraq and Afghanistan war between 2002 and 2004 was \$10.8 billion. By 2009, the total value of KBR contracts in support of operations in the region exceeded \$30 billion.²⁵

England has essentially followed the same trajectory as the United States with respect to PMCs in the last two decades. The Thatcher government kicked off its own military privatization efforts when it began to dispose of State-owned concerns such as the British Aircraft Corporation, Rolls Royce, and Royal Ordnance.²⁶ Training and military service support has followed suit. Fixed wing and helicopter pilot programs are now outsourced to private companies. By 2003, the Ministry of Defense had entered into partnerships with private companies that now provide as much as 80 percent of British Army training.²⁷ Other privatization initiatives have covered the construction and maintenance of military installations, again following a practice well established by the U.S. Defense Department.²⁸

One unique feature of the relationship between the United Kingdom and PMC contractors is the option to incorporate contractors into the British Sponsored Reserve. Under the 1996 Reserve Forces Act, civilian personnel providing military support services in a conflict can voluntarily enroll as members of England's Volunteer Reserve Forces for as long as nine months. While serving, PMC employees enjoy official status in the British military. They are also subject to military law under the Service Discipline Acts.²⁹

Since the end of the Cold War and reunification, Germany has also expanded its relationship with private military contractors. The government in Berlin has struggled with the conflicting dynamics of budget cuts, greater demands for efficiency, and increasing security

²⁵ PRATAP CHATTERJEE, HALIBURTON'S ARMY: HOW A WELL-CONNECTED TEXAS OIL COMPANY REVOLUTIONIZED THE WAY AMERICA MAKES WAR 214 (2009). This was an increase from FY 2001 sales to the Defense Department worth \$452.5 million. See also *Top 100 Defense Contractors*, GOV'T EXECUTIVE, August 2002, at 34-35; See also John Helyar, *Fortunes of War*, FORTUNE, July 26, 2004, at 80, 80-81.

²⁶ Elke Krahnmann, *Private Military Services in the UK and Germany: Between Partnership and Regulation*, 14 EUR. SEC. 277, 280-81 (2005); Whyte, *supra* note 18, at 586.

²⁷ Whyte, *supra* note 18, at 586.

²⁸ Ron Matthews and Judith Parker, *Prime Contracting in Major Defense Contracts*, 15 DEF. ANALYSIS 27, 28-32 (1999).

²⁹ Krahnmann, *supra* note 26, at 281-82.

requirements since the events of September 11, 2001.³⁰ Consequently, PMCs have become heavily involved in the basic infrastructure of German air, ground, and sea forces. Between 1999 and 2003, nearly seven hundred privately owned companies had signed agreements that covered a host of service support functions within the military.³¹ But, unlike their counterparts in Great Britain, actors in Germany tend toward technical support and logistics as opposed to security services.³²

South Africa has also been extremely active in the private security industry since the end of the Cold War. A significant part of the market for security services has been generated within South Africa itself. Rapidly rising crime rates and difficulties posed by an estimated three million illegal Zimbabwean immigrants have necessitated the domestic security industry.³³ In 2007, the South African Private Security Regulation Authority (“PSIRA”) recorded 4,898 private security businesses employing 307,343 individuals, a number approximately three times greater than official police forces.³⁴ Worldwide, former members of the South Africa Defense Force are highly sought after by private military companies. Known for the quality of their training and discipline, these soldiers are hired for conflicts throughout the lesser-developed world. PMCs also enjoy the added benefit that South Africans tend to accept salaries that are lower than their American or European counterparts. According to media estimates, in 2007 as many as 20,000 South Africans were members of foreign militaries or employed abroad by PMCs.³⁵

Non-governmental organizations (“NGOs”) have developed extensive contractual relationships with private military companies. After the conclusion of the Cold War, NGOs offered a viable “soft” target to the terrorist cell or the drug cartel.³⁶ As government facilities improved security precautions in the seventies and eighties, the private sector lagged behind. This gap was not lost on militant groups scattered around

³⁰ See generally, Rudolf Scharping, *The Reform of the Bundeswehr: An Investment in the Future*, MIL. TECH., Feb. 2001, at 35; Martin Aguera, *Reform of the Bundeswehr: Defense Policy Choices for the Next German Administration*, 21 COMP. STRATEGY 179 (2002).

³¹ Krahmman, *supra* note 26, at 283.

³² *Id.*

³³ Sabelo Gumedze, *Regulating the Private Security Sector in South Africa*, SOC. JUST., 2007, at 195, 196-97.

³⁴ PRIVATE SEC. INDUS. REGULATION AUTH., S. AFR., ANNUAL REPORT 2006/2007, available at http://www.psira.co.za/pdfs/annual_report_2007.pdf.

³⁵ Ian Bruce, *Army Could Lose South Africans*, THE HERALD, May 9, 2007, at 4.

³⁶ ROBERT MANDEL, *ARMIES WITHOUT STATES* 9-13 (2002).

the world. The first bombing of the World Trade Center in 1993 marked a growing trend towards attacks on private sector buildings and personnel. More relief workers were killed in the 1990s than soldiers of the U.S. Army. At decade's end, an organization as innocuous as the World Wildlife Fund solicited a bid from the private security company Saracen to protect its operations in the Democratic Republic of Congo.³⁷

Bolstered by a growing list of clients, the private military industry has boomed in the past decade. Estimated profits from the global security market were \$55.6 billion in 1990.³⁸ By 2010, these earnings are projected to rise as high as \$200 billion.³⁹ In the United States, twice as much money is spent on private security than on all the police departments in the country combined. In England, as many as 250,000 people are employed as private security personnel, more than the number manning the British army.⁴⁰ At present, nearly ninety major private military corporations operate in more than one hundred nations.⁴¹

As the security industry has grown, it has followed the corporate path of consolidation. Armor Holdings, one of the older companies in the military marketplace, was originally founded in 1969 to produce personal body armor and corporate security. Between 1996 and 1998, it acquired fifteen smaller companies to expand its portfolio, diversifying into security consulting and non-lethal weapons.⁴² By 2000, Armor Holdings' earnings had topped \$150 million and it was named by *Fortune* magazine as one of America's fastest growing companies.⁴³

³⁷ Deborah Avant, *The Privatization of Security and Change in the Control of Force*, 5 INT'L STUD. PERSPECT. 153, 153 (2004).

³⁸ *Id.* at 154.

³⁹ *Id.*

⁴⁰ P.W. Singer, *Peacekeepers, Inc.*, 119 POL'Y REV. 59, 63 (2003).

⁴¹ Jack Kelly, *Safety at a Price: Safety is a Booming, Sophisticated, Global Business*, PITT. POST-GAZETTE, Feb. 13, 2000, available at

<http://www.post-gazette.com/headlines/20000213security1.asp>. Filiz Zabci, *Private Military Companies: 'Shadow Soldiers' of Neocolonialism*, CAPITAL AND CLASS, Summer 2007, at 1, 3.

⁴² Gene G. Marcial, *Armor's Defenses Looking Formidable*, BUS. WK., Dec. 4, 2006, at 132.

⁴³ Corey Hajim, *Growth in Surprising Places*, FORTUNE, Sept. 5, 2005, at 92, available at http://money.cnn.com/magazines/fortune/fortune_archive/2005/09/05/8271385/index.htm; Doug Brooks, *Messiahs or Mercenaries?* 15 INT'L PEACEKEEPING 126, 129 (2000). DynCorp was listed as the 13th largest US defense contractor in 2002; Booz Allen & Hamilton was listed as 31st the same year. See *Top 100 Defense Contractors*, *supra* note 25, at 38.

II. ATTEMPTS TO REGULATE PRIVATE MILITARY CORPORATIONS

Private military corporations pose formidable difficulties for any agency or country attempting to regulate them. A significant problem is rooted in the nature of combat today and in the absence of traditional “rules of engagement” governing combatants.⁴⁴ Terrorists and insurgents are not by definition conventional opposing forces bound by the Geneva Convention or other rules governing warfare. Similarly, PMCs are not mercenaries in the traditional meaning of the term. They are not simply soldiers for hire as defined by previous Geneva Conventions or the United Nations.⁴⁵ Yet increasingly, PMCs confront terrorists and insurgents in unconventional conflicts.⁴⁶ While the idea of regulating terrorism is absurd, the behavior of military contractors deployed to war zones has drawn considerable international attention and demands for sanction.

Private military company activity is checkered with instances of significant violations of international law and basic standards of human decency. In the Balkans, for example, civilian employees of DynCorp advising local military forces were implicated in the operation of a sex slave ring that caused an international scandal.⁴⁷

Better known is the story of Executive Outcomes in Sierra Leone. Ostensibly hired to put down rebel forces and disaffected elements of the national army, the South African firm quickly restored order in the Freetown area and later expanded operations to the interior.⁴⁸ Executive Outcomes operatives were responsible not only for stability operations, but also training the so-called Kamajors, who replaced the military in local policing duties.⁴⁹ What tainted Executive Outcome’s success in Sierra Leone was its subsequent relationship with the Branch Mining Company, which committed \$80 million to develop a Kimberlite diamond mine in a former rebel stronghold once order was restored.⁵⁰

⁴⁴ Gerry Cleaver, *Subcontracting Military Power: The Privatisation of Security in Contemporary Sub-Saharan Africa*, 33 CRIM. L. & SOC. CHANGE 131, 132-33 (2000).

⁴⁵ *Id.*; Whyte, *supra* note 18, at 594.

⁴⁶ Brooks, *supra* note 43, at 133-36.

⁴⁷ Russell Mokhiber & Robert Weissman, *Bad Apples in a Rotten System: The 10 Worst Corporations of 2002*, MULTINAT’L MONITOR, Dec. 2002, at 8, 14 (2002).

⁴⁸ Kevin O’Brien, *Freelance Forces: Exploiters of Old and New-Age of Peacebrokers*, 10 JANE’S INTEL. REV. 42 (1998).

⁴⁹ William Reno, *Privatizing War in Sierra Leone*, 96 CURRENT HIST. 227, 229 (1997).

⁵⁰ *Id.* at 230.

The prospect of a foreign mining operation ensconced under the protection of mercenary guns raised a number of questions regarding Executive Outcome's motives and Sierra Leone's tentative grip on its own sovereignty. Within a relatively short period, South African legislators began to consider stiffer regulations of private military company operations based in the country.⁵¹

The career of former British officer Tim Spicer offers a case study in the problematic nature of private military corporations. In 1996, Spicer created Sandline International, an organization that provided "operational support" to private clients as well as host governments in need of military assistance.⁵² Within a year, Sandline operatives briefly deployed to Papua New Guinea to protect a copper mining company. In 1998, Spicer reappeared in Sierra Leone, where his company attempted to ship arms to coup plotters in that country.⁵³ The exposure of this operation and international scandal effectively destroyed Sandline as a viable entity in the private military security industry. However, Spicer was able to resurrect his career in 2002 when he created Aegis Defense Services, a company that created its own niche in the management of other security companies.⁵⁴ In relatively short order, retired British general officers and former U.S. national security advisor Robert McFarlane were on its board of directors. A turning point for the company came in 2004 when the Coalition Provision Authority granted Aegis an \$80 million contract to oversee the administration of private military contractors in Iraq.⁵⁵

Since coalition forces invaded Iraq in 2003, the country has become a magnet for private military companies and subsequent controversy. When the scandal involving the abuse of prisoners in Abu Ghraib became public a year after the war began, contractors working for the Titan Corporation and CACI were quickly implicated for their direct involvement.⁵⁶ Moreover, Ali Soufan, an F.B.I supervisory special agent from 1997 to 2005, suggests "that when reading between the lines of the

⁵¹ See, e.g., Elizabeth Rubin, *An Army of One's Own*, HARPER'S, Feb. 1997, at 44.

⁵² Robert Baer, *Iraq's Mercenary King*, VANITY FAIR, Apr. 2007, at 136.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*; see also Helyar, *supra* note 25, at 80-81.

⁵⁶ James Kwok, *Armed Entrepreneurs: Private Military Companies in Iraq*, HARV. INT'L REV., Spring 2006, at 34, 36; see also Naomi Klein, *Shameless in Iraq*, THE NATION, July 12, 2004, at 14.

newly released memos,⁵⁷ it seems clear that it was the contractors, not C.I.A. officers, who requested the use of these techniques.”⁵⁸

In May 2005, contractors working for Zapata Engineering allegedly opened fire on U.S. Marine positions in Fallujah, an act that resulted in their brief arrest and expulsion from the country.⁵⁹ The 2007 shooting of Iraqi civilians by Blackwater security contractors led to the first prosecution under the Military Extraterritorial Jurisdiction Act and the termination of the company’s contract in 2009.⁶⁰ Blackwater, later renamed “Xe,” was eventually expelled from Iraq. Former employees of the company were ordered out of the country in February 2010.⁶¹

As one of the most active repositories for private military corporations, South Africa has created some of the most stringent regulations for them. One early effort was the 1998 Regulation of Foreign Military Assistance Act, which provided that PMCs based in South Africa could not operate unless they were subjected to governmental authority. Primarily aimed at private military companies such as Executive Outcomes, it reserved the right to proscribe actions that threatened human rights, violated arms trafficking controls, or subverted national sovereignty.⁶² In 2001, the national legislature created Private Security Industry Regulation Act 56, which provides basic regulatory authority for South African PMCs.⁶³ The act defines PMC services and imposes a sanctioned code of conduct upon PMC employees. It also maintains standards for training, registration, and oversight. A host of state agencies, from the Private Security Regulation Authority to the Safety and Security Sector Education and Training Authority (“SASSETA”), now scrutinize private security contractors.⁶⁴

⁵⁷ Soufan is referencing the series of memos authored by the White House Office of Legal Counsel to John Rizzo, Acting Legal Counsel of the Central Intelligence Agency. These memos were declassified on April 16, 2009 and are available at http://www.aclu.org/safefree/general/olc_memos.html.

⁵⁸ Ali Soufan, *My Tortured Decision*, N.Y. TIMES., Apr. 23, 2009, at 27.

⁵⁹ Griff Witte, *Contractors Deny They Shot at Marines, Allege Mistreatment*, WASH. POST, June 10, 2005, at A18.

⁶⁰ Russell Mokhiber, *Blackwater on Trial*, MULTINAT’L MONITOR, Jan-Feb. 2009, at 52; Monte Morin, *Iraq Rescinds License for Blackwater Security Firm*, L.A. TIMES, Jan. 30, 2009, at A4.

⁶¹ Jane Arraf, *Blackwater Security Contractors Ordered Out of Iraq*, CHRISTIAN SCI. MONITOR, Feb. 10, 2010, <http://www.csmonitor.com/World/2010/0210/Blackwater-security-contractors-ordered-out-of-Iraq>.

⁶² Cleaver, *supra* note 44, at 144.

⁶³ Private Security Industry Regulation Act 56 of 2001 available at <http://www.ppira.co.za/content/category/5/20/37/>.

⁶⁴ Gumedze, *supra* note 33, at 201.

To enforce these provisions, the South African government has encouraged voluntary cooperation with PMCs and concluded various memoranda of understanding with the Security Industry Alliance, an umbrella group representing PMCs, to facilitate compliance with national law.⁶⁵

Unlike South Africa, Germany enjoys a long-standing body of law pertaining to private military functions that dates back to its 1927 Trade Code. However, the bulk of the code addresses the transfer of military technology and weapons rather than actual services rendered by individual contractors. In 1999 and 2002, it was updated to include private security services and training and employment application standards for PMCs.⁶⁶

In England, regulation is accomplished in part through cooperation between the public and private sectors. The British private security industry has committed itself to voluntary compliance with national law. The British Association of Private Security Companies (“BAPSC”) was formed in 2006 and includes in its charter promises to respect human rights and uphold British foreign policy.⁶⁷ The outright regulation of overseas PMC services is articulated in the British Export Control Act of 2002.⁶⁸ However, like earlier versions of the German Trade Code, the legislation focuses more on military equipment and technology transfers than military services performed by contractors. Recognizing this shortfall, the 2002 Green Paper “Private Military Companies: Options for Regulation” opened a discussion on the standards for national licensing, state sanction of recruitment, training, and personnel management.⁶⁹ To date, there has been no concrete progress on implementing these measures.

The legal regulation of private military corporations working for the United States has been inconsistent at best. Until recently,

⁶⁵ *Id.* at 198. For an interesting comparison of expatriate soldiers and legal status see *The Gurkhas: Trouble in the Rear*, THE ECONOMIST, Apr. 19, 2008, at 69.

⁶⁶ Krahnmann, *supra* note 26, at 290.

⁶⁷ *Who Dares Profits: Private Military Companies*, THE ECONOMIST, May 20, 2006, at 60. See also British Association of Private Security Companies, <http://www.bapsc.org.uk> (last visited Oct. 5, 2008).

⁶⁸ Export Control Act, 2002 available at http://www.opsi.gov.uk/acts/acts2002/ukpga_20020028_en_1; Krahnmann, *supra* note 26, at 287.

⁶⁹ See *Green Paper of the Foreign Affairs Committee of the House of Commons, Private Military Companies: Options for Regulation*, (Feb. 12, 2002), available at http://www.fco.gov.uk/resources/en/pdf/pdf4/fco_pdf_privatemilitarycompanies; Dave Whyte, *State-Corporate Crime and the United Kingdom Government's New Mercenaries*, 30 J.L. SOC'Y 575, 586-87 (2003).

Washington has treated military corporations like their civilian counterparts. For example, military firms are charged under the Defense Base Act⁷⁰ of 1941 to provide insurance for their workers employed in support of military operations abroad.⁷¹ However, rather than regulate the actual practices of private military corporations, the law is simply an extension of mandatory workmen's compensation coverage for death or injuries suffered on the job.

Legislation that created sanctions against illegal acts came much later. According to the 2000 Military Extraterritorial Jurisdiction Act, the Secretary of Defense is charged with initiating prosecutions against military contractors under U.S. criminal law.⁷² In 2004, the Coalition Provisional Authority stipulated that contractors fell under U.S. and not Iraqi or international jurisdiction. However, at the time, it was unclear which agencies were responsible for ensuring PMC compliance with American law. While the Defense Department retained its prosecutorial role, the State Department Office of Defense Trade Controls was tasked with monitoring U.S. military contractors for compliance with the law regulating the training of foreign militaries or providing services.⁷³

This confusion led some U.S. legislators to propose measures to tighten up controls on private military corporations. In 2006, Senator Lindsay Graham (R-SC) included an amendment to a 2007 defense spending bill that placed all civilian and military contractors working for the federal government under the jurisdiction of the Uniform Code of Military Justice ("UCMJ"). Previously, this type of jurisdiction applied only when the country had officially declared war. Graham's measure expanded the military's domain to include a "contingency operation" such as the deployment of American forces to Afghanistan and Iraq.⁷⁴

Despite Graham's reform, it is important to note that application of UCMJ standards applies only to crimes committed by PMC

⁷⁰ 42 U.S.C. §§ 1651-1654 (2009).

⁷¹ Claire Been, *Bypassing Redundancy: Resolving the Jurisdictional Dilemma Under the Base Defense Act*, 83 WASH. L. REV. 219 (2008).

⁷² Avant, *supra* note 15, at 24.

⁷³ Eugene Smith, *The New Condottieri and U.S. Policy: The Privatization of Conflict and Its Implications*, PARAMETERS, Winter 2002-03, at 104, 113. According to a 1997 amendment to the International Traffic in Arms Regulations, private military companies are required to register with the United States government before receiving contracts. Contracts are subsequently monitored by the State Department Office of Defense Trade Controls. See Ken Silverstein, *Privatizing War*, THE NATION, July 28, 1997, at 11, 12.

⁷⁴ Marc Lindemann, *Civilian Contractors Under Military Law*, PARAMETERS, Autumn 2007, at 83, 88.

contractors *after* they have already committed an alleged crime.⁷⁵ The actual regulation of prerequisite standards for military contractors – training, equipment, and doctrine – remains contained within individual contracts. Consequently, standards are rarely uniform and are often subject to both time-sensitive deadlines and mission imperatives in practice. Policy was further muddled by compromises between PMCs and host nations. When the December 2008 Status of Forces Agreement between the United States and Iraq took effect, contractors providing special protective services for American officials, such as Blackwater, lost limited immunity from the U.S. government in exchange for their services.⁷⁶

More broadly speaking, international regulation of private military corporations fits the stereotypical patchwork image posited by contemporary scholars of the topic. Within the European Union, nations such as Denmark, Finland, and France have potent control mechanisms and maintain strict authority over private security companies.⁷⁷ Italian standards, in contrast, are relatively lax.⁷⁸ Even where individual nations have a tradition of cooperative foreign policy, the consensus rapidly breaks down over PMCs. The United Kingdom, along with Australia, Finland, Japan, Costa Rica, and Kenya, supported a United Nations treaty to regulate the international arms trade, a venue in which private armaments companies have made substantial profits through weapons sales and technical assistance. However, the United States was the sole country to vote against the treaty resolution in 2006.⁷⁹

Military contractors understand the inconsistencies that exist within countries attempting good faith regulation of the industry and use them to avoid the law. Many former South African Defense Forces'

⁷⁵ *Id.*; Andrew Gray & Randall Mikkelsen, *U.S. to Tighten Rules for Iraq Contractors*, REUTERS, Oct. 30, 2007, <http://www.reuters.com/article/idUSN30198899>.

⁷⁶ Gray & Mikkelsen *supra* note 75; James Risen & Timothy Williams, *U.S. Looks for Blackwater Replacement in Iraq*, N.Y. TIMES, Jan. 30, 2009, available at <http://www.nytimes.com/2009/01/30/world/middleeast/30blackwater.html>. See also Agreement Between the United States of America and the Republic of Iraq on the Withdrawal of United States Forces from Iraq and the Organization of Their Activities During Their Temporary Presence in Iraq, art. 12, available at http://graphics8.nytimes.com/packages/pdf/world/20081119_SOFA_FINAL_AGREED_TEXT.pdf

⁷⁷ See DR. TINA WEBER, ECOTEC RESEARCH AND CONSULTING, A COMPARATIVE OVERVIEW OF LEGISLATION GOVERNING THE PRIVATE SECURITY INDUSTRY IN THE EUROPEAN UNION, available at <http://www.coess.org/studies.htm>.

⁷⁸ *Id.*

⁷⁹ Grace Jean, *United States and Britain at Odds Over Weapons Sales Regulations*, NAT'L DEF., Dec. 2007, at 26.

soldiers, for example, apply for U.S. citizenship and residency to void their home government's jurisdiction.⁸⁰ Employees of companies formed within countries with unstable governments, or at the behest of "rogue" governments that seek their services as a matter of deliberate policy, act with few or no sanctions whatsoever.

III. MERCENARY AND HUMANITARIAN LAW

The Protocol to the Geneva Convention ("Protocol 1"), the Organisation of African Unity Convention for the Elimination of Mercenarism in Africa ("OAU Convention"), and the International Convention Against the Recruitment, Use, Financing and Training of Mercenaries ("UN Convention") comprise the principle sources of international law governing private military forces⁸¹ and each has been critiqued extensively and their weaknesses are well documented.⁸² Consequently, this review will only examine these conventions briefly.

"Every empire, from Ancient Egypt to Victorian England, utilized contract forces,"⁸³ but mercenaries only obtained pariah status in the twentieth century.⁸⁴ The international community's collective effort to outlaw or control the undesirable effects of mercenarism was a response to three interrelated factors.

⁸⁰ Cleaver, *supra* note 44, at 141-42; Gumedze, *supra* note 33 at 197, 204-05. This was a common practice encountered by the author while deployed to Iraq in 2006.

⁸¹ Herein the three conventions are collectively referred to as the mercenary conventions.

⁸² See, e.g., Ellen L. Fry, *Private Military Firms in the New World Order: How Redefining "Mercenary" Can Tame the "Dogs of War,"* 73 *FORDHAM L. REV.* 2607, 2637-2644 (2005); E.L. Gaston, *Mercenarism 2.0? The Rise of the Modern Private Security Industry and Its Implication for International Humanitarian Law Enforcement,* 49 *HARV. INT'L L. J.* 221, 230-238 (2008); Christopher Kinsey, *Challenging International Law: A Dilemma of Private Security Companies,* 5 *J. OF CONFLICT SEC. & DEV.* 269 (2005); Allaoua Layeb, *The Need for An International Convention Against Mercenaries and Mercenarism,* 1 *AFRICAN J. OF INT'L & COMP. L.* 466 (1989); Jackson Nyamuya Maogoto & Benedict Sheehy, *Contemporary Private Military Firms Under International Law: An Unregulated "Gold Rush,"* 26 *ADELAIDE L. REV.* 245 (2006); Ryan Scoville, *Toward An Accountability-Based Definition of "Mercenary,"* 37 *GEO. J. INT'L* 541 (2006); 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 (1998).

⁸³ P.W. Singer, *Corporate Warriors: the Rise of the Privatized Military Industry and Its Ramifications for International Security,* *INT'L SECURITY,* Winter 2001-02, at 186, 190.

⁸⁴ Sarah Percy, *Mercenaries: Strong Norm, Weak Law,* 61 *INT'L ORG.* 367, 372-73 (2007); Nicholas Parrillo, *The De-Privatization of American Warfare: How the U.S. Government Used, Regulated, and Ultimately Abandoned Privateering in the Nineteenth Century,* 19 *YALE J. L. & HUMAN.* 1 (2007); Zarate, *supra* note 82, at 82.

First, mercenaries represent an inherent threat to state sovereignty.⁸⁵ A crucial distinction between states and other international actors is that states have a monopoly on the legitimate use of force.⁸⁶ From a strictly Weberian perspective,⁸⁷ mercenaries are rogue actors who, either by initiating or participating in a conflict, might undermine a state's desired foreign policy. Advances in transportation, communication, and military technology both during and immediately after World War II enabled mercenaries to easily operate outside the purview of states. Along this same vein, the rapid delocalization in Africa and Asia during the 1950s and 60s created fertile ground for mercenaries looking to sell their services. Newly formed states worried that former colonial powers might use mercenaries to destabilize their regimes, and groups still fighting for self determination worried that oppressive regimes might hire mercenaries to stymie their efforts.⁸⁸ As discussed above, the concern of untoward mercenary influence in African and Asian states is still alive and even the rumor of a mercenary presence can have a chilling effect on the local populous.⁸⁹

Finally, there was a concern that these "dogs of war" represented the worst elements of war. With no patriotic loyalties to inhibit their greed and affinity for wars, mercenaries were a scourge on local populations and undermined the ongoing efforts to codify and regulate conduct during war. As Sarah Percy's review of the proceedings of the Protocol and UN Convention demonstrates, both developed and developing countries shared a common opprobrium of the mercenary class of soldier.⁹⁰ By definition mercenaries stood as an affront to humanitarian law.

Composed of both treaty and customary law, IHL is a broad set of laws that governs armed conflict. Its aim is to introduce a certain degree of humanity into war by affording combatants and noncombatants rights and "restricting the means and methods of combat in order to spare

⁸⁵ Percy, *supra* note 84, at 381-86.

⁸⁶ MAX WEBER, *THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION* 154 (Free Press 1968) (1947).

⁸⁷ *See id.*

⁸⁸ Zarate, *supra* note 82, at 86-90.

⁸⁹ Ian Evans, *Mercenaries Join Mugabe's Ruthless Terror Campaign*, *THE INDEP.*, July 15, 2008, at 18, available at <http://www.independent.co.uk/news/world/africa/mercenaries-join-mugabes-ruthless-terror-campaign-867620.html>.

⁹⁰ Percy, *supra* note 84. However, the OAU Convention's modification of the Protocol's treatment of mercenaries suggests that the African states were attempting to prohibit unrestrained mercenarism rather than mercenaries. For example, the OAU Convention allows African countries to employ mercenaries to maintain their own security.

the civilian population from the adverse effects of hostilities.”⁹¹ At its core are the four Geneva Conventions of 1929 and the two additional Protocols of 1977.⁹² IHL also repeatedly cites the Hague Conventions of 1899 and 1907, and numerous treaties banning the use of certain weapons or controlling the effects of indiscriminate conventional weapons.⁹³ Customary law has also become an important source filling the gaps left by treaty law, and as Bassiouni puts it, “in the last one hundred years, the evolution of the dual sources of international humanitarian law, namely conventional and customary law, have become so intertwined and so overlapping that they can be said to be two sides of the same coin.”⁹⁴ Used here, IHL refers to treaty and customary law governing international and non-international conflict.

The following subsections review the international community’s attempt to advance IHL by outlawing mercenaries and attempting to regulate their undesirable effects.

A. ATTEMPTS TO DEFINE MERCENARIES

Thus far, the international community has attempted to outlaw mercenaries by casting them as illegitimate actors. Protocol 1 Article 47 Section 1 denies mercenaries the right to participate in combat and excludes them from the rights afforded other soldiers who become

⁹¹ Robert Kogod Goldman, *International Humanitarian Law: Americas Watch’s Experience in Monitoring Internal Armed Conflicts*, 9 AM. U.J. INT’L L. & POL’Y. 49, 52 (1993).

⁹² Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1949), 6 U.S.T 3115 (1956) [hereinafter Geneva Convention I]; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (1949), 6 U.S.T 3217 (1956) [hereinafter Geneva Convention II]; Geneva Convention (III) Relative to the Treatment of Prisoners of War (1949), 6 U.S.T 3316 (1956) [hereinafter Geneva Convention III]; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (1949), 6 U.S.T 3516 (1956) [hereinafter Geneva Convention IV]. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) Adopted by the Conference on 8 June 1977, 16 I.L.M 1391 (1977) [hereinafter Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) Adopted by the Conference on 8 June 1977, 16 I.L.M 1442 (1977) [hereinafter Protocol II].

⁹³ LINDSEY CAMERON, BASIL INSTITUTE ON GOVERNANCE CONFERENCE ON “NON-STATE ACTORS AS STANDARD SETTERS: THE EROSION OF THE PUBLIC-PRIVATE DIVIDE,” INTERNATIONAL HUMANITARIAN LAW AND THE REGULATION OF PRIVATE MILITARY COMPANIES (2008), available at <http://www.baselgovernance.org/fileadmin/docs/pdfs/Nonstate/Cameron.pdf>.

⁹⁴ M. Cherif Bassiouni, *The Normative Framework of International Humanitarian Law: Overlaps, Caps, and Ambiguities*, 8 TRANSNAT’L & CONTEMP. PROBS. 199, 200 (1998); see JEAN-MARIE HENCKAERTS ET AL., CUSTOMARY HUMANITARIAN LAW: VOL. 1 (2005).

prisoners of war.⁹⁵ The second section's definition of a mercenary has served as a quoin of all subsequent attempts at regulation.

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 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.⁹⁶

Disappointed by the Protocol's failure to hold states responsible for the actions of mercenaries, African states ratified an additional convention in 1977 within the auspices of the Organization of African Unity ("OAU").⁹⁷ Only applicable to Africa, the OAU Convention was designed to augment the Protocol but by doing so highlighted some of the inherent flaws in the Protocol's approach and the unique concerns of the African States.

The OAU Convention adopted the Protocol's definition of mercenaries in whole. The only change is to the economic component of the definition. Section 1(c) of the OAU Convention states that a mercenary "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..."⁹⁸ By adopting a more inclusive definition that drops the Protocol's requirement that a mercenary is paid significantly more than regular armed forces, the OAU attempted to

⁹⁵ Protocol I, *supra* note 92.

⁹⁶ *Id.*

⁹⁷ Organization of African Unity Convention for the Elimination of Mercenarism in Africa, July 3, 1977, O.A.U. Doc. CM/433/Rev L., Annex 1 (1972), *available at* <http://www1.umn.edu/humanrts/instree/mercenaryconvention.html> [hereinafter OAU Convention].

⁹⁸ *Id.*

address one of the several problematic aspects of ascribing economic motivation to a combatant's legal standing.

Secondly, and more importantly, the OAU Convention broke from the Protocol and did not make all mercenary acts illegal. Rather, the OAU sought to make only the undesirable aspects of mercenarism illegal. More specifically, the OAU Convention outlaws mercenary acts that are intended to inhibit a people's right to self-determination, defined as either threatening the territorial integrity of a state or opposing African independence from the former colonial powers.⁹⁹ As discussed below, the African approach of attaching legality of an act to the harm the act causes and the purpose behind the act, rather than the category of the soldier committing the act, is more consistent with the Geneva Conventions and IHL more generally than Article 47 of the Protocol.

The UN Convention, ratified in 1989 and entered into force in 1991, incorporated the key elements of the two earlier conventions. Defining a mercenary in nearly identical terms as the Protocol,¹⁰⁰ the UN Convention's approach was to outlaw the mercenary class. Elements of the OAU Convention are also incorporated as the training, financing, or recruitment of mercenaries by either individuals or states party to the convention is prohibited.¹⁰¹ Although jurisdiction over offenders is relegated to the domestic level, parties are required to initiate criminal or extradition proceedings if alleged offenders are found to be within their territory,¹⁰² and "state parties shall afford one another the greatest measure of assistance in connection with criminal proceedings."¹⁰³

B. JURISDICTION AND ENFORCEMENT

These collections of laws, however, have not produced the desired effects as few mercenaries have been prosecuted.¹⁰⁴ Moreover,

⁹⁹ OAU Convention, *supra* note 97, at art 1.

¹⁰⁰ The UN Convention does not include the Protocol's criteria of direct participation in the hostilities in its definition of a mercenary. "A mercenary, as defined in Article 1 of the present Convention, who participates directly in hostilities or in a concerted act of violence, as the case may be, commits an offence for the purposes of the Convention." G.A. Res. 44/34 (III), at 306, U.N. Doc. A/RES/44/34 (Dec. 4, 1989).

¹⁰¹ OAU Convention, *supra* note 97, at art 2.

¹⁰² *Id.* at art. 10.

¹⁰³ *Id.* at art. 13.

¹⁰⁴ Although there have been a high profile trials of mercenaries in various national courts (e.g. British and American mercenaries participating in the Angolan Civil War in 1976, Bob Denard for his role in the assignation of Ahmed Abdallah and for leading an attempted coup against the

the mercenary conventions are poorly suited to regulate such activities in a globalized world economy.¹⁰⁵ The problem stems from three different areas.

First, all three conventions contain fatal legal deficiencies. Each convention defines mercenary in cumulative terms so that if one criterion is absent, a person will not be considered a mercenary. This becomes an impossibly high standard to meet because each of the standards is underspecified. As Scoville asserts, by defining mercenaries as combatants “motivated to take part in the hostilities essentially by the desire for private gain,” the law “appears to require the prosecutor to prove that the actor both had a subjective desire to make money and that that subjective desire was more influential in causing the actor to take part in hostilities than any other simultaneously held, subjectively held.”¹⁰⁶ Because actors may enter combat either as regular soldiers or mercenaries with mixed motivations that might range from patriotism or adventurism to a desire to escape prosecution or make money, the ability to prove that private gain was the essential motivating factor is problematic.

Other authors have noted that the requirement that a mercenary not be a member of “armed forces Party to the contract” is easily escaped by integrating the outside combatants into regular forces. That is, by giving the mercenaries perfunctory rank and position, countries can effectively and legally recruit outside fighters for combat.¹⁰⁷ Furthermore, an outside private actor can only be considered a mercenary if he or she “does, in fact, take a direct part in the hostilities”¹⁰⁸ or engages “in a concerted act of violence.”¹⁰⁹ From this vantage point, a private company could legally operate in combat as long as it did not take part in the hostilities. This creates a loophole for mercenaries who fire upon opposing forces while protecting a person or asset.¹¹⁰

Second, the glaring gaps in the law are equally important. All three conventions rely on domestic enforcement of their provisions and

Benin government in 1977, and Simon Mann for participation in the Wongo Coup attempt in Equatorial Guinea in 2004), prosecution remains the exception rather than the norm.

¹⁰⁵ Thus far no PMC executives have been formally charged with violating either the mercenary conventions or other IHL.

¹⁰⁶ Scoville, *supra* note 82, at 557-58.

¹⁰⁷ Maogoto and Sheehy, *supra* note 82, at 261.

¹⁰⁸ Protocol 1, *supra* note 92, at art. 47; G.A. Res. 44/34, *supra* note 94, at art. 3 §1.

¹⁰⁹ G.A. Res. 44/34, *supra* note 100, art. 1 § 2(a).

¹¹⁰ CAMERON, *supra* note 93, at 3.

no sanctions are specified for countries that fail to prosecute known mercenaries in their territory. Nor do the conventions specify the punishment either for the mercenaries or the states that train or recruit them. Additionally, the authors of the conventions intentionally did not include any language that would hold states responsible for the actions of their citizens.¹¹¹ That is, a country is not liable if its citizens participate in a foreign war as mercenaries. As Percy notes, states balanced the anti-mercenary norm against the competing norm of preserving state sovereignty.¹¹² The effect is the creation of international law wherein the loopholes are so large and the enforcement mechanisms are so weak that one would imagine that it would be harder to violate the law in a way that led to prosecution than to operate freely and openly as a mercenary.¹¹³

Third, the conventions would have been more effective if they had better reflected the fundamental shifts in world politics. These conventions collectively created a regime to regulate mercenary action in an international environment that no longer exists. The state-centric model that defined much of Cold War international affairs has given way to a globalizing world that is in great flux. States remain the most important players, but the micro-technological revolution and the seemingly unending advances in telecommunication and transportation have given multinational corporations, including mercenaries or private military forces, a powerful new role in international relations. More importantly, most western states have embraced a new model of global business, which in turn has paved the way for bringing private actors into the public sector. PMCs have benefited tremendously from these changes.

¹¹¹ Percy, *supra* note 84, at 381-86. This is not to suggest that states are not responsible for the actions of their contracted PMCs. Rather the level of state responsibility to conduct due diligence and hold PMCs accountable is an open debate. *E.g.* Alexandre Faite, *Involvement of Private Contractors in Armed Conflict: Implications under International Humanitarian Law*, 4 DEFENCE STUD. 166, 176-78 (2004); Saad Gul, *The Secretary Will Deny All Knowledge of Your Actions: The Use of Private Military Contractors and the Implications for State and Political Accountability*, 10 LEWIS & CLARK L. REV. 287 (2006); Int'l Law Comm'n, *Draft Articles on State Responsibility*, U.N. Doc. A/56/10 at 44-45 (Oct. 30 2001), available at <http://www.ilsa.org/jessup/jessup06/basicmats2/DASR.pdf>.

¹¹² Percy, *supra* note 84.

¹¹³ The often cited hyperbolic observation captures the reality of the situation "any mercenary who cannot exclude himself from this definition deserves to be shot—and his lawyer with him!" SARAH PERCY, *MERCENARIES: THE HISTORY OF A NORM IN INTERNATIONAL RELATIONS* 53 (2007) (quoted in GEOFFREY BEST, *HUMANITY IN WARFARE* 375 (1980)).

Whether or not privatizing or outsourcing of the private sector is cost effective or consistent with larger democratic principles is beyond the scope of this paper. What is important for our purposes is that western countries see the proliferation of private military forces as desirable. That is, if we assume that countries still wish to limit the harmful effects of mercenaries, and changes to numerous countries' municipal laws support this contention,¹¹⁴ then the countries' desire to do so is tempered by their need to encourage mercenary-like action. The private military company has become a valuable tool of the state and any efforts to regulate it must reflect this reality.

Therefore, we argue in the next section that attempts to regulate the pernicious activities of mercenaries by outlawing the very act of being a mercenary are misplaced. Moreover, reforms that suggest changes to the conventions' definitions of a mercenary reflect an anachronistic mindset. Effective international law must reflect both competing norms; a desire to minimize the worst elements of war and the drive to privatize the public sector.

IV. PROPOSED REFORMS

If one accepts the assertion that PMCs are little more than mercenaries who cloak themselves in the language of modern business (i.e. specialists on violence)¹¹⁵ in an effort to circumvent standing prohibitions, then a simple solution is to treat PMCs as mercenary-like actors and ban their activities. Although this approach is not commonly advocated in academic works, there has been a call in more popular venues to outlaw PMCs.¹¹⁶ At a minimum, representatives of the United

¹¹⁴ For example, British and German reforms are reviewed by Elke Krahnmann, *supra* note 26, at 277-95; reforms to U.S. law are reviewed by JENNIFER K. ELSEA ET AL., CONG. RESEARCH SERV., PRIVATE SECURITY CONTRACTORS IN IRAQ: BACKGROUND, LEGAL STATUS, AND OTHER ISSUES (July 11, 2007); South Africa's reforms are reviewed in the following section.

¹¹⁵ A term reintroduced by Anna Leander, *Regulating the Role of Private Military Companies in Shaping Security and Politics*, in FROM MERCENARIES TO MARKET: THE RISE AND REGULATION OF PRIVATE MILITARY COMPANIES 49 (Simon Chesterman & Chia Lehnardt eds., Oxford Univ. Pr. 2007).

¹¹⁶ Eric Margolis, *No More Mercenaries*, LEWROCKWELL.COM, Sep. 26, 2007, <http://www.lewrockwell.com/margolis/margolis88.html>; Press Release, War on Want, 'Ban UK Mercenaries' Call After New Shootings (Oct. 19, 2007), available at <http://www.waronwant.org/news/press-releases/15036-ban-uk-mercenaries-call-after-new-shootings>; JEREMY SCHAHILL, BLACKWATER: THE RISE OF THE WORLD'S MOST POWERFUL MERCENARY ARMY (2007). Schahill does not call for a revision of the conventions' definitions of mercenaries, but as the title suggests, Blackwater and other PMCs are labeled mercenaries throughout the text and a central message of the work is that PMCs are operating outside the law.

Nations have advocated amending the UN Convention's definition of the word mercenary. Reporting to the United Nations Third Committee (Social, Humanitarian, and Cultural) UN Rapporteur on Mercenaries, Enrique Bernales Ballesteros stressed that a "broader legal definition of mercenarism to combat mercenary involvement in both international and domestic armed conflicts" is critical.¹¹⁷ Some countries have taken this approach as they look to strengthen their domestic law.¹¹⁸

Most notably, South Africa's Prohibition on Mercenary Activities and Prohibition and Regulation of Certain Activities in Areas of Armed Conflict Act No. 27 bars its citizens from participating in "combat for private gain in an armed conflict"¹¹⁹ and to "recruit, use, train, support or finance any person to provide assistance or render any service to a party to an armed conflict" without the expressed authorization of a specified government Committee.¹²⁰ By taking such an expansive approach, South Africa effectively outlawed routine PMC activities.¹²¹ Although hailed as "very innovative" by the International Committee of the Red Cross,¹²² it is not clear if the law will produce its intended effect. As Andrew Carswell, Regional Delegate to the Armed & Security Forces of the International Committee of the Red Cross, asks, "can the South African legislation be considered 'good practice' or a regulatory option for countries wishing to respect and ensure respect of IHL?"¹²³ That is, for the act to reduce substantially either the number of private military soldiers or companies, an exceptional level of

¹¹⁷ Press Release, General Assembly, Broader Legal Definition of 'Mercenary' Needed, Says Special Rapporteur, As Third Committee Continues Discussion of Self-Determination, Racism, U.N. Doc. GA/SHC/3752 (Oct. 27, 2003).

¹¹⁸ For example, Senators Clinton and Sanders co-sponsored a bill in the US Senate that would require all security for diplomatic or consular missions in Iraq only be provided by US federal personnel. S. 2398, 110th Cong. § 4 (2007).

¹¹⁹ Government Gazette, Republic of South Africa, 30477, 1083 PROHIBITION ON MERCENARY ACTIVITIES AND PROHIBITION AND REGULATION OF CERTAIN ACTIVITIES OF CERTAIN ACTIVITIES IN AREAS OF ARMED CONFLICT ACT 27 OF 2006 s. 2(1)(a), available at <http://www.info.gov.za/view/DownloadFileAction?id=75729>.

¹²⁰ *Id.* at s. 3 (1) (b).

¹²¹ The law applies to South Africa citizens no longer residing in South Africa. It remains an open case then, if South African officials will seek prosecutions of any South African citizens working for PMCs in Iraq, Afghanistan or other theaters. *Id.* at s. 11.

¹²² U.N. Refugee Agency [UNHCR], Integrated Reg'l Info. Networks, *The Downside of Banning Mercenaries* (May 27, 2008), available at <http://www.unhcr.org/refworld/docid/4843fff9c.html>.

¹²³ Nadia Ahmadou & Sabelo Gumedze, *Seminar Report on the Prohibition of Mercenary Activities and Regulation of Certain Activities in Areas of Armed Conflict Act 27 of 2006*, INST. SEC. STUDIES 8 (2008), available at http://www.iss.co.za/dynamic/administration/file_manager/file_links/RPSSREPFIN.PDF?link_id=5391&slink_id=6045&link_type=12&slink_type=13&tmpl_id=3.

cooperation must take place. Not only must the South African government demonstrate its willingness to prosecute its citizens who violate the act, but foreign governments that are currently employing South African citizens must agree to extradite them back to South Africa. This of course is not a minor point, since these are often the very countries employing the contractors.

Moreover, to keep firms based in South Africa from simply relocating (i.e. charter shopping),¹²⁴ most, if not all, countries will have to pass similar laws regarding PMCs. Reviewing options for regulating PMCs, the Green Report ordered by the British House of Commons concluded that among other problems, a ban on mercenaries would be difficult to enforce, raise definitional problems, and would deprive British defense exporters of legitimate business.¹²⁵ At a minimum, the report suggests that Great Britain, and by inference other western countries, would be very reluctant to support a ban on PMCs for economic reasons alone.

On a more elementary level, a ban on PMCs would run counter to states' primary interest of directing their foreign policy. Countries value PMC services, which help to maintain national security and to project force abroad. This is why Simon Chesterman and Chia Lehnardt argue that attempts to outlaw mercenaries or PMCs have failed in the past, and a realistic regulatory approach must be established that "addresses both the problems of unaccountable actors wielding potentially lethal force and the interests of the consumers and suppliers of an increasingly established industry"¹²⁶

Alternative proposals have taken one of two forms. One approach is to allow for self-regulation.¹²⁷ This quasi-laissez-faire approach suggests that the private military market has created economic incentives that affect PMC behavior. A PMC is like any other corporation that cares about its brand name. If a PMC becomes known as a violator of IHL, legitimate nongovernmental and governmental actors

¹²⁴ Benjamin Perrin, *Promoting Compliance of Private Security and Military Companies With International Humanitarian Law*, 88 INT'L REV. RED CROSS 615 (2006).

¹²⁵ HOUSE OF COMMONS, PRIVATE MILITARY COMPANIES: OPTIONS FOR REGULATION, 2002, H.C. 577, at 22-23.

¹²⁶ Simon Chesterman & Chia Lehnardt, *Introduction*, in FROM MERCENARIES TO MARKET, *supra* note 115, at 1, 2.

¹²⁷ Andrew Bearpark & Sabrina Schulz, *The Future of the Market*, in FROM MERCENARIES TO MARKET, *supra* note 115, at 239; Deborah Avant, *The Emerging Market for Private Military Services and the Problems of Regulation*, in FROM MERCENARIES TO MARKET, *supra* note 115, at 181; Perrin, *supra* note 124, at 634.

will turn to more reputable firms. In the simplest terms, violating IHL is bad for business. Consequently, many PMCs have joined trade associations to certify good standing.

At the time of this writing, four major trade associations have been formed with the common purpose of raising the standards of operation of firms providing security services.¹²⁸ Although each association varies in its membership and structure, they all share a stated commitment to observing IHL and requiring their members to follow external regulation. For example, International Peace Operations (“IPO”) requires its forty-seven members to pledge to abide by IHL and its own Code of Conduct that governs such issues as human rights, transparency, and ethical standards governing rules of engagement.¹²⁹

Trade associations differ considerably in the way they oversee their members’ activities. For instance, the British Association of Private Security (“BAPSC”) requires applicants to complete a Due Diligence Documentation process, and members graduate from provisional to full membership status only when they demonstrate their commitment to best practices to a BAPSC membership committee.¹³⁰ Alternatively, the Private Security Company Association of Iraq requires its members to be licensed, or in the process of licensing, with either the Baghdad Ministry of Interior or the Kurdistan Regional Government Republic Minister of Interior and to abide by the mandates issued by the Coalitional Provisional Authority.¹³¹

The self-regulation approach suffers from two well-known deficiencies. First, market forces may encourage some PMCs to operate transparently and in a manner that upholds IHL, but it may encourage others to shirk the law. The security market is far from homogenous and many nongovernmental organizations, such as the United Nations or International Committee of the Red Cross, may insist that PMCs maintain high standards before employing them; however, other groups,

¹²⁸ International Peace Operations, About IPOA, <http://ipoaworld.org/eng/aboutiopa.html> (last visited Nov. 6, 2009); British Association of Private Security, <http://www.bapsc.org.uk/> (last visited Nov. 6, 2009); See Private Security Company Association of Iraq, <http://www.pscai.org/> (last visited Nov. 6, 2009); National Association of Ordinance and Explosive Waste Contractors, Objectives, <http://www.naoc.org/Website/about.aspx> (last visited Nov. 6, 2009).

¹²⁹ International Peace Operations Association, Code of Conduct, <http://www.ipoaworld.org/eng/codeofconduct/91-codecodeofconductv11eng.html> (adopted Dec. 2006).

¹³⁰ British Association of Private Security Companies, Self-Assessment Workbook (2007), <http://www.bapsc.org.uk/downloads/BAPSC%20Self-Assessment%20Workbook.pdf>.

¹³¹ Private Security Company Association of Iraq, PSC Registration, <http://www.pscai.org/pscreg.html> (last visited Nov. 6, 2009).

such as rebels or rogue states, might seek out PMCs who offer hyper-aggressive or disreputable services.¹³² In the latter scenario, a PMC might benefit from openly flouting IHL.

Second, the current composition of the trade associations raises serious concerns about both their desire and ability to regulate PMCs. For instance, IPO only *encourages* its members to follow IHL and its Code of Conduct leaves some of its most important requirements vague and unspecified.¹³³ To illustrate, Article 3 pledges members to take “definitive action if employees of their organization engage in unlawful activities.”¹³⁴ Definitive action, however, is never defined or further clarified. Moreover, Article 3.2 stipulates that PMCs should cooperate with official investigations “to the extent possible and subject to contractual and legal limitations” and PMCs should address “minor infractions” of their employees themselves without defining either what constituted a minor infraction or the appropriate sanctions.¹³⁵

More troubling is Article 6.9 that requires members to hire employees fifteen years or older.¹³⁶ Article 4 (1) of The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict states that “Armed groups, distinct from the armed forces of a State, should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years.”¹³⁷ Because many of the PMC’s employees regularly operate in combat theaters, the Code of Conduct or benchmark to which IPO’s members aspire, falls short of minimal IHL standards.

In contrast to self-regulation, some legal scholars have linked PMC compliance with international law to more effective third party oversight.¹³⁸ The implicit assumption of this approach is that PMCs provide a valued service and the failure to regulate PMCs actions is either a byproduct of the way in which the international law is currently constructed or the absence of a nongovernmental regulatory agency.

¹³² Perrin, *supra* note 124, at 622.

¹³³ International Peace Operations Association, *supra* note 129.

¹³⁴ *Id.* at art 3 §§ 1-3.

¹³⁵ *Id.*

¹³⁶ *Id.* at art. 6 § 9.

¹³⁷ The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, G.A. Res. 116A, at Art. 4(1), 54th Sess., 97th plen. mtg., U.N. Doc A/RES/54/263 (May 25, 2000).

¹³⁸ Michael Scheimer, *Separating Private Military Companies from Illegal Mercenaries in International Law: Proposing an International Convention for Legitimate Military and Security Support That Reflects Customary International Law*, 24 AM. U. INT’L L. REV. 609, 646 (2009).

Scoville defines this as a problem of unaccountability.¹³⁹ PMCs are more likely to violate IHL if there is not a reasonable expectation that they will be disciplined. For Scoville, the solution is to rework the definition of mercenary in a way that is analytically sound and will gain broader state support.¹⁴⁰ Accountability would then lie with the state.

Eliminating the profit-motive and non-residency requirements of the conventions, Scoville offers an alternative definition of a mercenary:

A mercenary is any person who, in any situation:

(a) Is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at, *or having the reasonably foreseeable effect of*:

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

(ii) Undermining the territorial integrity of a State; or

(iii) *Causing or aiding and abetting any acts otherwise criminal under international law.*

(b) Has not been sent by a State on official duty;

(c) Is not a member of the armed forces of the State on whose territory the act is undertaken; and

(d) *With regard to the said concerted act of violence, is not otherwise legally accountable to [a / his or her own] government by means of a contract or license whose parties are the person and that government.*¹⁴¹

Section (a) represents a shift in legal reasoning that criminalizes the action and not the actor. As discussed above, the motivational requirements of the conventions created a virtual legal loophole that made identification and prosecution of mercenaries all but impossible. Sections (b), (c), and (d) represent an effort to establish a contractual accountability between the incorporating state and the PMCs.

It is our view that Scoville's alternative definition offers an important advancement over the current conventions' treatment of

¹³⁹ Scoville, *supra* note 82, at 544-45.

¹⁴⁰ *Id.* at 554

¹⁴¹ *Id.* at 564-65.

mercenaries. But we nevertheless believe that Scoville's proposed reform fails to fulfill its own goals of eliminating motivation requirements and inserting contractual accountability. Consider the following hypothetical example.

At the time of this writing, the International Criminal Court Prosecutor has issued an arrest warrant against Sudan's president, Omar al-Bashir, for ten counts of genocide, crimes against humanity, and war crimes.¹⁴² If an arrest warrant was issued, the ICC, United Nations, or another nongovernmental organization could employ a PMC to arrest President al-Bashir. As a consequence of this arrest, a civil war might erupt in the capital, and the situation in Darfur could further deteriorate. Given the pressing obligations that the United States and many western countries have in Iraq and Afghanistan, and the reluctance of other powers to intervene in what they see as a domestic question, it is reasonable to question whether the United Nations would authorize any further peacemaking operations in Darfur, or that any individual country would commit its forces to the conflict. PMCs might play a valuable role not only in apprehending Sudan's president, a suspected war criminal, but also in stabilizing any subsequent humanitarian disaster. Under this scenario, the PMCs would be advancing international law.

From the vantage point of Scoville's definition, however, the PMCs would also be deemed mercenaries and their activity would be illegal. Effecting the arrest of President al-Bashar is the quintessential example of an attempt to overthrow a government and undermining the constitutional order of a state. Moreover, if the PMCs were challenging the former government's forces in the subsequent peacekeeping operations, they would also be in violation of section (a)(i) of Scoville's definition. Lastly, PMCs are routinely employed by nongovernmental actors. Scoville's definition suggests that a contractual obligation between a recognized government and private military force is a prerequisite to legal action. In the hypothetical example, employment of a PMC by either the ICC or the UN would be insufficient.

Far from esoteric, this type of hypothetical is plausible. PMCs may increasingly become clients of nongovernmental agencies looking to advance human rights.¹⁴³ Far from neutral actors in some crisis, the PMCs can become peacemakers where the combatants are state

¹⁴² ICC Prosecutors Seeks Charges Against Sudanese President for Darfur Crimes, UN NEWS CENTRE, July 14, 2008, <http://www.un.org/apps/news/story.asp?NewsID=27361&Cr=Darfur&Cr1>.

¹⁴³ Bearpark & Schulz, *supra* note 127, at 241.

governments. To name a few examples: if an intervention force was deployed during the 1994 Rwandan genocide, used during the violence following the 2007 Kenyan elections, or currently sent to quell the seemingly never ending violence in Mogadishu, PMCs would likely view the local governments as more of an adversary than ally. Put differently, vesting states with the sole authority to contract PMCs would often run counter with the competing norm of advancing human rights. Legitimacy does not stem from a contract with a nation-state, but from the purpose of the act and the manner in which it is performed.

V. AN ALTERNATIVE REGULATORY REGIME

As the title of this article suggests, we argue that combatants are to be treated as like actors or “undifferentiated units” on the battlefield. Of course soldiers perform different duties (from frontline combat to providing logistical support), but once they enter into a combat theatre they ought to be entitled to the same protections as any other participant, and if they opt to use force they ought to be subject to the same rules as any other participant. The status of one’s employment should not determine whether or not one is afforded prisoner of war status, nor should it give a person greater or lesser license to be in compliance with IHL.

Regulation is possible if the law is well constructed, accountability is established, and the actors have equal incentives both to follow the law and to sanction those that do not. To this end, a regulatory regime ought to be organized around the following principles:

- (a) A legal combatant is one who is either a member of a country’s armed forces, an agent of a government, or is a contracted agent of a government or a licensed nongovernmental organization. Consequently, the conventions, or their relevant sections, that outlaw mercenary activity will be abrogated.
- (b) Participants in combat are afforded equal legal status. The laws that govern armed conflict apply to all participants.
- (c) The contracting country or nongovernmental actor is obligated to verify that contracted employees are in compliance with IHL, report violations, and sanction violators.

The first principle defines accountability as a function of the relationship between the contracting actor and PMC; the contract is the means of establishing liability. At first glance it might appear that

requiring a PMC to do no more than sign a contract before participating in a conflict is setting a low legal standard, but as Laura Dickinson observes, the contract is the “vehicle of military privatization and as such they could carry what we might call the norms and values of public international law into the ‘private’ sector.”¹⁴⁴ This overlap between the two spheres is worth noting and its re-emphasis is necessary. Much of what has obscured the lines defining the public and private spheres may be said to be due to state and international practice over the last two decades.

The first principle also addresses the post-colonial zeitgeist that permeates the conventions and led their authors to create a false dichotomy between public and private sector combatants with no provisions to regulate NGO employment of PMCs. By delivering an array of services that ranges from providing emergency humanitarian aid to education, NGOs frequently play critical roles before, during, and after conflicts; increasingly, they are turning to PMCs to provide logistics, transportation, or security. Although these NGOs are typically biased towards employing PMCs that abide by IHL,¹⁴⁵ nongovernmental actors are an elastic group of actors that range from international governmental actors (e.g. the United Nations) to multinational corporations that might look to secure economic interests before or during a conflict. Consequently, there is a need to create a set of laws to govern the NGO-PMC relationship. One potential answer is to license or certify NGOs. Should all NGOs be able to hire PMCs? Or should only international governmental organizations (“IGOs”) or NGOs working under a government or IGO contract be able to employ PMCs? There are merits to both approaches, and the licensing procedures could take several forms, but to be effective a regulatory regime must also hold the contracting agent accountable for their use of PMCs.

The second principle suggests that employment status (e.g. public versus private employees), motivations (e.g. patriotism or profit seeking), nationality (e.g. national or foreign fighter), and duty (e.g. force projection or training) have no bearing on the legality of the combatant. Rather, public law governing the standards of entering and fighting a war applies to all combatants. Consequently, the intractable problem of

¹⁴⁴ Laura Dickinson, *Contract as a Tool for Regulating PMCs*, in *FROM MERCENARIES TO MARKET*, *supra* note 115, at 217, 218.

¹⁴⁵ Allegations of misconduct are reviewed by IPOA’s Standards Committee of International Peace Operations (“SCIPOA”), but their decisions are explicitly not “legally binding.” International Peace Operations, <http://ipoaworld.org/eng/enforcementv01eng.html>.

ascertaining where PMCs fit into the existing law is put aside in favor of a more succinct approach.¹⁴⁶ It would no longer matter if a PMC is using force for defensive or offensive reasons, or if the company was providing services at the tooth or the tail of the operation; by participating in the theater with ongoing combat operations, PMCs are afforded the same protections and are subject to the same rules as any other combatant. By folding PMCs into the framework governing all other legal combatants, the inviolable distinction between civilian and combatant is preserved.

The third principle speaks to the obligations a government or NGO assumes by employing a PMC. In the simplest terms, the contracting party is responsible for monitoring its contractors' actions, must publicly disclose any discovered violations of IHL, and must sanction violators. For international nongovernmental actors employing PMCs, this would likely amount to terminating contracts, and reporting the violation to the employee's country of citizenship and to a designated international governmental organization. More fundamentally, the principle clarifies the level of state responsibility. States are free to draw upon private military forces as long as they hold the PMC to the same standards as their public military. Consequently, questions of which agency of the State is employing the PMC or if the PMC is directly involved in combat operations become moot. Accountability is established.

In sum, under the alternative regime proposed here, a private military force would be operating legally if it were employed by a licensed nongovernmental organization or state, complied with the standards of IHL, and the contracting party monitored the PMC, reported any violations, and enacted sanctions upon the PMC when appropriate.

CONCLUSION

Seen as a whole, these principles would inform a regulatory regime that would offer several advantages over the status quo. In particular, such a regime would institutionalize a method of maintaining PMC accountability within a flexible framework that privileges state sovereignty.

Accountability is established by creating a more transparent framework. The contract becomes the mechanism specifying both the

¹⁴⁶ For a review of the complicated process of determining a PMC's status in combat see CAMERON, *supra* note 93.

contracting agents' and PMCs' responsibilities. By employing a PMC, a country or licensed NGO explicitly assumes the duties of monitoring the actions of its contractors. Equally important, the standards of behavior are clarified. As reviewed above, PMCs would be subject to the same IHL that governs public militaries. This simple solution is far preferable to the status quo under which employer scrutiny of PMCs is inconsistent and unpredictable. Thus, rather than proposing what the formal restructuring of such a system may look like, the principles advanced herein could guide reform efforts and should be thought of as a possible first step that would foster transparency and accountability within the system.

The desire for reform, however, must be tempered by recognition of the realities of an international system that is still dominated by geostrategic concerns. That is, no matter how laudable the proposal, the likelihood of it gaining acceptance is dependent, at least in part, on the degree to which states see it as consistent with their interests.¹⁴⁷ The framework proposed here would regulate PMC activity in a manner that is consistent with states' primary interests.

To that end, the proposed framework retains a degree of flexibility at both the international and domestic levels. Internationally, efforts to regulate PMC activity, such as a PMC licensing regime, could operate either in parallel or within the framework proposed here. On the domestic level, states retain the flexibility of institutionalizing the proposed principles into their existing frameworks. Far from utilizing a "one size fits all" approach, governments could decide how best to regulate PMC activity (e.g. quasi-incorporation of the PMC into their public army, oversight maintained by a state appointed agency, or prohibition against their use).

Perhaps most importantly, the framework proposed here advances a method of regulating PMCs that is consistent with the manner in which states desire to utilize them. That is, it seeks to update international law so that it better reflects states' positions, rather than attempt to subjugate state activity under international law. Operations in the Balkans, Afghanistan, and Iraq suggest that PMCs have become an integral component of the modern battlefield. Any effort to hold PMCs to

¹⁴⁷ Robert J. Mathews & Timothy L. H. McCormack, *The Influence of Humanitarian Principles in the Negotiation of Arms Control Treaties*, 81 INT'L REV. RED CROSS 331 (1999). A review of the dynamic or "evolution" of norm adoption is found in Martha Finnemore and Kathryn Sikkink, *International Organization at Fifty: Exploration and Contestation in the Study of World Politics*, 52 INT'L ORG. 894 (1998).

the standards of IHL will only be successful if countries view these efforts as being consistent with their own larger geo-strategic interests. The conventions banning mercenaries reflect the interests of the international community during the decolonization and Cold War period, and fail to reflect the ongoing efforts to rely on private sector security. The consequence is that international mercenary law has been largely ineffective in preventing the proliferation of private military forces and simultaneously inhibits reasonable efforts to regulate their activity.

A solution begins with the recognition that PMCs are not mercenaries but are combatants (“men with guns”). As such, they should be regulated like any other combatant, and states and non-government organizations should be able to legally employ PMCs if they are willing to monitor the contracted PMCs and hold them accountable for their actions. Under such a regime IHL would be advanced.